



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

COURT (CHAMBER)

CASE OF DOMENICHINI v. ITALY

(Application no. 15943/90)

JUDGMENT

STRASBOURG

15 November 1996

In the case of *Domenichini v. Italy*¹,

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 European Commission of Human Rights ("the Commission") on 12 December 1995 and by the Italian Government ("the Government") on 20 December, 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. 15943/90) against the Italian Republic lodged with the Commission under Article 25 (art. 25) by an Italian national, Mr Massimo Domenichini, on 6 November 1989. The Commission's request 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 Government's application referred to Articles 44 and 48 (art. 44, art. 48). The object of the request and of the application was to obtain a decision as to whether the facts of the case

¹ The case is numbered 101/1995/607/695. 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)

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 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. On 8 February 1996 the President of the Court decided that, in the interests of the proper administration of justice, this case should be referred to the Chamber constituted on 13 July 1995 to hear the case of Calogero Diana v. Italy³ (Rule 21 para. 7). That Chamber 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)). The other seven members, whose names had been drawn by lot in the presence of the Registrar, were 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 cases (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 Government's memorial on 30 April 1996. The applicant did not submit any observations in writing.

5. On 3 May 1996 the Commission 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

³ Case no. 56/1995/562/648

Mr U. GIANNANGELI, avvocato,

Counsel.

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

AS TO THE FACTS

I. CIRCUMSTANCES OF THE CASE

7. The applicant has been in custody since 5 December 1980 in connection with various criminal proceedings brought against him on suspicion of his having taken part in the activities of the terrorist organisation known as "Prima linea".

8. When he lodged his application with the Commission on 6 November 1989, there were three prosecutions pending against Mr Domenichini. The first of these ended in a judgment of the Ancona Court of Appeal of 28 June 1988, which became final on 26 October 1989. The court sentenced him to eleven months and twenty days' imprisonment and a fine of 700,000 Italian lire for aiding and abetting aggravated armed robbery, aiding and abetting aggravated theft, aiding and abetting the handling of stolen goods and unlawful possession of weapons. The second trial ended in a judgment of the Rome Assize Court of Appeal of 9 December 1988, which became final on 13 July 1989. The court sentenced him to nineteen years, eleven months and fifteen days' imprisonment for murder, aggravated armed robbery, treasonable conspiracy, membership of an armed organisation and other offences. The third trial, at the Bari Assize Court of Appeal, ended in a judgment of 10 October 1989, which became final on 15 January 1990. The court imposed a sentence of eleven years and two months' imprisonment and a fine of one million lire for armed robbery and other offences. A. Monitoring of the applicant's correspondence during his detention in Cuneo Prison

9. On 12 March 1987 the judge responsible for the execution of sentences (magistrato di sorveglianza) at Cuneo, where Mr Domenichini had been in custody since 19 December 1984, decided under section 18 of Law no. 354 of 26 July 1975 (see paragraph 18 below) that his correspondence and that of other prisoners in the special unit of Cuneo Prison should be censored for a period of six months. On 23 May 1987 the Court of Cassation declared inadmissible an appeal on points of law lodged against that order on an unspecified date.

10. After the end of the first period, the Cuneo judge responsible for the execution of sentences renewed the censorship every six months, in September 1987, March 1988 and on 16 September 1988 and 13 March and

14 September 1989. The reasons given for these decisions were, firstly, that the monitoring of the applicant's correspondence and that of the other prisoners concerned had made it possible to discover differences of opinion within the group of former terrorists and to prevent confrontations and acts of vengeance and, secondly, that there was a danger that the applicant would use the mail to commit offences or prejudice public order or safety.

11. It is not contested that the following letters were inspected: (a) a letter of 29 November 1988 from the applicant to the lawyer Mr Francesco Piscopo; (b) a registered letter of 23 January 1989 from the applicant to the lawyer Mr Ugo Giannangeli; (c) a letter of 26 February 1989 from the applicant to Mr Ugo Giannangeli; and (d) letters of 26 February 1989 and 14 February 1990 from the applicant to Mr Francesco Piscopo.

12. On an unspecified date the applicant challenged the decision of 16 September 1988 (see paragraph 10 above) in the Turin Sentence Execution Court (*tribunale di sorveglianza*). On 24 October 1988 that court declared his appeal inadmissible on the ground that the relevant Italian Law did not provide any remedy in respect of such decisions in view of their administrative nature. The court's decision was served on Mr Domenichini on 8 November 1988, and on the next day he appealed on points of law. In a pleading of 30 November 1988 his counsel argued, in particular, that the possibility of appealing to the Sentence Execution Court against decisions to impose censorship was provided for in Italian legislation. He also maintained that the measure in issue, applied "collectively" to a group of prisoners, irrespective of the individual circumstances of each, was absolutely unjustified and that the delay in forwarding to him, after it had been inspected, the applicant's letter informing him of the receipt of the court's decision rejecting his appeal had impeded the exercise of the rights of the defence. The Sentence Execution Court, however, did not forward the appeal and other procedural documents to the Court of Cassation, but set the matter down for hearing on 19 December 1988, when it rejected the appeal, holding it to be essentially identical with the earlier one it had dismissed on 24 October 1988.

13. On 14 February 1989 the applicant's lawyer asked the court to forward the appeal to the Court of Cassation, which alone was competent to rule on an appeal that had been made direct to it.

14. Shortly afterwards, on 13 March 1989 (see paragraph 10 above) the Cuneo judge responsible for the execution of sentences renewed the order that Mr Domenichini's correspondence should be censored. On 17 April 1989 the applicant's lawyer lodged a fresh appeal on points of law with the Turin Sentence Execution Court. On 29 May 1989 the court declared inadmissible "the appeal against the decision declaring the appeal inadmissible" and did not forward the appeal to the Court of Cassation. B. The applicant's continued detention

15. On an unspecified date the applicant was transferred to Milan Prison.

16. In a report drawn up by the prison management in October 1992, it was stated that the applicant's behaviour towards the staff and his attitude towards his past had shown some improvement. On 22 October 1992, taking the view that this progress was not sufficient, the Milan Sentence Execution Court dismissed an application by Mr Domenichini to be given semi-custodial treatment instead of being kept in detention. From November 1992 onwards, however, the applicant was granted short periods of prison leave.

17. On 8 September 1993, on the basis of two reports of April and August 1993 which indicated further, substantial progress, the court ordered that the applicant should be given semi-custodial treatment.

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 measure in issue is an administrative act and has also stated that Italian law does not provide any remedy 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 Domenichini applied to the Commission on 6 November 1989 (application no. 15943/90). 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 Cuneo 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. On 4 July 1995 it decided to re-examine the application as regards the complaints concerning the monitoring of Mr Domenichini's private correspondence and the absence of any effective remedies in respect of that measure. On the same day it declared those complaints inadmissible. In its report of 6 September 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 judgment⁴

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 the merits of the complaint based on Article 13 (art. 13), the Court joins it to the merits (see paragraph 42 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.

⁴ 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

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 lawyers; 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 Domenichini 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 Domenichini having always retained the possibility of speaking to his lawyers in the visiting room, subject only to visual surveillance by a warder.

37. Mr Domenichini objected that the conversations were confidential only in theory, since the warder was often able to overhear them. Furthermore, he stated that after receiving notification of the dismissal of his appeal against the decision taken by the judge responsible for the execution of sentences on 16 September 1988, he appealed on points of law (on 9 November 1988) and then wrote to his lawyer, who had to file the grounds in support of that appeal within the statutory ten days. That letter had been intercepted at the prison, read and then forwarded to Mr Piscopo after the ten days had elapsed (see paragraph 12 above).

38. The Delegate of the Commission considered that the observations filed at the registry by counsel for the applicant were not such as to call in question the conclusion in paragraph 42 of the Commission's report that it was 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).

39. The Court notes at the outset that it is unnecessary to speculate on whether auditory checks were made during conversations in the visiting room between the applicant and his lawyers. As to the delay in sending Mr Piscopo the letter in question (which the Government did not contest), the Court considers that, notwithstanding the foreseeable outcome of the proceedings (see paragraph 12 above), the monitoring of the letter infringed Mr Domenichini's defence rights. His lawyer filed the grounds in support after the statutory ten-day period had expired. There has consequently been a breach of Article 6 para. 3 (b) (art. 6-3-b).

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

40. 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."

41. 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.

42. 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. On 24 October 1988 the Turin Sentence Execution Court declared inadmissible an appeal by Mr Domenichini, who was challenging the decision taken by the judge responsible for the execution of sentences at Cuneo on 16 September 1988, on the ground that the relevant Italian Law did not provide any remedy in respect of such decisions in view of their administrative nature (see

paragraph 12 above). The appeals on points of law lodged by the applicant on 9 November 1988 and by his counsel on 17 April 1989 were no more successful (see paragraphs 12 and 14 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)

43. 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

44. At the hearing on 23 May 1996 counsel for Mr Domenichini sought just satisfaction for the damage his client had allegedly sustained, without quantifying it or giving further particulars.

45. The Court considers that the applicant has not proved that he sustained 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

46. The applicant did not claim reimbursement of the costs and expenses incurred in the domestic courts. As to those incurred before the Convention institutions, he had received legal aid in a total amount of 14,055 French francs and sought nothing further.

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 there has been a breach of 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 in itself constitutes 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