



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

SECOND SECTION

CASE OF MEHMET ALİ AYHAN AND OTHERS v. TURKEY

(Applications nos. 4536/06 and 53282/07)

JUDGMENT

*This version was rectified on 12 August 2020
under Rule 81 of the Rules of Court*

STRASBOURG

4 June 2019

FINAL

07/10/2019

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

In the case of Mehmet Ali Ayhan and Others v. Turkey,

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

Robert Spano, *President*,

Işıl Karakaş,

Valeriu Griţco,

Egidijus Kūris,

Ivana Jelić,

Arnfinn Bårdsen,

Darian Pavli, *judges*,

and Stanley Naismith, *Section Registrar*,

Having deliberated in private on 14 May 2019,

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

PROCEDURE

1. The case originated in two applications (nos. 4536/06 and 53282/07) against the Republic of Turkey lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by five Turkish nationals, Mr Mehmet Ali Ayhan, Mr Mehmet Aytunç Altay, Mr Cengiz Kumanlı, Mr Mehmet Çiftçi and Zeki Şahin (“the applicants”) on 23 November 2005 and 21 November 2007 respectively.

2. The applicants were represented by Mrs G. Tuncer (in application no. 4536/06) and by Mr F. A. Tamer (in application no. 53282/07), lawyers practising in Istanbul. The Turkish Government (“the Government”) were represented by their Agent.

3. The applicants alleged that the domestic authorities had hindered the exercise of their right of individual petition.

4. On 5 September 2017 notice of the complaints concerning the alleged hindrance of the right of individual application was given to the Government and the remainder of the applications was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

THE FACTS**I. THE CIRCUMSTANCES OF THE CASE**

5. Details of the applicants can be found in the appendix.

6. At the time of the events giving rise to the applications, the applicants were all serving prison sentences in the Edirne F-type Prison.

A. Background information

7. On 21 June 2005 the disciplinary board of the Edirne F-Type Prison decided to intercept letters sent by an association, D.D. (“the association”), to the applicants on the ground that their content included propaganda for an illegal organisation and referred to activities in support of the illegal organisation and of people on a “fast to the death”.

8. On 28 June 2005 the Edirne Enforcement Court dismissed an objection lodged by the second applicant against that decision.

9. On 18 July 2005 the Edirne Assize Court upheld the Edirne Enforcement Court’s decision.

10. The applicants lodged an initial individual application with the Court (no. 45443/05) raising substantive complaints under the Convention, which was subsequently declared inadmissible on 12 October 2017 under the single-judge procedure.

1. Application no. 4536/06

11. On 14 September 2005 Mr Tamer, the applicants’ lawyer at the material time, sent a letter to the applicants asking them to fill out and sign the forms of authority that were enclosed with the letter, to authorise him to lodge an application on their behalf with the Court concerning the disciplinary board’s decision to intercept the letters sent by the association (see paragraph 7 above). He explained that he was sending his letter by registered mail because he had not received a reply to his previous letter with the same content. He also mentioned that the forms of authority were not required by the Court immediately on bringing an application and that they could be submitted at a later stage. In addition, he asked the applicants to inform him in the event that they did not want to pursue their application before the Court.

12. The administration of the Edirne F-Type Prison believed the contents of the letter of 14 September 2005 to be suspect and therefore lodged a request with the public prosecutor on 21 September 2005 for a decision to refer the matter to an enforcement court to determine whether the material sent to the applicants included objectionable content.

13. On 25 October 2005 the Edirne Enforcement Court allowed an application by the prosecutor and examined the contents of the letter. It decided that, under section 5 of Law no. 5351, the letter and the forms of authority should not be handed over to the applicants because it considered that Mr Tamer’s request for the applicants to complete the forms of authority for the purpose of bringing an application before the Court did not constitute a permitted professional activity (*serbest çalışma hayatına aykırılık*) but instead pressurised and incited the applicants to institute proceedings. The decision was served on the applicants on 17 November 2005.

14. On 29 November 2005 the Edirne Assize Court dismissed an objection lodged by the second, fourth and fifth applicants and upheld the Edirne Enforcement Court's decision of 25 October 2005.

15. On 1 December 2005 Mr Tamer filed a complaint with the Edirne Chief Public Prosecutor's Office against the governor of the Edirne F-Type Prison on the ground that he had neglected his official duties by not forwarding Mr Tamer's letter of 14 September 2005 to the applicants.

16. On 26 December 2005 the Edirne Chief Prosecutor's office decided not to prosecute the governor in relation to Mr Tamer's complaints, since the letter in question had been withheld from the applicants as a result of the implementation of the Edirne Enforcement Court's decision of 25 October 2005.

17. An objection to the prosecutor's decision, lodged by Mr Tamer, was dismissed by the Kırklareli Assize Court on 19 April 2006.

18. In the meantime, on 23 November 2005 Mr Tamer wrote to the Committee of Ministers of the Council of Europe informing it that the Edirne F-Type Prison administration's refusal to give the applicants the letter in question had impaired his ability to lodge an application with the Court and constituted a violation of the European Agreement relating to Persons Participating in Proceedings of the European Court of Human Rights.

19. On 22 February 2006 the Registry of the Court sent a letter to Mr Tamer acknowledging receipt of his letter dated 23 November 2005, addressed to the Committee of Ministers of the Council of Europe, as indicating the applicants' intention to lodge an application with the Court and invited him to submit a duly completed application form.

20. On 19 October 2006 the applicants' representative sent an application form to the Court. Their application was registered as application no. 4536/06.

2. *Application no. 53287/07*

21. On 30 March 2007 the Registry of the Court sent a standard letter to the applicants' representative in connection with application no. 4536/06 confirming, *inter alia*, receipt of their application and requesting the representative to provide forms of authority in connection with that application.

22. On 18 April 2007 the applicants' representative sent a copy of the Court's letter together with forms of authority to the applicants and requested them to fill out the forms of authority in connection with application no. 4536/06.

23. The Edirne F-Type Prison administration believed the contents of the letter of 18 April 2007 to be suspect and therefore lodged a request with the public prosecutor on 24 April 2007 for a decision to refer the letter to an

enforcement court to determine whether the material being sent to the applicants included objectionable content.

24. On 9 May 2007 the Edirne Enforcement Court allowed an application by the prosecutor and examined the contents of the letter. It decided that, under section 5 of Law no. 5351, the letter enclosing the forms of authority should not be handed over to the applicants, on the same grounds as those given in its previous decision dated 25 October 2005. The decision was served on the applicants on 18 May 2007.

25. On 1 June 2007 the Edirne Assize Court dismissed an objection lodged by the second and fourth applicants and upheld the Edirne Enforcement Court's decision.

26. On 21 November 2007 the applicants' representative lodged another application with the Court, complaining that the decision of 9 May 2007 had violated the applicants' right to effectively pursue their application with the Court. Their application was registered as application no. 53287/07.

B. Developments after the introduction of the applications

27. All the applicants submitted forms of authority in respect of each of the present applications to the Court on 5 April and 21 October 2010 respectively.

II. RELEVANT LAW

A. Domestic legislation

1. Law no. 5275 on the enforcement of sentences and preventive measures, as amended by Law no. 5351

28. The relevant provisions of Law no. 5275 on the enforcement of sentences and preventive measures as in force at the material time provided as follows:

Section 59 – Right to consultation with a lawyer or a notary

“...

(2) Consultation with a lawyer or a notary may be carried out in working hours except for weekends and public holidays, in a place reserved for that purpose within the sight but not hearing of officials.

...

(4) [as amended by section 5 of Law no. 5351] A lawyer's documents and files related to defence and his or her records of the meetings with his or her client shall not be subject to examination. However, if it emerges from documents or other evidence that visits by lawyers to a person convicted of the offences set out in section 220 of the Criminal Code or sub-chapters 4 and 5 of Chapter 2 of the Criminal Code are serving as a means of communication with a terrorist organisation or of committing a

crime or otherwise jeopardising the security of the prison, the enforcement court may, at the application of the prosecution, impose [the following measures]: presence of an official during the lawyer's visits; verification of documents exchanged between the prisoner and his or her lawyers during such visits; and/or confiscation of all or some of these documents by the judge.

..."

Section 68 – Right to send and receive letters, faxes and telegrams

“(1) With the exception of the restrictions set forth in this section, convicted prisoners shall have the right, at their own expense, to send and receive letters, faxes and telegrams.

(2) The letters, faxes and telegrams sent or received by prisoners shall be monitored by the reading committee in those prisons that have such a body, or, in those which do not, by the highest authority in the prison.

(3) If letters, faxes and telegrams to prisoners are a threat to order and security in the prison, single out serving officials as targets, permit communication with terrorist or criminal organisations, contain false or misleading information likely to cause panic in individuals or institutions, or contain threats or insults, they shall not be forwarded to the addressee.

Nor shall [letters, faxes and telegrams of the type described above] written by prisoners be dispatched.

(4) Letters, faxes and telegrams sent by prisoners to authorities or to lawyers for the purpose of their defence are not subject to monitoring. ”

2. Prison Regulations

29. Details of the relevant provisions of the prison regulations in force at the material time can be found in *Tan v. Turkey* (no. 9460/03, §§ 13-14, 3 July 2007) and *Mehmet Nuri Özen and Others v. Turkey* (nos. 15672/08 and 10 others, §§ 30-34, 11 January 2011).

3. Lawyers Act (Law no. 1136)

30. Section 55 sets out a prohibition on legal advertising as follows:

“Lawyers are prohibited from advertising or engaging in any conduct which may be regarded as soliciting for the purpose of offering their services ...”

B. International law

31. Article 3 of the European Agreement relating to Persons Participating in Proceedings of the European Court of Human Rights, ratified by Turkey on 6 October 2004 and in force as of 1 December 2004, reads as follows:

“1. The Contracting Parties shall respect the right of the persons referred to in paragraph 1 of Article 1 of this Agreement to correspond freely with the Commission and the Court.

2. As regards persons under detention, the exercise of this right shall in particular imply that:

(a) if their correspondence is examined by the competent authorities, its despatch and delivery shall nevertheless take place without undue delay and without alteration;

(b) such persons shall not be subject to disciplinary measures in any form on account of any communication sent through the proper channels to the Commission or the Court;

(c) such persons shall have the right to correspond, and consult out of hearing of other persons, with a lawyer qualified to appear before the courts of the country where they are detained in regard to an application to the Commission, or any proceedings resulting therefrom.

3. In application of the preceding paragraphs, there shall be no interference by a public authority except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, for the detection or prosecution of a criminal offence or for the protection of health.”

THE LAW

I. JOINDER OF THE APPLICATIONS

32. Having regard to the similar subject matter of the applications, the Court finds it appropriate to examine them jointly in a single judgment in accordance with Rule 42 § 1 of the Rules of Court.

II. ALLEGED VIOLATION OF ARTICLE 34 OF THE CONVENTION

33. The applicants in the first application, relying on Article 6 § 1 and Article 13 of the Convention, and in the second application, relying on Article 6 § 1 and Articles 8 and 13 of the Convention, complained that the domestic authorities had intercepted their correspondence with their representatives concerning their prospective and pending applications before the Court.

The Court reiterates that the scope of a case referred to it in the exercise of the right of individual application is determined by the applicant's complaint. A complaint consists of two elements: factual allegations and legal arguments. By virtue of the *jura novit curia* principle the Court is not bound by the legal grounds adduced by the applicant under the Convention and the Protocols thereto and has the power to decide on the characterisation to be given in law to the facts of a complaint by examining it under Articles or provisions of the Convention that are different from those relied upon by the applicant (see *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, § 126, ECHR 2018). In the present case the Court considers that the applicants' complaints should be examined from the standpoint of Article 34 of the Convention, which reads:

“The Court may receive applications from any person ... claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties undertake not to hinder in any way the effective exercise of this right.”

A. The parties' submissions

34. The Government raised a number of objections concerning the admissibility of the applications. Firstly, they submitted that lodging a criminal complaint with the public prosecutor against the governor of the Edirne Prison for intercepting the letters could not be considered an effective remedy for the purpose of application no. 4356/06 and that therefore the six-month time-limit for lodging an application with the Court could not start to run from the public prosecutor's decision not to prosecute. They submitted that an objection, which was an ordinary remedy against a decision of the enforcement court, had been available but that the first and third applicants had not filed an objection against either of the decisions of the Edirne Enforcement Court of 25 October 2005 and 9 May 2007. They further argued that the date on which application no. 4536/06 had been lodged should not be taken as 23 November 2005, when the applicants' representative had sent a letter to the Committee of Ministers, but as 19 October 2006, when the applicants' representative had sent an application form to the Court (see paragraphs 18 and 20 above). They therefore submitted that the application, in so far as it had been lodged by the first and third applicants, should in any event be rejected for non-compliance with the six-month rule since the impugned decisions of the Edirne Enforcement Court had been served on those applicants on 17 November 2005 and 18 May 2007, but the applications had been lodged with the Court only on 19 October 2006 and 21 November 2007. The Government further argued that none of the applicants could claim to be victims since they had ultimately been able to submit forms of authority to the Court (see paragraph 27 above).

35. Concerning the merits of the application, the Government argued that all of the applicants had been convicted of terrorism-related offences and the lawyers who had sent forms of authority to them had not submitted any information to confirm whether they had actually been retained by the applicants to represent them within the scope of any investigation or pending litigation prior to the letters being seized. According to the Government, it was evident from the letters sent by the applicants' representatives that they had been attempting to contact the applicants before they had expressed any wish to lodge an application with the Court. In that respect the Government argued that such conduct on the part of the applicants' representatives could be regarded as soliciting, which was prohibited under domestic law (see paragraph 30 above). Finally, they argued that the interception of the letters had had a legal basis in domestic

law, specifically section 59(4) of Law no. 5275, which provided that certain restrictions could be applied by enforcement courts to correspondence between prisoners convicted of terrorism-related offences and their lawyers. Lastly, they argued that Article 34 of the Convention could not be relied on alone but only in conjunction with a substantive complaint under the Convention or its Protocols.

36. In response, the applicants contended that their lawyers had defended their interests before both the national authorities and the Court and that they had not acted with the intention of soliciting business when contacting the applicants to obtain the forms of authority. They further argued that the fact that not all of them had objected to the decision of the enforcement court should not be regarded as a failure to exhaust domestic remedies because, had the assize court granted the applicants' objection, the impugned decision would have been quashed in respect of all of the applicants. They also argued that their communication with their lawyers should have remained confidential and that there had been no basis for the interception of those letters, which had only had the purpose of informing them of their rights under the Convention.

B. The Court's assessment

37. According to the Court's case-law, a complaint under Article 34 of the Convention is of a procedural nature and therefore does not give rise to any issue of admissibility under the Convention (see, among other authorities, *Rasul Jafarov v. Azerbaijan*, no. 69981/14, § 176, 17 March 2016, with further references). The Government's objections concerning non-exhaustion of remedies and non-compliance with the six-month time limit are therefore not relevant.

38. As regards the Government's objection that Article 34 cannot be relied on alone, the Court observes that the applicants lodged an initial substantive complaint before the Court, concerning the interception of the letters sent to them by the association (see paragraphs 7-10 above). Their subsequent applications to the Court, which concerned the exercise of their right of individual petition in connection with their first application, were registered under different numbers and were treated separately. The fact that their original complaint was declared inadmissible does not preclude the Court from examining the complaints made under Article 34 of the Convention separately.

39. As regards the merits, the Court reiterates that it is of the utmost importance for the effective operation of the system of individual petition instituted by Article 34 that applicants or potential applicants should be able to communicate freely with the Court without being subjected to any form of pressure from the authorities to withdraw or modify their complaints (see, among other authorities, *Akdivar and Others v. Turkey*, 16 September

1996, § 105, *Reports* 1996-IV). In this context, “pressure” includes not only direct coercion and flagrant acts of intimidation, but also other improper indirect acts or contacts designed to dissuade or discourage applicants from pursuing a Convention remedy (see *Kurt v. Turkey*, 25 May 1998, §§ 159-60, *Reports* 1998-III).

40. Furthermore, whether or not contacts between the authorities and an applicant are tantamount to unacceptable practice from the standpoint of Article 34 must be determined in the light of the particular circumstances of the case. In this respect, regard must be had to the vulnerability of the complainant and his or her susceptibility to influence exerted by the authorities (see *Konstantin Markin v. Russia* [GC], no. 30078/06, § 159, ECHR 2012 (extracts)). An applicant’s position might be particularly vulnerable when he is held in custody with limited contact with his family or the outside world (see *Cotleț v. Romania*, no. 38565/97, § 71, 3 June 2003, and *Naydyon v. Ukraine*, no. 16474/03, § 63, 14 October 2010, with further references). In that connection the Court considers that applicants who are detained or serving their sentences are in a particularly vulnerable position, as they are dependent in their correspondence with the Court – and with the rest of the outside world – on the prison administration (see *Chaykovskiy v. Ukraine*, no. 2295/06, § 88, 15 October 2009).

41. Lastly, and in response to the Government’s argument that the applicants were nevertheless able to submit forms of authority to the Court and that this fact should be taken into account when considering the complaint, the Court reiterates that a failure by the respondent Government to comply with their procedural obligation under Article 34 of the Convention does not necessarily require that the alleged interference should have actually restricted, or had any appreciable impact on, the exercise of the right of individual petition. The Contracting Party’s procedural obligations under Articles 34 and 38 of the Convention must be enforced irrespective of the eventual outcome of the proceedings, and in such a manner as to avoid any actual or potential chilling effect on the applicants or their representatives (see, among other authorities, *Rasul Jafarov v. Azerbaijan*, cited above, § 185).

42. The Court notes that the circumstances of the present case do not involve the opening or interception of letters dispatched from the Court to the applicants. The case concerns letters sent to the applicants by their representatives enclosing forms of authority to be completed for the purpose of lodging and then subsequently finalising their application with the Court. Furthermore, it is not in dispute that those letters were not handed over to the applicants and that the forms of authority were withheld from the applicants by the decisions of the Edirne Enforcement Court on the ground that the letters could not be categorised as falling within a lawyer’s permitted professional activities and that the applicants’ lawyers had allegedly put pressure on the applicants to lodge a case before the Court.

Therefore, the issue before the Court is whether the impediments to the correspondence between the applicants and their representatives, by means of the decisions of the domestic courts, amounted to a failure to comply with the respondent State's obligation not to hinder in any way the effective exercise of the right of petition under Article 34 of the Convention.

43. In that connection, the Court has already found in a number of cases that measures limiting an applicant's contacts with his representative may constitute interference with the exercise of the applicant's right of individual petition (see, for example, *Shtukurov v. Russia*, no. 44009/05, § 140, ECHR 2008, where a ban on a lawyer's visits, coupled with a ban on telephone calls and correspondence, was held to be incompatible with the respondent State's obligations under Article 34 of the Convention, and *Zakharkin v. Russia*, no. 1555/04, §§ 157-60, 10 June 2010, where the applicant's contacts with his representative before the Court had been restricted on the grounds that the representative in question was not a professional advocate and did not belong to any Bar association).

44. The Court notes that in the present case the domestic courts found that the lawyers had put pressure on the applicants to lodge a case before the Court by sending the letters and authority forms in question and that this conduct was not in line with permitted professional activities. The Government submitted in that connection that the lawyers were trying to solicit business by contacting the applicants before the applicants had expressed a wish to complain about the authorities' decision before the Court. The Court notes however that the Government's arguments are not supported by the decisions of the domestic courts which did not make any finding on that basis, namely whether the lawyers were retained by the applicants prior to their decision to lodge a complaint with the Court. Likewise the domestic courts did not refer to the relevant provisions of the Lawyers Act which prohibit lawyers from soliciting business. In the absence of such findings by the domestic courts, and having regard to the fact that the applicants claimed that their lawyers in question had been their lawyers prior to the interception of the letters sent by the association, the Court accordingly rejects the Government's arguments on this issue. On the other hand, the Court considers it unacceptable from the standpoint of the protection of the right of individual petition that the domestic courts took it upon themselves to decide for the applicants whether or not they should lodge an application with the Court. It goes without saying that it is for the individual to decide whether to take a course of action concerning an alleged violation of his or her Convention rights. It is also of particular concern to the Court that the domestic court which ordered the measure to intercept the letters addressed to the applicants was the very same court in respect of whose decisions the applicants wanted to complain in the context of their original application to the Court. The Court finds that by acting as

they did, the domestic courts attempted to discourage, or even prevent, the applicants from pursuing a Convention remedy.

45. In view of the foregoing, the Court considers that the respondent State has failed to comply with its obligations under Article 34 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

46. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

47. The applicants each claimed 20,000 euros (EUR) in respect of non-pecuniary damage. They also claimed a total of EUR 720 in respect of domestic court expenses and EUR 3,220 in respect of lawyers’ fees in each application without submitting any supporting documents.

48. The Government objected and argued that the amounts claimed were excessive, unfounded and unsubstantiated.

49. The Court observes that in the present case it has established that the respondent Government have failed to comply with their obligations under Article 34 of the Convention. Accordingly, it finds that the applicants have suffered non-pecuniary damage which cannot be compensated solely by the above findings. Therefore, deciding on an equitable basis and taking into account the nature of the violation, it awards each applicant EUR 4,500 in respect of non-pecuniary damage.

50. According to the Court’s case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. Regard being had to the fact that the applicants failed to submit any documents in support of their claims, the Court rejects the applicants’ claims for costs and expenses.

51. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Decides* to join the applications;
2. *Holds* that the respondent Government have failed to comply with their obligations under Article 34 of the Convention;
3. *Holds*

- (a) that the respondent State is to pay each applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 4,500 (four thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;
- (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;

4. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 4 June 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stanley Naismith
Registrar

Robert Spano
President

APPENDIX

No.	Application no.	Applicant's name date of birth	Represented by
1.	4536/06	Mehmet Ali AYHAN 01/01/1961 Mehmet Aytunç ALTAY 08/06/1956 ¹ Cengiz KUMANLI 03/08/1959 Mehmet ÇİFTÇİ 01/10/1952 Zeki ŞAHİN 09/04/1963	G. Tuncer
2.	53282/07	Mehmet Ali AYHAN 01/01/1961 Mehmet Aytunç ALTAY 08/06/1956 Cengiz KUMANLI 03/08/1959 Mehmet ÇİFTÇİ 01/10/1952	F. A. Tamer

¹ Rectified on 12 August 2020: the date of birth of applicant Mehmet Aytunç Altay was “20/03/1951”.