



**European Centre for Law and Justice Analysis on
Application No. 14340/05,
before the European Court of Human Rights Second Section:
Ecumenical Patriarchate (Fener Rum Patrikliği) v. Turkey**

January 2008

The European Centre for Law & Justice (“ECLJ”) is an international non profit law firm dedicated to protecting human rights and religious freedom for people of faith in Europe. Attorneys for the ECLJ have served as counsel in numerous cases before the European Court of Human Rights. Additionally, the ECLJ has special Consultative Status as an NGO before the United Nations. The proper resolution of this case is a matter of substantial organizational concern to the ECLJ because of the implications on religious denominations, religious organizations and minorities and their ability to lawfully and peacefully enjoy property within Turkey.

At the centre of this case, the Büyükada property, stands as a symbol of the systematic approach of the Respondent State in completely eliminating the Greek minority from Turkey despite the legal safeguards of both the European Convention of Human Rights and the Treaty of Lausanne. The success of this campaign, stemming in no small part from the ongoing property divestments by the Turkish government, cannot be denied. In 1955, the number of Greeks estimated to be living in Turkey amounted to 100, 000 strong. Today, it is estimated that only 2500-3000 Greeks remain in Turkey.¹ These remaining Greeks represent a community that is “dwindling, elderly and frightened.”²

This Court has correctly noted that the Applicant church represents the Greek and Orthodox minority in Turkey today. Internationally, however, the head of this same Patriarchate is the spiritual leader of 250 million Orthodox worldwide³ and the seat of this Patriarchate has been in Turkey since 330 A.D.⁴

The Applicant State, during its oral argument of 27 November 2007 argued that the Ecumenical Patriarchate did not have legal personality and therefore did not have the

¹ Loucas Tsilas, Greek-Turkish Relations In The Post-Cold War Era, 20 Fordham Int'l L.J. 1589, 1600 (1997).

² Human Rights Watch, Denying Human Rights and Ethnic Identity: The Greeks of Turkey 1, 5 (Mar. 1992).

³ In 381, the First Council of Constantinople declared that "The Bishop of Constantinople shall have the primacy of honour after the Bishop of Rome, because it is the New Rome." (cannon iii).

⁴ The Council of Chalcedon of 451 established Constantinople as a Patriarchate, however the church claims its historical roots back to its founding by the Apostle Andrew in the first century A.D.

right of property ownership, proffering as proof the fact that the Patriarchate had been legally titled as owner of this and only this sole property. The very premise of this argument, however, that one of the largest and oldest religious institutions in the world is registered as owner of a single property clearly establishes that the Patriarchate has been denied its Convention right to own property as a result of both ethnic and religious discrimination. The ECLJ herein contends that the proper analysis of this Application requires examining this case not in isolation, but within the context of the fundamental and underlying issues of religious discrimination and overall denial to the Greek minority of Turkey of both their right to property ownership and access to court to protect that right.

Protocol 1, Article 1: Right to Property

Under Article 1, of Protocol 1 of the European Convention of Human Rights, to which Turkey is a signatory, the right to property is guaranteed. This article provides:

Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

The proceeding provisions shall not, however, in any way impair the right of the state to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.⁵

(a) Threshold Issue

The European Court, in its analysis of claims under Protocol 1, Article 1 has first to determine whether a property right is at issue and whether that property is in play.⁶ In the instant application, there is no question that there has been a deprivation of a property interest. The Ecumenical Patriarchate enjoyed ownership and control of the Büyükada orphanage and was the registered title owner of the property until the misappropriation of the property from its ownership by the Respondent State. All lapses in control over the property and the ability to perform the necessary upkeep and renovations to maintain the property are the sole result of interference by the Turkish state organs in preventing the Patriarchate from exercising these natural rights under Protocol 1, Article 1. At its very essence, the Respondent's argument is that it should now benefit from unlawfully preventing the Patriarchate from exercising its right of ownership and stewardship over its own property by now claiming that since the Ecumenical Patriarch did not take care of the Büyükada property, when in fact it could not because of the State interference, that then the property divestment is somehow legitimated.

It must also be noted that the threshold issue of property rights provides for great leivity in interpretation. The Court has held that it is not necessary that the right which is the subject of the dispute be established as belonging to the Applicant, but the outcome of

⁵ Turkey ratified both the European Convention of Human Rights and the Additional Protocol on 18 May 1954. The Convention was fully codified into Turkish domestic law in 2002. Article 90 of the Turkish Constitution gives the Convention, as an international agreement, superiority over Turkish domestic law and bars challenges of the Articles of the Convention from the Turkish Constitutional Court.

⁶ See: Sporrang and Lonroth v. Sweden, Judgment of 23 September 1982, Series A. no. 53.

the dispute must be directly decisive for the right.⁷ Here, however, the Applicant has provided clear and convincing documentary evidence as to ownership of the properties in question. Thus, there is no issue as to whether this application meets the first prong of the Protocol 1, Article 1 analysis.

(b) Article 6 Component: Access to Court and Legal Personality

Freedom of thought, conscience and religion requires that churches and religious communities be able to obtain some level of legal personality in order to enjoy the fundamental protections and benefits of the Convention, such as the right to own and acquire property and the right to safeguard those properties through fair and impartial administrative and judicial organs.

The Court has recently stressed that authorization from national law derives from the fundamental Convention requirement of respect for the rule of law, and is in fact, “the first and most important requirement of Article 1 of Protocol 1.”⁸

Furthermore, it has been held that: “it is well established in the Court’s case-law that as a matter of principle Article 6(1) guarantees a right of access to the courts for the determination of claims under domestic law concerning compensation payable for expropriation of land.”⁹ The Golder Court held that Article 6 secures for all people the right to court proceedings in any claim relating to a civil right.¹⁰ The tribunal must be independent of the parties and the executive.¹¹ The State must also provide access to any relevant information in its possession.¹²

Precisely stated, the right of access to the courts means that the person (legal entity) involved must be able to have its matter brought before the court for determination without any improper legal or practical obstacles being placed in its way.¹³

A Member State, within its margin of appreciation, may limit access to courts under certain circumstance.¹⁴ However, under no circumstances may this right be used to “injure the substance of the right.”¹⁵ Any limitations placed on access to court are under the supervisory authority of the Convention organs. Furthermore, any limitation on the right to access must have a legitimate aim and must be reasonably proportionate to that aim.¹⁶

The European Centre for Law and Justice herein submits that at the heart of this case lies the issue of the denial of legal personality to the entity of the Ecumenical Patriarchate. This fact was made clear by the counsel for the Respondent State during the

⁷ Malhous v. Czech Republic, Admissibility Decision of Grand Chamber on 13 July 2001, 33071/96.

⁸ Former King of Greece Case, Judgment of 23 November 2000, Application No. 25701/94, § 79.

⁹ Holy Monasteries v. Greece, Application Nos. 13092/87; 13984/88; A301-A (1994), § 85.

¹⁰ Golder v. U.K. (1975) 1 EHRR 534.

¹¹ Ringeisen v. Austria (No. 1) (1971) 1 EHRR 455 at § 98.

¹² McGinley and Egan v. UK (1998) 27 EHRR 1 (see 8.8.3.4).

¹³ Article 6 of the European Convention of Human Rights: The Right to a Fair Trial, Human Rights Files No. 13, Council of Europe Publishing, 1994.

¹⁴ See e.g. Eur. Court H.R., Ashingdane judgment of 28 May 1985, Series A No. 93, p. 24, §§111-113 [placing limitations on access to court by people of unsound mind]; Eur. Court H. R., Monnell and Morris judgment of 2 March 1987, Series A No. 115, p. 23, § 59 [measures to deter unmeritorious criminal appeals were recognized as pursuing a legitimate aim in the proper administration of justice].

¹⁵ Eur. Court H.R., Golder judgment of 21 February 1975, Series A No. 18, p. 18, §§ 36-38.

¹⁶ Ashingane, op. cit., § 57.

oral hearing before this Court and by the dismissal of the counter-claim of the Applicant against the Directorate of Foundations in the Turkish domestic courts due to lack of standing resulting from refusal to recognize the legal personality of the Applicant Patriarchate. This refusal of recognition extends far beyond this one case, and has brought into jeopardy the very existence of the Patriarchate within Turkey despite a centuries long presence in the area. Furthermore, the denial of legal personality as a means of barring the Applicant from pursuing its counter-claim at the domestic level has done irreparable damage to the substance of its claim.

Legal personality enables religious communities or organizations to acquire property and other physical materials required for public manifestations of religion or belief.¹⁷ This Court, in Canea Catholic Church v. Greece, held that a limitation on the provision of legal personality impairs the very substance of the Applicant church's "right to a court and therefore constitutes a breach of Article 6 § 1 of the Convention."¹⁸ The Court further held that the refusal of legal personality to the Applicant Church and the subsequent inability to protect its property rights was not a proportionate measure for the protection of public order.¹⁹

The argument that no religious entity in Turkey enjoys legal personality and therefore the Applicant Church should also be refused fails under the same reasoning. No proportionality exists between the goal of maintaining public order among the various religious communities and the resulting lack of provisions in the law which would allow for a religious church or community to obtain legal personality and thus have the ability to acquire property and safeguard that property before the courts.

This is particularly true for three reasons. First, the argument typically proffered by the Respondent State that religious minorities in Turkey do not enjoy basic rights such as having legal personality because then those same rights would then have to be given to the fundamentalist fringe groups within the country is simply a misstatement of European law. This esteemed Court ruled in Refah Partisi a.o. v. Turkey²⁰ that Signatories to the Convention, and specifically Turkey as the respondent State in the case, could lawfully withhold rights from movements with fundamentalist roots which were a legitimate threat to democratic values and national security. Precisely stated, the granting of the right to acquire property to the Applicant Patriarchate and other minority religious groups, coupled with the denial of this right to fundamentalist groups, would be a legitimate means of maintaining public order while at the same time upholding the necessary components of a democratic state such as access to court.

Second, the argument that legal personality has been universally denied to all religious groups is also incorrect. Two decisions of the Turkish appellate courts have granted legal personality to the Chief Rabbinate. The first, heard by the Izmir Asliye Hukuk Mahkemesi (judgment affirmed by the 7. Chamber of the Appeal Court (T.C Yargitay, 7. Hukuk Dairesi, 23.09.1957)), concerned the question of whether the Izmir

¹⁷ W.C. Durham, Jr., "Perspectives on Religious Liberty: A Comparative Framework," in J. G. van der Vyver and J. Witte, Jr., Religious Human Rights in Global Perspective. Legal Perspectives (The Hague, Martinus Nijhoff, 1996), 39.

¹⁸ The Case of Canea Catholic Church v. Greece, Judgement of 16 December 1997, Application No. 143/1996/762/963, § 42.

¹⁹ Id.

²⁰ ECtHR, 13 February 2003, Refah Partisi a.o. v. Turkey (Grand Chamber) (Appl. No. 41340/98, 41342/98, 41343/98, 41344/98), § 124.

Chief Rabbinate had the legal capacity to register in its name the synagogue long used by it. The court of first instance in Izmir and the appellate court approved the Izmir Chief Rabbinate as having the capacity to become the legal owner of the Synagogue since it had been recognized by an 1821 regulation as a congregation. The second, heard by Edirne Asliye Hukuk Mahkemesi (judgment affirmed by the 1. Chamber of Yargitay (Edirne Asliye 1. Hukuk Mahkemessi, 1998/469 Esas, 1998/715 Karar and Yargitay 1. Hukuk Dairesi, E.99/6508, K.99/6647)) put at issue the Turkish Chief Rabbinate's legal capacity and its power to represent other chief rabbis and to own and acquire property. The appellate court in this case concluded that "The Jewish congregation is known throughout Turkey and it is represented by Turkey's Chief Rabbinate. All Jewish congregations are subjected to Turkey's Chief Rabbinate. Therefore the Chief Rabbinate's request to be a party to the case, and registration on its behalf, should be accepted." Under this very same reasoning, because of the long history of the Applicant Patriarchate within Turkey and its recognized authority both domestically and internationally by the Orthodox faithful, the Ecumenical Patriarchate should be extended the exact same rights and recognition.

Third, the Sunni majority have an unequivocal right to own, acquire and safeguard property. This is true both legally and extra-legally. Article 3194, Appendix 1 of the Public Works Statute states:

In the development of zoning plans, bearing in mind the conditions of the municipality and region being planned and future needs, locations for needed mosques are to be set aside. A mosque may be set up on condition that permission is received from the mufti of the province, provincial sub district or town, and that the location suits the zoning statutes. A place set aside for a mosque may not be allocated to other ends in contradiction of the zoning statutes.

Two items are notable with regard to the aforementioned statute. First, this statute casts grave doubt on the argument offered by the State that restrictions are placed on the religious freedoms of all religions in the country in order to maintain the integrity of the secular state of Turkey by endowing the local mufti the ability determine when and where necessary Mosques are to be established. This administrative function alone is discriminatory in relation to the fact that the Ecumenical Patriarchate, as evidenced by this case, is being barred from owning or acquiring property in Turkey as a religious institution. Second, even if one were to assume that the term mosque used in the statute relates to the opening of any religious house of worship, the application of the statute therein becomes discriminatory in the sense that a religious official from one religion must seek the consent of the mufti to get planning and building permission, which in practice would mean accepting the authority of one religion over the other; this being in clear violation of the 2nd Article of the Turkish Constitution which defines the Republic of Turkey as a "secular state under the rule of law" and the 10th Article which states that everyone is equal before the law without discrimination due to...philosophical belief, religion or sect..."

Further, whereas the Applicant's enjoyment and upkeep of the Büyükada orphanage property was made impossible due to State interference and its counter-claim against the Directorate of Foundations regarding the impermissible taking of the orphanage property before the Turkish domestic courts was dismissed due to lack of legal personality, the Director of Religious Affairs in Turkey estimated that 81% of mosques

were built without obtaining the required permits and 55 % of the mosques are built without an architectural plan.²¹

This difference in treatment between the Ecumenical Patriarchate and the Sunni majority in Turkey is in direct conflict with the provisions of Article 14 of the Convention and several provisions of the Treaty of Lausanne, which under both Article 90 of the Turkish Constitution and the last sentence of the first paragraph of Protocol 1, Article 1 of the Convention is made hierarchically superior to Turkish domestic law in the area of property rights.

Article 40 of the Treaty of Lausanne, which is congruous with Article 10 of the Turkish Constitution, grants all non-Muslim minorities in Turkey at the time of the signing of the Treaty, equality under the law and therefore is directly pertinent to the issue of the Büyükada orphanage as belonging to the Applicant as representative of the Greek minority in Turkey. Article 40 continues: “. In particular, they [non-Muslim minorities] shall have an equal right to establish, manage and control at their own expense, any charitable, religious and social institutions, any schools and other establishments for instruction and education, with the right to use their own language and to exercise their own religion freely therein.”

It is clear from this case that these obligations are being ignored. The Applicant Patriarchate has been systematically denied the ability to own and maintain property, its theological school has been shut down, it enjoys no government funding; all of which are rights enjoyed by the majority religion in Turkey.²² This Court has held that while a State may have a favoured religion; it must not act in a discriminatory manner towards all other religions.²³ It is incontrovertible as such, that the refusal of legal personality to the Applicant, while the majority religion is allowed almost unlimited ability to acquire property even without the appropriate permits and architectural plans, is gravely discriminatory and violates Applicant’s Convention rights. It is equally true that Respondent, in light of the dismissal of the Applicant’s counter-claim at the domestic level for apparent lack of legal personality, has violated the Applicant’s right to court under Article 6 of the Convention.

(C) Interference: Sporrong Three Rules Test

The traditional test of this esteemed Court in establishing whether an interference with property has occurred was formulated in Sporrong: “The first rule, which is of a general nature, enounces the principle of peaceful enjoyment of possessions; it is set out in the first sentence of the first paragraph. The second rule covers deprivation of possessions and subjects it to certain conditions; it appears in the second sentence of the

²¹ Statement of the Director of Religious Affairs, Mehment Nuri Yilmaz, published in the 30.11.2001 edition of the *Evrensel* newspaper.

²² The Directorate of Religious Affairs provides funding for 24 theological faculties and the teaching of Sunni Islam is obligatory in elementary education. See: Dr. Otmar Oehring, Human Rights-Turkey on the Road to the Europe- Religious Freedom?, Pontifical Mission Society (Missio), 2004. Also see: ECtHR, Case of Hasan and Eylem Zengin v. Turkey, Application No. 1448/04, Judgement of 9 October 2007, where the 2nd Section of this Court found Turkey had violated the Convention rights of an Alevi Muslim family for not allowing their child to opt-out of Sunni educational classes.

²³ See: Article 14 ECHR; ECtHR, 28 May 1985, Abdulaziz a.o. v. the UK (Series A vol. 94), § 82; ECtHR, 19 December 1994, VDSÖ & Gubi v. Austria (Series A vol. 302), § 37; 14 June 2001, Fernandez & Caballero v. Spain, Appl. No. 53072/99.

same paragraph. The third rule recognizes that the States are entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose; it is contained in the second paragraph.²⁴

Under the first prong, strong parallels can be drawn between this case and Fener Rum Erkek Lisesi Vakfi v. Turkey, where this Court found that Turkey had impermissibly interfered with the ownership rights of a Greek foundation and its operation of the Fener Greek secondary school in Istanbul. In both cases, the Applicants complied with the provisions of the Treaty of Lausanne on the protection of former foundations and religious communities providing public services for religious minorities. Both institutions were also recognized under the Ottoman Empire.²⁵ Further, both the Foundation in the latter case and the Ecumenical Patriarchate in the instant matter had peaceful enjoyment over the contested properties over a length of many years and both enjoyed legal security of ownership with the land registry as titled owners.²⁶ Therefore, no question exists as to the fulfillment of the first prong of the Sporrong test.

Under the second rule enunciated in the Sporrong judgment, it is equally clear that a deprivation of property has occurred in two senses; first with regard to the control the State held over the orphanage property preventing the Applicant from making the necessary renovations and upkeep; second the misappropriation of the property under the guise of serving the aim of public safety.

Furthermore, under rule 3 of the Sporrong test, control of the property in question by the Turkish government must serve the general interest. The Sporrong majority held that a fair balance must be struck between the demands of the general interests of the community and the requirements of the protections of the individual rights.²⁷

The European Commission of Human Rights, in Gillow v. United Kingdom, noted that the measure of proportionality used in the Sporrong/James fair balancing test differs in the application of deprivation and control of use rules since deprivation of property is inherently more serious than the control of its use.²⁸ The James Court reformulated this requirement to state that “not only must a measure depriving a person of his property pursue, on the facts as well as in principle, a legitimate aim “in the public interest”, but there must also be a reasonable relationship of proportionality between the means employed and the aim sought to be realized.”²⁹

Control of the Büyükada property was withheld from the Applicant by the Turkish authorities and therefore the required maintenance and upkeep of the property was made impossible. It strains credulity to now suggest that the Respondent has the right to deprive the Applicant of the property for reasons of public safety when the sole reason for the Orphanage’s dilapidated state was the ongoing Government interference. While the aim of public safety is certainly legitimate, the means used by the State in effectuating

²⁴ Sporrong and Lonroth v. Sweden, Judgment of 23 September, 1982, Series A. no. 52, § 61.

²⁵ Fener Rum Erkek Lisesi Vakfi v. Turkey, Judgment of 9 January 2007, Application No. 34478/97, § 11.

²⁶ Id., §§ 47-48.

²⁷ Sporrong and Lonroth v. Sweden, Judgment of 23 September, 1982, Series A. no. 52 § 68.

²⁸ Gillow v. UK, Judgment of 24 November 1986, Series A no. 109 (Report of the Commission § 148-157).

²⁹ James and Others v. UK, Judgment of 21 February 1986, Series A no. 98 § 50; Lithgow and Others v. UK, Judgment of 8 July 1986, Series A no. 103 § 120.

this aim are fully disproportionate to the end sought, particularly in light of the current proposal of the Applicant to renovate the property and therefore meet the public safety standards set by the Republic of Turkey. Reason dictates that because Applicant was not responsible for the poor state of the Büyükada property, then the only proportionate means of achieving the aim of maintaining public safety is allowing the Applicant to perform the necessary renovations.

The European Centre for Law and Justice therefore submits that a violation of Protocol 1, Article 1 has occurred both with respect to the taking of the orphanage property and also by placing unnecessary legal restrictions on the Applicant which has infringed upon its ability to enjoy its Convention rights.

Article 9 + Article 14 Claim: Freedom of Thought, Conscience and Religion and Prohibition Against Discrimination

The European Court of Human Rights has elevated Article 9 rights to be one of the cornerstones of a democratic society.³⁰ This Court has held that religious freedom is one of the vital elements that go to make up the identity of believers and their conception of life.³¹ Article 9 has taken the position of a substantive right under the European Convention.³²

As the majority opinion in Hasan and Chaush correctly reasons:

The Court recalls that religious communities traditionally and universally exist in the form of organized structures. They abide by rules which are often seen by followers as being of divine origin. Religious ceremonies have their meaning and sacred value for the believers if they have been conducted by ministers empowered for that purpose in compliance with these rules. The personality of the religious ministers is undoubtedly of importance to every member of the community. Participation in the life of the community is thus a manifestation of one's religion, protected by Article 9 of the Convention,³³

The protection of this fundamental right to enjoyment of religious practice and organization is bolstered when taken in conjunction with Article 14's prohibition against discrimination. This Court held that discrimination among various religious groups is contrary to the European Convention of Human Rights³⁴; and that "(f)acts demonstrating a failure by the authorities to remain neutral in the exercise of their powers in this domain must lead to the conclusion that the State interfered with the believers' freedom to manifest their religion within the meaning of Article 9 of the Convention."³⁵ The Court, in Refah Partisi a.o. v. Turkey, noted that this Court has "frequently emphasised the State's role as

³⁰ ECtHR, 25 May 1993, Kokkinakis v. Greece, Series A No. 260-A, § 31: AFDI, 1994, p. 658.

³¹ ECtHR, 20 September 1994, Otto-Preminger-Institut v. Austria, Series A, No. 295-A: JDI, 1995, p. 772.

³² Kokkinakis op.cit., ECtHR, 23 June 1993, Hoffmann v. Austria, Series A, No. 255-C: JDI, 1994, p. 788; Otto-Preminger-Institut, op. cit.; ECtHR, 26 September 1996, Manoussakis and Others v. Greece, Reports 1996-IV: AFDI, 1996, p. 749.

³³ ECtHR, 26 October 2000, Hasan & Chaush v. Bulgaria (Appl. No. 30985/96), § 62.

³⁴ See e.g. ECtHR, 23 June 1993, Hoffmann v. Austria (Series A vol. 255-C), § 38; ECtHR, judgment of 16 December 1997, Canea Catholic Church v. Greece (Reports of Judgments and Decisions (RJD) 1997, p. 2843), § 47.

³⁵ ECtHR, 26 October 2000, Hasan & Chaush v. Bulgaria (Appl. No. 30985/96), § 78.

the neutral and impartial organiser of the exercise of various religions, faiths and beliefs.”³⁶ This latter holding, notably against the Respondent, makes clear that the obligation not to discriminate among religious denominations applies equally to Turkey as to all western democracies. Further, it makes clear that Turkey’s argument that the discrimination it shows towards all minority religions in Turkey is not immune from challenge.

As the Court held in Serif v. Greece: “The Court recalls that freedom of thought, conscience and religion is one of the foundations of a “democratic society” within the meaning of the Convention. The pluralism indissociable from a democratic society, which has been dearly won over the centuries, depends on it. It is true that in a democratic society it may be necessary to place restrictions on freedom of religion to reconcile the interests of the various religious groups. However, any such restriction must correspond to a “pressing social need” and must be “proportionate to the legitimate aim pursued”.”³⁷

Under no circumstances can an umbrella denial of legal personality to a *de facto* legal entity enjoying both the protections of the Convention and Articles 37-45 of the Treaty of Lausanne be deemed to be proportionate to the goals of maintaining secularism and national security within Turkey. Article 9 is a collective right: “an ecclesiastical or religious body may, as such, exercise on behalf of its adherents the rights guaranteed by Article 9 of the Convention”.³⁸ As this Court has held one of the means of exercising the right to manifest one’s religion, especially for a religious community, in its collective dimension, is the possibility of ensuring judicial protection of the community, its members and its assets, so that Article 9 must be seen not only in the light of Article 11, but also in the light of Article 6.³⁹ The Ecumenical Patriarchate has existed peaceably within Turkey for centuries, and the extension of basic protections would have no effect on that peace. Thus, there is no legitimacy in the denial of legal personality.

Furthermore, the Salvation Army Court held that citizens should be able to form a legal entity, including a religious entity, in order to act collectively in a field of mutual interest; and that absent this ability the freedom of association guaranteed by the Convention would be deprived of any meaning.⁴⁰ The Court also held that strict scrutiny should be used by Member States when determining whether refusal of recognition of legal personality was necessary in a democratic society.⁴¹

Any interference must correspond to a “pressing social need”; thus, the notion “necessary” does not have the flexibility of such expressions as “useful” or “desirable”.⁴² The list of restrictions on freedom of religion, as contained in Articles 9 of the

³⁶ ECtHR, 13 February 2003, Refah Partisi a.o. v. Turkey (Grand Chamber) (Appl. No. 41340/98, 41342/98, 41343/98, 41344/98), § 91. See also: Dr. R. A. Lawson, Opinion at the Request of the Council of Europe: Concerning the Confessions Act, May 2003 (unpublished).

³⁷ ECtHR, Serif v. Greece, application no. 38178/97, judgment of 14 December 1999, § 49.

³⁸ ECtHR, 27 June 2000, Cha’are Shalom Ve Tsedek v. France (Appl. No. 27417/95, § 72).

³⁹ See, *mutatis mutandis*, Sidiropoulos and Others v. Greece, judgment of 10 July 1998, Reports 1998-IV, p. 1614, § 40; Canea Catholic Church v. Greece, judgment of 16 December 1997, Reports 1997-VIII, pp. 2857 and 2859, §§ 33 and 40-41, and opinion of the Commission, p. 2867, §§ 48-49.

⁴⁰ ECtHR, Case of the Moscow Branch of the Salvation Army v. Russia, judgment of 05 October 2006, Application No. 72881/01, §§ 59, 61. § 71 further notes that when a religious group is deprived of the right to recognition as a legal entity, then an interference with religious freedoms has also occurred.

⁴¹ Id., § 62.

⁴² ECtHR, Case of Svyato-Mykhaylivska Parafiya v. Ukraine, application no. 77703/01, judgment of 14 June 2007, § 116.

Convention, is exhaustive and they are to be construed strictly, within a limited margin of appreciation allowed for the State and only convincing and compelling reasons can justify restrictions on that freedom.⁴³

Under this strict scrutiny analysis, particularly when viewed in the context of the vast disparity in treatment between the majority religion in Turkey and the Applicant, Respondent's argument that no religious entity enjoys legal personality does not pass muster. As with the Applicant in Salvation Army, the Ecumenical Patriarchate has a long and peaceable history in Turkey. The Patriarchate has consistently abided by all of its legal and state obligations and no evidence whatsoever exists to suggest that this will not continue to be the case in the future. Therefore, under the reasoning of Salvation Army, it cannot be said that the denial of legal recognition to the Applicant Patriarchate was either necessary in a democratic society or was legitimate to serving the interest of public safety or public order.⁴⁴

Different treatment is discriminatory, for the purposes of Article 14, if it "has no objective and reasonable justification", that is, if it does not pursue a "legitimate aim" or if there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realized".⁴⁵ Ongoing limitation and interference with the Applicant's basic rights without legitimate justification while the majority religion in Turkey enjoys almost unfettered rights is a clear violation of this principle and is damaging to the concept of a democratic society.

The Hasan & Chash judgment held that: "the believer's right to freedom of religion encompasses the expectation that the community will be allowed to function peacefully free from arbitrary State intervention. Indeed, the autonomous existence of religious communities is indispensable for pluralism in a democratic society and is thus at the very heart of the protection which Article 9 affords."⁴⁶ The position of the European Court is that provisions of the domestic law must be precise enough and reasonably foreseeable enough to foresee the consequences which one's actions may entail. And the law should also provide adequate safeguards against arbitrary interference with respective substantive rights.⁴⁷ In no way are either of these requirements met under Turkish law as is evidenced by the *ad hoc* approach used by the Directorate of Foundations in taking land from the Greek community and then by placing the massive obstacle of denying legal personality to the Ecumenical Patriarchate in safeguarding their rights as relate to those properties.

In conclusion, as relates to the Article 9 rights offended in the instant Application, a two-fold reality exists. First; because of the unfettered discretion allowed to the

⁴³ Wingrove v. the United Kingdom, judgment of 25 November 1996, Reports of Judgments and Decisions 1996-V, p. 1956, § 53.

⁴⁴ ECtHR, Case of the Moscow Branch of the Salvation Army v. Russia, judgment of 05 October 2006, Application No. 72881/01, §§ 85-86, 95.

⁴⁵ ECtHR, Case of Kostas v. The Former Yugoslavia Republic of Macedonia, application no. 55170/00, judgment of 13 April 2006, § 44. See also: Karlheinz Schmidt v. Germany, judgment of 18 July 1994, Series A no. 291-B, pp. 32-33, § 24, and ECtHR, Camp and Bourimi v. the Netherlands, application no. 28369/95, judgment of 3 October 2000, § 37.

⁴⁶ Hasan & Chash, *op. cit.*, § 62.

⁴⁷ Huvig v. France, Judgment of 24 April 1990, Series A no. 176-B § 27; Kruslin v. France, Judgment of 24 April 1990, Series A no. 176-A § 36.

Directorate of Foundations in interfering with and depriving the Applicant of its property rights, the discriminatory treatment of the Applicant in relation to the majority religion in Turkey, and the legal obstacles placed in front of the applicant at the judicial level by denial of its legal personality; it is clear that the taking of the Büyükada orphanage property fails to meet the Convention's foreseeability requirement and thus is not prescribed by law and violates the Applicant's Convention rights. Second, the taking itself, resulting from the deprivation of control over the property because of State interference, as well as the overall refusal of legal personality to the Applicant is not necessary in a democratic society and is not a proportionate means to meeting the aims of maintaining public safety or order. As such, the European Centre for Law and Justice respectfully pleads that this Court find that Respondent has breached its Convention obligations and violated the Article 9+14 rights of the Applicant.

Damages

As this brief has analyzed, there are many strong parallels between the instant property deprivation and that in Fener Rum Erkek Lisesi Vakfı v. Turkey, both legally and factually.

In finding a violation of Applicants' property rights in Fener Rum Erkek Lisesi Vakfı, the court had a dual holding. In the first instance, the Court notes that a judgment confirming that there has been a violation implies for the defendant State the legal obligation to end the violation and to remove its consequences in order, as far as possible, to re-establish the situation as it was prior to the violation.⁴⁸ Therefore, the Court makes allowance for the possibility of re-listing the two parcels of property to the ownership of the Applicant foundation within three months of judgment.⁴⁹ In the second instance, the Court holds that since it has no equitable authority to force the re-listing of the property, in lieu of such re-listing, Turkey would be required to pay the value of the property as per expert valuation plus additional costs for material prejudice for non-enjoyment of the properties in question.⁵⁰

A similar damages pleading has been made in the instant matter by the Applicant Patriarchate. The European Centre for Law and Justice fully supports this pleading while in addition noting several aggravating factors which, when taken cumulatively, should act to compound the amount of non-pecuniary damages as a punitive measure to act as a deterrent from such property deprivations ever taking place again.

First, this case establishes a pattern of unlawful property divestments from the Greek minority, which when viewed in light of the vast diminution of the Greek minority in Turkey resulting in large part from property misappropriations, must be met with the severest of consequences if this minority is to survive in Turkey. Second, these same tactics have been used as part of a systematic effort to remove the Applicant Patriarchate from Turkey; measures which have included forbidding it to own any other properties in its name, refusal to allow the Patriarchate to use its Ecumenical title, interference in its election process, ongoing harassment, and the closing of its theological seminary. Finally, the same reasoning regarding legal personality has been used elsewhere by the Turkish

⁴⁸ Fener Rum Erkek Lisesi Vakfı v. Turkey, Application No. 34478/97, Judgment of 9 January 2007, § 72. See also: Iatridis v. Greece, (just satisfaction) [Grand Chamber], No. 31107/96, § 32, ECHR 2000-XI.

⁴⁹ Id., § 74.

⁵⁰ Id., § 75.

state organs, most recently in Public Prosecutor v. Vasil Yuanidi et al., Supreme Court (4th Criminal Offense), judgment of 16 June 2007, and has been used as a method of preventing the Applicant from exercising its basic and daily functions as a religious community under the protections of both the Convention and the Treaty of Lausanne.

It is accepted almost automatically that a democratic society standard must be applied to all Council of Europe Member States.⁵¹ Arguably, the standard for Turkey with regard to the margin of appreciation would be a higher level of scrutiny since its move to pre-accession candidacy with the European Union. While such candidacy has no bearing on Council of Europe standing, it can be argued that since the burden on the Applicant in bringing a case before the Court is higher in candidacy countries because of the implementation of new harmonization measures and the effect of those measures on potentially on-going claims, then reciprocally, those same Member States should be held to an equally arduous standard of review.

The blatant and ongoing violations suffered by the Applicant Patriarchate and Greek minority in Turkey, as symbolized by this case, cannot go unpunished if this once vibrant minority and sacred Church are to survive in Turkey.

⁵¹ See e.g., ECtHR, 30 September 1976, Handyside v. the United Kingdom, Series A, No. 24.