



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

COURT (CHAMBER)

CASE OF CALOGERO DIANA v. ITALY

(Application no. 15211/89)

JUDGMENT

STRASBOURG

21 October 1996

In the case of Calogero Diana v. Italy¹,

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of Rules of Court B², as a Chamber composed of the following judges:

Mr R. RYSSDAL, *President*,

Mr THÓR VILHJÁLMSSON,

Mr F. GÖLCÜKLÜ,

Mr C. RUSSO,

Mr A.N. LOIZOU,

Mr A.B. BAKA,

Mr B. REPIK,

Mr P. KURIS,

Mr U. LOHMUS,

and also of Mr H. PETZOLD, *Registrar*, and Mr P.J. MAHONEY, *Deputy Registrar*,

Having deliberated in private on 24 May and 21 October 1996, Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case was referred to the Court by the Italian Government ("the Government") on 19 June 1995, within the three-month period laid down by Article 32 para. 1 and Article 47 of the Convention (art. 32-1, art. 47). It originated in an application (no. 15211/89) against the Italian Republic lodged with the European Commission of Human Rights ("the Commission") under Article 25 (art. 25) by an Italian national, Mr Calogero Diana, on 30 May 1989. The Government's application referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Italy recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the application was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Articles 8, 6 para. 3 (b) and 13 of the Convention (art. 8, art. 6-3-b, art. 13).

2. In response to the enquiry made in accordance with Rule 35 para. 3 (d) of Rules of Court B, the applicant stated that he wished to take part in

¹ The case is numbered 56/1995/562/648. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

² Rules of Court B, which came into force on 2 October 1994, apply to all cases concerning the States bound by Protocol No. 9 (P9).

the proceedings and designated the lawyer who would represent him (Rule 31). The lawyer was given leave by the President to use the Italian language (Rule 28 para. 3).

3. The Chamber to be constituted included ex officio Mr C. Russo, the elected judge of Italian nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 4 (b)). On 13 July 1995, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr Thór Vilhjálmsson, Mr F. Gölcüklü, Mr R. Pekkanen, Mr A.N. Loizou, Mr B. Repik, Mr P. Kuris and Mr U. Lohmus (Article 43 in fine of the Convention and Rule 21 para. 5) (art. 43). Subsequently Mr A.B. Baka, substitute judge, replaced Mr Pekkanen, who was unable to take part in the further consideration of the case (Rules 22 para. 1 and 24 para. 1).

4. As President of the Chamber (Rule 21 para. 6), Mr Ryssdal, acting through the Registrar, consulted the Agent of the Government, the applicant's lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 39 para. 1 and 40). Pursuant to the order made in consequence, the Registrar received the applicant's memorial on 11 January 1996 and the Government's memorial on 16 January.

5. On 11 January 1996 the Commission had produced the file on the proceedings before it, as requested by the Registrar on the President's instructions.

6. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 23 May 1996.

The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) for the Government

Mr G. RAIMONDI, magistrato, on secondment to the Diplomatic
Legal Service, Ministry of Foreign Affairs, *co-Agent*,
Mr G. FIDELBO, magistrato, on secondment to the Criminal Affairs
Department, Ministry of Justice, *Counsel*,
Mrs M.A. SARAGNANO, magistrato, on secondment to the Criminal
Affairs Department, Ministry of Justice, *Adviser*;

(b) for the Commission

Mr J.-C. GEUS, *Delegate*;

(c) for the applicant

Mr G. PELAZZA, avvocato, *Counsel*.

The Court heard addresses by Mr Geus, Mr Pelazza and Mr Raimondi.

AS TO THE FACTS

I. CIRCUMSTANCES OF THE CASE

7. On 11 September 1970 Mr Diana was arrested on suspicion of having taken part in the activities of the terrorist organisation known as the "Red Brigades" and immediately taken into custody. He was convicted on eleven occasions between February 1971 and January 1987, the heaviest sentences he received being those imposed in the Novara Assize Court on 5 February 1981 (twenty-seven years' imprisonment and a fine of 200,000 Italian lire) and by the Milan Assize Court of Appeal on 28 November 1985 (life imprisonment). Since 11 September 1970 the applicant, pursuant to an aggregation of sentences ordered on 17 June 1992 by the Principal Public Prosecutor of Cagliari, has been serving the sentence of life imprisonment and has at the same time been, among other things, permanently disqualified from holding public office, stripped of his civic rights for the duration of his prison sentence and removed from parental control.

A. Monitoring of the applicant's correspondence

1. During detention in Palmi Prison

8. On 28 March 1987 the judge responsible for the execution of sentences (magistrato di sorveglianza) in Reggio di Calabria decided that Mr Diana's correspondence - the applicant then being in custody in Palmi Prison - should be subject to censorship under section 18 of Law no. 354 of 26 July 1975 (see paragraph 18 below). The grounds given for the decision were: the nature of the applicant's offences; the fact that he belonged to a special category of prisoner whose attitude was one of total opposition to the institutions of the State; his conduct; and his rejection of prison and refusal of any cooperation with prison staff.

2. During detention in Ascoli Piceno Prison

9. On an unspecified date the applicant was transferred to Ascoli Piceno Prison.

10. On 17 December 1988 the judge responsible for the execution of sentences at Macerata ordered that all the applicant's correspondence, both incoming and outgoing, should be subject to censorship for six months from 22 December 1988, the date on which the prisoner was notified of the decision. He considered that the reasons which had prompted his counterpart in Reggio di Calabria to take such a measure (see paragraph 8 above) remained valid and that there was a continuing danger that the

applicant would use his correspondence to commit offences or to prejudice public order or safety. At that time Mr Diana already had two convictions, and two other sets of criminal proceedings were pending against him. The first of these, in the Cagliari Assize Court of Appeal, related to charges of kidnapping, manufacture, possessing and carrying explosives, aggravated destruction of property and resisting arrest; they ended in a judgment of 17 March 1989, which became final on 5 March 1990 and in which the applicant was convicted and sentenced to eight years and six months' imprisonment and permanently disqualified from holding public office. The second set of proceedings, which were pending before the Novara Magistrate's Court (pretore), originated in a prosecution brought following an escape by the applicant on 23 September 1986; Mr Diana had been recaptured on 5 December 1986.

11. It is not contested that the following letters were inspected:

- (a) a letter of 22 January 1989 from the applicant to his lawyer;
- (b) a registered letter of 27 January 1989 to the applicant from his lawyer;
- (c) a letter of 16 February 1989 from the applicant to his lawyer;
- (d) a letter of 18 April 1989 from the applicant to his lawyer;
- (e) a registered letter of 24 May 1989 to the applicant from his lawyer, enclosing a form for lodging an application with the Commission; and
- (f) a letter of 30 May 1989 from the applicant to his lawyer, enclosing the Commission application form signed by the applicant on the same date, each page bearing the censor's stamp.

B. Applications challenging censorship during detention in Ascoli Piceno

12. Mr Diana made several applications challenging the monitoring of his correspondence. In particular, he lodged an application (*richiesta di riesame*) with the Macerata judge responsible for the execution of sentences to reconsider his decision of 17 December 1988 (see paragraph 10 above). The judge refused the application on 13 January 1989. On 22 January 1989 the applicant sent a copy of the judge's decisions to his lawyer. On 27 January 1989 the lawyer sought to have the censorship of his correspondence with the applicant ended and the order of 17 December 1988 (see paragraph 10 above) rescinded. Relying on Articles 6 para. 3 (b) and 8 of the Convention (art. 6-3-b, art. 8), he argued, among other things, that the censorship was a manifest violation of the rights of the defence and could not be ordered on the basis of a similar decision taken by another judge nearly two years earlier or on the basis of considerations relating to the applicant's conduct in another prison, especially as the applicant was receiving more lenient treatment in Ascoli Piceno Prison.

13. On 17 March 1989 the judge responsible for the execution of sentences held that the measure in issue was wholly justified, having regard to the arguments already set out in his decision of 17 December 1988, to disciplinary reports on Mr Diana and to the fact that while in custody in Palmi Prison the applicant had been a member of a group of prisoners all of whom belonged to extreme-left-wing subversive movements. He nevertheless decided to adjourn the lawyer's application and submit a question concerning the interpretation of the relevant law to the Prison Service (*Direzione generale degli Istituti di prevenzione e pena*), relating to whether the monitoring of the applicant's correspondence with his lawyer was lawful, given that two sets of criminal proceedings against the applicant were still pending at the time. The applicant's correspondence nevertheless continued to be monitored while a reply from the relevant authority was awaited.

14. On 26 May 1989 the judge, in reply to a letter sent him by the defence lawyer on 18 May, again confirmed his decision of 17 December 1988.

15. The Prison Service replied on 1 June 1989. In its opinion, censorship of a prisoner's correspondence, provided that all the legal requirements were satisfied, covered all his correspondence, including that with his lawyer, and could not be regarded as infringing the rights of the defence, which were guaranteed by Article 24 of the Constitution. The confidentiality of communications between a prisoner charged with a criminal offence and his lawyer was preserved through the possibility of communication during private conversations inside the prison. On 10 June 1989 the judge responsible for the execution of sentences refused the lawyer's application of 27 January 1989.

16. The measure in issue ended automatically on 22 June 1989, on the expiry of the period specified in the decision (see paragraph 10 above).

17. On 26 June 1992 the applicant was transferred to the special prison at Trani (Bari). Since February 1994 he has enjoyed a semi-custodial regime.

II. RELEVANT DOMESTIC LAW

A. Legislation

18. Section 18 of Law no. 354 of 26 July 1975 ("Law no. 354"), as amended by section 2 of Law no. 1 of 12 January 1977, provides that power in the matter of censorship of prisoners' correspondence vests in the judge dealing with the case - whether an investigating judge or a trial judge - up to the decision at first instance and in the judge responsible for the execution of sentences thereafter. The judge may order censorship of a prisoner's

correspondence in a reasoned decision; this provision, however, does not specify the cases in which such a decision may be taken.

19. The censorship of which the applicant complains consists, in particular, in all mail being intercepted and read by either the judicial authority that has ordered the censorship or the prison governor or prison staff designated by him, and in the stamping of letters for the purpose of showing that they have been inspected. Censorship cannot extend to deleting words or sentences, but the judicial authority can order that one or more letters shall not be handed over; in that case, the prisoner must immediately be informed of the fact. This latter measure can also be ordered temporarily by the prison governor, who must, however, notify the judicial authority of his action.

20. Article 103 of the New Code of Criminal Procedure forbids the seizure or any form of control of the correspondence between a prisoner and his lawyer, provided that the correspondence is recognisable as such and unless the judicial authority has well-founded reasons to believe that the correspondence constitutes the substance of the offence. Similarly, by Article 35 of the transitional provisions of the same Code, the rules on the censorship of a prisoner's correspondence that are laid down in Law no. 354 and Presidential Decree no. 431 of 29 April 1976 do not apply to correspondence between the prisoner and his lawyer. It follows, among other things, that the only authority that may order censorship of that correspondence, and then solely in the case mentioned above, is the judge or court dealing with the case.

B. Case-law on whether domestic remedies exist for challenging monitoring of correspondence

21. The Court of Cassation has held on several occasions that the monitoring of a prisoner's correspondence is an administrative act and has also stated that Italian law does not provide any remedies in respect of it; in particular, censorship cannot be the subject of an appeal on points of law, since it does not affect the prisoner's personal freedom (Court of Cassation, judgments nos. 3141 and 4687 of 14 February 1990 and 4 February 1992 respectively).

PROCEEDINGS BEFORE THE COMMISSION

22. Mr Diana applied to the Commission on 30 May 1989 (application no. 15211/89). He complained that (1) there had been infringements of his right to respect for his correspondence (Article 8 of the Convention) (art. 8); (2) there had been a breach of his right to defend himself and to have all

necessary facilities for the preparation of his defence (Article 6 para. 3 (b)) (art. 6-3-b); (3) he had not obtained a decision by an impartial tribunal on his application to have the censorship of his correspondence ended (Article 6 para. 1) (art. 6-1); and (4) there were no effective remedies in respect of the alleged breaches of the Convention (Article 13) (art. 13).

23. On 5 July 1994 the Commission declared the second and fourth complaints admissible and also the first one in so far as it concerned the monitoring of the applicant's correspondence with his lawyer pursuant to the decisions taken by the Macerata judge responsible for the execution of sentences (see paragraph 10 above); on the other hand, it declared the third complaint and the remainder of the first one inadmissible. In its report of 28 February 1995 (Article 31) (art. 31), it expressed the unanimous opinion that there had been a breach of Article 8 (art. 8), that the complaint relating to the rights of the defence raised no separate issue under Article 6 para. 3 (art. 6-3) and that there had been a breach of Article 13 (art. 13). The full text of the Commission's opinion is reproduced as an annex to this judgment³

FINAL SUBMISSIONS TO THE COURT BY THE GOVERNMENT

24. In their memorial and subsequently at the hearing the Government asked the Court, as their primary submission, to declare the application inadmissible for failure to exhaust domestic remedies and, in the alternative, to hold that there had been no breach of Articles 6, 8 and 13 of the Convention (art. 6, art. 8, art. 13).

AS TO THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION

25. As before the Commission, the Government pleaded non-exhaustion of domestic remedies, arguing that the applicant had not challenged the disputed measures either before the judge responsible for the execution of sentences or in the regional administrative courts. As this plea also goes to

³ For practical reasons this annex will appear only with the printed version of the judgment (in Reports of Judgments and Decisions 1996-V), but a copy of the Commission's report is obtainable from the registry.

the merits of the complaint based on Article 13 (art. 13), the Court joins it to the merits (see paragraph 41 below).

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION (art. 8)

26. The applicant submitted that the inspection of the letters in question had infringed Article 8 of the Convention (art. 8), which provides:

"1. Everyone has the right to respect for ... his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

27. The Government disputed that contention, whereas the Commission accepted it.

28. There was, quite obviously, "interference by a public authority" with the exercise of the applicant's right, guaranteed in paragraph 1 of Article 8 (art. 8-1), to respect for his correspondence - in this instance, with his lawyer; and that was not contested. Such an interference will contravene Article 8 (art. 8) unless it is "in accordance with the law", pursues one or more of the legitimate aims referred to in paragraph 2 (art. 8-2) and, furthermore, is "necessary in a democratic society" in order to achieve them (see the following judgments: *Silver and Others v. the United Kingdom*, 25 March 1983, Series A no. 61, p. 32, para. 84; *Kruslin v. France*, 24 April 1990, Series A no. 176-A, p. 20, para. 26; *Huvig v. France*, 24 April 1990, Series A no. 176-B, p. 52, para. 25; and *Campbell v. the United Kingdom*, 25 March 1992, Series A no. 233, p. 16, para. 34).

A. "In accordance with the law"

29. The Government submitted that section 18 of Law no. 354 of 26 July 1975 ("Law no. 354"), which provides for the possibility of monitoring prisoners' correspondence, was in conformity with the Court's case-law; the power to order such a measure was vested in the judiciary - which was independent and impartial - and there was a specific obligation to give reasons for the decision, so that arbitrariness was excluded.

30. The applicant rejected that argument, maintaining that while it was true that the censorship of correspondence was in accordance with domestic law, the provision in question did not specify the circumstances in which it could be ordered or within what limits.

31. The Commission, even though it doubted that the wording of Law no. 354 satisfied the requirements of paragraph 2 of Article 8 of the Convention (art. 8-2), did not consider it necessary to determine the issue in

its report as at all events the disputed measures were, in its opinion, contrary to Article 8 (art. 8) in other respects.

32. The Court reiterates that while a law which confers a discretion must indicate the scope of that discretion, it is impossible to attain absolute certainty in the framing of the law, and the likely outcome of any search for certainty would be excessive rigidity (see, among many other authorities, the *Silver and Others* judgment previously cited, p. 33, para. 88). In this instance, however, Law no. 354 leaves the authorities too much latitude. In particular, it goes no further than identifying the category of persons whose correspondence may be censored and the competent court, without saying anything about the length of the measure or the reasons that may warrant it. The gaps in section 18 of the Law weigh in favour of rejecting the Government's argument.

33. In sum, the Italian Law does not indicate with reasonable clarity the scope and manner of exercise of the relevant discretion conferred on the public authorities, so that Mr Diana did not enjoy the minimum degree of protection to which citizens are entitled under the rule of law in a democratic society (see the *Kruslin* judgment previously cited, pp. 24 and 25, para. 36). There has therefore been a breach of Article 8 (art. 8).

B. Purpose and necessity of the interference

34. Having regard to the foregoing conclusion, the Court does not consider it necessary in the instant case to ascertain whether the other requirements of paragraph 2 of Article 8 (art. 8-2) were complied with.

III. ALLEGED VIOLATION OF ARTICLE 6 PARA. 3 (b) OF THE CONVENTION (art. 6-3-b)

35. The applicant also complained of a breach of his right to defend himself and to have adequate facilities for the preparation of his defence. He relied on Article 6 para. 3 (b) of the Convention (art. 6-3-b), whereby

"3. Everyone charged with a criminal offence has the following minimum rights:
(...) (b) to have adequate time and facilities for the preparation of his defence;

(...)"

36. In the Government's submission, opening and reading the letters in question had not jeopardised the applicant's defence, Mr Diana having always retained the possibility of speaking to his lawyer in the visiting room, subject only to visual surveillance by a warder.

37. Mr Diana objected that the conversations were confidential only in theory, since the warder was often able to overhear them. Furthermore, his transfer from Milan Prison to Palmi Prison and then to Ascoli Piceno

Prison, the latter two being 1,000 and 600 kilometres respectively from Milan, where his lawyer had his office, had further impeded the exercise of the right guaranteed in Article 6 para. 3 (art. 6-3).

38. Like the Delegate of the Commission, the Court considers that the observations filed at the registry by counsel for the applicant are not such as to call in question the conclusion in paragraph 40 of the Commission's report that it is not necessary to examine this complaint separately and that it should rather be regarded as being covered by the one relating to Article 8 (art. 8).

IV. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION (art. 13)

39. The applicant complained that in Italian law there was no effective remedy in respect of the decisions whereby the judge responsible for the execution of sentences ordered that his correspondence should be censored. He alleged a breach of Article 13 of the Convention (art. 13), which provides:

"Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

40. The Government considered that this complaint was unfounded. They relied, in the first instance, on the fact that it was possible to apply to the judge responsible for the execution of sentences to reconsider his decision and they drew attention to the judicial nature of the censorship measure provided for in section 18 of Law no. 354, under which the power to order censorship of a prisoner's correspondence was reserved to the judiciary. In removing such a sensitive area from the competence of the administrative authorities, the Italian legislature's purpose had been to provide the safeguards of independence and impartiality. The Commission's unduly formal approach to the subject of the effectiveness of the right guaranteed by Article 13 (art. 13), which did not require the "national authority" to belong to the judiciary, misunderstood the import of the Law in question. If that argument was not accepted, the censorship measure had to be classified as an "administrative decision taken by" the judge responsible for the execution of sentences "in performance of duties inherent in the supervision of prisons". By interpreting the case-law of the Court of Cassation, which ruled out any appeal on points of law or to a criminal judicial authority other than the judge responsible for the execution of sentences, the Government maintained that it was possible to have recourse to the regional administrative courts to challenge the measures in question.

41. In the Court's estimation, the possibility of applying to the judge responsible for the execution of sentences cannot be regarded as an effective remedy for the purposes of Article 13 (art. 13), as he is required to reconsider the merits of his own decision, taken moreover without any adversarial proceedings. The allegedly judicial nature of the disputed decisions, stemming from the nature of the authority empowered to take them, does not stand up to scrutiny either. The judge responsible for the execution of sentences at Macerata, in reply to an application from Mr Diana's lawyer for the censorship order to be rescinded, considered it necessary to submit a question concerning the interpretation of Law no. 354 to the Prison Service - an administrative authority, therefore - relating to whether the monitoring of correspondence between a prisoner and his lawyer was lawful (see paragraph 13 above). As to the third submission, two points must be noted. Firstly, the Court of Cassation has held that Italian law does not provide any remedies in respect of decisions whereby prisoners' correspondence is ordered to be monitored (see paragraph 21 above). Secondly, no regional administrative court would appear hitherto to have delivered a judgment on the subject. The Court accordingly dismisses the Government's preliminary objection and holds that there has been a breach of Article 13 (art. 13).

V. APPLICATION OF ARTICLE 50 OF THE CONVENTION (art. 50)

42. By Article 50 of the Convention (art. 50),

"If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the (...) Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

43. Mr Diana sought just satisfaction for the damage he had allegedly sustained, without quantifying it or giving further particulars.

44. The Court considers that the applicant has not proved that he sustained any pecuniary damage. As to non-pecuniary damage, it takes the view, like the Government and the Delegate of the Commission, that in the circumstances of the case a mere finding of violations of the Convention constitutes in itself sufficient just satisfaction under this head.

B. Costs and expenses

45. The applicant sought reimbursement of the costs and expenses incurred before the Convention institutions but left it to the Court's discretion to assess the amount.

46. The Government likewise wished to leave the matter to the Court's discretion. The Delegate of the Commission confined himself to pointing out that the applicant had not made any precise claim supported by vouchers.

47. The Court notes that Mr Diana did not submit any bill of costs or fee note, either before or during the hearing on 23 May 1996. That being so, it dismisses the claim.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Joins the Government's preliminary objection to the merits and dismisses it after examining the merits;
2. Holds that there has been a breach of Article 8 of the Convention (art. 8);
3. Holds that the complaint relating to the rights of the defence raises no separate issue under Article 6 para. 3 (b) of the Convention (art. 6-3-b);
4. Holds that there has been a breach of Article 13 of the Convention (art. 13);
5. Holds that this judgment constitutes in itself sufficient just satisfaction for non-pecuniary damage;
6. Dismisses the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 15 November 1996.

Rolv RYSSDAL
President

Herbert PETZOLD
Registrar