



A teacher dismissed by emergency legislative decree after the failed *coup d'état* did not exhaust domestic remedies

In its decision in the case of [Zihni v. Turkey](#) (application no. 59061/16) the European Court of Human Rights has unanimously declared the application inadmissible. The decision is final.

The case concerned the dismissal of a teacher from his duties by a legislative decree issued by the Council of Ministers in the context of the state of emergency introduced after the attempted *coup d'état* of 15 July 2016.

The Court noted that Mr Zihni had lodged his application without having first brought proceedings before the national courts. It therefore rejected the application for non-exhaustion of domestic remedies (Article 35 §§ 1 and 4 of the Convention).

The Court noted that there were no special circumstances in the present case absolving Mr Zihni from the obligation to make use of the domestic remedies available to him under Turkish law, namely an administrative action and an individual appeal to the Constitutional Court.

The Court also considered that the fact that the Constitutional Court had ruled on the constitutionality of a law, in the context of a challenge to constitutionality, did not prevent members of the public from lodging an individual appeal before that court against specific decisions taken in application of that particular law's provisions. The Court further noted that the Constitutional Court, which had received thousands of individual appeals, had not yet ruled on whether it had jurisdiction to examine the appeals lodged against the measures taken under the legislative decrees.

Principal facts

The applicant, Akif Zihni, is a Turkish national who was born in 1976 and lives in Trabzon (Turkey).

Mr Zihni had been a secondary school teacher since 2000. On 25 July 2016 he was suspended from his duties as deputy headmaster of the Anatolia Gazi High School in Ortahisar (Trabzon) in the context of the measures taken after the state of emergency was decreed on 21 July 2016.

On 1 September 2016, following the enactment of legislative decree no. 672 concerning the dismissal of 50,875 civil servants regarded as belonging to or being affiliated or connected to terrorist organisations or to organisations, entities or groups which the National Security Council had found to be engaged in activities harmful to the State, Mr Zihni, whose name appeared at number 26,897 on the list appended to the legislative decree, was dismissed from his duties.

This legislative decree also provided that the dismissed civil servants could no longer be reinstated, and their passports were cancelled.

Complaints, procedure and composition of the Court

The application was lodged with the European Court of Human Rights on 26 September 2016.

Relying on Article 6 (right of access to a court), Article 13 (right to an effective remedy) and Article 15 (derogation in time of emergency), Mr Zihni complained that he did not have access to a court in order to assert his rights in relation to the dismissal decision taken against him.

Relying on Article 6 § 2 (presumption of innocence), he complained of a violation of the right to the presumption of innocence, indicating that, without there having been any criminal proceedings, he

had been dismissed for belonging or being affiliated to terrorist organisations or to organisations, entities or groups which the National Security Council had found to be engaged in activities harmful to national security. Under Article 6 § 3 (a) (right to be informed promptly about the accusation), he complained that he had not been informed about the nature and cause of the accusation against him.

Relying on Article 7 (no punishment without law), Mr Zihni also alleged that he had been dismissed from his duties for acts that did not constitute an offence at the time they were committed. Relying on Article 8 (right to respect for private and family life), Mr Zihni complained about his dismissal for belonging to or being affiliated to the above-mentioned organisations, entities or groups in so far as it entailed a violation of his right to respect for his family life. Under Article 14 (prohibition of discrimination), he also complained about having suffered discrimination on account of his dismissal.

The decision was given by a Chamber of seven, composed as follows:

Julia **Laffranque** (Estonia), *President*,
Işıl **Karakaş** (Turkey),
Paul **Lemmens** (Belgium),
Valeriu **Griţco** (the Republic of Moldova),
Ksenija **Turković** (Croatia),
Jon Fridrik **Kjølbro** (Denmark),
Georges **Ravarani** (Luxembourg), *Judges*,

and also Stanley **Naismith**, *Section Registrar*.

Decision of the Court

The Court noted that Mr Zihni had lodged his application without having first brought proceedings before the national courts. To explain his failure to comply with this rule, the applicant alleged that no remedies were available to him in order to challenge the dismissal decision, since no appeal was possible against the measures taken by legislative decree in the context of the state of emergency. He also indicated that two members of the Constitutional Court, as well as lawyers working in that court, had been arrested and detained on remand. The applicant submitted that in such a context the Constitutional Court was not in a position to reach a decision impartially.

The Court noted that under Turkish law, judicial review of the legislative decrees adopted during a state of emergency had always been a subject of controversy in legal writings and in the case-law of the domestic courts. In its judgment of 4 November 2016, the Supreme Administrative Court had examined an application for judicial review lodged by a judge who had been dismissed following a decision issued by the Supreme Council of Judges and Public Prosecutors under emergency legislative decree no. 667: although the Supreme Administrative Court had found that it did not have jurisdiction to examine the merits of that application, it had remitted the case to the first-instance court, holding that it was primarily for the administrative courts to examine such applications. Without speculating on the outcome of that case, which was to date still pending before the national courts, the Court noted that it had not been shown that at the relevant time Mr Zihni did not have effective access to this remedy, an administrative action, in order to assert his rights.

Moreover, Article 148 § 3 of the Constitution granted the Constitutional Court jurisdiction to examine, after exhaustion of the ordinary remedies, applications lodged by members of the public who considered that they had been deprived of their fundamental rights and freedoms as guaranteed by the Constitution and by the Convention and its protocols. Many individuals in the same situation as Mr Zihni had lodged individual applications before the Constitutional Court against the measures they complained of. Even if that court, in its four leading judgments, had departed from its case-law and had decided that it did not have jurisdiction to examine the constitutionality of

legislative decrees nos. 668, 669, 670 and 671, it was nonetheless the case that those judgments formed part of the review of whether these decrees were compatible with the Constitution.

The Court noted that the fact that the Constitutional Court had ruled on the constitutionality of a law, in the context of a challenge to constitutionality, did not prevent members of the public from lodging an individual appeal before that court against specific decisions taken in application of the provisions of that particular law. In addition, the Constitutional Court, which had received thousands of individual appeals, had not yet ruled on whether it had jurisdiction to examine those appeals, which had been lodged against the measures taken under the legislative decrees. Without speculating on the outcome of the individual appeals lodged by these persons, which were still pending before the Constitutional Court, the Court noted that it had not been shown that at the relevant time the remedy of an individual application, like that of an administrative action, had not been accessible in practice to Mr Zihni.

As to whether there existed in the present case special circumstances that could have dispensed Mr Zihni from the requirement to avail himself of the above-mentioned remedies, the Court considered that the arguments submitted by the applicant on this point were not such as to cast doubt on the effectiveness of these remedies, especially that of an individual application to the Constitutional Court. In the Court's opinion, the mere fact that Mr Zihni had fears as to the impartiality of the Constitutional Court's judges did not relieve him of the obligation to lodge an application before that court, so as to comply with the requirements of Article 35 § 1 of the Convention.

In consequence, the Court could see no special circumstance which could have dispensed Mr Zihni from the obligation to use the domestic remedies available to him under Turkish law, and considered that the applicant had not taken the appropriate steps to enable the domestic courts to fulfil their fundamental role in the Convention protection system, that of the European Court being subsidiary to theirs. Accordingly, the Court dismissed the complaint for failure to exhaust the domestic remedies (Article 35 §§ 1 and 4 of the Convention).

The decision is available only in French.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.