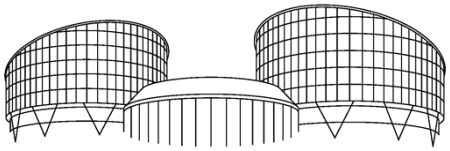

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF GÖZÜM v. TURKEY

(Application no. 4789/10)

JUDGMENT
(Extracts)

STRASBOURG

20 January 2015

FINAL

20/04/2015

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Gözüm v. Turkey,

The European Court of Human Rights (Second Section), sitting as a Chamber composed of:

Guido Raimondi, *President,*
Işıl Karakaş,
András Sajó,
Nebojša Vučinić,
Egidijus Kūris,
Robert Spano,
Jon Fridrik Kjølbro, *judges,*
and Stanley Naismith, *Section Registrar,*

Having deliberated in private on 13 November 2014,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 4789/10) against the Republic of Turkey lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Turkish national, Ms Nigar Gözüm ("the applicant"), on 12 January 2010.

2. The applicant was represented by Ms Habibe Yılmaz Kayar, a lawyer practising in Istanbul. The Turkish Government ("the Government") were represented by their Agent.

3. The applicant alleged, in particular, that there had been a violation of Article 8 of the Convention, taken separately or together with Article 14, on account of the refusal by the national authorities to indicate her forename in the civil register of births as that of the mother of her adopted child.

4. On 31 August 2012 notice of the application was given to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1966 and lives in Istanbul.

6. In a decision of 22 May 2007, which became final on 20 July of that year, the Üsküdar Family Court (Istanbul) authorised the applicant, who was then single, to adopt a child, E., born on 5 November 2003 to Ms S.Ö.

Consequently, under Article 314 §§ 2 and 3 of the Civil Code (no. 4721), "Gözüm" was registered as the surname of E. in the register of births and on the child's identity documents. However, the registrar refused to indicate the applicant's forename under the heading "mother", where the name "S." was retained, this being the forename of the child's biological mother.

7. On 23 November 2007 the applicant applied to Üsküdar District Court seeking the replacement of the forename "S." by her own. In her view, the fact that her forename had not been given as that of the mother of her adopted son was both discriminatory and unconstitutional, likely to undermine their personal, family and social development, and thus constituting a violation of, among other provisions, Articles 8 and 14 of the Convention. She argued that in relation to single-parent adoptions there was a lacuna in the Civil Code which required the court to make provision for such a situation of its own motion, pursuant to Article 1 of that Code or, failing that, to request a preliminary ruling of the Constitutional Court.

8. On 26 February 2008 the court dismissed the applicant's request on the ground that it had no legal basis. It found that the Civil Code, in choosing to regulate only two-parent adoptions – those granted to a couple jointly –, intended to treat the legal relationship between the adoptive parents and the adopted child as "a biological relationship", which was not possible in the case of single-parent adoptions, where either a mother or a father was absent. Thus the legal situation obtaining in the present case could not be regarded as unconstitutional.

On 14 April 2008 the applicant appealed on points of law.

9. On 15 March 2009, when those proceedings were still pending, a new regulation entered into force entitled "Regulation on the implementation of mediation services for the adoption of minors" ("the Regulation"), enabling a single adoptive parent to have his or her forename registered in the place of that of the biological parent ...

10. On 5 November 2009 the Court of Cassation upheld the decision of the court below in a judgment which made no mention of the legislative reform.

11. On 14 December 2009 the applicant was notified of that judgment.

12. On 9 November 2010 she applied to the registry office for the registration of her forename as that of the mother of E., relying on Article 20 § 4 of the new Regulation. That request was granted on the same day and the record entries concerning the child were consequently amended with immediate effect.

...

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 ... OF THE CONVENTION

16. The applicant complained that the civil-law regime, as applied to her at the material time, had entailed a violation of her right to respect for her private and family life as provided in Article 8 of the Convention ..., which read[s] as follows:

...

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

...

17. The Government contested that argument.

A. The parties' submissions

...

2. Merits

22. The applicant, reiterating the submissions she had made to the domestic courts (see paragraph 7 above), argued that in the present case the State had not respected her right to enjoy to the full her private and family life with her adopted son. In her view, the distinction made by the national authorities between single-parent and two-parent adoptions constituted an unjustified interference which was detrimental to her and which was also discriminatory, being based on her status as a spinster.

23. On that point the applicant observed that because of the lacuna in Article 314 of the Civil Code it had been impossible for her to foresee that she would be confronted with such problems or that her request, which she regarded as entirely legitimate, would be rejected. The interference in question had not therefore been foreseeable.

24. Nor could such interference pursue any legitimate aim, because regardless of the weight to be attached to the interests of the biological parents, there was no justification for the fact that her status as single adoptive mother or the existence of a single-parent adoption were made public, in breach of her right to the secrecy of her private life.

By way of example, the applicant mentioned the mere fact that when she had registered her son for pre-school admission, and whenever they

travelled together, they had been unduly obliged to disclose that E. was an adopted child and to present the adoption order to prove parental authority.

25. In sum, the applicant said that she failed to understand what situation under Article 8 § 2 of the Convention could have the effect of preventing an adoptive mother from having her own forename registered as that of the child's mother.

26. For their part, the Government asserted that the refusal of the national authorities to substitute the adoptive mother's forename for that of the biological mother could not be seen as an interference with the rights guaranteed in Article 8. In fact the legal regime applicable at the material time had merely sought to maintain the adopted child's link with his or her original family and thus of ensuring "the authenticity of the line of descent" and respect for the rights of the biological parents, in order to preserve, among other things, the rights of succession of the adopted child. They explained that in the Turkish civil-law system, any adoption had to be in the interest of the child, in other words its sole objective was to provide the latter with a family life and not to confer any personal rights on the adopter.

27. The Government explained that in the case of single-parent adoptions, prior to the Regulation the legislature had deliberately left open the question of the registration of an adopter's forename in the place of that of the "biological" parent so that the judge deciding on the adoption could assess situations on a case-by-case basis, thus protecting the rights both of the biological parents and of unemancipated adopted children.

Moreover, they pointed to actual examples of cases where an adoptive mother had been entitled to have her forename registered as that of the mother. The Government produced a copy of a judgment to that effect, delivered on 10 November 2008 (file no. 2008/339 – 2008/382) by Sarıyer District Court (Istanbul), which, in its reasoning, stated as follows:

> "... It would appear natural for the applicant to wish to have her forename entered in the register. To explain to a child of that age [about two years and three months] that his real mother is someone else will entail a number of disadvantages and difficulties. It will be appropriate to inform him about it when he reaches a certain age. For example, when the child reaches school age and starts school he could feel disappointment and distress if he were to learn that the forename on the register is different from that of his mother, and it is highly probable that the child will be affected by any mention of it by his classmates. This court thus allows the application."

28. That being said, the Government acknowledged that at the time, the application of Article 314 § 4 of the Civil Code had led to some uncertainty in practice and in the minds of single people wishing to adopt children. It was precisely to resolve that sensitive issue that the legislature had introduced the Regulation of 15 March 2009.

29. The applicant replied that neither the legislative reform in question nor the fact that she had ultimately won her case on 9 November 2010

sufficed to remove the distressing consequences of the situation of which she had been a victim until that date.

As regards the weight to be attached to the Regulation of 15 March 2009, the applicant asserted that it had not produced the intended effect in domestic law. In her view, such an amendment should have been incorporated into the Civil Code, even by a law rather than in the form of a Regulation, failing which its existence had remained unknown not only to the general public but also to the Court of Cassation. Otherwise it would be difficult to understand why the latter had upheld the first-instance judgment on 5 November 2009, about nine months after the Regulation had come into effect.

In the applicant's view the reform in question, judging from the need for its existence, served to prove that there had indeed been a violation of human rights until then, as recognised by the Government when they had pointed to "some uncertainties in practice" which had previously existed.

30. The applicant lastly argued that the judgment of Sarıyer District Court referred to by the Government was a known but isolated precedent, which had become final without being examined by the Court of Cassation, whose practice was much less amenable in such matters.

B. The Court's assessment

...

2. Merits

(a) Article 8 of the Convention

44. The Court reiterates that Article 8 does not merely compel the State to abstain from arbitrary interference by public authorities. In addition to this primarily negative undertaking, there may be positive obligations inherent in an effective respect for private and/or family life (see *Dickson v. the United Kingdom* [GC], no. 44362/04, § 70, ECHR 2007-V, and, as regards family life more specifically, see *Todorova v. Italy*, no. 33932/06, § 69, 13 January 2009) and the introduction of an effective system of protection of the corresponding rights (see *Taliadorou and Stylianou v. Cyprus*, nos. 39627/05 and 39631/05, § 49, 16 October 2008).

This could also involve the introduction of a regulatory framework of adjudicatory and enforcement machinery protecting individuals' rights and the implementation, where appropriate, of specific measures (see *X and Y v. the Netherlands*, 26 March 1985, § 23, Series A no. 91, and *Tysiąc v. Poland*, no. 5410/03, § 110, ECHR 2007-I). Such a system should afford the possibility of an effective proportionality assessment of instances of restriction of an individual's rights (see *Taliadorou and Stylianou*, cited above, § 55 *in fine*).

45. In the present case, the Üsküdar District Court dismissed the applicant's action on the ground that her request had no legal basis and that the situation was not unconstitutional (see paragraph 8 above). On 5 November 2009 the Court of Cassation upheld all the provisions of that judgment, without any reasoning or explanation, not even referring to the new Regulation which had come into force in the meantime, prior to its decision (see paragraphs 9 and 10 above).

46. This case thus focusses on one aspect of the problems that may be encountered in the context of a single-parent adoption and, in view of the judicial reaction to the issue, the Court finds it appropriate to analyse it as a case concerning the State's positive obligations to ensure effective respect for private and family life through the intermediary of its legislative, executive and judicial authorities (see, *mutatis mutandis*, *Evans v. the United Kingdom* [GC], no. 6339/05, §§ 75 and 76, 10 April 2007, *Taliadorou and Stylianou*, cited above, § 50, and *Todorova*, cited above, § 70).

On this subject it should be pointed out that at the relevant time Turkish civil law entitled the single adoptive parent to give his or her surname to the adopted child, but did not provide for any rule regarding the recognition of that parent's forename in the place of that of the biological parent (... – for comparable situations affecting other aspects related to Article 8, see, *mutatis mutandis*, *X and Y v. the Netherlands*, cited above, § 27; *L. v. Lithuania*, no. 27527/03, §§ 57 and 58, ECHR 2007-IV; and *Taliadorou and Stylianou*, cited above, § 57).

47. According to the Government, however, this was not a lacuna in the law: the Turkish legislature had deliberately left open the question raised in the present case so that the courts could assess the circumstances on a case-by-case basis, with the sole aim of protecting the rights both of the biological parents and of unemancipated adopted children (see paragraph 27 above) and to maintain the biological parent-child relationship, "the authenticity of the line of descent", and therefore the rights of succession of the adopted child (see paragraph 26 above).

48. The Court does not deny that, in this type of case, there may be competing interests that are not easily reconciled: those of the biological mother, those of the child and of the adoptive family, and the general interest. It further acknowledges that the State enjoys a certain margin of appreciation in striking a balance between the interests at stake, but in all such situations the child's best interests must be paramount (see *Odièvre v. France* [GC], no. 42326/98, §§ 40 and 45, ECHR 2003-III; *Todorova*, cited above, § 77; and *Evans*, cited above, § 75).

49. The margin of appreciation thus defined clearly coincides with the discretionary power which was supposedly conferred on the Turkish civil courts in terms of reconciling the various personal interests underlying single-parent adoptions. On that precise point, the Court emphasises that it

is not its task to substitute its own opinion for that of the Turkish courts, but rather to review under the Convention the decisions that those courts have taken in the exercise of that discretionary power (see *X and Y v. the Netherlands,* cited above, § 29, and *Todorova*, cited above, § 72).

50. That being said, the Court would first observe that neither the District Court nor the Court of Cassation even took note of the applicant's plea (see paragraph 7 above) based on the rule of interpretation in Article 1 of the Civil Code, which required the courts to resolve the lacuna in the law ... in order to protect the competing interests involved in the adoption of E.

Furthermore, the Court finds nothing in the decisions in question to persuade it that those courts endeavoured to assess the case on the basis of its specific circumstances and, still less, with the aim of preserving E.'s best interests.

It is thus unnecessary to consider whether, as claimed by the Government, the courts had in fact sought to prevent the severance of E.'s biological parent-child relationship, in order to preserve his inheritance or other rights, because, even supposing that such a purpose existed, it could not in itself justify the refusal to grant the applicant's request: the official information on E.'s biological descent and adoption were already recorded once and for all in the State's civil registers and, if need be, the authorities would still have been in a position to ensure that the child could duly claim his inheritance from his biological parent, under the conditions laid down by law.

To fulfil such a purpose, there was no compelling reason to draw attention to the fact that E. was an adopted child by recording the forename of his biological mother on his personal documents, thus leaving the applicant in a situation of distressing uncertainty in her private and family life with her son, with the pressure of having to reveal their status of adoptive parent and adopted child, or of having to explain this sensitive situation to a small child in a precipitated manner.

51. The balance that the Turkish legislature had supposedly sought to strike between the interests of the children, those of their biological parents and those of single adoptive parents required, in reality, that particular weight be attached to the positive obligations arising from Article 8.

To this end, effective protection required a clearly established framework in the domestic legal system that enabled a proportionality assessment of instances in which the applicant's fundamental or "intimate" rights guaranteed by Article 8 were restricted, bearing in mind that an incomplete and unreasoned assessment by the domestic courts of the exercise of those rights – as in the present case – is not consonant with an acceptable margin of appreciation (see, *mutatis mutandis*, *Connors v. the United Kingdom*, no. 66746/01, § 82, 27 May 2004, and references therein; also *Taliadorou and Stylianou*, cited above, § 58).

52. As regards, lastly, the example of judicial precedent adduced by the Government in support of their argument (see paragraph 27 *in fine* above), it certainly referred to a situation that was identical to that of the applicant and where, in upholding the claim, the court had relied on a pertinent assessment of the interests of the child and of the adoptive mother. That being said, the Government were not able to explain how reasons comparable to those given in that precedent – apparently a one-off case – could not be applicable, or even taken into account, in the case of the applicant, whose son was much closer to compulsory school age.

The Court thus observes that this precedent serves to highlight the legal uncertainty which existed – as the Government in fact admitted – at the relevant time (see paragraph 28 above), as a result of the failure of Turkish law to specify with sufficient clarity the scope and conditions of exercise of the courts' discretionary power in the area of single-parent adoption (see, *mutatis mutandis*, *Amann v. Switzerland* [GC], no. 27798/95, § 62, ECHR 2000-II, and *Stolder v. Italy*, no. 24418/03, § 33, 1 December 2009).

53. The Court thus refers back to its initial observation: in matters of single-parent adoption, there was a legal lacuna in Turkish civil law which affected persons in the situation of the applicant, whose request fell within a legal sphere which the Turkish legislature had clearly failed to foresee or to regulate in such a way as to strike a fair balance between the general interest and the competing interests of the individuals involved.

The Court concludes that the civil-law protection, as envisaged at the relevant time, was inadequate in the light of the respondent State's positive obligations under Article 8 of the Convention.

54. Accordingly, there has been a violation of that provision on the above basis.

(b) Article 14 of the Convention, taken together with Article 8

55. Having regard to its finding that there has been a violation of Article 8, taken separately, in respect of the applicant (see paragraph 54 above), the Court does not consider it necessary to examine her complaint of a violation of Article 14 taken together with that Article (see, among many other authorities, *Mennesson v. France*, no. 65192/11, § 108, ECHR 2014 (extracts)).

...

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

59. Article 41 of the Convention provides:

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

60. The applicant claimed 20,000 euros (EUR) in respect of non-pecuniary damage that she alleged to have sustained until 9 November 2010, when her rights had ultimately been acknowledged.

61. The Government argued that the applicant had not been able to justify having sustained any non-pecuniary damage. In any event, her claim was excessive and devoid of any verifiable foundation.

62. As to the claim of non-pecuniary damage, the Court recognises that the applicant must have suffered from the consequences of the Article 8 violation that it has found. Like the Government, it takes the view, however, that the sum claimed on that basis is excessive.

Being called upon to rule on an equitable basis, it must take account of the particular circumstances of the case, which could have had a bearing on the harm caused, such as the legislative reform of 15 March 2009 – while the proceedings in question were pending in the Turkish courts –, and which, to a certain extent, must have compensated for the applicant's non-pecuniary damage. Without calling into question the difficulty of her personal situation prior to that reform, the Court also takes note of the time period of about one year and eight months between the above-mentioned date and that of the applicant's request to the competent authorities on 9 November 2010, which marked the end of the situation complained of.

Taking everything into consideration and in the light of its relevant case-law on the application of Article 41 to the protection of private and family life, the Court decides to award EUR 2,500 in compensation for non-pecuniary damage.

B. Costs and expenses

63. The applicant claimed 650 Turkish lira (TRY) for translation expenses, supported by a receipt. She also claimed the reimbursement of her lawyer's fees, for an amount of TRY 15,400 (about EUR 5,294), which she said she owed under a contract of 18 March 2013 on the basis of the minimum sum fixed under Article 21 (b) of the 2013 scales of the Istanbul Bar.

64. The Government argued that the sums in question, in particular the lawyer's fees, were not commensurate with the amounts paid in Turkey for comparable cases. As to the receipt for translation work, it was not indicated that the work was related to the lodging of the present application.

65. The Court observes that in support of her claims the applicant produced a receipt for TRY 650 corresponding to the cost of translation work. Having regard to the content of the file it finds that expense to be relevant and genuine.

As to the lawyer's fees the Court takes note of the contract showing that the sum of TRY 15,400 is owed, with reference to the 2013 fee scales of the Istanbul Bar. Even though it does not appear that any payment has already been made on that basis, there is nothing to suggest that the applicant will not be obliged to pay a sum for the significant amount of work carried out by her lawyer for her representation, in both the domestic and the Strasbourg proceedings (see *Krejčíř v. the Czech Republic*, nos. 39298/04 and 8723/05, § 137, 26 March 2009). However, the Court cannot accept, as it stands, the amount agreed in the said contract, as it appears excessive.

66. Having regard to the evidence in its possession, to the above-mentioned criteria and to the complexity of the case, the Court finds it reasonable to award EUR 3,000 in respect of all costs and expenses.

C. Default interest

67. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT,

...

2. *Holds*, unanimously, that there has been a violation of Article 8 of the Convention ...;

...

5. *Holds*,
   (a) unanimously, that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 2,500 (two thousand five hundred euros), in respect of non-pecuniary damage, to be converted into the currency of the respondent State at the rate applicable at the date of settlement, plus any tax that may be chargeable;
   (b) by six votes to one, that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 3,000 (three

thousand euros), in respect of costs and expenses, to be converted into the currency of the respondent State at the rate applicable at the date of settlement, plus any tax that the applicant may have to pay;
(c) unanimously, that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses*, unanimously, the remainder of the applicant's claim for just satisfaction.

Done in French, and notified in writing on 20 January 2015, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith
Registrar

Guido Raimondi
President

...