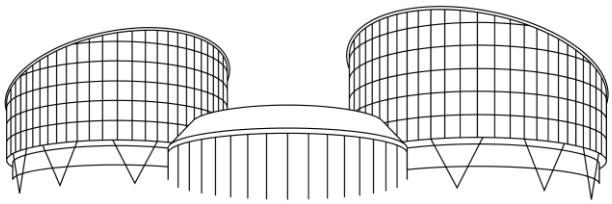

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF MUSTAFA AND ARMAĞAN AKIN v. TURKEY

(Application no. 4694/03)

JUDGMENT

STRASBOURG

6 April 2010

FINAL

06/07/2010

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

In the case of Mustafa and Armağan Akın v. Turkey,

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

Françoise Tulkens, *President*,
Ireneu Cabral Barreto,
Vladimiro Zagrebelsky,
Danutė Jočienė,
András Sajó,
Nona Tsotsoria,
Işıl Karakaş, *judges*,
and Sally Dollé, *Section Registrar*,

Having deliberated in private on 16 March 2010,

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

PROCEDURE

1. The case originated in an application (no. 4694/03) 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 two Turkish nationals, Mr Mustafa Akın and Mr Armağan Akın ("the applicants"), on 6 January 2003.

2. The applicants were represented by Ms Leyla Hülya Tuna, a lawyer practising in İzmir. The Turkish Government ("the Government") were represented by their Agent.

3. The applicants alleged, in particular, that a domestic court decision, which prevented the second applicant from seeing his younger sister, had infringed their right to respect for their family life within the meaning of Article 8 of the Convention.

4. On 22 January 2008 the President of the Second Section decided to give notice of the application to the Government. It was also decided to examine the merits of the application at the same time as its admissibility (Article 29 § 3).

THE FACTS

THE CIRCUMSTANCES OF THE CASE

5. The applicants were born in 1957 and 1988 respectively and live in Ödemiş.

6. On 30 September 1999 the first applicant's wife instituted divorce proceedings and asked for the custody of their two children; Armağan (the second applicant) and his younger sister Damla who was born in 1993.

7. The Ödemiş Civil Court of First Instance ("the Ödemiş Court") granted the couple's divorce on 23 June 2000. Having regard to the "parties' incomes and the ages of the two children", the Ödemiş Court awarded custody of Armağan to the first applicant and that of Damla to her mother. It also decided that the parents would exchange the children between 1 and 15 February every year, during the month of July and for a total period of four days during the two religious holidays.

8. On 30 November 2000 the first applicant requested the Ödemiş Court to grant an interim measure to the effect that he would have both children one weekend and his ex-wife would have them the next. This way, he argued, the children would not lose contact with each other and he would have the opportunity to spend every other weekend with both his children. This request was rejected on 19 December 2000 by the Ödemiş Court which considered that its decision concerning the custody issue had been correct.

9. The appeal lodged by the applicant against the Ödemiş Court's decision of 23 June 2000 was rejected by the Court of Cassation on 8 December 2000. A request made by the first applicant for a rectification of that decision was rejected on 8 February 2001.

10. On 11 September 2001 the first applicant brought a court case on behalf of his son and on his own behalf against his ex-wife. He claimed that although he and his son were living in the same town and very close to his ex-wife and his daughter, the decision of the Ödemiş Court had prevented the two children from seeing each other and him from spending time with both his children. This, he claimed, was causing irreversible psychological problems for the children. Even when the children saw each other in the street they were prevented from talking to each other by their mother. He requested that the children be able to see each other every weekend.

He also asked the court to order his ex-wife to pay maintenance to him in respect of Armağan.

11. The Ödemiş Court refused the applicants' requests on 1 February 2002. It held that, although diligence had to be shown to satisfy the needs of the parents and their children and to improve the ties between them, ordering Damla to spend every weekend with her father would mean a continual change of environment for her and would confront her with variations in discipline.

12. The applicants appealed and referred in their appeal to a number of decisions of the Court of Cassation. According to those decisions, the applicable law and procedure required domestic courts to ensure that access arrangements do not prevent the children of divorced parents from seeing each other. The applicants maintained that ensuring this was a matter for a court of law to consider of its own motion. They also argued that the

children's best interests should be given paramount importance. They drew the Court of Cassation's attention to the fact that the two siblings had not seen each other for two years.

13. The appeal was rejected by the Court of Cassation on 29 April 2002 which considered that the Ödemiş Court had "adequately examined the evidence available to it and that its conclusion had been in accordance with the applicable legislation". A subsequent rectification request lodged by the applicants was rejected on 15 July 2002. In their request for rectification the applicants submitted that the two children had not seen each other for almost three years and that their request for rectification was their last chance of seeing each other.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

14. The applicants complained that the decision of the domestic court preventing the two children from seeing each other infringed their right to respect for their family life within the meaning of Article 8 of the Convention, the relevant part of which reads as follows:

> "1. Everyone has the right to respect for his ... family life,...
>
> 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 ... for the protection of health or morals, or for the protection of the rights and freedoms of others."

15. The Government contested that argument.

A. Admissibility

16. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

17. The applicants argued that the domestic court's decision amounted to an unjustified interference with their right to respect for their family life, Moreover, in reaching their decisions the domestic court had failed to observe and protect the best interests of the two children.

18. The Government were of the opinion that the decisions adopted by the domestic courts had not prevented the two siblings from seeing each other; as the children were living in the same neighbourhood, contact was possible. In any event, if the applicants' requests had been accepted by the domestic courts, Damla would have spent one weekend with her mother and the next weekend with her father. This, in the opinion of the Government, would have adversely affected her development.

19. The Court considers at the outset that there can be no doubt that a bond amounting to family life within the meaning of Article 8 § 1 of the Convention exists between the parents and the children born from their marriage-based relationship, as is the case in the present application. Such a natural family relationship is not terminated by reason of the fact that the parents separate or divorce, as a result of which the child ceases to live with one of its parents (see *Cılız v. the Netherlands*, no. 29192/95, § 59, ECHR 2000-VIII and the cases cited therein). Likewise, the Court considers that family life within the meaning of the same provision also exists between the second applicant Armağan and his sister Damla, with whom he lived in the same house until the divorce of his parents in 2000 (see, *inter alia*, *Olsson v. Sweden (no. 1)*, 24 March 1988, § 81, Series A no. 130). Noting, in any event, that the existence of a family life in the instant case is not disputed by the parties, the Court will proceed to examine whether the applicants' right to respect for their family life has been adequately protected.

20. The Court reiterates that the essential object of Article 8 is to protect the individual against arbitrary action by the public authorities. There are in addition positive obligations inherent in effective "respect" for family life. However, the boundaries between the State's positive and negative obligations under this provision do not lend themselves to precise definition. The applicable principles are, nonetheless, similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests and in both contexts the State enjoys a certain margin of appreciation (see *Tuquabo-Tekle and Others v. the Netherlands*, no. 60665/00, § 42, 1 December 2005).

21. In the present case the Court considers that the decision of the Ödemiş Court separating the two siblings constituted an interference with the applicants' right to respect for their family life. It not only prevented the two siblings from seeing each other, but also made it impossible for the first applicant to enjoy the company of both his children at the same time. Having regard to the facts of the present application, and in particular the fact that the domestic courts have been requested on a number of occasions by the applicants to reconsider their decisions, the Court deems it more appropriate to examine whether the respondent State complied with its positive obligation and whether its authorities acted with a view to maintaining and developing the family ties.

22. In its examination the Court will take into account its case-law under Article 8 of the Convention, which emphasises the authorities' obligation to have regard to the best interests of the child (see *Maslov v. Austria* [GC], no. 1638/03, § 82, 23 June 2008). Moreover, an assessment of the quality of the decision-makıng process requires the Court to establish whether the conclusions of the domestic authorities had a sufficient evidentiary basis (including, as appropriate, statements by witnesses, reports by competent authorities, psychological and other expert assessments and medical notes) and whether the interested parties, including the children themselves, were able to express their views (see, for example, *Havelka and Others v. the Czech Republic*, no. 23499/06, § 62, 21 June 2007; *Haase v. Germany*, no. 11057/02, § 97, ECHR 2004-III (extracts)).

23. The Court notes at the outset that the custody of the second applicant and his younger sister was determined by the Ödemiş Court of its own motion; neither parent had requested the judge to make such a determination. In fact, the mother had asked the Ödemiş Court for the custody of both children (see paragraph 6 above). The Court is thus struck by the absence of reasoning justifying the separation of the children.

24. The Government submitted that the decisions adopted by the domestic courts had not prevented the two siblings from seeing each other because the children were living in the same neighbourhood and it was thus possible for them to keep in contact. The Court cannot accept that argument and considers that maintaining the ties between the children is too important to be left to the discretion and whim of their parents. Indeed, it is not disputed by the Government that the children were prevented by their mother from even speakıng to each other when they saw each other in the street.

25. On two occasions the applicants made pertinent submissions to the Ödemiş Court and argued that the access arrangements was rupturing the family ties between them and Damla (see paragraphs 8 and 10). They also submitted that the situation was causing irreversible psychological problems for the children. The Ödemiş Court was informed about the mother's uncooperative behaviour. Nevertheless, it concluded that regulating contact between the applicants and Damla in the way sought by the applicants would mean “a continual change of environment for her and would confront her with variations in discipline”.

26. The Court cannot concur with that conclusion for a number of reasons. Firstly, it notes that no explanation was given by the Ödemiş Court as to exactly how and why allowing the two siblings to spend time together every weekend would confront Damla with variations in discipline or would amount to an unacceptable change of environment, especially given the fact that they lived in the same neighbourhood. In the alternative, even if it deemed the access arrangements proposed by the applicants to be unsuitable, it would have been possible for the Ödemiş Court to consider

other methods of access between the two children and thus uphold their rights under Article 8 of the Convention.

27. Neither did the Ödemiş Court seek to differentiate the case from those of the Court of Cassation's previous decisions which had been relied on by the applicants in support of their submissions and from which it appears that the established practice of the judiciary in Turkey is to ensure that contact between the children of divorced couples is maintained (see paragraph 12 above). Moreover, the Court observes that the Ödemiş Court did not only fail to seek the opinion of the children but also failed to base its decision on any evidence, such as psychological and other expert assessments, despite the fact that it was informed by the applicants that the situation had been causing them psychological problems.

28. Neither can the Court accept the Government's argument that allowing Damla to spend every other weekend with her father would have adversely affected her development, in the absence of solid evidence in support of that submission, such as the psychological or other expert assessments referred to in the preceding paragraph. At this juncture the Court reiterates that, contrary to the Government's submission, the mutual enjoyment by parents and children of each other's company constitutes a fundamental element of "family life" within the meaning of Article 8 of the Convention (see *Kutzner v. Germany*, no. 46544/99, § 58, ECHR 2002-I and the cases cited therein).

29. The Court also observes with regret that, despite the importance of the case it had before it, in its decision rejecting the appeal the Court of Cassation did not address the two detailed submissions made by the applicants which included references to its own case-law concerning the need for siblings to keep in contact (see paragraphs 12-13 above) but merely held that the Ödemiş Court had "adequately examined the evidence available to it and that its conclusion had been in accordance with the applicable legislation".

30. In the light of the foregoing, the Court considers that the domestic courts' handling of the applicants' case, during which they failed to have due regard to the best interests of the family**,** fell short of the State's positive obligation.

There has therefore been a violation of Article 8 of the Convention.

II. ALLEGED VIOLATION OF ARTICLES 6 AND 14 OF THE CONVENTION AND ARTICLE 5 OF PROTOCOL No. 7 TO THE CONVENTION

31. The applicants complained that different conclusions reached by different courts were not compatible with Article 6 of the Convention. They also argued that the inability of the children to see each other, and that ordering the first applicant to pay maintenance to his ex-wife in respect of

his daughter because he was a male, was discriminatory within the meaning of Article 14 of the Convention and infringed their rights under Article 5 of Protocol No. 7 to the Convention.

32. The Court has examined these complaints. Having regard to all the material in its possession, and in so far as these complaints fall within its competence, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that this part of the application must be rejected as being manifestly ill-founded, pursuant to Article 35 §§ 3 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

33. 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

34. The applicants claimed 13,352 euros (EUR) in respect of pecuniary damage. This amount represented the first applicant's unsuccessful claim for maintenance payments from his ex-wife in respect of his son Armağan (see paragraphs 10-11 above). The applicants also claimed the sum of EUR 80,000 in respect of non-pecuniary damage. In support of this latter claim the applicants submitted medical reports showing that they had received treatment for depression.

35. The Government submitted that the claim in respect of pecuniary damage had no basis. Concerning the claim for non-pecuniary damage, the Government suggested that, after Damla reaches the age of eighteen, she will be able to have contact with other members of her family.

36. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. However, deciding on an equitable basis, it awards the applicants jointly the sum of EUR 15,000 in respect of non-pecuniary damage.

B. Costs and expenses

37. The applicants also claimed EUR 1,796 for the costs and expenses incurred before the domestic courts and EUR 5,882 for the fees of their legal representative before the Court. In support of their claims the

applicants submitted various bills and a fee agreement with their representative.

38. The Government considered that the expenses relating to the domestic proceedings could not be claimed under this head. As for the applicants' claim for their costs and expenses before the Court, the Government submitted that they were not supported by any documentary evidence.

39. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In response to the Government's argument concerning the costs and expenses relating to the proceedings at the national level, the Court reiterates that, if it finds that there has been a violation of the Convention, it may award the applicant the costs and expenses incurred before the national courts for the prevention or redress of the violation (see *Société Colas Est and Others v. France*, no. 37971/97, § 56, ECHR 2002-III, and the cases cited therein). In the present case the applicants brought the substance of their Convention rights, that is their right to respect for their family life, to the attention of both the first-instance court and the appeal court. In the light of the foregoing, the Court considers that the applicants have a valid claim in respect of part of the costs and expenses incurred at the national level.

40. Regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 2,500, covering costs under all heads.

C. Default interest

41. The Court considers it appropriate that the default interest 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 UNANIMOUSLY

1. *Declares* the complaint under Article 8 of the Convention admissible and the remainder of the application inadmissible;

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

3. *Holds*

(a) that the respondent State is to pay the applicants jointly, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 15,000 (fifteen thousand

euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, and EUR 2,500 (two thousand five hundred euros) in respect of costs and expenses, plus any tax that may be chargeable to the applicants, to be converted into Turkish liras at the rate applicable on the date of settlement;

(b) 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;

4. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 6 April 2010, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Sally Dollé Registrar	Françoise Tulkens President