



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

THIRD SECTION

CASE OF DEMIRTEPE v. FRANCE

(Application no. 34821/97)

JUDGMENT

STRASBOURG

21 December 1999

In the case of Demirtepe v. France,

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

Sir Nicolas BRATZA, *President*,

Mr J.-P. COSTA,

Mr L. LOUCAIDES,

Mr P. KÜRIS,

Mr W. FUHRMANN,

Mr K. JUNGWIERT,

Mrs H.S. GREVE, *judges*,

and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 7 December 1999,

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

PROCEDURE

1. The case was referred to the Court by the French Government (“the Government”) on 9 April 1999, within the three-month period laid down by former Articles 32 § 1 and 47 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”). It originated in an application (no. 34821/97) against the French Republic lodged with the European Commission of Human Rights (“the Commission”) under former Article 25 by a Turkish national, Mr Bédirhan Demirtepe (“the applicant”), on 22 January 1997. The applicant was represented by Mr J.-M. Darrigade, of the Montpellier Bar, and the Government were represented by their Agent, Mr R. Abraham, Head of the Department of Legal Affairs at the Ministry of Foreign Affairs.

The Government’s application referred to former Articles 47 and 48. 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 Article 8 of the Convention.

2. Following the entry into force of Protocol No. 11 to the Convention on 1 November 1998 and in accordance with the provisions of Article 5 § 4 thereof read in conjunction with Rules 100 § 1 and 24 § 6 of the Rules of Court, a panel of the Grand Chamber decided on 7 July 1999 that the case would be examined by a Chamber constituted within one of the Sections of the Court.

3. In accordance with Rule 52 § 1, the President of the Court, Mr L. Wildhaber, then assigned the case to the Third Section. The Chamber constituted within that Section included *ex officio* Mr J.-P. Costa, the judge elected in respect of France (Article 27 § 2 of the Convention and Rule 26 § 1 (a)), and Sir Nicolas Bratza, President of the Section (Rule 26 § 1 (a)).

The other members designated by the latter to complete the Chamber were Mr L. Loucaides, Mr P. Kūris, Mrs F. Tulkens, Mr K. Jungwiert and Mrs H.S. Greve (Rule 26 § 1 (b)). Subsequently Mrs F. Tulkens, who was unable to take part in the further consideration of the case, was replaced by Mr W. Fuhrmann, substitute judge (Rule 26 § 1 (c)).

4. On 25 August 1999 the Court decided that there was no need to hold a hearing.

5. The applicant submitted his memorial on 25 October 1999 and the Government submitted theirs on 5 November 1999.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. On 5 April 1993 the applicant, who was then in Villeneuve-lès-Maguelonne Prison serving an eighteen-year sentence for murder imposed by the Assize Court of the Hérault *département*, lodged a criminal complaint with the senior investigating judge at the Montpellier *tribunal de grande instance* against the prison mail officer for breach of the secrecy of correspondence. He also lodged a concomitant application for leave to join the criminal proceedings as a civil party.

7. The applicant alleged in his complaint that since being imprisoned in Villeneuve-lès-Maguelonne Prison he had received a number of letters from his lawyers, the judiciary, the prison social services and the prison chaplain that had already been opened, in breach of Articles D. 69, D. 262, D. 438 and D. 469 of the Code of Criminal Procedure and Article 8 of the Convention.

8. In an order of 24 October 1994 the investigating judge of the Montpellier *tribunal de grande instance* ruled that there was no ground for bringing criminal proceedings for breach of the secrecy of correspondence because there was “insufficient evidence that anyone had committed the offence of breaching the secrecy of correspondence referred to in the complaint”.

9. The applicant appealed against that decision to the Indictment Division of the Montpellier Court of Appeal. In a judgment of 6 April 1995 the Court of Appeal upheld the decision and dismissed the appeal. As to whether the *actus reus* of the offence had been made out, the Court of Appeal held that it had for the following reasons:

“It should be pointed out in the instant case that while there is general provision for interference by the prison authorities with prisoners’ mail, such interference is formally prohibited by Articles D. 69, D. 262, D. 438 and D. 469 of the Code of

Criminal Procedure in respect of letters to prisoners from their defence lawyers, from administrative and judicial authorities, from prison chaplains and from social workers belonging to one of the departments of the Ministry of Justice.

The evidence shows that letters falling into the categories referred to above, addressed to Demirtepe, were opened by the prison staff and that the administrative departments of Villeneuve-lès-Maguelonne Prison admitted opening them since the staff employed in the mail department mentioned opening letters in error owing to the volume of mail received and the use of an electric machine. Furthermore, among the documents filed in evidence were a number of envelopes which had clearly been marked so as not to be censored but had evidently been opened by a machine. Lastly, there is also a letter from the deputy governor of the prison accompanying a letter which had, according to him, been opened in error.

...”

10. The Court of Appeal found, however, that although the *actus reus* of the offence complained of by the applicant had been established, that is to say that letters had been opened, the prison mail department could not be held collectively liable, nor could the officer in charge of it be held individually liable. It upheld the decision that no prosecution should be brought.

11. The applicant lodged an appeal on points of law against that judgment. The Court of Cassation dismissed his appeal in a judgment of 14 May 1996, which was served on him on 20 August 1996.

II. RELEVANT DOMESTIC LAW

A. Code of Criminal Procedure

12. The relevant Articles of the Code of Criminal Procedure provide:

Article D. 69 § 1

“Sealed letters sent from remand prisoners to their defence lawyers and from defence lawyers to remand prisoners are not subject to the censorship referred to in Article D. 416 if it can be unequivocally ascertained that such letters are genuinely intended for the defence lawyer or have been sent by him.”

Article D. 259

“All prisoners shall be entitled to submit an application or a complaint to the governor of the prison, who shall grant him a hearing if the ground on which he relies is sufficient.

Any prisoner may request a hearing by the judges and officials responsible for inspecting or visiting the prison, without any member of the prison staff being present.”

Article D. 260

“A prisoner or party adversely affected by an administrative decision can apply for it to be referred to the regional director if the decision was made by a prison governor, or to the Minister if it was made by a regional director.

However, any decision taken pursuant to powers conferred by law, regulations or a ministerial circular shall be immediately enforceable notwithstanding recourse to the remedy provided for above.”

Article D. 262

“Prisoners may at any time send letters to the French administrative or judicial authorities, a list of which is drawn up by the Minister of Justice.

Such letters may be sent sealed and are accordingly not subject to any censorship; they must be dispatched without delay.

Any prisoner who takes advantage of the above provision to make insulting remarks, threats or defamatory allegations or to repeat unjustified complaints which have already been dismissed shall be liable to a disciplinary penalty, without prejudice to any criminal penalties.”

Article D. 415

“Letters to and from prisoners must not be encoded and must not contain any coded sign or character.

They shall be stopped if they contain specific threats to the security of persons or of prisons.”

Article D. 416

“... all prisoners’ incoming and outgoing mail may be read for the purposes of censorship.

Letters to and from remand prisoners shall also be sent to the judge in charge of the investigation as and when that judge requires.

Letters which do not comply with the legal requirements may be stopped.”

Article D. 438

“Prisoners may always correspond freely in sealed envelopes with the prison chaplain. That right cannot be withdrawn as part of any disciplinary penalty.”

Article D. 469 § 1

“Correspondence between prisoners and social workers belonging to one of the departments of the Ministry of Justice may be undertaken freely in sealed envelopes.”

B. Circular no. AP 86.29.G1

13. Article 29, third paragraph, of Circular no. AP 86.29.G1 of 19 December 1986 provides:

“If there is doubt as to the source of a sealed letter, it may be opened in the presence of the prisoner if he consents, or, failing that, in the presence of the Chairman of the Bar or of his representative.”

PROCEEDINGS BEFORE THE COMMISSION

14. Mr Demirtepe applied to the Commission on 22 January 1997. He alleged that the opening of his letters, which were not subject to censorship under the domestic law, by officials at Villeneuve-lès-Maguelonne Prison had violated his right to respect for his correspondence as guaranteed by Article 8 of the Convention. The applicant also relied on Article 3.

15. On 2 July 1997 the Commission (Second Chamber) decided to give notice of the application (no. 34821/97) to the Government and to invite the parties to submit observations on the admissibility and merits of the applicant’s complaint that there had been a violation of his right to respect for his correspondence. It declared the remainder of the application inadmissible.

On 20 May 1998 the Commission declared the application admissible with regard to the complaint based on Article 8. In its report of 1 December 1998 (former Article 31 of the Convention) it concluded, by twenty-two votes to two, that there had been a violation of Article 8¹.

THE LAW

I. THE GOVERNMENT’S PRELIMINARY OBJECTION

16. As they had done before the Commission, the Government submitted that the applicant had failed to exhaust domestic remedies as required by Article 35 § 1 of the Convention (former Article 26). The Government considered that although the applicant had indeed sought relief, he had not used the remedies which would have been effective for obtaining compensation for the damage he had suffered as a result of his letters being unlawfully opened. In that connection, the Government observed that the

1. *Note by the Registry.* The report is obtainable from the Registry.

applicant could have applied to the relevant administrative authority and to the administrative courts complaining of an infringement of his right to respect for his correspondence and, if appropriate, seeking damages. Whether or not he had applied to the administrative authority, the applicant could have sued the Prison Service for damages in the administrative courts. Had he done so, he could have requested the court to find that there had been an official error on the ground that the infringements of his freedom of correspondence were contrary to the domestic legal provisions and Article 8 of the Convention.

17. The Government added that this case was special in that it had already been determined in a decision delivered in criminal proceedings that there had been a malfunctioning of the prison mail department. In the Government's submission, that court decision undeniably constituted for the applicant irrefutable proof of the facts alleged, which would have to be taken into account by the administrative court dealing with a claim for damages and should normally lead it to find that the authorities had been negligent in the case (a fact, moreover, that was not disputed). It was settled case-law that the decision on the facts of a case given by a criminal court trying that case in criminal proceedings was binding on the administrative courts as regards the facts found (*Conseil d'Etat*, judgment of 9 June 1972, *Vve Allemand*, Rec. CE). Furthermore, given that in the instant case letters addressed to the applicant were opened as a direct result of a breach of the legal requirements, it was likely that any claim for damages submitted by the applicant to the administrative court would have very good prospects of succeeding. Indeed, developments in administrative case-law on the liability of the Prison Service suggested that an action for damages in the administrative courts would be effective. In the instant case an action undoubtedly lay against the prison authorities in straightforward negligence (*faute simple*).

18. In that connection, the Government observed that, in a recent case concerning correspondence between a prisoner and his lawyer, the Versailles Administrative Court had found against the State on 10 October 1997 on the ground that the letters had been unlawfully opened "while effecting operations which, although they were part of the Prison Service's sphere of activity, did not entail any particular difficulties" and that that act had therefore "constituted negligence for which the State can be held liable". The Administrative Court consequently awarded the prisoner 2,000 French francs in damages. That judgment had been circulated to all prison governors. In a second decision, dated 3 December 1997 and delivered by the Melun Administrative Court, the State had likewise been ordered to pay damages to a prisoner after a letter to him from his lawyer had been opened in error. A further judgment of the same Administrative Court, dated 15 October 1997, had set aside a prison governor's decision to stop a letter sent to a prisoner by a fellow inmate. The Ministry of Justice

had not appealed against any of those judgments, thereby – in the Government’s submission – clearly showing that while the Ministry might not have agreed with the reasoning of the administrative courts, it at least realised that the authorities would not have had a serious prospect of having the decisions reversed on appeal, given the general case-law of the *Conseil d’Etat* on liability for negligence arising out of the infringement of a regulation. In that connection, contrary to the Commission’s findings in its admissibility decision, the existence of established case-law in this area made it unnecessary for the *Conseil d’Etat* to give an opinion in so far as the administrative courts concerned had merely applied the general principles of administrative liability. There was therefore no need to await a judgment of the *Conseil d’Etat* on the particular situation in issue.

19. In the Government’s submission, the fact that the impugned opening of letters had occurred in 1993 did not prevent the applicant from bringing an action in the administrative courts as in the other cases they had cited. The fact that the decisions to which they had referred concerning the opening of prisoners’ mail dated only from 1997 did not affect the actual existence of the remedy or its effectiveness, seeing that the courts had based the relevant decisions on the ordinary law governing administrative liability.

20. In the light of all their observations, the Government therefore considered that the applicant should have brought proceedings in the administrative court since such proceedings were indeed effective within the meaning of the case-law of the Convention institutions.

21. The applicant, for his part, submitted that he had exhausted all the domestic remedies available to him under the Criminal Code and the Code of Criminal Procedure for seeking damages for the criminal offence of breaching the secrecy of correspondence. In his submission, the damage caused by the deliberate opening of letters to him which were not subject to censorship could be compensated only by instituting criminal proceedings as he had done. In that connection, he stressed that between 25 March and 1 April 1993 the Montpellier public prosecutor had sent him a communication suggesting that he apply to join the criminal proceedings as a civil party by lodging a complaint with the senior investigating judge, which he had done (see paragraph 6 above). With regard to the Government’s submissions relating to the developments in administrative case-law, he considered that they could not be used against him. Any compensation he might have obtained in the administrative courts was purely hypothetical and in any event it had not been shown that such hypothetical compensation would have been greater than the amount he could have claimed in the criminal courts had they dealt with his case properly.

22. The Court observes that, as well as lodging a complaint in criminal proceedings, the applicant could – according to the Government – have brought an action in the administrative courts to complain of the

infringements of his right to respect for his correspondence and, if appropriate, seek an award of damages. In support of their submission the Government referred to developments in the case-law on prison correspondence and cited three decisions delivered at the end of 1997 by the Versailles and Melun Administrative Courts. However, the Court notes, firstly, that the applicant's complaints date back to 1993, that is to a period well before the aforementioned decisions. Moreover, since the *Conseil d'Etat* has never ruled on the point, it would appear premature to conclude that the case-law has actually been established and that it would have afforded the applicant an effective remedy here with regard to the complaint lodged under Article 8 of the Convention (see *Vernillo and Siciliano v. France*, application no. 11889/85, Commission decision of 10 March 1989, Decisions and Reports 59, p. 95). The Court notes that the fact, stated by the Government in their observations, that the Versailles Administrative Court's judgment was circulated to all prison governors contradicts the Government's assertion that the judgment reflected well-established case-law (see paragraph 18 above). Moreover, the Government have failed to provide any evidence that the remedy in criminal law used by the applicant was an inadequate remedy for the purpose of obtaining damages for the infringement complained of. In that connection, the Court reiterates that the exhaustion of domestic remedies requires only that the applicant make use of remedies likely to be effective and adequate in remedying his or her complaints (see the *Vernillo and Siciliano* decision cited above, p. 95). In the circumstances, the Government's objection on the ground of non-exhaustion of domestic remedies cannot be allowed.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

23. The applicant alleged that the opening by the prison authorities of mail addressed to him infringed his right to respect for his correspondence and violated Article 8 of the Convention, which provides:

“1. Everyone has the right to respect for his private and family life, his home and 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.”

24. The applicant submitted that the opening by the prison authorities of various letters to him which were not subject to censorship under domestic law amounted to an interference with his right to respect for his correspondence within the meaning of paragraph 1 of Article 8 and that it could not be justified under paragraph 2 of that Article.

25. The Government did not dispute that the prison authorities' opening of letters to the applicant which should have been given to him sealed amounted to an interference with his right to respect for his correspondence within the meaning of Article 8 of the Convention. Moreover, that interference did not satisfy the conditions laid down in the second paragraph of Article 8, precisely because such interference was not provided for in the domestic legal provisions. The prison mail service probably did not open the mail deliberately. Nevertheless, since letters were opened repeatedly, the incidents revealed a malfunctioning of the mail service within the prison such as could attract a penalty in domestic proceedings in the administrative courts.

26. The Court is of the opinion that the opening of the applicant's letters in the circumstances described above indisputably amounted to an interference with his right to respect for his correspondence within the meaning of Article 8 § 1 (see the *Campbell v. the United Kingdom* judgment of 25 March 1992, Series A no. 233, p. 21, § 57).

27. The issue therefore arises whether in the instant case the interference satisfied the conditions laid down in paragraph 2 of Article 8. The Court notes in this connection that the Government have acknowledged that it did not, precisely because the interference in question was not provided for in domestic law.

28. That being so, the Court considers that the prison authorities' interference with the applicant's mail was not justified under Article 8 § 2.

There has therefore been a violation of Article 8 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

29. 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.”

A. Damage

30. The applicant claimed one million French francs (FRF) for non-pecuniary damage on account of the endless harassment the prison authorities inflicted on him in an attempt to undermine him and make him abandon the various criminal proceedings he had instituted.

31. The Government submitted that the amount claimed was manifestly excessive in view of the amounts generally awarded for the unlawful opening of mail sent to a prisoner.

32. The Court considers that the applicant has sustained non-pecuniary damage and that he should be awarded FRF 5,000 in compensation on an equitable basis.

B. Costs and expenses

33. The applicant sought, firstly, reimbursement of the costs and expenses incurred in the criminal proceedings in the domestic courts in the sum of FRF 84,478. With regard to the costs incurred before the Convention institutions, the applicant claimed FRF 10,000 plus FRF 2,060 in value-added tax, that is a total amount of FRF 12,060.

34. The Government pointed out that the applicant had been granted legal aid for the domestic proceedings. Consequently, he should not be awarded any compensation for costs already paid for by the national authorities. As regards the costs incurred before the Convention institutions, the Government observed that the first bill of costs produced by the applicant did not distinguish between the costs incurred in the domestic proceedings and those relating to the proceedings before the Convention institutions. As to the second, it did not provide any explanation for the amount mentioned. In the light of their observations, the Government considered that an aggregate sum of FRF 10,000 could be awarded to the applicant in just satisfaction.

35. The Court notes that the applicant was granted legal aid for the domestic proceedings. No amount can therefore be awarded under that head. As to the costs and expenses incurred before the Convention institutions, the Court considers that the amount claimed is not excessive. It therefore awards him the full sum claimed under that head, namely FRF 12,060.

C. Default interest

36. According to the information available to the Court, the statutory rate of interest applicable in France at the date of adoption of the present judgment is 3.47% per annum.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Dismisses* the Government's preliminary objection;
2. *Holds* that there has been a violation of Article 8 of the Convention;

3. *Holds*

(a) that the respondent State is to pay the applicant, within three months, the following amounts:

- (i) 5,000 (five thousand) French francs for non-pecuniary damage;
- (ii) 12,060 (twelve thousand and sixty) French francs for costs and expenses;

(b) that simple interest at an annual rate of 3.47% shall be payable from the expiry of the above-mentioned three months until settlement;

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

Done in French, and notified in writing on 21 December 1999, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

N. BRATZA
President