



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

SECOND SECTION

CASE OF KOHEN AND OTHERS v. TURKEY

(Applications nos. 66616/10 and 3 others)

JUDGMENT

Art 6 § 1 (criminal) and Art 6 § 3 (c) • Overall fairness of proceedings, despite restrictions on applicants' access to lawyer, without compelling reason, during preliminary investigation stage, and use of statements made by applicants and co-defendants without a lawyer being present • Application of very strict scrutiny

STRASBOURG

7 June 2022

FINAL

10/10/2022

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

In the case of Kohen 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,

Jovan Ilievski,

Saadet Yüksel,

Diana Sârcu, *judges*,

and Hasan Bakırcı, *Section Registrar*,

Having regard to:

the applications (nos. 66616/10, 66625/10, 66646/10 and 66650/10) 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 four Turkish nationals, Erol Maks Kohen, Nail Tahsildaroğlu, Ezra Ören and Hüseyin Özçalı (“the applicants”), on the various dates indicated in the appendix;

the decision to give notice to the Turkish Government (“the Government”) of the complaints under Article 6 of the Convention concerning the fairness of the criminal proceedings against the applicants and to declare the remainder of the applications inadmissible;

the parties’ observations;

Having deliberated in private on 10 May 2022,

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

INTRODUCTION

1. The applications concern the alleged unfairness of criminal proceedings against the applicants owing to (i) the systemic restriction placed on their right of access to a lawyer during the preliminary investigation stage, (ii) the use by the trial court of the statements made by them and certain other co-defendants without a lawyer being present, (iii) the alleged breach of the principle of equality of arms in relation to the collection and examination of certain expert reports at the trial stage, and (iv) the trial court’s failure to specify the documents on the basis of which it asked the defendants to make additional defence submissions.

THE FACTS

2. The applicants were born in 1959, 1948, 1961 and 1944 respectively and live in Istanbul. The applicants were represented by Mr İ. D. Gökkılıç, a lawyer practising in Istanbul.

3. The Government were represented by their Agent, Mr Hacı Ali Açığül, 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. In January and July 2001, two tax inspection reports revealed a chain of false transactions carried out by certain persons and various companies, as well as further irregularities.

6. On 21 September 2001 an expert panel drew up a report concerning an organised fictitious and fraudulent export scheme headed by the applicant Erol Maks Kohen and concluded, *inter alia*, that false exports had been carried out by two different chains of companies. Furthermore, the experts also found it established that certain companies under the applicant Erol Maks Kohen's direct control and authority (in particular the Ö., M., V.G. and V.T. companies) had entered into so-called "indirect export" agreements with many other companies and had carried out exports on their behalf. The experts also attached as annexes to their report the customs declarations used in the false exports.

7. On 28 October 2001 the applicant Erol Maks Kohen was arrested. He subsequently made detailed self-incriminatory statements to the police and the public prosecutor without a lawyer being present.

8. On 31 October 2001 police officers carried out searches of the premises of two companies belonging to the applicant Erol Maks Kohen (the S. and E. companies) and his archive, which resulted in the discovery of certain documents.

9. On 4 November 2001 E.K. gave statements to the public prosecutor, submitting that he had started working as a driver for the applicant Erol Maks Kohen, who had set up the S. company which had later carried out fictitious exports, in which he and a certain E.D. had been the only two shareholders. Although E.K. had appeared to be the owner of that company, he stated that he had not carried out any actions on its behalf, and submitted further information regarding similar companies that had also been set up in the names of other persons by the applicant Erol Maks Kohen, who had financed and directed all of the companies which had been involved in the fictitious and fraudulent export scheme. E.K. also gave a detailed account of the modalities of the fictitious exports and the persons involved in the scheme, including the methods used to bribe customs officials so that the lorries could exit through the Turkish border gates without any inspections; he explained that the applicant Nail Tahsildaroğlu was an accountant who had sent money to the tax inspectors, and that the applicant Hüseyin Özçalı was the customs broker who had drawn up the customs declarations.

10. On a number of dates between 1 November (M.D., E.D. and N.S.) and 7 December 2001 (Ş.K. on 8 November, and K.M.K. and M.K. on 7 December), certain other persons also made statements to the police or the public prosecutor or to both, essentially reiterating the content of the

statements that E.K. had given on 4 November 2001. It was apparent from that evidence that Nail Tahsildaroğlu had dealt with the financial affairs of the scheme as its accountant and that he had attempted to put pressure on some of the above-mentioned persons to alter their statements.

11. On 7 November 2001 the applicants Nail Tahsildaroğlu and Hüseyin Özçalı were arrested. They subsequently made self-incriminating statements to the police and the public prosecutor in the absence of a lawyer.

12. On 11 December 2001 Y.K. went to the police of his own motion and gave very detailed explanations concerning persons involved in the scheme, including the applicants, and submitted a set of documents and four floppy disks in support of his claims. In particular, Y.K. submitted that even though the applicant Erol Maks Kohen and his men had made him a shareholder in the V.G. and V.T. companies, he had not signed any of the documents; thus, the signatures that appeared to have been put on the documents on his behalf had all been forged because the applicant Erol Maks Kohen had abused a power of attorney that Y.K. had given to him in respect of the companies' affairs.

13. On 21 December 2001 the applicant Ezra Ören was arrested. He subsequently made detailed self-incriminatory statements to the police and the public prosecutor without a lawyer being present.

14. On 27 December 2001 a panel of experts consisting of a senior tax auditor and three tax inspectors carried out an examination of the documents found and seized during the searches carried out on 31 October 2001. The experts found that the applicant Erol Maks Kohen had set up and directed a fictitious and fraudulent export scheme with a view to claiming unjustified VAT refunds from the State *via* either "direct export" or "indirect export". In doing so, the applicant Erol Maks Kohen had used different export channels comprising thirty-one companies, as was demonstrated by the material found and seized during the search, which included the following items: (i) documents relating to some of the thirty-one companies despite the fact that the applicant Erol Maks Kohen had no official role in them; (ii) a document entitled "emergency scenario: who is who" containing an organigram showing the commercial relations between the companies forming part of the scheme; (iii) a list containing information regarding the judicial proceedings initiated against those companies and the names of the judges appointed to those cases; (iv) documents and leasing contracts showing that the factories of the companies which had produced the exported material and their equipment had been leased to the different companies in the scheme on different dates; (v) blank documents stamped by foreign companies which had allegedly imported the goods; (vi) an organigram showing the flow of purchases between the companies belonging to the scheme; (vii) a document with the name of the applicant Erol Maks Kohen's brother containing a list of possible questions that might be asked in a criminal investigation, and possible answers; and (viii) documents relating

to foreign import companies, and correspondence materials in which the applicant Erol Maks Kohen advised the representatives of those companies. The experts concluded that the bogus exports were worth 341,267,805 United States dollars (USD), of which the scheme had obtained approximately USD 52 million in VAT refunds.

15. On 14 January 2002 the Ankara public prosecutor lodged a bill of indictment dated 14 January 2002 against eighty-five persons, including the applicants. The applicants Erol Maks Kohen and Nail Tahsildaroğlu were charged with forming a profit-oriented criminal organisation (Law no. 4422), forgery of official and unofficial documents (Articles 342 and 345 of the former Criminal Code (Law no. 765)), and aggravated fraud (Article 504 § 7 of the former Criminal Code). The other two applicants (Ezra Ören and Hüseyin Özçalı) were charged with carrying out activities on behalf of a criminal organisation and forgery of unofficial documents.

16. The trial court held its hearings from 26 November 2002 (the preparatory hearing) to 16 September 2009.

17. During the trial, the trial court also obtained an expert report from a panel of three experts on 7 July 2003, and it appears that neither the applicants nor their lawyers were informed of the scope or the subject of the trial court's request to those experts; they were thus unable to put questions to them. The expert report of 7 July 2003 indicated the amount of the loss of VAT caused by the companies involved in the export scheme and essentially reiterated the findings of the expert report dated 21 September 2001. Importantly, Annex I to the expert report indicated the number of forged customs declarations in respect of each company.

18. At a hearing held on 10 July 2003, the trial court asked the applicants Erol Maks Kohen, Ezra Ören and Hüseyin Özçalı, and certain other co-defendants to make additional defence submissions in respect of multiple counts of the offence of forgery which were based on a number of customs declarations used in the false exports.

19. At a hearing held on 9 September 2003, the trial court commissioned an expert report to determine whether the signatures on certain indirect export agreements entered into by the M. and Ö. companies belonged to the applicant Ezra Ören.

20. Following objections raised by the defence against the trial court's commissioning of the expert report (see paragraph 17), the trial court decided to obtain an additional report from the same panel. The experts then submitted a new report dated 27 October 2003, wherein they provided answers in respect of the questions asked and the objections lodged against their report by the lawyers representing the applicants Erol Maks Kohen, Nail Tahsildaroğlu and Ezra Ören, and certain other co-defendants.

21. At a hearing held on 9 October 2003, the trial court gave a statement of the details of the facts on the basis of which it had asked the applicants to submit additional defence submissions, explaining that if the court found that

an offence had been committed, it might consider that a separate offence had been committed in respect of each company which had carried out exports. The court further specified that it might cumulate any sentences that it might impose on the basis of the number of customs declarations used by each company. The applicants and the co-defendants adamantly objected to this stance and asked the court to explain the kinds of forgery they had each made in each of the customs declarations.

22. At a hearing held on 5 March 2004, the applicant Ezra Ören gave evidence in person and was apprised of the details of the information on the basis of which the trial court had asked him to make additional defence submissions with regard to multiple counts of forgery.

23. At a hearing held on 28 May 2004, the applicant Hüseyin Özçalı gave evidence in person and made additional defence submissions with regard to multiple counts of forgery.

24. In an expert report dated 12 July 2004, the experts analysed, *inter alia*, the signatures contained in certain documents used in relation to the M. company's exports, and found it highly probable that those signatures belonged to the applicant Ezra Ören.

25. At a hearing held on 25 September 2008, the trial court invited the lawyers representing the applicants Nail Tahsildaroğlu and Ezra Ören to make additional defence submissions with regard to additional multiple counts of forgery.

26. On 16 September 2009 the Ankara Assize Court gave its judgment. It found that the applicant Erol Maks Kohen had set up and directed a fictitious and fraudulent export scheme with a view to claiming unjustified VAT refunds from the State either *via* "direct export" or "indirect export". The trial court found the applicants guilty of multiple counts of forgery of official documents, namely customs declarations, but held that the prosecution of the other offences had been statute-barred on the expiry of the relevant limitation periods.

27. In its reasoned judgment, which ran to 296 pages, the trial court first indicated the conclusions reached by the different experts, and then listed the contents of the statements of certain defendants and of the applicants (save for Hüseyin Özçalı) as evidence (twenty co-defendants, including M.O.E., Y.S.U., B.A., M.K., and K.M.K.), noting that (i) some defendants (the applicant Ezra Ören, and the co-defendants Ö.K., Y.S.U., B.A., M.K., and M.B.) had denied the accuracy of the statements they had made to the police and the public prosecutor, alleging that coercion and undue pressure had been exerted on them to make those statements, and that (ii) some others (the applicant Nail Tahsildaroğlu, and four other co-defendants, including M.O.E. and K.M.K.), who had made statements regarding the existence of a scheme and the fictitious and fraudulent nature of the exports, had not given any such explanations at the trial stage. Those allegations and discrepancies led the trial court to assess which statements should be regarded as reliable. In that

connection, observing that the first three paragraphs of the written defence submissions of certain co-defendants, including the applicant Ezra Ören, the above-mentioned five co-defendants, and K.M.K. had been the same, the trial court took the view that the defence submissions of those persons had been organised externally during the trial stage. Referring to the findings contained in the expert reports, the fact that the signatures of Y.K. and N.S. contained in the relevant documents of the V.G., V.T. and N.T. companies had been forged, and the documents found during the search of premises belonging to the applicant Erol Maks Kohen, the trial court concluded that the defence submissions of the applicant Ezra Ören, the above-mentioned five co-defendants and K.M.K. during the trial had not been truthful.

28. In establishing the existence of a fictitious and fraudulent export scheme headed by the applicant Erol Maks Kohen, the trial court relied in particular on the following elements:

(i) the various expert reports drawn up by tax auditors, tax inspectors, and the Ministry of Finance, attesting, in particular, to the following facts: (a) that manufacturing and sales of goods had not taken place, (b) that the importers who were indicated on the export invoices had either not existed or had denied that the transactions forming the basis of the exports had taken place, (c) that the payment of the fees for the exports had not been made, and (d) that the customs declarations attesting to the exit of goods through customs had not reflected the reality of the situation;

(ii) statements by N.S. to the effect that certain low-quality products had been used as exported goods, which had been kept in customs storage located in the destination countries and had then been “imported” to Turkey;

(iii) written materials found during searches of premises belonging to the applicant Erol Maks Kohen.

29. The trial court went on to examine the different chains of companies involved in the scheme, and reproduced information from the expert reports, before analysing the individual situation of each defendant.

30. In respect of the applicant Erol Maks Kohen, the trial court made the following observations. He had been the owner of the S. and E. companies, and the expert report of 21 September 2001 had revealed that he had set up many other companies on behalf of certain other persons, which companies had been used in the export scheme; that point had also been confirmed by the statements made by the relevant co-defendants. The trial court then listed in detail all of the exports which it considered to be fictitious, and the number of customs declarations in relation to each of them, holding that they had been carried out by the M., Ö., V.T. and V.G. companies.

31. The trial court found that the applicant Erol Maks Kohen had accepted, in his statements to the police and the public prosecutor, that he had paid the purchase price for the V.G. and V.T companies through his company, S., which had been registered to other persons, including Y.K. However, later during the proceedings, he had alleged that all the companies had been set up

in compliance with the applicable provisions and that the exports, as well as the purchases and sales, had been genuine. The trial court dismissed those submissions with reference to (i) the statements of the other defendants that it had listed in the first part of the judgment, including, in particular those of M.A., N.S., E.K., E.D., M.K. and A.C.H.; and (ii) the findings of the different expert reports to the effect that the applicant Erol Maks Kohen had been the head of the scheme.

32. As regards the applicant Nail Tahsildaroğlu, the trial court found it established that he had taken part in the forgery of customs declarations with the applicant. In reaching that conclusion, the trial court relied on the statements that he, fourteen other co-defendants (including M.K. and B.A.), and the applicants Erol Maks Kohen and Ezra Ören, had made to the police and the public prosecutor, and the facts which had been established as regards the scheme.

33. In respect of the applicant Ezra Ören, the trial court held that he was the owner of one of the companies involved in the scheme, namely the Ö. company, as was demonstrated by the statements made by the applicants Erol Maks Kohen and Nail Tahsildaroğlu, and the co-defendants A.C.H. and S.D. More importantly, the expert report of 17 January 2001 had established that the applicant Ezra Ören's company had purchased 98 per cent of its goods and services from the B. company, and had issued 97 per cent of its invoices to another company, M. Furthermore, as could be seen from the expert report dated 12 May 2004, the applicant Ezra Ören had signed the indirect export agreement of the M. company, despite the fact that he had had no role in that company. In view of the above, the trial court found that the applicant Ezra Ören had taken part in the fictitious and fraudulent exports of the Ö. and M. companies.

34. In respect of the applicant Hüseyin Özçalı, the trial court held, relying on the statements given by E.K., Ş.K. and Ş.P., that he had been a partner of, and a customs broker at, the customs brokerage firm which had been part of the export scheme. The expert report dated 21 September 2001 had also established that that applicant's duty had been to approve customs declarations concerning the fictitious exports. The trial court further held that the statements made by E.K. and Ş.K. had been consistent with the statements that the applicant Hüseyin Özçalı had made to the police and the public prosecutor, even though he had later denied them.

35. As regards sentencing, the trial court found that the forgery of customs declarations on behalf of each company had represented a single count for the offence of forgery of official documents; however, where multiple customs declarations had been used on behalf of the same company, they should be regarded as one transaction, but be subjected to an increased penalty. The trial court therefore sentenced each applicant (save for Hüseyin Özçalı) to one count of forgery in respect of the company for which they had been held responsible and increased those penalties if the companies in question had

used more than one customs declaration. By calculating in this manner the sentences in respect of the customs declarations used by each company (one hundred and ninety-five years and eighty-eight months' imprisonment in respect of Erol Maks Kohen and Nail Tahsildaroğlu, and forty-nine years and ninety-three months' imprisonment in respect of Ezra Ören), the trial court then handed down a combined sentence, namely thirty-six years' imprisonment in respect of each applicant, save for Hüseyin Özçalı, who was sentenced to three years and six months' imprisonment.

36. On 21 April 2010 the Court of Cassation upheld the trial court's judgment in respect of the applicants but quashed it in so far as it concerned certain other defendants.

RELEVANT DOMESTIC LAW

37. The relevant provisions of the former Code of Criminal Procedure (Law no. 1412), namely Articles 135, 136 and 138, provided that anyone suspected or accused of a criminal offence had a right of access to a lawyer from the moment he or she was taken into police custody. In accordance with section 31 of Law no. 3842 of 18 November 1992, which amended the legislation on criminal procedure, the above-mentioned provisions were not applicable to persons accused of offences falling within the jurisdiction of the State Security Courts. On 15 July 2003, by virtue of Law no. 4928, the restriction on an accused's right of access to a lawyer in proceedings before the State Security Courts was lifted (see *Salduz v. Turkey* [GC], no. 36391/02, §§ 27-29, ECHR 2008).

THE LAW

I. JOINDER OF THE APPLICATIONS

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

II. PRELIMINARY REMARKS

39. In their observations in reply to those of the Government, the applicants raised certain complaints which did not form part of their original complaints as contained in the application forms. In that connection, even though in their application forms the applicants alleged a breach of the principle of equality of arms in relation to the two expert reports obtained by the trial court (on 7 July 2003 and 27 October 2003), they extended those complaints to the other expert reports which had been obtained during the preliminary investigation stage. Similarly, each applicant also complained of the use by the trial court of the statements that the other three had made in the

absence of a lawyer in respect of each other (save for the statements of the applicant Ezra Ören, of which the other three applicants duly complained).

40. In the Court's view, the new complaints which the applicants raised after notice of the case had been given to the Government (see paragraph 45 above) are not an elaboration of their original complaint to the Court, as they concern previously unmentioned issues with respect to the fairness of the proceedings (see *Andersena v. Latvia*, no. 79441/17, § 80, 19 September 2019). It follows that this part of the applications was introduced out of time and must be rejected, in accordance with Article 35 §§ 1 and 4 of the Convention.

41. The Court further notes that the first aspect of the applicants' complaints under Article 6 § 3 (b) of the Convention, which they reiterated in their observations, namely the trial court's failure to collect and provide them with each and every forged document at the trial, was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court at the time when notice of the application was given. In other words, the only aspect of the complaint under Article 6 § 3 (b) that was communicated to the Government concerned – as indicated in the relevant question put to the Government – the applicants' alleged inability to exercise their defence rights, owing to the trial court's failure to specify details of the documents on the basis of which it had found them guilty of forgery of official documents and had increased the penalties imposed on them.

III. *LOCUS STANDI* WITH RESPECT TO APPLICATION NO. 66650/10

42. The Government invited the Court to strike application no. 66656/10 out of its list of cases, arguing that the heirs of the applicant Hüseyin Özçalı, who had passed away on 18 May 2011, had informed the Court of this fact belatedly and had, in any event, failed to submit their wish to pursue the application.

43. The Court notes that by a letter which arrived at the Court on 26 February 2020, the heirs of the applicant Hüseyin Özçalı, namely his wife, son and two daughters, expressed their wish to continue the proceedings before the Court, and submitted a domestic court decision whereby they had been designated as his heirs. Having regard to the Court's case-law concerning the victim status of heirs of an applicant who died after lodging his or her application (see *Murray v. the Netherlands* [GC], no. 10511/10, § 79, ECHR 2016, with further references), the Court accepts that the heirs have a legitimate interest in pursuing the application. The Court therefore dismisses the Government's request.

44. For reasons of convenience, the text of this judgment will continue to refer to Mr Hüseyin Özçalı as "the fourth applicant", although his above-mentioned heirs are today to be regarded as having this status.

IV. THE GOVERNMENT'S PRELIMINARY OBJECTIONS

45. The Government raised a plea of non-exhaustion of domestic remedies, submitting that the applicants had failed to raise before the domestic courts, in particular the Court of Cassation, the complaints which they had submitted to the Court.

46. The applicants submitted in a rather general manner that they had raised all their complaints in their detailed appeal submissions.

47. The Court rejects the Government's objection in so far as it relates to the restriction imposed on the applicants' right to legal assistance in the light of its well-established case-law (see *Mehmet Zeki Çelebi v. Turkey*, no. 27582/07, § 39, 28 January 2020).

48. As regards the remainder of the complaints, the Court notes that the applicants Erol Maks Kohen, Nail Tahsildaroğlu and Ezra Ören raised them in their appeal to the Court of Cassation, which did not specifically address them. That being the case and albeit not having the applicant Hüseyin Özçalı's appeals in its possession, the Court considers that the Government have failed to demonstrate how an appeal of the same kind by the fourth applicant on the same subject would have had a different outcome. It thus dismisses the Government's preliminary objection in its entirety.

V. ALLEGED VIOLATIONS OF ARTICLE 6 OF THE CONVENTION

49. The first three applicants (Erol Maks Kohen, Nail Tahsildaroğlu and Ezra Ören) complained of a breach of their right to a fair trial owing to the restriction imposed on their right to a lawyer when they had made statements to the police, and to the use by the trial court of those statements to convict them. In the same vein, all the applicants also complained of the trial court's use of the statements which certain other co-defendants had made in the absence of a lawyer (including the statements made by the applicant Ezra Ören in the cases of the applicants Erol Maks Kohen, Nail Tahsildaroğlu and Hüseyin Özçalı), of a breach of the principle of equality of arms concerning the collection and examination of certain expert reports during the trial, and of the domestic courts' failure to provide them with the details of the allegedly forged customs declarations, on the basis of which it had asked them to make additional defence submissions and later convicted them. The Court considers that these complaints should be examined under Article 6 §§ 1 and 3 of the Convention, which, in so far as relevant, provides:

"1. In the determination of ... any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by [a] tribunal ...

3. Everyone charged with a criminal offence has the following minimum rights:

...

(b) to have adequate time and facilities for the preparation of his defence; ...

(c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; ...”

A. Restriction of the right to legal assistance and the use of statements that the applicants and certain co-defendants made in the absence of a lawyer

1. Admissibility

50. The Government argued that the application forms did not contain any complaint about the alleged denial of legal assistance to the applicants; instead, the applicants’ complaints in that respect were limited to the use of statements that the co-defendants Y.S.U., B.A., A.K., M.O.E., A.S., M.K., K.M.K., and Ezra Ören had made in the absence of a lawyer. That being the case, the Government invited the Court to disregard the applicants’ complaints in so far as they concerned their own access to a lawyer while in police custody. The applicants did not comment on that issue.

51. The Court notes that the part of the application forms in which the applicants listed their complaints did not contain (with the exception of Ezra Ören) any explicit complaint concerning their right of access to a lawyer. Indeed, complaint number six of the application forms was entitled “The witness statements that were considered by the trial court as evidence and relied upon in the judgment against the applicant[s] had been obtained through prohibited methods”, where the applicants’ lawyer stated that the use of evidence obtained without a lawyer present in convicting the person who had given that evidence or another person, was a violation of Article 6 § 1 of the Convention. However, in the “facts” part of the application forms, the applicants’ lawyer explicitly stated that the applicants Erol Maks Kohen and Nail Tahsildaroğlu had been questioned by the police through the use of prohibited methods. A combined reading of these two points suffices to conclude that all of the applicants, save for Hüseyin Özçalı, raised the substance of their complaints that they had been denied access to a lawyer while in police custody. The Court accordingly upholds the Government’s objection in respect of the applicant Hüseyin Özçalı, but dismisses it as regards the remaining applicants.

52. The Court notes that these complaints are neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. They must therefore be declared admissible.

2. Merits

(a) The parties’ submissions

53. The first three applicants (Erol Maks Kohen, Nail Tahsildaroğlu and Ezra Ören) submitted that the statutory restriction on their right to legal

assistance, for which the Government had not provided any compelling reasons, had irretrievably prejudiced the overall fairness of the trial. This was because the statements that they had made in the absence of a lawyer had contained detailed explanations concerning the activities of the companies and exports in dispute; hence, they were self-incriminatory according to the Court's well-established case-law. Additionally, all of the applicants argued that their conviction had also been based on the statements that certain other co-defendants, namely Y.S.U., B.A., A.K., M.O.E., A.S., M.K. and K.M.K., had made in the absence of a lawyer, and without due regard to the fact that they had all retracted those statements. The applicants Erol Maks Kohen, Nail Tahsildaroğlu and Hüseyin Özcallı raised the same complaint in respect of the statements that the applicant Ezra Ören had made in the absence of a lawyer. The impugned statements had therefore formed an integral part of the evidence upon which their conviction had been based, despite the domestic courts' failure to remedy the procedural shortcomings.

54. The Government argued in essence that the applicants had had a fair trial because the statements made by them without a lawyer being present had not been of a nature that could have affected the decision given; nor could they cause any prejudice to the overall fairness of the proceedings. Indeed, the trial court's judgment had been based on the reports drawn up by the tax inspectors, the documents found at the applicant Erol Maks Kohen's residence and workplace, and the submissions of the co-defendants Y.K., M.A., E.K., M.D., E.D., N.S. and Ş.K., who had consistently maintained them during the proceedings. On that basis, the Government further submitted that the use of the statements made by certain co-defendants – about which the applicants had complained – had not adversely affected the fairness of the proceedings. In particular, the trial court had not referred to any of those statements for the convictions of the applicants Ezra Ören and Hüseyin Özcallı. In any event, the trial court had approached that evidence with caution by subjecting its admissibility and reliability to meaningful scrutiny. In view of the above and having regard to the public interest in the criminal prosecution of the applicants, which concerned a tax loss of more than 76 trillion old Turkish liras, the Government argued that the overall fairness of the proceedings against them had not disclosed a breach of Article 6 of the Convention.

(b) The Court's assessment

(i) General principles

55. The Court reiterates that general principles with regard to the right of access to a lawyer may be found in the Grand Chamber judgments in *Beuze v. Belgium* ([GC], no. 71409/10, §§ 119-150, 9 November 2018), *Simeonovi v. Bulgaria* ([GC], no. 21980/04, §§ 110-120, 12 May 2017), and *Ibrahim*

and Others v. the United Kingdom ([GC], nos. 50541/08 and 3 others, §§ 249-274, 13 September 2016).

(ii) *Application of the principles to the present case*

(α) Whether there was a restriction on the applicants' right to a lawyer

56. The Court notes that the applicants' right to a lawyer during the preliminary investigation stage of the proceedings was subject to a statutory restriction, stemming from the then applicable Law no. 3842, which excluded that right in respect of persons held in police custody in connection with an offence falling under the jurisdiction of the State Security Courts.

(β) Whether there were compelling reasons for the restriction

57. The Court has already held that a systemic and statutory restriction could not satisfy the procedural requirements of the concept of "compelling reasons" (see *Beuze*, cited above, § 138, and *Mehmet Zeki Çelebi*, cited above, § 55). There was therefore no compelling reason to restrict the applicants' right to a lawyer; thus, the Court must apply very strict scrutiny of the fairness of the proceedings. The absence of such reasons weighs heavily in the balance when assessing the overall fairness of the criminal proceedings and may tip the balance towards finding a violation. It is incumbent on the Government to demonstrate convincingly why, exceptionally and in the specific circumstances of the case, the overall fairness of the trial was not irretrievably prejudiced by the restriction of the applicants' access to a lawyer (see the above-cited cases of *Beuze*, § 145; *Ibrahim and Others*, § 265; and *Simeonovi*, §§ 118 and 132).

(γ) Fairness of the proceedings as a whole

58. The Court is mindful of the difficulties that States encounter in prosecuting financial offences owing to the wide range and complexity of the methods, and the tools used, in such offences (see, *mutatis mutandis*, *Brus v. Belgium*, no. 18779/15, § 30, 14 September 2021). Nevertheless, it is called upon to examine whether the restrictions on the applicants' right to a lawyer were such as to prejudice the overall fairness of the criminal proceedings against them through the lens of Article 6 §§ 1 and 3 (c) of the Convention.

59. Firstly, the Court considers it important that the trial court duly noted which defendants had retracted the statements they had previously made to the police and the public prosecutor, and subjected this issue to a detailed assessment, explaining why it had decided to attach weight to their previous statements. That said, the domestic courts made no assessment as regards the impact that the procedural defect (the absence of a lawyer) might have had either on the rights of the defence or on the overall fairness of the proceedings. The lack of an assessment to that effect is in itself *prima facie* incompatible with the requirements of a fair trial in accordance with Article 6 of the

Convention (see *Mehmet Zeki Çelebi*, cited above, § 51). In the absence of any such assessment, the Court must nevertheless make its own determination of the overall fairness of the proceedings. Furthermore, in carrying out that task, the Court should not act as a court of fourth instance by calling into question the outcome of the trial or engaging in an assessment of the facts and evidence or the sufficiency of the latter justifying a conviction. These matters, in line with the principle of subsidiarity, are the domain of domestic courts (*ibid.*, §§ 50-51). This applies all the more in the present case which concerned complex legal issues concerning customs, negotiable instruments, taxes and the criminal responsibility of the applicants along with 178 other defendants.

60. That being said, sight should not be lost of the fact that the Court has envisaged “the strength of the other evidence in the case” as a factor to be taken into account in assessing the impact of procedural failings at the pre-trial stage on the overall fairness of the criminal proceedings (see *Ibrahim and Others*, cited above, § 274). In that connection, the Court in the circumstances of the present case makes the following observations. The criminal investigation in respect of the applicants did not commence with, or as a result of, the statements that they had made without legal assistance. Prior to the applicants’ statements, numerous expert reports had already been obtained wherein the fictitious and fraudulent export scheme, the companies which operated thereunder or cooperated with it, its *modus operandi*, the veracity of the financial transactions and customs activities, and the information concerning the alleged import companies, were set out in comprehensive detail. Furthermore, the searches conducted on 31 October 2001 – of which the applicants did not complain – also yielded information of crucial importance as regards, in particular, the role and involvement of various persons, including the applicants, in the scheme. In the absence of any submissions from the applicants or any other pertinent material, the Court has no reason to assume that the authorities carried out those searches as a result of any of the applicants’ police interviews during which they did not benefit from legal assistance. Additionally, on different dates a large number of other people also made statements revealing the role played by the applicants in the scheme. In the case of the applicant Ezra Ören, the trial court also relied on the expert report in which it was stated that he had signed the M. company’s export agreements, despite having no official role in that company, and the expert report of 17 January 2001 which had established that an overwhelming proportion of the purchases and sales of the applicant Ezra Ören’s company had been the result of its activities with the two companies belonging to the scheme. The Court is aware that the statements made by the applicants in the absence of a lawyer contained detailed self-incriminatory remarks. Yet, they were not such as to provide the authorities with the narrative of what had happened. Nor did they frame the process of evidence-gathering in the criminal proceedings against the applicants (see

Artur Parkhomenko v. Ukraine, no. 40464/05, § 87, 16 February 2017, and compare *Mehmet Zeki Çelebi*, cited above, § 71-72). In any event, abundant evidence relating to the accusations levelled against the applicants was collected prior to and independently of the statements that they made without a lawyer being present.

61. The overwhelming evidence, which has been discovered or collected either prior to the statements made without a lawyer and/or without being the direct or indirect result of such statements, formed the backbone of the domestic courts' findings in respect of the applicants' convictions. These statements at times confirmed the information obtained independently, notably through expert reports, searches and the statements of other co-defendants, about which the applicants did not complain. In these specific circumstances, the Court considers that the trial court's reliance upon the statements that the applicants made without a lawyer being present, was not such as to irretrievably prejudice the overall fairness of the criminal proceedings against them (compare *Brus*, cited above, §§ 27-37). These considerations also hold true in respect of the use of the statements made by the co-defendants Y.S.U., B.A., A.K., M.O.E., A.S., M.K. and K.M.K., in the absence of a lawyer, having regard, in particular, to the trial court's scrutiny of their reliability and accuracy, as well as the strength and nature of the other evidence mentioned above (see *Stephens v. Malta (no. 3)*, no. 35989/14, § 76, 14 January 2020). This conclusion applies to the complaints of the applicants Erol Maks Kohen, Nail Tahsildaroğlu and Hüseyin Özçalı concerning the use by the trial court of the statements the applicant Ezra Ören made without a lawyer being present.

62. Furthermore, the "strength of the other evidence in the case" is only one factor to be taken into account. All other criteria indicated in *Ibrahim and Others*, as far as relevant in the specific case, also need to be assessed. This applies notably with regard to the lack of vulnerability of the applicants, the opportunity to challenge the authenticity of the evidence, the quality of the evidence, the assessment of guilt by professional judges and the weight of the public interest. All these factors also militate in favour of finding that the proceedings were overall fair.

63. Accordingly, and being mindful of the fact that very strict scrutiny is to be applied to cases where there are no compelling reasons to restrict an applicant's right to a lawyer during the preliminary investigation stage, the Court considers that in the specific circumstances of the case neither of the above flaws was such as to irretrievably prejudice the overall fairness of the criminal proceedings against the applicants (see, *mutatis mutandis*, *Pervane v. Turkey*, no. 74553/11, § 32, 8 September 2020).

64. There has therefore been no violation of Article 6 §§ 1 and 3 (c) of the Convention.

B. Alleged breach of the principle of equality of arms

65. The applicants complained that the principle of equality of arms, in relation to the two expert reports obtained by the trial court on 7 July 2003 and 27 October 2003, which were allegedly of fundamental relevance to the case, had been breached, for the following reasons. Firstly, the applicants had not been provided with any information as regards the names and professions of the experts on the panel commissioned by the trial court, and they were unable to obtain any information relating to the content of the report until its submission to the case file. Furthermore, the experts had overstepped their duty to furnish the courts with information on specialised and technical matters by analysing which offences had been committed by each defendant and had thus lost their impartiality. In any event, the experts had lacked skill as their report had merely constituted “a duplicate” of the expert report dated 21 September 2001. The situation had been further exacerbated by the trial court’s refusal to obtain a fresh expert report.

66. The Government submitted that the expert reports that the applicants had complained about had not played an active or predominant role in the applicants’ conviction. The applicants had had access to all of the expert reports and had freely challenged the findings contained therein. In fact, as a result of their objections, the trial court had obtained another report from the same experts, who had provided additional explanations in respect of those objections. Moreover, they were different experts to the ones who had taken part in the preliminary investigation stage, and the applicants’ contention as regards the competency of the experts had not been supported by concrete and credible evidence. In view of the above, and having regard to the fact that Article 6 did not require a trial court to order a new expert examination just because a party had requested it, the Government argued that there had not been a violation of the principle of equality of arms.

67. The Court reiterates that the general principles with regard to the taking and examination of expert evidence may be found in *Gülağacı v. Turkey* ((dec.), no. 40259/07, 20 May 2020).

68. The Court reiterates that the fact that an expert report was obtained without any involvement of the defence as such does not raise any issue under the Convention, provided that the defence subsequently had an opportunity to examine and challenge that report before the trial court (see *Khodorkovskiy and Lebedev v. Russia*, nos. 11082/06 and 13772/05, § 704, 25 July 2013, and *Matytsina v. Russia*, no. 58428/10, § 175, 27 March 2014). In the present case, it is true that the trial court did not inform the applicants or their lawyers of certain details concerning the experts who drafted the expert report dated 7 July 2003, which resulted in the applicants’ inability to formulate their own questions to the experts or to challenge them. Nevertheless, when the applicants raised their objections to the impugned expert report, the trial court obtained an additional report from the same panel with a view to elucidating

the issues raised by the defence, with the result that the experts provided supplementary explanations in that regard.

69. Furthermore, the applicants did not argue before the Court that they had asked the trial court to examine the experts in person, or that such a request had been unduly rejected (compare *Danilov v. Russia*, no. 88/05, §§ 115-116, 1 December 2020). Neither did they complain that they had been unable to obtain their own specialist opinion or that such a report would not have had the necessary equal force to challenge the court-appointed experts (compare *Matytsina*, cited above, §§ 193-195), or that any such report would not have been admitted as evidence or have been assessed as such by the trial court (see *Pichugin v. Russia*, no. 38623/03, § 36, 23 October 2012, and compare *Khodorkovskiy and Lebedev*, cited above, §§ 721-723). Neither did the applicants argue that all those procedural means would have been doomed to failure from the outset. In any event, the applicants acknowledged that the expert report obtained during the trial stage had been a mere reproduction of the expert report dated 21 September 2001, which, in the Court's view, they had had ample opportunity to challenge. Accordingly, the Court does not discern any exceptional circumstances which would have required the trial court to obtain a fresh expert opinion (see, by contrast, *Stoimenov v. the former Yugoslav Republic of Macedonia*, no. 17995/02, 5 April 2007). In view of the above, the Court cannot conclude that the applicants were put at a procedural disadvantage *vis-a-vis* the prosecution in relation to the taking and examination of the expert reports dated 7 July 2003 and 27 October 2003.

70. Lastly, as regards the applicants' allegation that the experts had overstepped their duty, the Court notes that any possible prejudice that the applicants might have encountered on that account was offset by the negligible, if any, weight attached to that part of the impugned report by the trial court in finding the applicants guilty of the forgery of official documents, a fact that is capable of demonstrating that, in this respect, it distanced itself from the report's wording (see *Constantinides v. Greece*, no. 76438/12, § 47, 6 October 2016, and compare *Müller v. Germany*, no. 54963/08, §§ 51-52, 27 March 2014). In any event, that report's importance did not lie in that point, which had already been reiterated by the previous expert reports, but rather in its annexes where the number of the customs declarations used by each export company was indicated, an aspect which will be examined below.

71. This complaint is accordingly manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

C. Alleged lack of sufficient time and necessary facilities for the preparation of defence submissions

72. The applicants further complained under Article 6 § 3 (b) of the Convention that even though the trial court had asked them to make additional submissions, on the basis of the fact that it might find them guilty of multiple

counts of forgery of official documents and apply a cumulated sentence on that basis, it had failed to specify the location and date of each customs declaration that had purportedly been forged. The applicants had therefore not been provided with the necessary information forming the basis of their conviction in order to prepare their defence submissions in a manner consistent with the guarantees of a fair trial. Furthermore, as the trial court did not collect each and every customs declaration, it had convicted them without verifying their authenticity and veracity.

73. The Government argued that the applicants had had access to the case file throughout the entire trial and the trial court had, on different dates, asked them to make additional defence submissions and had granted them additional time for that purpose, in view of the possibility of applying the provisions relating to multiple offences committed within the same criminal intent and the accumulation of sentences. Moreover, the trial court had clearly explained the reasons for that request during the hearing of 9 October 2003, and the expert report dated 7 July 2003 had established the details of the accusation against the applicants, including the companies on behalf of which the exports had been carried out and the volume of those exports.

74. The Court observes that the principles concerning the right to be informed of the nature and the cause of the accusation and the accused's right to prepare his or her defence are well-developed in the Court's case-law and have been summarised in *Pélissier and Sassi v. France* ([GC], no. 25444/94, §§ 51-54, ECHR 1999-II).

75. In the present case, the applicants' conviction on account of the forgery of customs declarations rested on the finding that the content of those documents was false as it was found to have been based on exports which were characterised as fictitious and fraudulent owing to the untrue nature of the transactions, purchases, sales, payments and transport relevant to those exports, and not on the material elements of the physical versions of those declarations. The Court therefore dismisses the applicants' assertion that the trial court had not verified the authenticity and veracity of the customs declarations.

76. As regards whether the trial court specified the details of the customs declarations about which it asked the applicants to make additional defence submissions, the Court notes that the false customs declarations mentioned in the expert report dated 21 September 2001 already formed part of its annexes (see paragraph 6). Moreover, after receiving the expert report dated 7 July 2003, wherein the number of customs declarations used in respect of each company had been listed in an annex, the trial court asked the applicants on various dates to make additional defence submissions. At the hearing held on 9 October 2003, the trial court stated the reasons for that request, clarifying that if it found that an offence had been committed, it might consider that a separate offence had been committed in relation to the exports of every company, and it might cumulate the sentences on the basis of the number of

customs declarations used by each of them. Having regard to the above factors, the applicants had the necessary elements in their possession to know what they had been accused of, that is, the factual grounds of the accusations laid against them and their legal classification, and they could make their submissions and produce evidence in their defence with regard to every act of forgery that they had been charged with (see *Previti v. Italy* (dec.), no. 4529106, §§ 206-208, 8 December 2009, and compare *Marilena-Carmen Popa v. Romania*, no. 1814/11, § 47, 18 February 2020).

77. Accordingly, this complaint is manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Decides* to join the applications;
2. *Holds* that the wife, son and two daughters of the applicant Hüseyin Özçalı have standing to pursue the proceedings in his stead;
3. *Declares* the applications admissible in so far as they concern the complaints under Article 6 §§ 1 and 3 (c) of the Convention concerning (i) the restrictions imposed on the first three applicants' right of access to a lawyer and the use of the statements that they made without a lawyer being present, (ii) the use of the statements made by certain other co-defendants in the absence of a lawyer in respect of all the applicants; and (iii) the use of the statements made by the applicant Ezra Ören in respect of the other three applicants; and the remainder of the applications inadmissible;
4. *Holds* that there has been no violation of Article 6 §§ 1 and 3 (c) of the Convention on account of the above-noted complaints that were found admissible;

Done in English, and notified in writing on 7 June 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Hasan Bakırcı
Registrar

Jon Fridrik Kjølbro
President

APPENDIX

List of cases:

No.	Application no.	Case name	Lodged on	Applicant Year of Birth Place of Residence Nationality	Represented by
1.	66616/10	Kohen v. Turkey	19/10/2010	Erol Maks KOHEN 1959 Istanbul Turkish	İsmail Deniz GÖKKILIÇ
2.	66625/10	Tahsildaroğlu v. Turkey	19/10/2010	Nail TAHSİLDAROĞLU 1948 Istanbul Turkish	İsmail Deniz GÖKKILIÇ
3.	66646/10	Ören v. Turkey	20/10/2010	Ezra ÖREN 1961 Istanbul Turkish	İsmail Deniz GÖKKILIÇ
4.	66650/10	Özçalı v. Turkey	20/10/2010	Hüseyin ÖZÇALLI 1944 Istanbul Turkish	İsmail Deniz GÖKKILIÇ