

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

# SECOND SECTION

# DECISION

Application no. 24654/19
Tolga ÇAKIR
against Türkiye

The European Court of Human Rights (Second Section), sitting on 27 September 2022 as a Committee composed of:

Egidijus Kūris, *President,*
Pauliine Koskelo,
Gilberto Felici, *judges,*
and Dorothee von Arnim, *Deputy Section Registrar,*

Having regard to:

the application (no. 24654/19) against the Republic of Türkiye lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") on 30 April 2019 by a Turkish national, Mr. Tolga Çakır ("the applicant"), who was born in 1976 and lives in Istanbul, and was represented before the Court by Mr. İ.Z. Çekici, a lawyer practising in Paris;

the decision to give notice of the application to the Turkish Government ("the Government"), represented by their Agent, Mr Hacı Ali Açıkgül, Head of the Department of Human Rights of the Ministry of Justice of the Republic of Türkiye;

the parties' observations;

Having deliberated, decides as follows:

## SUBJECT MATTER OF THE CASE

1. The application concerns the alleged unfairness of criminal proceedings against the applicant on account of a breach of the principle of equality of arms stemming from the domestic courts' stance *vis-à-vis* the applicant's requests for the collection and examination of evidence, including that of defence witnesses.

2. On 28 February 2017 the Istanbul Assize Court convicted the applicant of embezzlement under Article 247 of the Criminal Code and sentenced him to four years and two months' imprisonment. The trial court held that the

applicant had been acting as the lawyer of M.S., who had sent him a certain sum of money so that he could use it as a guarantee in order to obtain a provisional attachment order against certain debtors of M.S. in a civil case. M.S. asked his friend D.A. to send the sum in question to B.E., who had introduced the applicant to him. In his testimony, B.E. stated that he and the applicant had withdrawn the money from two different branches of a certain bank. The applicant had deposited the money with the relevant commercial court on behalf of his client M.S. and had secured the provisional attachment order. Even though the applicant had subsequently withdrawn the sum in question from the registry of the same court, and despite repeated telephone calls from M.S., he had not returned the money to his client, thereby committing the offence of embezzlement.

3. One of the factual disputes before the trial court was whether it was M.S. who had sent the sum in question to the applicant or whether it was the applicant who had collected that amount from his friends and relatives and had deposited it with the relevant court. Referring to, *inter alia*, statements of D.A., B.E. and M.S. and a bank transfer receipt showing that D.A. had sent the sum in question to the bank account of B.E., the trial court took the view that the applicant had not supported his contention with documentary proof.

4. At the second hearing held on 28 February 2017, the applicant briefly stated that, if the trial court considered it necessary, he could obtain the attendance of witnesses in support of his contention that the sum in question was his own money which he had previously borrowed from his friends and relatives. The trial court did not specifically address that submission and handed down the above-mentioned judgment at the end of the hearing.

5. The applicant appealed against his conviction, submitting, *inter alia*, that security camera footage from the commercial court and the banks had not been collected or examined. On 21 December 2017 the Istanbul Regional Court of Appeal upheld the trial court's judgment without specifically addressing the applicant's requests for the collection of additional evidence.

6. On 14 February 2018 the applicant lodged an individual application with the Constitutional Court, complaining that security camera footage from the commercial court and the banks had not been analysed and that witnesses on his behalf had not been heard. On 15 October 2018 the Constitutional Court found his application inadmissible as being manifestly ill-founded.

## THE COURT'S ASSESSMENT

7. The applicant complained under Article 6 §§ 1, 2 and 3 (d) of the Convention that he had not had a fair trial in that the domestic courts had dismissed his requests for the hearing of witnesses on his behalf and the collection of the following items of evidence: (i) security camera footage from the bank and the courthouse, (ii) cell tower records capable of showing whether he had arranged with B.E. to withdraw the money in question,

(iii) bank records pertaining to the transfer of the money, and (iv) the records and contents of the messages he had exchanged with M.S.

8. The Government raised a plea of non-exhaustion of domestic remedies in respect of the above-mentioned items (iii) and (iv), arguing that the applicant had failed to raise complaints on that account during the domestic proceedings. The Government further invited the Court to declare the application inadmissible on the grounds that the applicant had submitted his requests at a very late stage of the proceedings in an ambiguous manner and had not indicated the names of the witnesses on his behalf.

9. The applicant submitted that an accused was under no obligation to substantiate his or her requests for the collection of further evidence, arguing that Article 160 § 2 of the Code of Criminal Procedure enjoined a public prosecutor to collect evidence both in favour of and against an accused. Similarly, the regional appeal courts were empowered to quash any decision if they took the view that it had been based on insufficient evidence. The applicant accordingly invited the Court to dismiss the Government's preliminary objections.

10. The Court upholds the Government's plea of non-exhaustion in respect of the above-mentioned items of evidence (iii) and (iv), given that the applicant did not refer to them in his application before the Constitutional Court, and declares this part of the application inadmissible under Article 35 § 1 of the Convention for non-exhaustion of domestic remedies and rejects it pursuant to Article 35 § 4 of the Convention.

11. The applicant's remaining complaints fall to be examined under Article 6 §§ 1 and 3 (d) of the Convention. The general principles developed under these provisions with regard to the right to the examination of defence witnesses were summarised in *Murtazaliyeva v. Russia* ([GC], no. 36658/05, §§ 139-68, 18 December 2018). Those principles have also been found to be applicable in respect of other evidence which defendants have sought to adduce, such as video-recordings (see *Abdullayev v. Azerbaijan*, no. 6005/08, §§ 59-60, 7 March 2019). Where a request for the examination of a witness on behalf of the accused has been made in accordance with domestic law, the Court will carry out its assessment on the basis of the following three-pronged test:

(i) whether the request to examine a witness was sufficiently reasoned and relevant to the subject matter of the accusation;

(ii) whether the domestic courts considered the relevance of that testimony and provided sufficient reasons for their decision not to examine a witness at trial; and

(iii) whether the domestic courts' decision not to examine a witness undermined the overall fairness of the proceedings (see, in particular, *Murtazaliyeva*, cited above, § 158).

12. The Court stresses that the applicant did not submit the names and addresses of the witnesses he wished to have examined, either at the pre-trial

or the trial stage of the proceedings or during the ensuing appellate review. Neither did he explain with sufficient clarity the underlying reason to have them heard or ask the trial court to grant him additional time to supply information relating to those witnesses (compare *Zirnīte Latvia*, no. 69019/11, § 51, 11 June 2020; *Gregačević v. Croatia*, no. 58331/09, § 64, 10 July 2012; and *Emmanuello v. Italy* (dec.), no. 35791/97, 31 August 1999).

13. Furthermore, even though the applicant's lawyer submitted that an accused was under no obligation to substantiate his or her requests for the collection of further evidence, arguing that Article 160 § 2 of the Code of Criminal Procedure enjoined a public prosecutor to collect evidence both in favour of and against an accused, the Court considers that the mere fact that the domestic authorities have such a power is not sufficient to conclude that the applicant submitted a sufficiently reasoned request, as required by the first step of the *Murtazaliyeva* test referred to above. Moreover, the Court cannot but note that at a hearing held before the Istanbul Civil Court on 12 June 2014, the applicant stated that no sum had been paid to him as a guarantee, arguing that it had been paid to B.E. However, when giving evidence before the Istanbul Assize Court on 28 February 2017, the applicant asserted that he had collected the sum in question from his friends and relatives and requested that the trial court hear witnesses if it considered it necessary, but his request was unanswered by that court.

14. In view of the foregoing, and having regard to the insufficiently formulated nature of the applicant's request before the domestic courts, the Court cannot hold that the overall fairness of the criminal proceedings against him was undermined by the domestic courts' silence in respect of that request (see *Murtazaliyeva*, cited above, § 148).

15. The same considerations also hold true in respect of the complaint concerning the domestic courts' failure to examine the security camera footage from the bank and the courthouse – a complaint that the applicant raised for the first time at the appeal stage, that is to say approximately three years after the institution of the criminal proceedings, without providing any reason for the significant delay in raising that complaint.

16. Furthermore, the Court notes that there is no indication that the applicant submitted an explicit request to the domestic courts to collect the cell tower records (the above-mentioned item (ii)). That being the case, the Court considers that, in any event, the overall fairness of the criminal proceedings against him was not undermined in respect of that evidence either.

17. Against the above background, the Court is unable to subscribe to the applicant's contention that the domestic authorities acted in a manner contrary to the principle of equality of arms. Similarly, the Court discerns no grounds to conclude that the overall fairness of the criminal proceedings was undermined by the domestic courts' failure to take into consideration the validity, credibility or relevance of all the evidence.

18. Accordingly, the Court concludes that the remaining part of the present application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court, unanimously,

*Declares* the application inadmissible.

Done in English and notified in writing on 20 October 2022.

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| Dorothee von Arnim<br>Deputy Registrar | Egidijus Kūris<br>President |