

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

SECOND SECTION

CASE OF YILMAZ v. TÜRKİYE

(Application no. 19202/11)

JUDGMENT

STRASBOURG

9 May 2023

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



In the case of Yılmaz 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. 19202/11) 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 25 March 2011 by a Turkish national, Mr Mithat Yılmaz ("the applicant"), who was born in 1973, lives in Erzurum and was initially represented by Ms Şenal Sarıhan, a lawyer practising in Ankara, and later by Mr Ü. Kılınç, a lawyer practising in Strasbourg, whom the applicant appointed as his representative by means of an authority form sent to the Court by a letter dated 22 December 2021;

the decision to give notice of the complaint under Article 6 § 1 of the Convention concerning the alleged unfairness of criminal proceedings 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, and to declare the remainder of the application inadmissible;

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 11 April 2023,

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 against the applicant on account of the loss of the main folder and some other documents from the physical case file at the appeal stage of proceedings and the allegedly flawed appellate review carried out by the Court of Cassation in the absence of those documents, which included, *inter alia*, the applicant's appeal (*gerekçeli temyiz dilekçesi*) in which his grounds of appeal were set out.

2. On 16 June 2009 the Istanbul Assize Court convicted the applicant on charges of establishment and leadership of a criminal organisation, criminal threat, and unauthorised possession of firearms, and sentenced him to a term of imprisonment. On the same day the applicant's lawyer at the time, S.G., lodged a short notice of appeal (*süre tutum dilekçesi*) against that judgment and on 11 September 2009 she lodged the appeal.

3. On 24 September 2010 the President of the 8th Criminal Division of the Court of Cassation drew up a report in which it was indicated that after the applicant's lawyer (S.A., who had represented him at the appeal stage) had made a second request to obtain a copy of the case file on 16 June 2010, it had come to light that the main folder had been lost and could not be found, despite a comprehensive search having been carried out. The President accordingly asked the Chief Public Prosecutor's Office at the Court of Cassation to reconstruct the case file.

4. According to a report drawn up by the trial court's registrar on 18 October 2010, the main folder had subsequently been reconstructed and included the following items: (i) the bill of indictment dated 27 May 2004, which was certified as a true copy of the original, (ii) copies of the records of the hearings held before the trial court, which bore the signature of the court's clerk and an indication that they had been printed out from the court's IT system, and (iii) the master copy of the trial court's reasoned judgment.

5. On 6 December 2010 the applicant's lawyer asked the trial court to provide him with a list of the contents of all the folders with a view to determining which documents or evidence were missing from the reconstructed file.

6. On 14 December 2010 the Court of Cassation upheld the first-instance court's judgment without mentioning the loss of the main folder from the case file or its partial reconstruction.

7. On 15 February 2011 the applicant's lawyer, after having obtained a list of the contents of all the folders from the trial court, submitted a detailed list of documents which had not been included in the reconstructed case file.

8. On 10 June 2011 the main folder from the case file was found in the Court of Cassation's cellars.

9. The applicant complained that his right to a fair trial under Article 6 § 1 of the Convention had been infringed on the grounds that the Court of Cassation had carried out its appellate review in the absence of the main folder, which had been lost and which had contained many important documents.

THE COURT'S ASSESSMENT

ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

10. The Government contended that the application should be rejected as an abuse of the right of individual application because, according to an intercepted telephone call that the applicant had made in 2004, he had asked a clerk at the Court of Cassation to have a certain file "lost" for some years. The applicant's lawyer fiercely disputed that contention, arguing that it had no relevance to the present case and criticised the Government for attempting to arouse suspicion against the applicant based on presumptions.

11. The Court notes that the telephone call referred to by the Government did not concern the present case in which the trial court delivered its judgment in 2009 and the case file was sent to the Court of Cassation thereafter; thus, the Government's objection based on that call cannot be upheld. Accordingly, it dismisses the Government's preliminary objection.

12. Secondly, the Government submitted that the application had to be declared inadmissible as being manifestly ill-founded because it was aimed at contesting the outcome reached by the domestic courts.

13. The Court considers that the application raises complex issues of facts and law which cannot be determined without an examination on the merits. It finds that the application is neither manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention nor inadmissible on any other grounds and must therefore be declared admissible.

14. The applicant reiterated his complaints.

15. The Government submitted that the evidence forming the basis of the applicant's conviction was at all times in the part of the case files that had not been lost. Moreover, the applicant had not explained whether and, if so, how, the missing documents had affected the overall fairness of the proceedings. In fact, the applicant's lawyers before the Court of Cassation and the Court had been inconsistent as to which documents had been lost; they had only been consistent in respect of, *inter alia*, the appeal. However, in accordance with the Code of Criminal Procedure in force at the material time, the submission of grounds of appeal was optional and a failure to submit such grounds would not result in the dismissal of an appeal. In any event, the Court of Cassation had carried out a thorough review of the case and remedied any prejudice which might have stemmed from the loss of certain documents.

16. Having regard to the contents of the reconstructed case file (see paragraph 4 above), the Court's examination on that point will be limited to the loss of the applicant's appeal, since the applicant neither contested the Government's claim as to which documents were missing, nor specified in a consistent manner what those documents were. The thrust of the legal question is thus whether the appellate review carried out by the Court of Cassation in the absence of the applicant's appeal ran counter to the principle of adversarial procedure under Article 6 § 1 of the Convention.

17. The general principles concerning the principle of adversarial procedure may be found in *Vegotex International S.A. v. Belgium* ([GC], no. 49812/09, § 134, 3 November 2022), and *Murtazaliyeva v. Russia* ([GC], no. 36658/05, § 91, 18 December 2018, with further references). According to that principle, the parties must have the opportunity to make known any evidence needed for their claims to succeed, but also to have knowledge of, and comment on, all evidence adduced or observations filed, with a view to influencing the court's decision (ibid.).

18. In determining whether the applicant was given the opportunity to make known any elements relevant for his appeal to succeed, the Court notes

at the outset that the domestic courts' approach to the issue of lost documents at no point in time included the applicant or his lawyer. The documents in the Court's possession do not demonstrate that either the applicant or his lawyers were informed of the steps taken to reconstruct the main folder. Nor did the Government argue otherwise. Furthermore, once the case file had been reconstructed, it appears that it was not transmitted to the applicant or his lawyers. The applicant could not have inferred what documents formed part of the case file before the Court of Cassation without having been informed of the contents of the reconstructed case file. The trial court took no real steps to inform the applicant or his lawyer that the case file would be reconstructed and to invite them to submit the missing documents. While the report by the trial court's registrar indicated that none of the lawyers involved in the case could be contacted, it is unclear what steps had been taken to that end and why it had not been possible to contact any of those lawyers. It is also not clear what steps had been taken to contact the Bar Association and why any such efforts proved futile.

19. Furthermore, when the Court of Cassation upheld the trial court's judgment, no mention was made of the reconstruction of the case file or its contents.

20. Accordingly, even though the applicant had lodged an appeal in which his grounds of appeal were set out, the domestic courts' above-mentioned stance meant that there was no real opportunity for the applicant to comment, namely to have his appeal examined by the Court of Cassation. The Court cannot uphold the Government's argument that the Court of Cassation carried out a thorough examination of the case without having had regard to the applicant's appeal submissions, irrespective of the fact that the appeals setting out the grounds of appeal were optional under the former Code of Criminal Procedure (compare also *Quadrelli v. Italy*, no. 28168/95, § 34, 11 January 2000). The Court does not need to determine whether that situation gave rise to any prejudice; the existence of a violation is conceivable even in the absence of prejudice (see, *mutatis mutandis*, *Bajić v. North Macedonia*, no. 2833/13, § 59, 10 June 2021, and *Zahirović v. Croatia*, no. 58590/11, § 48, 25 April 2013).

21. In view of the above, and having regard to what was at stake for the applicant, namely his conviction and sentence of imprisonment, the Court concludes that the appellate review conducted in the absence of the applicant's above-mentioned appeal did not comply with the requirements of the principle of adversarial procedure under Article 6 § 1 of the Convention.

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

APPLICATION OF ARTICLE 41 OF THE CONVENTION

23. The applicant did not submit a claim for just satisfaction. Accordingly, there is no call to award him any sum on that account. Notwithstanding that conclusion, the Court 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, § 64, 27 November 2018).

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 6 § 1 of the Convention.

Done in English, and notified in writing on 9 May 2023, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Dorothee von Arnim Deputy Registrar	Pauliine Koskelo President