

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

SECOND SECTION

CASE OF İMRET v. TÜRKİYE

(Application no. 69539/12)

JUDGMENT

STRASBOURG

20 February 2024

This judgment is final but it may be subject to editorial revision.



In the case of İmret v. Türkiye,

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

Pauliine Koskelo*, President*,
Lorraine Schembri Orland,
Davor Derenčinović*, judges*,

and Dorothee von Arnim, *Deputy Section Registrar,*

Having regard to:

the application (no. 69539/12) 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 18 September 2012 by a Turkish national, Mr Abdulcelil İmret ("the applicant"), who was born in 1958, lives in Batman and was represented by Mr E. Şenses, a lawyer practising in Batman;

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;

the decision to reject the Government's objection to the examination of the application by a Committee;

Having deliberated in private on 30 January 2024,

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

SUBJECT MATTER OF THE CASE

1. The application concerns the alleged unfairness of criminal proceedings on account of (i) the lack of impartiality of the trial court owing to the absence of the public prosecutor from the trial and (ii) the applicant's inability to take part in an on-site examination or to question witnesses who gave evidence during the trial. The application further pertains to an alleged breach of the right of access to a court owing to the applicant's inability to lodge an appeal against his conviction as the judicial fine imposed did not reach the statutory threshold set for appeals.

2. On 18 February 2011 the Batman public prosecutor's office lodged a bill of indictment against the applicant. He was accused of electricity theft and breaking the seal on a meter box, on the basis of the following evidence: a complaint filed by the electricity supplier; an illegal electricity use report; statements given by a certain K.İ.; a report concerning the sealing of the applicant's meter box; his electricity contract; and the payment he had made after being informed by the supplier of his illegal electricity use.

3. The applicant stood trial before the Batman Criminal Court of First Instance, sitting as a single judge.

4. On 5 May 2011 the trial judge carried out an on-site examination of the applicant's flat together with an expert and a witness, Y.K., a public official working for the electricity supplier who had drawn up the illegal electricity use report in respect of the applicant. During the on-site examination, Y.K. testified that he had already discovered, in the context of routine checks carried out by the electricity company, that the applicant's meter box had been tampered with so as to prevent a meter reading being taken.

5. The trial court held six hearings between 3 June 2011 and 22 May 2012. No public prosecutor attended, in accordance with provisional section 3 of Law no. 5320 on the entry into force and implementation of the Code of Criminal Procedure ("Law no. 5320"). The applicant's lawyer, who attended the trial for the first time on 23 March 2012, asked the trial court to summon the expert with a view to hearing evidence from her in person, but to no avail.

6. On 22 May 2012 the Batman Criminal Court of First Instance convicted the applicant of electricity theft and breaking the seal on his meter box. He was sentenced to fines of 4,000 Turkish liras (TRY) and TRY 3,000 respectively. His sentence for breaking a seal was final because the fine imposed did not meet the statutory threshold set for appeals at the material time.

7. On 18 September 2012 the applicant lodged his application with the Court.

8. On 13 November 2012 the Chief Public Prosecutor's Office at the Court of Cassation remitted the case file to the trial court owing to a legislative change requiring the reassessment of convictions for electricity theft by the first-instance courts.

9. On 23 November 2012 the Batman Criminal Court of First Instance decided to discontinue the case against the applicant in so far as it concerned his conviction for electricity theft. He lodged an appeal against that decision.

10. On 7 May 2014 the Court of Cassation decided to return the case file to the trial court, holding that there was no judgment which could form the basis of an appeal assessment given that the applicant had not appealed against his conviction for breaking a seal which was, in any event, final, and that the trial court had discontinued the case against him concerning the offence of electricity theft.

THE COURT'S ASSESSMENT

I. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION OWING TO THE ABSENCE OF THE PUBLIC PROSECUTOR FROM THE TRIAL

A. Admissibility

1. The parties' submissions

11. The Government raised two preliminary objections based on the non-exhaustion of domestic remedies. Firstly, they submitted that the applicant had not raised his complaint concerning the absence of the public prosecutor from the trial before the domestic courts, including before the Constitutional Court. Secondly, they contended that the applicant had failed to lodge an individual application with the Constitutional Court concerning the decision to discontinue the proceedings against him for electricity theft, which, in their view, could have offered him the possibility of having his complaint examined. Accordingly, they argued that the Court should limit its examination to the remainder of the complaints raised in the present case.

12. The applicant argued that since his final conviction for breaking a seal had been handed down before the entry into force of the right to make an individual application to the Constitutional Court on 23 September 2012, he had been absolved from the need to avail himself of that remedy. He further submitted that he had not lodged an individual application with the Constitutional Court in respect of his conviction for electricity theft because he had had certain doubts concerning his victim status after the trial court's decision to discontinue the proceedings in respect of that offence. Lastly, he submitted that the absence of the public prosecutor from the trial had been due to a statutory provision and that he had been aware that the trial court could not have ensured the presence of the public prosecutor in disregard of the provision in question.

2. The Court's assessment

13. The Court observes that the absence of the public prosecutor from the trial stemmed from a statutory provision, namely provisional section 3 of Law no. 5320, and that the Government did not argue that the domestic courts had been vested with authority to secure the presence of the public prosecutor in the event of an objection based on his or her absence – which would also have been against the clear wording of that provision (compare also *Ozerov v. Russia*, no. 64962/01, § 57, 18 May 2010). On the contrary, the Government submitted that the absence of the public prosecutor had been in conformity with the domestic law applicable at the time. The applicant's failure to raise a complaint on that basis cannot therefore be held against him.

Accordingly, the Government's preliminary objection regarding the fact that the applicant failed to raise his complaint concerning the absence of the public prosecutor from the trial before the criminal courts is dismissed.

14. However, the Court accepts the Government's plea of non-exhaustion concerning the applicant's alleged failure to lodge an individual application with the Constitutional Court in respect of his conviction for the offence of electricity theft, since mere doubts concerning his victim status could not absolve him from the need to have recourse to that remedy (see *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, § 74, 25 March 2014). Accordingly, the Court rejects the complaint under that head in accordance with Article 35 §§ 1 and 4 of the Convention for non-exhaustion of domestic remedies.

15. The above finding has no bearing on the Court's ability to examine the complaint under the present head in respect of the applicant's conviction for breaking a seal on 22 May 2012, because he was not required to lodge an application with the Constitutional Court in respect of that offence, given that its jurisdiction covered judgments that became final as of 23 September 2012. In view of the above, the Government's objection in this regard is dismissed.

16. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention or inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

17. In the applicant's view, the roles of judge and public prosecutor could not be assumed by the same person in a fair trial. However, in the present case, the trial judge had assumed the role of public prosecutor by not respecting the procedure for the discussion of evidence laid down under Article 216 of the Code of Criminal Procedure, which prescribed that final submissions in a trial were to be made by, *inter alia*, the public prosecutor and the accused and his or her lawyer respectively.

(b) The Government

18. In the Government's view, the prosecution did not have to attend the hearing in order to perform its role within the criminal procedure, which could be fulfilled by carrying out an investigation with the purpose of establishing the material truth, submitting all the evidence collected against and in favour of the accused to the trial court, by ensuring that such evidence was discussed and by having recourse to legal remedies against judgments.

19. Moreover, the trial judge in the present case had largely based the decision to convict the applicant on the evidence indicated in the bill of

indictment lodged by the public prosecutor. The trial court had not extended the scope of the criminal proceedings against him by carrying out an on-site examination which had solely been intended for the purpose of detecting and confirming the points indicated in the report concerning the sealing of the applicant's meter box and the illegal electricity use report. Accordingly, there was no indication that the criminal court of first instance had lacked impartiality by confusing its role with that of the public prosecutor.

2. The Court's assessment

20. The general principles concerning the right to be tried by an impartial tribunal as protected under Article 6 § 1 of the Convention have been summarised in *Morice v. France* ([GC], no. 29369/10, §§ 73-78, ECHR 2015). The relevant principles concerning the specific issue of lack of impartiality owing to the absence of a public prosecutor from trial may be found in *Karelin v. Russia* (no. 926/08, §§ 53-57, 20 September 2016, with further references).

21. The Court notes at the outset that there is nothing to cast doubt on the subjective impartiality of the judge of the Batman Criminal Court of First Instance. Accordingly, it will seek to ascertain whether the applicant could be said to have had objectively justified fears as regards the objective impartiality of the same judge on account of the absence of a public prosecutor from his trial.

22. In that connection, the Court reiterates that where an oral hearing is judged opportune for the judicial determination of a "criminal charge" against a defendant and where, having been afforded an adequate opportunity to attend, the defence has not validly waived it, the presence of a prosecuting party is, as a rule, "appropriate" in order to avert legitimate doubts that may otherwise arise in relation to the impartiality of the court (see *Karelin*, cited above, § 76). While the trial court judges are the ultimate guardians of criminal proceedings, it is normally the task of a public authority in a case of public prosecution to present and substantiate the criminal charge with a view to adversarial argument with the other party or parties (see *Karelin*, cited above, § 77).

23. In the present case, no public prosecutor took part in the applicant's trial which was held before the Batman Criminal Court of First Instance and which resulted, *inter alia*, in his conviction for breaking a seal. The legislative basis for this was Law no. 5320, which excluded the participation of the public prosecutor September 2020. That was so even though the Code of Criminal Procedure did not provide for a trial procedure from which the public prosecutor was absent. The Government did not contest this but argued that the public prosecutor did not have to attend the trial to be able to perform his or her duties.

24. Be that as it may, in the present case, the trial court read the bill of indictment to the applicant, obtained his defence submissions *vis-à-vis* the

accusations and proceeded to examine the evidence submitted by the public prosecutor. Moreover, it decided, of its own motion, to carry out an on-site examination prior to holding the first hearing in the case and did not notify the applicant – who was detained in prison in respect of a separate offence unrelated to the present case – of its decision to do so. In the course of the on-site examination, the trial court heard evidence from an official working for the electricity supplier who had drawn up an illegal electricity use report against the applicant, and an expert examined the applicant's meter box and made notes, which were later submitted to the court as an expert opinion and which contained incriminatory statements in respect of the applicant based on the on-site examination. Moreover, and more importantly, when the applicant's privately retained counsel (who appeared for the first time at the fourth hearing held on 23 March 2012) asked the trial court to summon the expert with a view to examining her in person at the hearing, it dismissed that request, holding that it would have no bearing on the outcome of the case.

25. While it is true that some of the actions undertaken by the trial court judge were aimed at verifying the evidence already referred to by the public prosecutor in the bill of indictment, the Court is unable to conclude that the above courses of action could be reduced to "the verification of evidence", as contended by the Government. In fact, the trial court judge effectively took evidence from an expert whose evidence did not form part of the bill of indictment and later admitted it into evidence before convicting the applicant. In doing so, the judge did not enable the applicant or his lawyer to examine the expert in their presence. While the trial court did not explicitly cite that report in its reasoned judgment, its choice of words "having regard to the case file" shows that it cannot be ruled out that the expert report had a bearing on the outcome of the case.

26. In the Court's view, the above-mentioned circumstances show that the trial court confused the roles of public prosecutor and judge to such an extent as to give rise to objectively justified fears about the trial court judge's impartiality.

27. Lastly, the Court is unable to accept the Government's argument regarding the absence of public prosecutors from relatively simple cases tried by criminal courts of first instance, since the right to a fair administration of justice nevertheless holds such a prominent place (see *Delcourt v. Belgium*, 17 January 1970, § 25, Series A no. 11) that it cannot be sacrificed for the sake of expedience. In any event, the Court cannot but note that as of 1 September 2020, public prosecutors were required to take part in trials taking place before criminal courts of first instance.

28. There has accordingly been a violation of Article 6 § 1 of the Convention.

II. REMAINING COMPLAINTS

29. The applicant further complained under Article 6 of the Convention about his inability to take part in an on-site examination or to question witnesses. He further claimed that his inability to lodge an appeal against his conviction as the judicial fine imposed did not reach the statutory threshold breached his right of access to a court. In view of the above finding of a violation of Article 6 of the Convention, the Court does not consider it necessary to carry out a separate examination of the admissibility and merits of the applicant's remaining complaints under that provision.

APPLICATION OF ARTICLE 41 OF THE CONVENTION

30. The applicant claimed 1,000 euros (EUR) in respect of pecuniary damage, which was the amount of the fine that he had had to pay, and EUR 6,000 as regards non-pecuniary damage. The applicant further claimed EUR 2,150 for legal fees based on a time sheet drawn up by his lawyer, corresponding to twenty-one and a half hours of legal work at an hourly rate of EUR 100 and a further EUR 11 for the costs and expenses he had incurred.

31. The Government contested those claims.

32. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim. However, having regard to the principle of *non ultra petita,* it awards the applicant 6,000 EUR in respect of non-pecuniary damage, plus any tax that may be chargeable. The Court further reiterates that the most appropriate form of redress would be a retrial in accordance with the requirements of Article 6 of the Convention, should the applicant so request (see *Soytemiz v. Turkey*, no. 57837/09, §§ 63-64, 27 November 2018).

33. Having regard to the documents in its possession, the Court considers it reasonable to award the claimed sum in respect of costs and expenses (EUR 2,161) in full, plus any tax that may be chargeable to the applicant.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* admissible the complaint under Article 6 § 1 of the Convention concerning the lack of impartiality of the trial court owing to the absence of the public prosecutor from the trial in so far as it concerned the applicant's conviction for breaking a seal, and declares inadmissible the same complaint in so far as it concerned the proceedings for the offence of electricity theft;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention on account of the lack of impartiality of the trial court in so far as it concerned the applicant's conviction for breaking a seal;

3. *Holds* that there is no need to examine the admissibility and merits of the remaining complaints;

4. *Holds*
   (a) that the respondent State is to pay the applicant, within three months, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
      (i) EUR 6,000 (six thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 2,161 (two thousand one hundred and sixty-one euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 20 February 2024, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Dorothee von Arnim Deputy Registrar	Pauliine Koskelo President