



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

FIFTH SECTION

CASE OF FIGURKA v. UKRAINE

(Application no. 28232/22)

JUDGMENT

Art 6 § 1 (criminal) • Impartial tribunal • Absence of prosecuting party before Court of Appeal in proceedings against applicant for a minor administrative traffic offence not punishable by imprisonment • Applicant's failure to demonstrate objectively justified doubts as to court's impartiality • Domestic court did not take up, or was not put in a position requiring it to take, the role of a prosecuting party • Applicant had full opportunity to prepare defence

STRASBOURG

16 November 2023

FINAL

08/04/2024

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

In the case of Figurka v. Ukraine,

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

Georges Ravarani, *President*,

Lado Chanturia,

Mārtiņš Mits,

Stéphanie Mourou-Vikström,

María Elósegui,

Kateřina Šimáčková,

Mykola Gnatovskyy, *judges*,

and Victor Soloveytschik, *Section Registrar*,

Having regard to:

the application (no. 28232/22) against Ukraine lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Ukrainian national, Mr Bogdan Romanovych Figurka (“the applicant”), on 17 May 2022;

the decision to give notice of the application to the Ukrainian Government (“the Government”);

the parties’ observations;

Having deliberated in private on 17 October 2023,

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

INTRODUCTION

1. The case concerns the applicant’s complaint, under Article 6 § 1 of the Convention, that the domestic court which examined an administrative offence case against him had lacked impartiality on account of the absence of a prosecuting party in the proceedings.

THE FACTS

2. The applicant was born in 1964 and lives in Ternopil. The applicant was represented by Mr M.Y. Samulyak, a lawyer practising in Ternopil.

3. The Government were represented by their then acting Agent, Ms O. Davydchuk.

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

5. On 23 November 2020 the police drew up an administrative offence report charging the applicant with an administrative offence under Article 130 § 1 of the Code of Administrative Offences, namely driving while displaying signs of intoxication and refusing to undergo intoxication testing proposed by the traffic police (see paragraph 11 below). The report was subsequently sent to the Pidvolochysk District Court of Ternopil region.

6. On 7 December 2020 the District Court examined the case in the absence of the parties. The court stated that the applicant had been informed

of the hearing but failed to appear. The court convicted the applicant as charged, sentenced him to a fine of 10,200 Ukrainian hryvnias (about 297 euros) and suspended his driving licence for one year. It relied on the administrative offence report and written statements of two witnesses.

7. The applicant appealed. He submitted that he had only learned about the District Court's judgment on 28 January 2022, when he had unsuccessfully tried to have his driving licence exchanged for a new-format licence. He challenged the factual findings of the first-instance court, arguing that the charges against him had not been proved and the evidence against him had been inadmissible. Specifically, he contended that the video recording present in the file was inadmissible as evidence, notably because the "technical characteristics" of the device on which it had been made had not been duly documented.

8. The applicant also referred to the Court's judgment in *Karelin v. Russia* (no. 926/08, 20 September 2016), and submitted that the first-instance court had examined the case in the absence of a prosecutor and had therefore assumed the function of the prosecution.

9. On 11 April 2022 the Ternopil Court of Appeal held a hearing in the presence of the applicant and his lawyer. The court examined the applicant (who affirmed his innocence), the written case material (notably the offence report and the written witness statements) and video recordings from the police officers' body cameras.

10. At the close of the hearing the Court of Appeal upheld the first-instance court's judgment. In its decision it noted that the applicant had only learned about the first-instance court's judgment on 28 January 2022 and therefore decided to extend the time-limit for appeal as requested by the applicant. The Court of Appeal found no indication of error in the first-instance court's judgment and held that the evidence in the case file supported the finding of guilt. In particular, the Court of Appeal referred to the administrative offence report and witness statements. It stated that their contents were corroborated by the video recording present in the file.

RELEVANT LEGAL FRAMEWORK

11. Article 130 § 1 of the Code of Administrative Offences of 1984 (as amended) makes driving in a state of intoxication or refusal by a driver to undergo intoxication testing an administrative offence. The first such offence committed during a twelve-month period is punishable by suspension of the driver's licence for one year and a fine of six hundred times the "amount of income not subject to tax"; that amount was set by law at the time at 17 Ukrainian hryvnias (UAH), so that the fine was UAH 10,200.

12. Article 250 of the Code provides that prosecutors can initiate administrative offence proceedings, take part in the examination of such cases, lodge applications and appeals, and exercise other procedural rights.

13. Article 250 § 2, introduced by a law of 7 April 2011, also makes a prosecutor's participation obligatory in cases involving certain categories of offences, such as corruption-related offences. This does not apply to the offence in issue in the present case.

14. Article 279 of the Code sets out the procedure for the examination of administrative offence cases. It provides that at the opening of the hearing the presiding judge announces which case is being examined and explains to the parties their rights and obligations. Then the administrative offence report is read out, the parties are heard, evidence is examined and any applications presented by the parties are dealt with.

15. Article 294 of the Code provides that the parties to administrative offence proceedings (notably the defendant, the victim and the prosecutor) have the right to appeal against court judgments in their cases within ten days from their delivery. The Courts of Appeal examine appeals at public hearings in the presence of the parties, unless the parties, having been duly summoned, fail to appear.

The appellate court's examination is limited to matters raised in the appeal, unless the court discovers another breach of substantive or procedural law. The court has the power to examine new evidence if it finds that a good reason has been shown for non-production of such evidence before the first-instance court or that the first-instance court rejected such evidence without sufficient grounds. The court has powers to reject the appeal, to quash the first-instance court's judgment and discontinue the proceedings or overturn the judgment and adopt a new one, or to amend the judgment. A court of appeal cannot impose a sentence more severe than that imposed at first instance. The appellate courts' decision is final and not amenable to any further appeal.

THE LAW

ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

16. The applicant complained that the lack of a prosecuting party in the proceedings in the Court of Appeal meant that that court could not be considered impartial, in breach of Article 6 § 1 of the Convention, the relevant parts of which read as follows:

“In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law.”

A. The parties' submissions

17. The Government stated that, after the events of 2007 which had given rise to the finding of a violation of Article 6 § 1 on account of the absence of a prosecuting party in administrative offence proceedings in *Mikhaylova v. Ukraine* (no. 10644/08, 6 March 2018), the Code of Administrative

Offences had been amended to provide for situations in which participation of a prosecutor in administrative offence proceedings was mandatory (see paragraph 13 above).

The Government referred to *Thorgeir Thorgeirson v. Iceland* (25 June 1992, Series A no. 239) and submitted that in the present case, as in that case, the domestic courts had delivered decisions based on the relevant facts and had not violated Article 6 § 1 of the Convention. They distinguished the present case from that of *Karelin v. Russia* (no. 926/08, 20 September 2016). They pointed out that in that case the judge's impartiality had been undermined by the fact that he had changed the charges on which Mr Karelin had subsequently been convicted from those that had been indicated in the administrative arrest report. That had not occurred in the applicant's case.

18. The applicant submitted that the proceedings were "criminal" for the purposes of the Convention. While the prosecutor had had a right to be present, the domestic courts had not even informed the prosecutor of the proceedings. In certain types of cases the presence of the prosecutor was obligatory, but the offence for which the applicant was tried did not fall into that category. There had therefore been no prosecutor in the proceedings before the Court of Appeal and although the applicant had affirmed his innocence, the Court of Appeal had nevertheless upheld his conviction. The applicant pointed out that, unlike in the case cited by the Government (*Thorgeir Thorgeirson v. Iceland*, 25 June 1992, Series A no. 239, where the prosecutor had been absent from only some sittings), in his case no prosecuting party had been present at any of the court sittings.

19. The applicant also contended that the Court's judgments in *Bantysch and Others v. Ukraine* ([Committee], no. 13063/18 and 3 others, 6 October 2022) and *Glushchenko and Pustovyy v. Ukraine* ([Committee], nos. 68073/17 and 72743/17, 2 March 2023), where the Court had found violations on account of similar situations, indicated the existence of a systemic problem at the domestic level.

B. The Court's assessment

1. Admissibility

20. The Court has previously held that proceedings leading to the withdrawal of points from a driving licence were "criminal" within the meaning of Article 6 of the Convention (see, for example, *Malige v. France*, 23 September 1998, §§ 35-40, *Reports of Judgments and Decisions* 1998-VII, and *Igor Pascari v. the Republic of Moldova*, no. 25555/10, §§ 20-23, 30 August 2016).

21. The Court finds no reason to reach a different conclusion in the present case. It follows that Article 6 of the Convention applies in its criminal limb.

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

2. *Merits*

(a) **Relevant general principles**

23. The Court reiterates that impartiality normally denotes the absence of prejudice or bias and its existence or otherwise can be tested in various ways. According to the Court's settled case-law, the existence of impartiality for the purposes of Article 6 § 1 must be determined according to a subjective test where regard must be had to the personal conviction and behaviour of a particular judge, that is, whether the judge held any personal prejudice or bias in a given case; and also according to an objective test, that is to say by ascertaining whether the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality (see, for example, *Kyprianou v. Cyprus* [GC], no. 73797/01, § 118, ECHR 2005-XIII; *Micallef v. Malta* [GC], no. 17056/06, § 93, ECHR 2009; *Morice v. France* [GC], no. 29369/10, § 73, ECHR 2015; and *Ilenseher v. Germany* [GC], nos. 10211/12 and 27505/14, § 287, 4 December 2018).

24. As to the subjective test, the principle that a tribunal must be presumed to be free of personal prejudice or partiality is long-established in the case-law of the Court (see *Kyprianou*, § 119; *Micallef*, § 94; and *Morice*, § 74, all cited above). The personal impartiality of a judge must be presumed until there is proof to the contrary (see *Hauschildt v. Denmark*, 24 May 1989, § 47, Series A no. 154). As regards the type of proof required, the Court has, for example, sought to ascertain whether a judge has displayed hostility or ill will for personal reasons (see *De Cubber v. Belgium*, 26 October 1984, § 25, Series A no. 86, and *Morice*, cited above, § 74).

25. In the vast majority of cases raising impartiality issues the Court has focused on the objective test (see *Micallef*, cited above, § 95). However, there is no watertight division between subjective and objective impartiality since the conduct of a judge may not only prompt objectively held misgivings as to impartiality from the point of view of the external observer (objective test) but may also go to the issue of his or her personal conviction (subjective test) (see *Kyprianou*, cited above, § 119). Thus, in some cases where it may be difficult to procure evidence with which to rebut the presumption of the judge's subjective impartiality, the requirement of objective impartiality provides a further important guarantee (see *Pullar v. the United Kingdom*, 10 June 1996, § 32, *Reports of Judgments and Decisions* 1996-III, and *Morice*, cited above, § 75).

26. As to the objective test, it must be determined whether, quite apart from the judge's conduct, there are ascertainable facts which may raise doubts

as to his or her impartiality. This implies that, in deciding whether in a given case there is a legitimate reason to fear that a particular judge or a body sitting as a bench lacks impartiality, the standpoint of the person concerned is important but not decisive. What is decisive is whether this fear can be held to be objectively justified (see *Micallef*, cited above, § 96).

27. The objective test mostly concerns hierarchical or other links between the judge and other protagonists in the proceedings. It must therefore be decided in each individual case whether the relationship in question is of such a nature and degree as to indicate a lack of impartiality on the part of the tribunal (see *Morice*, cited above, § 77).

28. In this connection even appearances may be of a certain importance or, in other words, “justice must not only be done, it must also be seen to be done” (see *De Cubber*, cited above, § 26). What is at stake is the confidence which the courts in a democratic society must inspire in the public. Thus, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw (see *Castillo Algar v. Spain*, 28 October 1998, § 45, *Reports of Judgments and Decisions* 1998-VIII; *Micallef*, cited above, § 98; and *Morice*, cited above, § 78).

29. The absence of a prosecuting party at an oral hearing may raise an issue under Article 6 §§ 1 and 3 of the Convention since it may give rise to doubts about the court’s objective impartiality by leading the court to take up the prosecution’s case and may cause difficulty in the exercise of the defendant’s rights to be informed of “the nature and cause of the accusation”, to have “adequate time and facilities” for the preparation of defence and by undermining the defendant’s ability to put forward an adequate defence in adversarial proceedings (see *Thorgeir Thorgeirson*, cited above, §§ 16-20 and 46-54; *Weh and Weh v. Austria* ((dec.)), no. 38544/97, 4 July 2002; *Ozerov v. Russia*, no. 64962/01, §§ 51-58, 18 May 2010; *Krivoshapkin v. Russia*, no. 42224/02, §§ 41-46, 27 January 2011; *Malofeyeva v. Russia*, no. 36673/04, §§ 116-20, 30 May 2013; *Karelin v. Russia*, no. 926/08, §§ 58-84, 20 September 2016; *Butkevich v. Russia*, no. 5865/07, §§ 82-84, 13 February 2018; *Mikhaylova v. Ukraine*, no. 10644/08, §§ 61-70, 6 March 2018; *Hasanov and Majidli v. Azerbaijan*, nos. 9626/14 and 9717/14, §§ 35-41, 7 October 2021).

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

30. The Court notes at the outset that the applicant’s complaint about an alleged lack of impartiality is limited to the proceedings before the Court of Appeal.

31. In the present case the Court of Appeal had jurisdiction to deal with questions of law as well as questions of fact, with powers to discontinue the proceedings against the applicant or uphold his conviction (see paragraph 15 above). In fact, the Court of Appeal did re-examine the case, notably the evidence in the file, in its entirety (see paragraphs 9 and 10 above).

32. In doing so, the Court of Appeal held a hearing but did not summon either the prosecutor or the police officer who had drawn up the administrative offence report. As a result, no party supported the prosecution's case against the applicant at the hearing. Despite that, and despite the applicant affirming his innocence at the hearing, the Court of Appeal upheld the applicant's conviction.

33. According to the applicant, that fact in itself created a doubt about the court's impartiality since the Court of Appeal had had to take the role of a prosecuting party.

34. The Court starts by observing that there is no suggestion that there was an issue with the Court of Appeal's impartiality under the subjective test, such as displays of hostility, personal conduct or use of language indicating a preconceived opinion of the case (contrast *Kyprianou*, cited above, §§ 130-33, and *Dāvidsons and Savins v. Latvia*, nos. 17574/07 and 25235/07, § 55, 7 January 2016).

35. As to the objective test, the Court has found that the absence of a prosecuting party in the proceedings can indeed raise an issue in that respect and cause difficulty in the exercise of the defendant's rights (see the case-law cited in paragraph 29 above and, in addition, *Gafgaz Mammadov v. Azerbaijan*, no. 60259/11, §§ 77-82, 15 October 2015; *Ibrahimov and Others v. Azerbaijan*, nos. 69234/11 and 2 others, §§ 97-101, 11 February 2016; and *Huseynli and Others v. Azerbaijan*, nos. 67360/11 and 2 others, §§ 113-18, 11 February 2016).

36. However, in the present case nothing in the applicant's submissions or in the case file indicates that the absence of the prosecutor at the hearing before the Court of Appeal could give rise to justified doubts about that court's objective impartiality or otherwise affect the fairness of the proceedings.

37. In particular, there is no indication that the Court of Appeal itself, in the absence of a prosecuting party, took steps that could be interpreted as assuming the role of the prosecuting party, such as, for example, changing the body of evidence to the applicant's disadvantage, introducing new incriminating evidence of its own motion or removing certain evidence submitted by the prosecution (contrast, for example, *Ozerov*, cited above, §§ 51-58). There is no indication either that the Court of Appeal modified, of its own motion, the charges contained in the administrative offence report (contrast *Karelin*, cited above, § 18) or that it treated the evidence in a manner that would suggest that the burden of proof was shifted to the applicant (compare *Makarashvili and Others v. Georgia*, nos. 23158/20, 31365/20 and 32525/20, §§ 60-63, 1 September 2022).

38. The Court also notes that the physical absence of the prosecutor during the hearing before the Court of Appeal had no impact on the possibility for the prosecuting authorities under domestic law to intervene, had they considered it necessary, and to file written pleadings.

39. In these circumstances taken as a whole, it cannot be considered that the Court of Appeal took the role of a prosecuting party or was put in a position requiring it to take the role of a prosecuting party.

40. The applicant was at liberty and was represented by a lawyer of his choosing; his case was a relatively simple one; and, contrary to the cases cited in paragraph 35 above where the applicants' trials followed within hours after their arrest, more than four months passed between the drawing up of the offence report and the hearing in the Court of Appeal (see paragraphs 5 and 9 above).

41. Therefore, the applicant had full opportunity to prepare his defence and there is no indication that there was any issue with him being properly informed of "the nature and cause of the accusation" against him, as presented in the administrative offence report, or having been afforded "adequate time and facilities" for the preparation of his defence against the charges formulated in the report (contrast *Malofeyeva*, cited above, §§ 116-20).

42. The Court also has regard to the subject matter of the present case, which concerned a minor traffic offence not punishable by imprisonment, a category of offences to which the criminal-head guarantees of Article 6 do not apply with their full stringency (see *Marčan v. Croatia*, no. 40820/12, § 37, 10 July 2014, and contrast, for example, *Ozerov*; *Krivoshapkin*; *Malofeyeva*; *Butkevich*; *Gafgaz Mammadov*; *Ibrahimov and Others*; *Huseynli and Others*; *Hasanov and Majidli*; *Karelin*; and *Mikhaylova*, all cited above).

43. In summary, in the present case the applicant did not point to any specific circumstances which could cause the Court to doubt the Court of Appeal's impartiality. He therefore failed to demonstrate that there were any objectively justified doubts as to the impartiality of that court.

44. There has, accordingly, been no violation of Article 6 § 1 of the Convention.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;
2. *Holds*, that there has been no violation of Article 6 § 1 of the Convention.

Done in English, and notified in writing on 16 November 2023, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Victor Soloveytschik
Registrar

Georges Ravarani
President