



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

FOURTH SECTION

CASE OF ERDEM v. GERMANY

(Application no. 38321/97)

JUDGMENT
[Extracts]

STRASBOURG

5 July 2001

FINAL

05/10/2001

In the case of Erdem v. Germany,

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

Mr A. PASTOR RIDRUEJO, *President*,

Mr G. RESS,

Mr I. CABRAL BARRETO,

Mr V. BUTKEVYCH,

Mrs N. VAJIĆ,

Mr J. HEDIGAN,

Mr M. PELLONPÄÄ, *judges*,

and Mr V. Berger, *Section Registrar*,

Having deliberated in private on 28 September 2000 and 14 June 2001,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 38321/97) against the Federal Republic of Germany lodged with the European Commission of Human Rights (“the Commission”) under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Turkish national, Mr Selahattin Erdem (“the applicant”), on 29 July 1997.

2. The applicant was represented by Mr Schultz, a lawyer practising in Bremen. The German Government (“the Government”) were represented by their Agent, Mr K. Stoltenberg, *Ministerialdirigent*, of the Federal Ministry of Justice.

3. The applicant alleged, in particular, that the length of his detention had exceeded that permitted by Articles 5 § 3 and 6 § 2 of the Convention. He also complained that his correspondence with his lawyer had been monitored, contrary to Article 8 of the Convention.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. It was allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

6. By a decision of 28 September 2000 the Chamber declared the application admissible¹.

1. *Note by the Registry.* The Court’s decision is obtainable from the Registry.

7. The applicant and the Government each filed observations on the merits (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant said that his name was Selahattin Erdem and that he was born in 1958 in Derik (Turkey). However, according to the Düsseldorf Court of Appeal (*Oberlandesgericht*), his real name was Duran Kalkan and he was born in 1954 in Adana (Turkey).

A. Background to the case

9. On 7 April 1988 the applicant, who had enjoyed political refugee status in France since December 1987, was arrested at the German border on suspicion of being a member of a terrorist organisation (Article 129a of the Criminal Code) and of forging documents (Article 267 of the Criminal Code).

B. The investigation

10. On 8 April 1988 the investigating judge at the Federal Court of Justice (*Bundesgerichtshof*) issued a warrant for the applicant's detention pending trial. The applicant remained in custody until 7 March 1994.

11. On 20 October 1988 the Federal Public Prosecutor started a judicial investigation into the activities of the applicant and fifteen other leaders of the PKK (Workers' Party of Kurdistan).

C. The trial

12. On 31 August 1989 the Fifth Criminal Division of the Düsseldorf Court of Appeal made an order for the main proceedings, which included five other charges against members of the PKK, to begin.

13. The proceedings had been brought against eighteen accused and concerned six murders and six abductions, the structure of the terrorist organisation and a further five murders that had been committed within the organisation.

14. The trial began on 24 October 1989 and ended on 7 March 1994 after 353 days in court.

15. At the hearing on 7 December 1990 the public prosecutor asked the Court of Appeal to inform the applicant, in accordance with Article 265 of the Code of Criminal Procedure, that the charges he was facing could entail a conviction for murder (Article 211 of the Criminal Code) and for his activities as a leader (*Rädelsführer*) of a terrorist organisation (Article 129a § 2 of the Criminal Code).

16. By a decision of 8 March 1993, the Court of Appeal ruled that the accused, Mr Kalkan, faced convictions for being a member of a terrorist organisation and for murder, but not for his activities as a leader of that organisation.

17. Fourteen defendants were no longer involved in the proceedings: two defendants had been discharged in 1990 – one owing to the minor nature of the charges (*Geringfügigkeit*), the other because of unfitness to stand trial (*Verhandlungsunfähigkeit*) – while in 1992 ten others had fled the country and two had been convicted of separate offences.

D. The applicant's detention pending trial

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23. While the applicant was in detention pending trial, his correspondence with his lawyer was monitored under powers contained in Article 148 § 2 of the Code of Criminal Procedure ...

E. The judgment of the Düsseldorf Court of Appeal and the applicant's appeals to the domestic courts

24. In a 900-page judgment of 7 March 1994 the Düsseldorf Court of Appeal convicted the applicant of being a member of a terrorist organisation and sentenced him to six years' imprisonment (Article 129a § 1 of the Criminal Code). It found that he had been one of the founders of the PKK in 1978, had set up units in Lebanon and Syria and had been in charge of recruitment in those countries.

It added that in 1983 the applicant had led armed resistance in Turkey until he was deposed by Abdullah Öcalan, after being accused of incompetence and authoritarianism. Subsequently he had been assigned to the PKK's European headquarters in Cologne with Ali Cetiner, who was later to become the main prosecution witness (*Kronzeuge*) against him.

The Court of Appeal said that from December 1986 to December 1987 the applicant had been a member of the executive committee of the PKK, with responsibilities for, *inter alia*, surveillance and intelligence. At executive committee meetings he had proposed to identify and collect information on groups within the PKK that were hostile to Öcalan, to combat them, liquidating them if necessary. He had also helped to compile lists of persons to be liquidated.

25. In a judgment of 6 March 1996 the Federal Court of Justice dismissed the applicant's appeal, holding that the judgment of the Court of Appeal did not contain any errors of law that had operated to his detriment.

26. On 10 April 1996 the applicant lodged a constitutional appeal with the Federal Constitutional Court (*Bundesverfassungsgericht*), in which he alleged in particular a violation of Article 5 § 3 of the Convention on the ground that he had not been brought to trial within a reasonable time, and that his correspondence had been monitored unlawfully.

27. On 19 February 1997 a three-member committee of the Constitutional Court refused to examine the appeal.

II. RELEVANT DOMESTIC LAW AND PRACTICE

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31. Article 148 § 1 of the Code of Criminal Procedure lays down that remand prisoners may communicate in writing and orally with their lawyers.

32. The first sentence of Article 148 § 2 of the Code of Criminal Procedure reads as follows:

“If the accused is in custody and the investigation concerns an offence under Article 129a of the Criminal Code [membership of a terrorist organisation], access to written or other documents must be refused unless the sender agrees to their first being examined by a judge ... In cases in which correspondence has to be monitored ... adequate measures shall be taken to avoid written or other documents being handed over at meetings between prisoners and their lawyers.”

33. The purpose of the exception set out in Article 148 § 2 of the Code of Criminal Procedure is to prevent prisoners suspected of an offence under Article 129a of the Criminal Code from continuing to work for the terrorist organisation to which it is alleged they belong and contributing to its survival (Federal Court of Justice, *Neue Strafrechtszeitschrift* no. 84, p. 177).

34. Article 148a of the Code of Criminal Procedure provides that the judge with responsibility for such surveillance measures is the judge of the district court where the prison is located and that he or she shall not have, and may not be assigned, conduct of the investigation and shall keep the information thus obtained confidential, unless it concerns a serious or very serious offence, such as an offence under Article 138 §§ 1 or 2 of the Criminal Code.

THE LAW

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II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

50. The applicant also submitted that the fact that his correspondence with his lawyer was monitored under Article 148 § 2 of the Code of Criminal Procedure infringed 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.”

51. In the Government's submission, the exception to the rule that correspondence between lawyers and their clients is privileged – an exception that was set out in Article 148 § 2 of the Code of Criminal Procedure and applied to cases in which the prisoner was suspected of being a member of a terrorist organisation within the meaning of Article 129a of the Criminal Code – was necessary in the interests of national security, public safety, the prevention of disorder or crime and for the protection of the rights and freedoms of others. Furthermore, that provision contained all the necessary safeguards to avoid abuse (for instance, the judge responsible for opening the correspondence could not have the conduct of the investigation and was required to keep the information confidential).

52. The applicant contended that the provision was incompatible on principle with Article 8 of the Convention and the presumption of innocence. He pointed out that it had been introduced at the time of the proceedings against members of terrorist groups such as the Red Army Faction (*Rote Armee Fraktion*), but argued that it could not apply to members of the PKK. In any event, the interference had been disproportionate in view of the nature of the offences with which the applicant was charged. Even if the judge responsible for monitoring the correspondence was under a duty to keep any information obtained confidential, he would need the assistance of a Turkish translator, so there was a risk of leaks or of pressure being exerted, especially in a trial concerning members of the PKK.

A. Whether there has been an interference

53. It was not disputed that the correspondence between the applicant and his lawyer had been monitored by a judge in accordance with Article 148 § 2 of the Code of Criminal Procedure while the applicant was being detained pending trial (see paragraphs 31-34 above).

54. There has therefore been an “interference by a public authority” within the meaning of Article 8 § 2 of the Convention with the applicant's right to respect for his correspondence – in this instance with his lawyer – guaranteed by paragraph 1 of Article 8.

B. Whether the interference was justified

55. Such an interference will contravene Article 8 unless it is “in accordance with the law”, pursues one or more of the legitimate aims referred to in paragraph 2 and, furthermore, is “necessary in a democratic society” in order to achieve them (see, among other authorities, *Calogero Diana v. Italy*, judgment of 15 November 1996, *Reports of Judgments and Decisions* 1996-V, p. 1775, § 28).

1. “In accordance with the law”

56. The Court notes that the basis for the interference was Article 148 § 2 of the Code of Criminal Procedure, which lays down that the correspondence of prisoners suspected of belonging to a terrorist organisation within the meaning of Article 129a of the Criminal Code with their representatives shall be monitored by a judge who is not involved in the pending proceedings and who is required to keep the information confidential. That provision operates as an exception to the general rule set out in Article 148 § 1 of the Code of Criminal Procedure, which provides that prisoners are entitled to communicate in writing and orally with their lawyers.

57. There was therefore a legal basis for the interference in domestic law.

58. Furthermore, having regard to the wording of the statute concerned, the Court considers that it satisfied the tests of accessibility and foreseeability established in the Court's case-law (see, for a statement of the principles, *Silver and Others v. the United Kingdom*, judgment of 25 March 1983, Series A no. 61, pp. 32-34, §§ 85-90).

59. Accordingly, the interference was “in accordance with the law” within the meaning of Article 8 § 2.

2. *Legitimate aims*

60. In the Court's view, it is not open to doubt that the monitoring of the applicant's correspondence pursued the legitimate aims of, *inter alia*, protecting "national security" and/or preventing "disorder or crime" referred to in Article 8 § 2.

3. *"Necessary in a democratic society"*

61. The Court reiterates the principles applicable to the monitoring of correspondence between prisoners and their lawyers which it laid down in particular in *Campbell v. the United Kingdom* (judgment of 25 March 1992, Series A no. 233, pp. 18-19, §§ 44-48):

"... the notion of necessity implies that the interference corresponds to a pressing social need and, in particular, that it is proportionate to the legitimate aim pursued. In determining whether an interference is 'necessary in a democratic society' regard may be had to the State's margin of appreciation (see, amongst other authorities, the *Sunday Times v. the United Kingdom* (no. 2) judgment of 26 November 1991, Series A no. 217, pp. 28-29, § 50).

45. It has also been recognised that some measure of control over prisoners' correspondence is called for and is not of itself incompatible with the Convention, regard being paid to the ordinary and reasonable requirements of imprisonment (see the *Silver and Others v. the United Kingdom* judgment of 25 March 1983, Series A no. 61, p. 38, § 98). In assessing the permissible extent of such control in general, the fact that the opportunity to write and to receive letters is sometimes the prisoner's only link with the outside world should, however, not be overlooked.

46. It is clearly in the general interest that any person who wishes to consult a lawyer should be free to do so under conditions which favour full and uninhibited discussion. It is for this reason that the lawyer-client relationship is, in principle, privileged. Indeed, in its *S. v. Switzerland* judgment of 28 November 1991 the Court stressed the importance of a prisoner's right to communicate with counsel out of earshot of the prison authorities. It was considered, in the context of Article 6 that if a lawyer were unable to confer with his client without such surveillance and receive confidential instructions from him his assistance would lose much of its usefulness, whereas the Convention is intended to guarantee rights that are practical and effective (Series A no. 220, pp. 15-16, § 48; see also, in this context, the *Campbell and Fell v. the United Kingdom* judgment of 28 June 1984, Series A no. 80, p. 49, §§ 111-113).

47. In the Court's view, similar considerations apply to a prisoner's correspondence with a lawyer concerning contemplated or pending proceedings where the need for confidentiality is equally pressing ...

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This means that the prison authorities may open a letter from a lawyer to a prisoner when they have reasonable cause to believe that it contains an illicit enclosure which the normal means of detection have failed to disclose. The letter should, however, only be opened and should not be read. Suitable guarantees preventing the reading of the letter should be provided, e.g. opening the letter in the presence of the prisoner. The

reading of a prisoner's mail to and from a lawyer, on the other hand, should only be permitted in exceptional circumstances when the authorities have reasonable cause to believe that the privilege is being abused in that the contents of the letter endanger prison security or the safety of others or are otherwise of a criminal nature. What may be regarded as 'reasonable cause' will depend on all the circumstances but it presupposes the existence of facts or information which would satisfy an objective observer that the privileged channel of communication was being abused (see, *mutatis mutandis*, the Fox, Campbell and Hartley v. the United Kingdom judgment of 30 August 1990, Series A no. 182, p. 16, § 32)."

62. The Court notes that in the instant case Article 148 § 2 of the Code of Criminal Procedure operates in a very specific field, namely the prevention of terrorism, its purpose, according to the case-law of the Federal Court of Justice, being to prevent prisoners suspected of offences under Article 129a of the Criminal Code from continuing to work for the terrorist organisation to which it is alleged they belong and contributing to its survival (see paragraph 33 above).

63. This exception to the general rule that correspondence between prisoners and their representatives is privileged was adopted in Germany in the 1970s in the wake of a series of bloody terrorist attacks by the Red Army Faction that had a traumatic effect on German society.

64. In *Klass and Others v. Germany* (judgment of 6 September 1978, Series A no. 28, p. 23, § 48), which concerned a statute permitting restrictions on the confidentiality of mail, post and telecommunications, the Court stated that the following principles applied in prevention of terrorism cases:

"... Democratic societies nowadays find themselves threatened by highly sophisticated forms of espionage and by terrorism, with the result that the State must be able, in order effectively to counter such threats, to undertake the secret surveillance of subversive elements operating within its jurisdiction. The Court has therefore to accept that the existence of some legislation granting powers of secret surveillance over the mail, post and telecommunications is, under exceptional conditions, necessary in a democratic society in the interests of national security and/or for the prevention of disorder or crime."

65. Nonetheless, the privilege that attaches to correspondence between prisoners and their lawyers constitutes a fundamental right of the individual and directly affects the rights of the defence. For that reason, as the Court has stated above, that rule may only be derogated from in exceptional cases and on condition that adequate and sufficient safeguards against abuse are in place (see, *mutatis mutandis*, *Klass and Others*, cited above, *ibid.*).

66. The trial of senior PKK figures took place in the special context of the prevention of terrorism in all its forms. Furthermore, it does not appear unreasonable for the German authorities to have sought to ensure maximal security during the trial, bearing in mind that a large Turkish community, many of whose members are of Kurdish origin, lives in Germany.

67. The Court further notes that the provision is worded very precisely, as it specifies the category of persons whose correspondence must be

monitored, that is to say prisoners suspected of belonging to a terrorist organisation within the meaning of Article 129a of the Criminal Code. Moreover, there are restrictions on the use of the measure, which operates as an exception to the general rule that privilege attaches to correspondence between prisoners and their lawyers, which act as safeguards: unlike other cases that have come before the Court and in which correspondence was opened by the prison authorities (see in particular *Campbell*, cited above, and *Campbell and Fell v. the United Kingdom*, judgment of 28 June 1984, Series A no. 80), in the instant case the power to monitor correspondence was vested in an independent judge who had to be unconnected with the investigation and was under a duty to keep the information thus obtained confidential. Lastly, the power to monitor correspondence is limited, since prisoners are free to discuss their cases orally with their representatives. While it is true that representatives are precluded from delivering written documents or other objects to prisoners, they may provide them with information contained in written documents.

68. The Court reiterates that some compromise between the requirements for defending democratic society and individual rights is inherent in the system of the Convention (see, *mutatis mutandis*, *Klass and Others*, cited above, pp. 27-28, § 59).

69. Having regard to the threat posed by terrorism in all its forms (see *Bader, Meins, Meinhof, Grundmann v. Germany*, no. 6166/73, Commission decision of 30 May 1975, Decisions and Reports 2), the safeguards attached to the monitoring of correspondence in the instant case and the margin of appreciation afforded to the State, the Court holds that the interference in issue was not disproportionate to the legitimate aims pursued.

70. Consequently, there has been no violation of Article 8 of the Convention.

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FOR THESE REASONS, THE COURT UNANIMOUSLY

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2. *Holds* that there has been no violation of Article 8 of the Convention.

Done in French, and notified in writing on 5 July 2001, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Vincent BERGER
Registrar

Antonio PASTOR RIDRUEJO
President