Joannou v Turkey: An important legal development and a missed opportunity

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Abstract: This article analyses *Joannou v. Turkey*, the latest judgment of the European Court of Human Rights addressing the issue of forced displacement in Cyprus. Situating *Joannou* within the Court's forced displacement jurisprudence, which relates both to the Cypriot and other frozen conflicts, it argues that the case is an important legal development and, at the same time, a missed opportunity. On the one hand, *Joannou* builds on existing case law by offering additional guidance for the development of the Immovable Property Commission, the body set up to remedy displaced Greek Cypriots. On the other, it argues that both the Court and the Republic of Cyprus missed an opportunity to use the case as a springboard for improving the procedures followed and the remedies provided by the Commission.

Keywords: right to property, remedy, forced displacement, Immovable Property Commission.

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Introduction

On 12 December 2017, the Chamber of the European Court of Human Rights ("ECHR" or "Court") delivered *Joannou v Turkey*,[1] its latest judgment in the saga of Greek Cypriot forced displacement cases.[2] Previous case law of the Court had found Turkey responsible for violations of property rights of Greek Cypriots in the areas not under the control of the Republic of Cyprus[3] and determined that the Immovable Property Commission ("IPC" or "Commission") could provide an effective domestic remedy to these violations.[4] *Joannou v Turkey* develops this jurisprudence by being the first case since the Court's endorsement of the Commission in 2010, to find that the IPC did not provide an effective remedy. This ruling is significant for two reasons: first, it gives rise to welcome guidance by the ECHR on the practices and procedures that should be followed by a domestic remedying body, like the IPC. Second, it reasserts the Court's readiness to exercise a supervisory function over the implementation of this guidance and guarantee the effectiveness of the Commission. At the same time however, *Joannou* presents a missed opportunity both on behalf of the Court and the Republic of Cyprus. On the one hand, the Court's unwillingness to examine in more detail the processes followed by the IPC has arguably encouraged the continuation of obscure practices and undermined a sense of procedural justice among the applicants. On the other, the Republic of Cyprus' refusal to intervene as a third party in this case resulted in a lost opportunity to present evidence relating to a potential substantive violation of the right to property.

The facts of the case and decision of the Court

The applicant's central argument in *Joannou* concerned delays in the proceedings of the IPC, which allegedly constituted violations of Articles 6 (right to fair trial), 13 (right to an effective remedy), 14 (freedom from discrimination) and 1 of Protocol No. 1 (right to property, henceforth "Article 1-1") of the European Convention on Human Rights. In particular, Ms Joannou had submitted her application to the IPC in May 2008 and proceedings were still pending when the ECHR delivered its judgment 9 and a half years later. This delay, it was argued, was caused by the unreasonable demands of the Office of the Attorney-General, which was representing the authorities of the "Turkish Republic of Northern Cyprus" ("TRNC"), and the unwillingness or inability of the Commission to put a stop to these.

A timeline of events illustrates this argument:[5] when the applicant filed her claim with the Commission, she had included documents showing that she was the owner of 18 *dönüm* of land in the areas not under the control of the Republic, over which Turkish authorities and the IPC have jurisdiction. The documents showed that the land in question had originally belonged to her mother and aunt, who then transferred it to the applicant. When the Attorney-General

[1] *Joannou v Turkey* (App No.53240/14), judgment of 12 December 2017 ("*Joannou*").

[2] For the Turkish Cypriot forced displacement case law of the Court, see *Kazali v Cyprus* (App. No.49247/08), judgment of 6 March 2012 and N. Hadjigeorgiou, "Case note on *Kazali and Others v Cyprus*" (2013) 2(1) *Cyprus Human Rights Law Review* 103.

[3] *Loizidou v Turkey* (Merits) (1997) 23 E.H.R.R. 513; *Cyprus v Turkey* (2002) 35 E.H.R.R. 30.

[4] *Demopoulos and Others v Turkey* (2010) 50 E.H.R.R. SE14 ("*Demopoulos*").

[5] This is detailed in *Joannou* at [7]-[38].

responded to the applicant's claim in May 2010, he argued that Ms Joannou had not demonstrated that she was the legal heir of the original owners and that she should submit additional documents that proved this. The problem arose from the fact that the aunt's name was spelled in slightly different ways in various documents that had been submitted to the IPC, which the Attorney-General contended, prevented him from being certain about the identities of the parties. Thus, clarificatory documents of this nature were requested and submitted 4 more times during the period between November 2012 and April 2013. In late 2013, the Attorney-General indicated that he could make the applicant an offer for a friendly settlement, if she provided additional documents showing the dates of birth and death of the two original owners. Further delays ensured, with no substantive developments taking place, until the ECHR delivered its judgment in December 2017.

Turkey responded by arguing that any delays were the result of the applicant's bad communication with her lawyers and not the fault of the Commission. Rejecting this, the Court held that the applicant had adequately proven her identity and legal claim to the properties, and any delay should be attributed to the "TRNC" authorities. Specifically, much time could have been saved, had the IPC identified the controversial points from the outset of the case and gathered evidence in relation to them in a more efficient manner.[6] Its failure to do so, meant that it "did not act with coherence, diligence and appropriate expedition", which resulted in a unanimous finding of a procedural violation of Article 1-1.[7] Moreover, the majority of the Court reasoned that since the applicant's central grievance concerned her inability to be remedied for a violation of her right to property, her complaint should be examined solely under this Article.[8] Dissenting on this point, Judge Karakaş held that in addition to a violation of the right to property, an examination of the complaint under Article 6 would have been more appropriate. This makes it the first time that a Turkish judge at the ECHR agrees with the majority that there has been a human rights violation in a Greek Cypriot displacement case.

<u>*Joannou* as an important legal development</u>

On the face of it, *Joannou* looks like a dry, procedural decision on delays in the proceedings of an obscure body, with limited wider implications. However, the importance of the case becomes clear when it is situated in, and understood as part of, the ECHR's more general jurisprudence on remedying displaced persons both in Cyprus and other frozen conflicts. The first such forced displacement case to have reached the ECHR was *Loizidou v Turkey*, in which the applicant successfully made the ground-breaking argument that the presence of Turkish troops in the north of Cyprus since 1974, and the military, economic and political control that Turkey exercises in the area, rendered it – and not the Republic of Cyprus – responsible for any violations that took place there.[9] Building on this reasoning, the Court held that preventing the applicant from accessing her property in the areas not under the control of the Republic, or

[6] *Joannou* at [104]
[7] *Joannou* at [116].
[8] *Joannou* at [57].
[9] *Loizidou v Turkey (Preliminary Objections)* (1995) 20 E.H.R.R. 99 at [62].

using it in any way, constituted a violation of Article 1-1.[10] Since the "TRNC" Constitution considered the relevant Greek Cypriot properties as voluntarily "abandoned", rather than forcibly evacuated during the war, it did not allow for the provision of an effective remedy to applicants like Ms Loizidou. Exceptionally therefore, *Loizidou* gave Greek Cypriot displaced people direct access to the ECHR, without a need to exhaust domestic remedies.

In the early forced displacement cases against it, Turkey refused to accept any responsibility, contending that even if a violation had taken place, which it disputed, this was due to actions of the authorities of the "TRNC", an independent and sovereign state.[11] Following the ECHR's consistent rejection of this argument,[12] Turkey changed tactics in *Xenides-Arestis*, when it submitted that the case should be found inadmissible because the applicant had failed to exhaust the newly established domestic remedy of the IPC.[13] The Court accepted in principle that the Commission could offer an effective remedy, but rejected the argument on the facts of the case because the IPC's procedures and the substantive remedies it provided, suffered from several deficiencies. In delivering this decision, the ECHR offered the first preliminary guidance on the procedures and safeguards that should be adopted, and remedies that should be made available, by bodies such as the Commission. It indicated that members of the IPC should not have a conflicting interest (for example, by themselves occupying properties owned by Greek Cypriot displaced persons); that the Commission should also consist of international members, and not just Turkish Cypriots; and that it should allow applicants to ask for restitution, in addition to the remedy of compensation.

Turkey swiftly complied with the Court's guidance by amending the IPC Law, so when the next case – *Demopoulos and Others v Turkey* – was heard, it was held that the Commission provided an effective remedy that applicants should exhaust before resorting to the ECHR.[14] *Demopoulos* was a game changer for Greek Cypriots who lost their direct access to the Court, but it also provided additional guidance for the IPC's more effective operation. It indicated that it would not constitute a problem if the majority of applicants were remedied through compensation;[15] that the Commission should be accessible to the applicants in terms of its language of operations (which was satisfied if proceedings took place in Turkish and were translated in English);[16] and that it should remain independent and impartial.[17]

Since *Demopoulos*, a range of cases concerning the IPC have reached the Court. In all of them, the ECHR endorsed the remedy that had been ordered by the IPC and confirmed the

[10] *Loizidou (Merits)* at [63].
[11] *Loizidou* (Preliminary Objections) at [47].
[12] *Loizidou* (Preliminary Objections) at [62]; *Loizidou* (Merits) at [56]; *Cyprus v Turkey* at [77].
[13] *Xenides-Arestis v Turkey* 52 E.H.R.R. 16.
[14] *Demopoulos* at [127].
[15] *Demopoulos* at [119].
[16] *Demopoulos* at [126].
[17] *Demopoulos* at [120].

effectiveness of the remedying body.[18] It also indicated that remedies that had not been discussed in detail in *Demopoulos*, like the remedy of exchange, were compatible with the Court's jurisprudence.[19] In one case, *Meleagrou and Others v Turkey*, the ECHR accepted the argument that quasi-judicial bodies like the IPC were subject to the requirements of Article 6, but did not find that the 4-and-a-half-year period of proceedings constituted an unreasonable delay and a violation of the right to a fair trial.[20] Finally, in *Loizou v Turkey* the Court held that a period of 3 years and 7 months for the completion of the IPC proceedings was not an unreasonable amount of time and did not result in a violation of Articles 6 or 1-1.[21]

Thus, *Joannou* – so far the only case in which the Court found that the practices of the Commission fell short of human rights standards – is an important development, as it arguably provides the most detailed recommendations since *Demopoulos* about the procedures that should be followed by the IPC. In particular, it sets an upper time limit, which did not exist so far, over which the remedies provided by the Commission will be considered ineffective. Although the ECHR had previously addressed the prolonged proceedings argument in *Meleagrou* and *Loizou*, the specific facts of these cases, which did not resemble those of a typical IPC case, had not given rise to adequate recommendations on this issue. The ECHR has indicated in previous case law, that whether delays will result in a violation:

> "[M]ust be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicant and of the relevant authorities and what was at stake for the applicant in the dispute."[22]

Since most IPC cases are similar in terms of the listed criteria, the ruling in *Joannou* can give rise to a fairly accurate indication of when delays render the Commission ineffective.

Moreover, the case is significant because it reasserts the ECHR's willingness to continue scrutinising the practices of the IPC, even after it has determined that these generally result in effective remedies. The Court made it clear that its finding in this case does not impact on the general effectiveness of the Commission since:

> "[I]t is perfectly possible that a remedy that is in general found to be effective operates inappropriately in the circumstances of a particular case."[23]

Thus, Greek Cypriots are still under an obligation to resort to the IPC in order to be remedied for violations of their right to property. At the same time however, *Joannou* paves the way for the launching of other cases against the IPC before the ECHR. Following *Demopoulos*, concerns were raised (mostly by Greek Cypriot academics and commentators[24]) that by

[18] See, for instance, *Alexandrou v Turkey* (App. No.16162/90), judgement of 28 July 2009; *Angoulos Estate Ltd v Turkey* (App. No.36115/03), judgment of 9 February 2010.

[19] *Eugenia Michaelidou Developments Ltd and Michael Tymvios v Turkey* (2004) 39 E.H.R.R. 36.

[20] *Meleagrou and Others v Turkey* (App. No.14434/09), judgement of 2 April 2013.

[21] *Loizou v Turkey* (App. No.50646/15), judgment of 3 October 2017.

[22] *Frydlender v France* (2001) 31 E.H.R.R. 52 at [43].

[23] *Joannou* at [86].

[24] See E. Katselli-Proukaki, "The Right of Displaced Persons to Property and to Return Home after *Demopoulos*" (2014) 14 *Human Rights Law Review* 701; L. Loucaides, "Is the European Court of Human Rights Still a

endorsing the IPC, the Court had washed its hands off the Greek Cypriot displacement issue. This case suggests that the ECHR's approach is, in fact, more nuanced than that. While it gave Turkey the benefit of the doubt when it recognised the effectiveness of the IPC in *Demopoulos*, it moderated this in *Joannou* by remaining vigilant that the applicants actually received what they had been promised. This was explicitly asserted when the Court noted that:

> "[I]t remains attentive to the developments in the functioning of the IPC remedy and its ability to effectively address Greek Cypriot property claims."[25]

Finally, *Joannou* could potentially provide guidance for the establishment of remedying bodies similar to the IPC, in other frozen conflicts around Europe. While originally, the only frozen conflict that had generated ECHR case law was the one relating to Cyprus, recently, the Grand Chamber delivered two judgments – *Chiragov v Armenia* and *Sargsyan v Azerbaijan* – on the remedying of forced displacement in Nagorno-Karabakh.[26] In the merits judgments of both cases the Court made extensive references to its Cyprus case law and emphasised the respondent states' obligation:

> "To establish a property claims mechanism … allowing the applicants and others in their situation to have their property rights restored and to obtain compensation for the loss of their enjoyment."[27]

This obligation, was reiterated verbatim in the *Chiragov* and *Sargsyan* just satisfaction judgments, which were delivered on the same day as *Joannou*.[28] During the same period, Ukraine submitted two inter-state applications against Russia – *Ukraine v Russia (I)*[29] and *Ukraine v Russia (IV)*[30] – that relate to the latter's exercise of effective control over Crimea and the consequent alleged violations of several Convention rights, including Article 1-1. In light of the political analysis that Eastern Ukraine will, or has already, become a frozen conflict, the Court is likely to follow its established case law on Cyprus, including the guidance it provided in *Joannou*, when responding to these Article 1-1 arguments.[31]

<u>*Joannou* as a missed opportunity</u>

Despite its importance in developing the law, this case also created opportunities to deliver additional guidance on the way the IPC should be operating, which neither the ECHR, nor the

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Principled Court of Human Rights after the Demopoulos Case?" (2011) 24 *Leiden Journal of International Law* 435.

[25] *Joannou* at [86].

[26] *Chiragov v Armenia* (2016) 63 E.H.R.R. 9; *Sargsyan v Azerbaijan* (2017) 64 E.H.R.R. 4.

[27] *Chiragov v Armenia* (2016) 63 E.H.R.R. 9 at [199]; *Sargsyan v Azerbaijan* (2017) 64 E.H.R.R. 4 at [238].

[28] *Chiragov v Armenia* (App. No.13216/05), judgment of 12 December 2017; *Sargsyan v Azerbaijan* (App. No.40167/06), judgment of 12 December 2017.

[29] *Ukraine v Russia* (App. No.20958/14) (pending); see also, Press Release issued by the Registrar of the Court, "European Court of Human Rights Deals with Cases concerning Crimea and Eastern Ukraine" ECHR 345 (2014), 16 November 2014.

[30] *Ukraine v Russia (IV)* (App. No.42410/15) (pending); Press Release issued by the Registrar of the Court, "European Court of Human Rights Communicates to Russia New Inter-State Case concerning Events in Crimea and Eastern Ukraine" ECHR 296 (2015), 1 October 2015.

[31] International Crisis Group, "Can Peacekeepers Break the Deadlock in Ukraine?" *Europe Report No 246* (Brussels/Kyiv/New York/Vienna/Washington, 15 December 2017).

Republic of Cyprus, utilised fully. Specifically, the Court missed an opening to push the IPC into adopting more transparent and accessible procedures, while the Republic of Cyprus should have intervened and provided evidence pointing to a further violation of the substantive right to property.

The first instance of a missed opportunity by the Court concerns its reluctance to address the fact that the Commission has not been complying with the IPC Law[32] and the secondary legislation ("the Rules")[33] that relate to it. According to these, the IPC operates in a similar manner to a civil court: the applicant makes a claim for the provision of a remedy, the Attorney-General responds with a defence, and after the two sides have presented their arguments and evidence, the IPC decides whether a remedy should be granted to the applicant and what this entails.[34] If the remedy is compensation, the Commission must determine the appropriate amount by considering a range of factors listed in the Law.[35] Yet the facts of *Joannou*, make it clear that this was not the procedure followed by the Commission. Instead of the parties participating in proceedings that resembled a civil case, they engaged throughout the 9-and-a-half-year period in direct negotiations with each other. Eventually, the Attorney-General indicated that he was willing to make an offer to the applicant for a given amount, without any explanation of how this was calculated. Notably, this process did not take place in tandem with the procedure described in the Law, but as an alternative to it.

In principle, there is nothing wrong with opting for informal negotiations, rather than quasi-judicial proceedings. In fact, the former is likely to be less confrontational and its outcome more readily acceptable by the applicant, when compared to a judicially-imposed remedy. What is problematic however, is the fact that this process is regularly used by the Commission, without it being outlined, or its safeguards discussed, anywhere in the Law.[36] The IPC's overwhelming reliance on this procedure is confirmed by official statistics, which indicate that by January 2018, 965 cases had been settled through informal negotiations and only 27 had gone through the hearing process detailed in the Law.[37] Ultimately, the Court found a procedural violation of Article 1-1 because of the "passive attitude on the part of the IPC",[38] but did not acknowledge that this impassiveness was partly because of the role it had adopted in observing the negotiations between the parties, rather than actively resolving their disagreement in the way provided for by the Law.

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[32] ("TRNC") Law No. 67/2005 ("Law for the Compensation, Exchange and Restitution of Immovable Properties which are Within the Scope of Sub-paragraph (B) of Paragraph 1 of Article 159 of the Constitution").

[33] ("TRNC") Rules Made under Sections 8(2)(A) and 22 of the Law for the Compensation, Exchange and Restitution of Immovable Properties which are Within the Scope of Sub-paragraph (B) of Paragraph 1 of Article 159 of the Constitution.

[34] IPC Law, Section 16; Rules, Sections 7 and 9.

[35] IPC Law, Section 8(4).

[36] N. Hadjigeorgiou, "Remedying Displacement in Frozen Conflicts: Lessons from the Case of Cyprus" (2016) 18 *Cambridge Yearbook of European Legal Studies* 152.

[37] Presidency of the Immovable Property Commission, "Monthly Bulletin" Issue 98, 10 January 2018 at http://www.tamk.gov.ct.tr/dokuman/istatistik_ocak18ing.pdf (last visited 10 January 2018) ("Presidency of the IPC, 'Bulletin'"). These numbers do not take into account revoked cases.

[38] *Joannou* at [97].

This approach is surprising in light of contradictory case law from the ECHR on the matter. The Court has indicated in the past that the requirement in Article 1-1 that any interference with the right to property is "provided by law", means not only that this has a basis in national law, but also that the law is accessible, precise and foreseeable.[39] As a result, it has found violations of the right to property in cases where there were inconsistencies between what was described in the law and what was happening on the ground.[40] Yet, despite the existence of established case law on this point, and clear evidence that the "TRNC" authorities did not apply the domestic legislation precisely and foreseeably, the ECHR allowed this practice to continue.

Further, the Court should have taken steps to enhance the IPC's effectiveness by commenting on the standard of proof used during its proceedings. The ECHR referred in detail to the Attorney-General's numerous requests for additional documents and held that it was the Commission's responsibility to establish more efficient procedures for gathering evidence. It failed to note however, that arguably part of the reason the IPC had not stopped the Attorney-General from making these requests is because, according to Section 6(2) of the IPC Law, "the burden of proof shall rest with the applicant who must satisfy the Commission *beyond any reasonable doubt*" of his/her identity and legal claim to the property.[41] The Court's uncritical stance towards this high standard of proof is regrettable because it is neither in accordance with the civil proceedings described in the IPC Law, nor with guidance from its previous case law, namely that the remedying mechanism established by the respondent states "should be easily accessible and provide procedures operating with flexible evidential standards".[42]

The last missed opportunity in *Joannou* lies, not with the Court, but with the Republic of Cyprus. This concerns the alleged substantive violation of the right to property and, in particular, whether the compensation amount granted to the applicants through the IPC process constitutes an adequate remedy for the harm they have suffered. Of the 990 applicants that have been remedied by the Commission to date, 873 of them have received compensation.[43] This is in the mist of allegations by a wide range of Greek Cypriot stakeholders, including the Republic of Cyprus itself, that the compensation amount they receive is so low that it does not constitute an effective remedy in the first place.[44] These allegations are best illustrated by the vastly differing amounts quoted by the two parties in *Joannou*, with the applicant asking for €2,285,000 and the Attorney-General offering £60,000, approximately €80,000.

Some guidance on bridging this gap should have been welcome by all, not least the Republic of Cyprus. Yet regrettably, and uncharacteristically in light of its practices in previous Greek Cypriot forced displacement cases, the Republic refused to intervene in the case and missed

[39] *Carbonara and Ventura v Italy* (App. No.24638/94), judgement of 30 May 2000 at [64]; *Beyeler v Italy* 33 E.H.R.R. 52 at [109].
[40] *Baklanov v Russia* (App. No.68443/01), judgement of 9 June 2005 at [46].
[41] My emphasis.
[42] *Chiragov v Armenia* (2016) 63 E.H.R.R. 9 at [199]; *Sargsyan v Azerbaijan* (2017) 64 E.H.R.R. 4 at [238].
[43] Presidency of IPC, "Bulletin".
[44] *Demopoulos* at [121].

the opportunity to persuade the Court to rule on this issue.[45] The ECHR has already provided some guidance on what is an appropriate compensation amount in *Demopoulos* when it noted that in some instances, the valuations relied on by the applicants were exceptionally high because they included very high interest rates and were based on unrealistic assumptions about the properties' profitability. Nevertheless, this guidance remained general because the applicants in *Demopoulos* had not actually been compensated by the IPC, since they had failed to resort to it in the first place. *Joannou* was the first case in which each side had given its preferred compensation amount, without the applicant having already accepted the Attorney-General's offer, thus giving an opportunity to the Court to choose between them. In light of this, had the Republic of Cyprus intervened, it could have provided information, based on Land Registry records, on the valuation of specific properties and compared them with compensation amounts awarded by the IPC. In turn, this could have given the Court the perfect opportunity to provide meaningful guidance on the substance of Article 1-1.

Conclusion

Joannou, the latest in the saga of Greek Cypriot displacement cases, constitutes both an important legal development and a missed opportunity. On the one hand, it develops the ECHR's growing jurisprudence on frozen conflicts by offering guidance on the best way to ensure the effectiveness of remedying bodies, like the Commission. Moreover, the case is of interest to Cypriots more specifically, since it sends the message that the Court is willing to continue playing an active role in the protection of human rights in the area. On the other hand, *Joannou* presents a missed opportunity both on behalf of the Court and the Republic of Cyprus itself. The Court could have provided greater guidance for the effectiveness of the Commission by finding a violation due to the IPC's failure to comply with its own establishing legislation. It could have also raised as a potential problem the excessively high standard of proof used by the Commission, which makes it much harder for applicants to access the remedies the IPC was established to provide in the first place. Finally, the Republic of Cyprus should have intervened and provided evidence to support its position that the compensation amounts awarded by the IPC do not constitute an effective remedy. These missed opportunities suggest that *Joannou* is not the last of the Greek Cypriot displacement cases; important as it might be, the ground-breaking case that is to potentially determine the value of 36% of the island of Cyprus, is yet to come.

[45] *Joannou* at [5].