



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

SECOND SECTION

CASE OF SİNAN ÇETİNKAYA AND AĞYAR ÇETİNKAYA v. TURKEY

(Applications nos. 74536/10 and 75462/10)

JUDGMENT

Art 7 • *Nullum crimen sine lege* • Domestic courts' failure to apply more lenient legal provisions retrospectively, resulting in applicants' conviction for embezzlement without any legal basis

STRASBOURG

24 May 2022

FINAL

24/08/2022

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

In the case of Sinan Çetinkaya and Ağyar Çetinkaya v. Turkey,

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

Jon Fridrik Kjølbro, *President*,
Carlo Ranzoni,
Egidijus Kūris,
Branko Lubarda,
Gilberto Felici,
Saadet Yüksel,
Diana Sârcu, *judges*,

and Hasan Bakırcı, *Section Registrar*,

Having regard to:

the applications (nos. 74536/10 and 75462/10) 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 two Turkish nationals, Mr Sinan Çetinkaya and Mr Ağyar Çetinkaya (“the applicants”), on 7 December 2010;

the decision to give notice to the Turkish Government (“the Government”) of the complaints concerning Articles 6 and 7 of the Convention and to declare the remainder of the applications inadmissible;

the Governments’ observations;

Having deliberated in private on 3 May 2022,

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

INTRODUCTION

1. The application concerns the alleged breach of Article 7 of the Convention owing to the domestic courts’ failure to apply more lenient criminal-law provisions in respect of the applicants, with the result that their conviction for taking part in the offence of embezzlement purportedly lacked any legal basis.

THE FACTS

2. The applicants were born in 1966 and 1964 respectively and live in Istanbul. They were represented before the Court by Mr B. Koçak, a lawyer practising in Istanbul.

3. The Government were represented by their Agent, Mr Hacı Ali Açıkgül, Head of the Department of Human Rights of the Ministry of Justice of the Republic of Turkey.

4. The facts of the case may be summarised as follows.

5. By a bill of indictment dated 13 July 1999, the applicants were committed to stand trial before the Istanbul Assize Court for forgery of official documents and aggravated fraud (Articles 342 and 504 of the former

Criminal Code (Law no. 765)). According to the public prosecutor, the second applicant, who had been the chairman of the board of directors of an automobile company, had obtained bank loans from the Taksim branch of Ziraat Bank (a State-owned bank at the time the bill of indictment was filed) on behalf of seventy-six people by using certain documents that he and the first applicant, who had been the general director of that company, had forged and they had later used those loans for personal purposes, to the detriment of the victims.

6. On 23 June 1999 the Banks Act (Law no. 4389) of 18 June 1999 entered into force.

7. By an additional bill of indictment filed on 21 September 1999, the manager of the Taksim branch of Ziraat Bank, B.E., was also put on trial for the same offences as the applicants on the grounds that he had connived with the applicants in those offences by means of granting loans despite knowing that the documents forming the basis of the loan applications had been forged.

8. On 25 November 2000 Law no. 4603 entered into force and modified the legal status of Ziraat Bank, transforming it from a public bank into a public limited company, with the result that its employees were no longer considered public officials in respect of criminal prosecutions.

9. On 19 November 2003 the Istanbul 4th Assize Court acquitted the applicants of the offence of forgery of official documents, but convicted them of fraud, finding it established that they had used documents belonging to third parties to obtain loans on their own behalf from Ziraat Bank, and sentenced each of them to five years, eight months and one day's imprisonment and a fine. B.E. was also found guilty of misconduct in public office (*görevi kötüye kullanma*) under Article 240 of the former Criminal Code on the grounds that he had granted the loans in question without verifying the accuracy and reliability of the loan application documents, and was sentenced to two years and eleven months' imprisonment and a fine.

10. On 3 November 2004 the Court of Cassation quashed the trial court's judgment and remitted the case to the trial court, finding that certain documents had not been included in the case file.

11. On 1 June 2005 a new Criminal Code (Law no. 5237) entered into force.

12. On 8 July 2005 the Istanbul 4th Assize Court delivered a judgment whereby it reiterated its earlier findings on the merits of the case and found the applicants guilty of aggravated fraud under Article 158 § 1 (e) and (j) of the new Criminal Code, finding its provisions to be more favourable to the defendants. The applicants were each sentenced to five years, two months and fifteen days' imprisonment and a fine. Similarly, B.E. was also found guilty of misconduct in public office (*görevi kötüye kullanma*) under Article 257 of the new Criminal Code and was sentenced to two years and nine months' imprisonment.

13. On 1 November 2005 the Banking Activities Act (Law no. 5411) of 19 October 2005 entered into force, repealing and replacing Law no. 4389.

14. On 15 June 2006 the Court of Cassation quashed the convictions of the applicants and B.E. In its detailed assessment, the Court of Cassation held that B.E. had had a close relationship with the second applicant at the material time and that the acts of B.E., consisting of granting loans to the applicants without carrying out the necessary checks of the loan application documents and despite knowing that the loans would not be repaid, had constituted the offence of embezzlement as provided for in Law no. 4389 (and later in Law no. 5411), given that employees of Ziraat Bank could no longer be regarded as public officials pursuant to Law no. 4603. The Court of Cassation took the view that the applicants, who had shared a joint criminal intent and acted in concert with B.E., should be treated as persons who had physically committed the offence (“principal material participation” – *asli maddi iştirak*). It went on to hold that Law no. 4389 should be applied in respect of the applicants and B.E. because it contained provisions favourable to them, regardless of the fact that it had entered into force after the date of the offence.

15. On 27 April 2007 the Istanbul 4th Assize Court delivered its judgment, which adopted and reiterated the Court of Cassation’s line of reasoning, finding that the applicants had shared a joint criminal intent and acted in concert with B.E. and they had thus committed the offence of aggravated banking embezzlement as set out in section 22(3) of Law no. 4389. The trial court further found the provisions of Law no. 4389 to be more favourable than those of Law no. 5411 and sentenced each applicant and B.E. to thirteen years, seven months and ten days’ imprisonment and a judicial fine.

16. On 14 February 2008 the Court of Cassation quashed the trial court’s judgment once again, finding that the date of the commission of the offence was 14 May 1999, that being the last date on which harm had been caused to Ziraat Bank. It took the view that at the material time, the acts attributed to the applicants and B.E. had constituted the offence of embezzlement as provided for in Article 202 of the former Criminal Code. However, section 22 of Law no. 4389 was more favourable to them than Article 202 of the former Criminal Code owing to the fact that Law no. 4603 had stripped Ziraat Bank of its status as a public bank. Notwithstanding that finding, the Court of Cassation went on to hold that the trial court was required to assess whether Law no. 5411 or Article 247 of the Criminal Code, both of which had entered into force in the course of the proceedings, was more favourable to the accused by virtue of the fact that they could have been held criminally liable as public officials at the time of the commission of the offence.

17. On 17 June 2009 the Istanbul 4th Assize Court once again found, on the basis of its earlier reasoning, that the acts of the applicants and B.E. had constituted the offence of banking embezzlement as defined in Law no. 4389 (and later in Law no. 5411); however, it convicted the applicants under

Article 247 of the Criminal Code (Law no. 5237), finding that its provisions were the most favourable to the applicants, after comparing the provisions of the former Criminal Code, the current Criminal Code, Law no. 4389 and Law no. 5411. Accordingly, the trial court sentenced the applicants, under Article 247 of the Criminal Code, to ten years, ten months and twenty-five days' imprisonment, but discontinued the case against B.E., noting that he had died in the meantime.

18. The second applicant's lawyers lodged an appeal against the trial court's judgment, submitting, *inter alia*, that the trial court had failed to apply the legal provisions that were in the applicant's favour, in breach of the principle that only the law can define an offence and prescribe a penalty (*nullum crimen, nulla poena sine lege*).

19. On 26 May 2010 the first applicant's lawyer also lodged an appeal, essentially reiterating, *inter alia*, the appeal arguments of the second applicant's lawyers and his argument that the first applicant could not be held criminally liable as a principal offender in respect of a "special offence", namely embezzlement, on the grounds that he had been neither a public official nor a member of a bank, which were the necessary qualifications for an individual to be considered a principal offender in respect of such offences.

20. On 16 June 2010 the Court of Cassation upheld the trial court's judgment, but criticised it for not concluding, pursuant to the decisions of the plenary criminal divisions of the Court of Cassation, that the case fell within the ambit of either Law no. 4389 or Law no. 5411, both of which had entered into force after the commission of the offence. However, as no appeal had been lodged against the conviction to the detriment of the applicants, the Court of Cassation did not quash the trial court's judgment on that basis.

RELEVANT LEGAL FRAMEWORK

21. Article 202 § 1 of the former Criminal Code (Law no. 765, which entered into force on 1 July 1926), which defined the offence of embezzlement, provided as follows:

"1. A public official who appropriates for himself or herself money or bonds or [negotiable] instruments which could substitute for money or other goods that have been entrusted to him or her owing to his or her duties or placed under his or her custody, oversight or responsibility shall be punished by heavy imprisonment of six months to twelve years and by a heavy fine of twice the amount of the damage sustained [as a result of that act]."

22. Section 22(3) of the Banks Act (Law no. 4389, which entered into force on 23 June 1999), which defined the offence of banking embezzlement, provided as follows:

"3. The chair or any member of a bank's board of directors or any other member [of the bank who] appropriates for himself or herself the bank's funds or any other assets that have been entrusted to him or her or placed under his or her custody, oversight or

responsibility shall be punished by a term of imprisonment of six to twelve years and be ordered to pay for the damage sustained by the bank.”

23. Article 247 §1 of the Criminal Code (Law no. 5237, which entered into force on 1 June 2005), which defined the offence of embezzlement, provided as follows:

“1. A public official who appropriates for himself or herself or for others goods, the possession of which has been transferred to him or her owing to his or her duties or which he or she bears a responsibility to protect and supervise, shall be punished by a term of imprisonment of six to twelve years. ...”

24. Section 160(1) of the Banking Activities Act (Law no. 5411, which entered into force on 1 November 2005), which defined the offence of banking embezzlement, provides as follows:

“1. The chair or any member of a bank’s board of directors or any other member [of the bank] who appropriates for himself or herself or for others the bank’s funds or [negotiable] instruments or bonds which could substitute for money, or other assets, the possession of which has been transferred to him or her owing to his or her duties or which he or she bears a responsibility to protect and supervise, shall be punished by a term of imprisonment of six to twelve years and a judicial fine of up to 5,000 days and be ordered to pay for the damage sustained by the bank.”

25. In Turkish criminal law, certain offences that may only be committed by specific persons are defined as “special offences” (*özgü / mahsus suç*) and only those persons who possess the statutory constituent qualifications to become the perpetrator of a special offence may incur criminal liability as the principal offender. For instance, the offence of embezzlement is a special offence (both in the former and in the new Criminal Code) in that it may only be committed by a public official. Following the entry into force of the current Criminal Code on 1 June 2005, the question as to whether persons who do not possess the statutory qualification required to be considered a principal perpetrator of a special offence may be held criminally liable in respect of special offences is answered in Article 40 § 2, which states that persons who have participated in the commission of a special offence may only be held criminally liable in their capacity as “inciters” or “assistants” (Articles 38 and 39 of the Criminal Code). During the period when the former Criminal Code was in force (up until 1 June 2005), there was no such limitation and those who could not become the principal offender by virtue of the fact that they did not possess the required characteristic element to become one could be held criminally liable in different capacities, including as co-principals or even principals, as borne out by the Court of Cassation’s judgment of 15 June 2006 in the present case.

26. The Court also notes in that connection that in Turkish criminal law, courts are required to comply with Article 7 § 2 of the Criminal Code, in accordance with which the provisions most favourable to the offender shall be applied (see *Parmak and Bakır v. Turkey*, nos. 22429/07 and 25195/07, § 64 *in fine*, 3 December 2019).

THE LAW

JOINDER OF THE APPLICATIONS

27. Having regard to the similar subject matter of the applications, the Court finds it appropriate to examine them jointly in a single judgment.

ALLEGED VIOLATION OF ARTICLE 7 OF THE CONVENTION

28. The applicants complained that their conviction for embezzlement in disregard of the fact that they lacked the status of public officials, and without there being a principal offender who had been a public official, had lacked any legal basis in domestic law and had given rise to a violation of Article 7 of the Convention, which reads as follows:

“1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

2. This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.”

A. Admissibility

29. The Government raised a preliminary objection, arguing that in the domestic proceedings the applicants had failed to raise their contention that even though it had not been possible for them to become principal offenders, they had been convicted as such by the domestic courts. The Government further argued that this complaint was manifestly ill-founded because it had been aimed at challenging the domestic courts’ assessment of the evidence and the outcome of the criminal proceedings against them; they stressed that the applicants had never contested the material facts on which their conviction had been based.

30. The applicants failed to submit their observations within the time allocated for that purpose.

31. The Court notes that the applicants raised their complaints under Article 7 of the Convention in their appeals lodged against the trial court’s last judgment. The first applicant’s appeal, dated 26 May 2010, also included his grievance that he had been convicted as a principal offender, despite the fact that it had not been possible for him to be treated as one in respect of the offence of embezzlement, a grievance which in any event was not addressed by the Court of Cassation. That being the case, the Court considers that the Government have failed to demonstrate how an objection of the same kind by the second applicant on the same subject would have had a different outcome. On that basis, the Court dismisses the first limb of the

Government's preliminary objection (see *Pfeifer and Plankl v. Austria*, 25 February 1992, § 42, Series A no. 227, and *Ömer Güner v. Turkey*, no. 28338/07, § 39, 4 September 2018).

32. As regards the Government's second objection, the Court notes that it has been called upon to examine whether the applicants' conviction had (or did not have) a legal basis, as required by Article 7 of the Convention, which is a different task from the one suggested by the Government. That being the case, the Court dismisses the Government's second objection.

33. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

34. The applicants failed to submit their observations within the time allocated for that purpose.

35. The Government submitted that the offence of embezzlement had been a special offence which could only be committed by a public official or a member of a bank, such as B.E. There had therefore been a legal basis for the application of the provisions concerning the offence of embezzlement to B.E.'s acts because he had unduly granted loans to the second applicant. As regards third parties, like the applicants, who had been involved in the commission of a special offence, their criminal liability could only come into play if they had been regarded as assistants or inciters under the general provisions relating to involvement, as provided for in the current Criminal Code, a position which was also supported by the case-law of the Court of Cassation. The Government further submitted that they were aware that the trial court's judgment had not indicated whether the applicants had been held criminally liable as assistants or inciters. However, the same judgment had clearly noted that the applicants had shared a joint criminal intent and acted in concert with B.E. In the Government's opinion, that situation had had no bearing on the outcome of the case and they accordingly invited the Court to hold that there had not been a violation of Article 7 of the Convention.

2. The Court's assessment

(a) General principles

36. The Court reiterates that Article 7 § 1 of the Convention guarantees not only the principle of the non-retroactivity of the harsher criminal law, but also, implicitly, the principle of the retroactivity of the more lenient criminal law. That principle is embodied in the rule that where there are differences between the criminal law in force at the time of the commission of the offence and subsequent criminal laws enacted before a final judgment is rendered, the

courts must apply the law whose provisions are most favourable to the defendant (see *Scoppola v. Italy (no. 2)* [GC], no. 10249/03, § 109, 17 September 2009; *Advisory opinion concerning the use of the “blanket reference” or “legislation by reference” technique in the definition of an offence and the standards of comparison between the criminal law in force at the time of the commission of the offence and the amended criminal law*, [GC], request no. P16-2019-001, Armenian Constitutional Court, § 81, 29 May 2020 (“*Advisory opinion P16-2019-001*”); and *Jidic v. Romania*, no. 45776/16, § 80, 18 February 2020). The principle of retrospective application of the more lenient criminal law also applies in the context of an amendment relating to the definition of the offence (see *Parmak and Bakır v. Turkey*, nos. 22429/07 and 25195/07, § 64, 3 December 2019, and *Advisory opinion P16-2019-001*, cited above, § 82).

37. The Court reaffirms that in principle, it is not its task to substitute itself for the domestic courts as regards the assessment of the facts and their legal classification (see *Rohlena v. the Czech Republic* [GC], no. 59552/08, § 51, ECHR 2015) or to rule on the applicant’s individual criminal responsibility (see *Kononov v. Latvia* [GC], no. 36376/04, § 187, ECHR 2010). However, the Court points out that its power of review must be greater when the Convention right itself, Article 7 in the present case, requires that there was a legal basis for a conviction and a sentence. Article 7 § 1 requires the Court to examine whether there was a contemporaneous legal basis for the applicant’s conviction and, in particular, it must satisfy itself that the result reached by the relevant domestic courts was compatible with Article 7 of the Convention, even if there are differences between the legal approach and reasoning of the Court and the relevant domestic decisions. To accord a lesser power of review to this Court would render Article 7 devoid of purpose (see *Rohlena*, cited above, § 52).

(b) Application of the above principles to the present case

38. The Court notes that the domestic courts found it established that the date of the commission of the offence attributed to the applicants was 14 May 1999 and eventually convicted them of the offence of embezzlement under Article 247 of the Criminal Code, which did not enter into force until 1 June 2005, that is, approximately six years after the date of the impugned acts. Those acts were punishable at that time (on 14 May 1999) under Article 202 of the previous Criminal Code. However, that situation pertained only until 25 November 2000, the date on which Law no. 4603 removed B.E.’s status as a public official, as a result of which it was no longer possible to convict him of embezzlement, which was a special offence that could only be committed by a public official. Moreover, even if those acts could potentially also have been punishable under section 22(3) of Law no. 4389, as suggested by the domestic courts, that provision only entered into force on 23 June 1999.

39. Be that as it may, the above considerations may not automatically be transposed to the applicants because they could have incurred criminal liability in respect of the offence of embezzlement as assistants or inciters. The Court will thus seek to ascertain the provisions governing their criminal liability in respect of special offences in order to determine whether the applicants' conviction remained compatible with the requirements of Article 7 of the Convention (compare *Huhtamäki v. Finland*, no. 54468/09, § 46, 6 March 2012).

40. In that connection, the Court notes that when the former Criminal Code was in force, that is to say, up until 1 June 2005, persons who were not public officials or members of a bank could incur either principal or secondary liability in respect of special offences (embezzlement and banking embezzlement in the instant case), as borne out by the Court of Cassation's judgment dated 15 June 2006. However, the current Criminal Code narrows the scope of criminal liability in such cases to only secondary liability, that is to say inciting and assisting (Articles 38 and 39 of the Criminal Code), laying special emphasis on the fact that only those persons who satisfy the preconditions of becoming a principal offender in the case of special offences may be held criminally liable in that capacity (Article 40 § 2 of the Criminal Code).

41. Taken at face value, Article 40 § 2 of the current Criminal Code may appear to fall within the concept of "more favourable criminal law", because it extinguished the applicants' criminal liability as a principal or co-principal in respect of special offences. However, the applicants could still be convicted as inciters or assisters under that provision. Accordingly, the Court's examination will focus on the domestic courts' assessment with a view to ascertaining under which capacity they convicted the applicants of the offence of embezzlement. In that connection, the Court observes that in its judgment of August 2006 (that is, after the entry into force of the current Criminal Code), the Court of Cassation did not take Article 40 § 2 into consideration, as it held that the applicants "had shared a joint criminal intent and acted in concert with B.E." and that they should thus have been treated as persons who had physically committed the offence ("principal material participation" – *asli maddi iştirak*). Thereafter, the trial court adopted an almost identical line of reasoning as contained in that judgment and eventually found the applicants guilty of embezzlement, holding that "the applicants had shared a joint criminal intent and acted in concert with B.E.".

42. The Court attaches decisive importance to the fact that the trial court did not indicate that the applicants had incurred criminal liability as assistants or inciters, notwithstanding the fact that those were the only two capacities under Article 40 § 2 of the Criminal Code under which they could have been convicted of a special offence from 1 June 2005 (the date of the entry into force of the current Criminal Code) onwards. Importantly, this last point was also conceded by the Government. Neither did the Court of Cassation

scrutinise this crucial point. It follows that the domestic courts' failure to apply Article 40 § 2 of the Criminal Code effectively meant that the applicants' criminal liability in respect of a "special offence", namely embezzlement lacked a contemporaneous legal basis, as it was no longer possible to convict them as a principal or co-principal of that offence.

43. Consequently, there has been a violation of Article 7 of the Convention.

OTHER ALLEGED VIOLATIONS OF THE CONVENTION

44. Lastly, the applicants complained under Article 6 of the Convention of the unfairness of the criminal proceedings at issue, arguing in particular that they had not been given sufficient opportunities to submit their defence arguments after the reclassification of the charge against them, that the domestic courts had failed to provide adequate reasoning to show on what legal and factual grounds their acts had been considered to amount to aggravated embezzlement, that their requests for the hearing of their witnesses had been dismissed without the court providing any reasons, even though the prosecution witnesses had been taken into consideration, and that no independent expert opinion had been obtained despite the technical nature of the offence in question.

45. In view of the finding of a violation of Article 7 of the Convention (see paragraph 43 above), the Court considers that it is not necessary to rule on either the admissibility or the merits of the above-mentioned complaints under Article 6 of the Convention.

APPLICATION OF ARTICLE 41 OF THE CONVENTION

46. 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."

47. The applicants failed to submit any claims for just satisfaction within the time-limit allotted to them.

48. Accordingly, there is no call for the Court to award any sum to the applicants under Article 41 of the Convention. The same holds true in respect of non-pecuniary damage, as the Court discerns no exceptional circumstances requiring it to make any award in that respect (see *Nagmetov v. Russia* [GC], no. 35589/08, §§ 74-82, 30 March 2017).

49. Notwithstanding that conclusion, the Court notes that Article 311 of the Code of Criminal Procedure allows for reopening of the domestic proceedings in the event that the Court finds a violation of the Convention.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Decides* to join the applications;
2. *Declares* the complaints under Article 7 of the Convention admissible;
3. *Holds* that there has been a violation of Article 7 of the Convention in respect of each of the applicants;
4. *Holds* that there is no need to examine the admissibility or merits of the complaints under Article 6 of the Convention.

Done in English, and notified in writing on 24 May 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Hasan Bakırcı
Registrar

Jon Fridrik Kjølbro
President