CONSEIL DE L'EUROPE

COUNCIL OF EUROPE

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

FINAL DECISION

AS TO THE ADMISSIBILITY OF

Application no. 37043/97
by Vitali SLAVGORODSKI
against Estonia

The European Court of Human Rights (First Section) sitting on 9 March 1999 as a Chamber composed of

Mr J. Casadevall, *President*,
Mr L. Ferrari Bravo,
Mr Gaukur Jörundsson,
Mr R. Türmen,
Mr C. Bîrsan,
Mrs W. Thomassen,
Mr R. Maruste, *Judges*,

with Mr M. O'Boyle, *Section Registrar*;

Having regard to Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 23 July 1996 by Vitali Slavgorodski against Estonia and registered on 25 July 1997 under file no. 37043/97;

Having regard to the report provided for in Rule 49 of the Rules of Court;

Having regard to the observations submitted by the respondent Government on 22 July 1998 and the observations in reply submitted by the applicant on 24 September 1998;

Having deliberated;

Decides as follows:

THE FACTS

The applicant is an Estonian citizen, born in 1940 and living in Tallinn.

The facts of the case, as submitted by the parties, may be summarised as follows.

A. Particular circumstances of the case

The applicant was convicted of murder by judgment of the Tallinn City Court ("Tallinna Linnakohus") of 15 November 1994 and sentenced to a term of imprisonment. The judgment was upheld by the Tallinn Court of Appeal ("Tallinna Ringkonnakohus") on 5 January 1995. Leave to appeal to the Supreme Court ("Riigikohus") was refused on 8 March 1995. The applicant subsequently made an attempt to reopen the proceedings, but his application was turned down by the Supreme Court on 19 April 1995. He then submitted a request for pardon to the President of the Republic who refused it on 16 October 1995.

Following his conviction, the applicant was detained in Murru prison. On 4 September 1998 he was released on probation.

During his detention the applicant's incoming and outgoing mail was regularly opened by the prison administration and the dispatch and delivery of his correspondence took place with delay. The applicant refers to letters from the Ministry of Interior, the public prosecutor's office, the President, international organisations and Santa Claus, which he received already opened. As regards outgoing mail, the prison administration has opened his letters addressed to the President and Santa Claus.

The applicant claims that letters from the European Commission of Human Rights, dated 12 December 1996, 22 January 1997, 16 April 1997, 25 July 1997, 22 October 1997, 19 December 1997 and 5 June 1998, were delivered to him already opened.

A letter from the Commission dated 25 July 1997, which arrived in the prison on 11 August 1997, was opened by the prison administration and given to the applicant on 14 August 1997 with a request to sign a statement that he had been informed of its content. The letter, which the applicant has returned to the Commission, bears Murru prison's stamp together with a reference number and the date of 11 August 1997.

B. Relevant domestic law

Article 43 of the Estonian Constitution provides:

[Translation]

> "Everyone has the right to secrecy of messages transmitted by him/her or to him/her by post, telegram, telephone or other generally used means. Exceptions can be made on authorisation by a court, in cases and in accordance with the procedure prescribed by law in order to prevent a criminal act or for the purpose of establishing facts in a criminal investigation."

[Estonian]

"Igaühel on õigus tema poolt või temale posti, telegraafi, telefoni või muul üldkasutataval teel edastatavate sõnumite saladusele. Erandeid võib kohtu loal teha kuriteo tõkestamiseks või kriminaalmenetluses tõe väljaselgitamiseks seadusega sätestatud juhtudel ja korras."

At the material time, prisoners' correspondence was regulated by the following provisions of the Code on Procedure for the Execution of Judgments ("Täitemenetluse seadustik"), adopted on 21 June 1993, and of the Internal Prison Regulations ("Vanglaasutuse sisekorraeeskirjad"), approved by the decree of the Minister of Justice of 2 February 1994.

Code on Procedure for the Execution of Judgments

[Translation]

Article 98. Rights of the detainee

"....the detainee has the right:
5) to correspondence and phone calls under the administration's supervision;
7) to submit applications and complaints to the prison administration and to its supervising authority. It is prohibited for the administration to check the applications addressed to the court, defence lawyer, the Department of Prisons or the public prosecutor."

Article 122. Correspondence and phone calls

"The detainee has the right, under the administration's supervision, to send and receive an unlimited number of letters..."

[Estonian]

Paragrahv 98. Kinnipeetava õigused

" ... kinnipeetaval [on] õigus:
5) kirjavahetusele ja telefonikõnedele administratsiooni kontrolli all;
7) esitada avaldusi ja kaebusi vanglaasutuse administratsioonile ning vanglaasutuse tegevuse üle järelvalvet teostavale riigi- või ühiskondlikule asutusele. Kohtule, kaitsjale, Vanglate Ametile või prokurörile adresseeritud avaldusi on administratsioonil keelatud kontrollida."

Paragrahv 122. Kirjavahetus ja telefonikõned

"Kinnipeetaval on õigus administratsiooni järelvalve all saata ja saada piiramatul arvul kirju..."

The Internal Prison Regulations

[Translation]

"Letters are sent only through the prison administration and are subject to censorship. Letters are dropped in a mailbox or forwarded to the representative of the administration open." (Point 96)

"Only letters addressed to the court, the prosecutor, the defence lawyer and the Department of Prisons are forwarded unexamined; they can be handed to the administration in a sealed envelope and will be forwarded to the addressee the same or at the latest the next work day." (Point 101)

"The inmate can submit applications orally or in writing. Written applications are forwarded by the prison administration to the addressee..." (Point 105)

"Written applications are registered by the prison's office and are sent to the addressee within three days." (Point 112)

"Replies regarding the outcome of the examination of the application are made known to the inmate within three days of their arrival; the detainees sign for their receipt and the replies are added to the inmate's personal file." (Point 113)

[Estonian]

"Kirju saadetakse ainult vanglaasutuse administratsiooni kaudu tsensuuri läbides. Kirjad lastakse postkasti või antakse administratsiooni kätte avatult." (Punkt 96)

"Kontrollimata edastatakse kohtule, prokurörile, kaitsjale ja Vanglate Ametile adresseeritud kirjad, mida võib administratsioonile anda suletud ümbrikus ning mis edastatakse adressaadile samal või hiljemalt järgmisel tööpäeval." (Punkt 101)

"Kinnipeetav võib esitada avaldusi suuliselt või kirjalikult. Kirjalikud avaldused saadab vanglaasutuse administratsioon adressadile..." (Punkt 105)

"Kirjalikud avaldused registreeritakse vanglaasutuse kantseleis ja saadetakse kolme päeva jooksul adressadile." (Punkt 112)

"Vastused avalduste lahendamise tulemuste kohta tehakse kinnipeetavale teatavaks allkirja vastu kolme päeva jooksul vastuse saabumisest ning lisatakse kinnipeetava isikutoimikusse." (Punkt 113)

By circular letter of 10 May 1996 the Ministry of Justice instructed the prison governors to dispatch, unopened and without delay, all letters addressed to the supervising bodies of the Convention.

On 30 June 1998 the Amending Law of the Law on the Code on Procedure for the Execution of Judgments, the Law on Search and Surveillance, the Criminal Procedure Code and the Administrative Procedure Code was promulgated and entered into force on 16 July 1998. The amended articles provide as follows:

Article 98: Rights of the detainee

"(1) ....the detainee has the right:
5) to correspondence and phone calls;
7) to submit applications and complaints to the prison administration and to its supervising authority. It is prohibited for the administration to check the applications addressed to the court, defence lawyer, the Department of Prisons or the public prosecutor.
(2) all letters sent to or by the detainee, with the exception of those sent to or by the institutions listed in section 1, sub-section 7, will be opened for guaranteeing the security and safety in the presence of the detainee and all objects not permitted will be removed."

Article 122: Correspondence and phone calls

"(1) The detainee has the right to send and receive an unlimited number of letters...
(2) The content of the detainees' letters, postal packages and phone calls, telegraph messages or other messages sent by a common transmission facility may be checked only on the basis of and following the procedure established in the Law on Search and Surveillance and with the permission of a court."

[Estonian]

Paragrahv 98. Kinnipeetava õigused

"(1) ... kinnipeetaval [on] õigus:
5) kirjavahetusele ja telefonikõnedele;
7) esitada avaldusi ja kaebusi vangla administratsioonile ning vangla tegevuse üle järelvalvet teostavale riigi- või ühiskondlikule asutusele. Kohtule, kaitsjale, Vanglate Ametile või prokurörile adresseeritud avaldusi on administratsioonil keelatud kontrollida.
(*2) Kõik kinnipeetavale saadetud või tema poolt saadetavad kirjad, välja arvatud käesoleva paragrahvi 1. lõike punktis 7 tähendatud asutustele adresseeritud kirjad, avatakse julgeoleku ja ohutuse tagamiseks kinnipeetava juuresolekul ning võetakse sealt ära keelatud esemed."*

Paragrahv 122. Kirjavahetus ja telefonikõned

"(1) Kinnipeetaval on õigus saata ja saada piiramatul arvul kirju ...
(2) Kinnipeetava kirjavahetuse, postisaadetiste ning telefoni, telegraafi või muude üldkasutatavate tehniliste sidekanalitega edastatavate sõnumite sisu on õigus kontrollida ainult jälitustegevuse seaduses sätestatud alustel ja korras kohtu loal."

Article 15 of the Estonian Constitution provides:

[Translation]

"Everyone whose rights and freedoms are violated has the right of recourse to the courts. Everyone has the right, while his or her case is before the court, to petition for any relevant law, other legislation or procedure to be declared unconstitutional.

The courts shall observe the Constitution and shall declare unconstitutional any law, other legislation or procedure which violates the rights and freedoms provided by the Constitution or which is otherwise in conflict with the Constitution."

[Estonian]

"Igaühel on õigus pöörduda oma õiguste ja vabaduste rikkumise korrral kohtusse. Igaüks võib oma kohtuasja läbivaatamisel nõuda mis tahes asjassepuutuva seaduse, muu õigusakti või toimingu põhiseadusevastaseks tunnistamist.

Kohus järgib põhiseadust ja tunnistab põhiseadusevastaseks mis tahes seaduse, muu õigusakti või toimingu, mis rikub põhiseaduses sätestatud õigusi ja vabadusi või on muul viisil põhiseadusega vastuolus."

Article 123 of the Estonian Constitution provides:

[Translation]

"If laws or other legislation of Estonia are in conflict with international treaties ratified by the Riigikogu the provisions of the international treaty shall apply."

[Estonian]

"*Kui Eesti seadused või muud aktid on vastuolus Riigikogu poolt ratifitseeritud välislepinguga, kohaldatakse välislepingu sätteid."*

COMPLAINTS

1. The applicant complains about interference by the prison administration with his correspondence with the Commission stating that letters from the Commission were forwarded to him opened and with delay. The applicant invokes Art. 25 of the former Convention.[1]

2. The applicant also complains about interference by the prison authorities with his other correspondence. He submits that his personal mail was regularly opened and that letters were often delivered to him by the prison staff with delay.

[1] The term "former" refers to the text of the Convention before the entry into force of Protocol No. 11 on 1 November 1998.

PROCEEDINGS BEFORE THE COURT

The application was introduced with the European Commission of Human Rights on 23 July 1996 and registered on 25 July 1997.

On 21 May 1998, the Commission decided to communicate the applicant's complaint concerning interference with his correspondence to the respondent Government and to declare the remainder of the application inadmissible.

The Government's written observations were submitted on 22 July 1998. The applicant replied on 24 September 1998.

On 1 November 1998, by operation of Article 5 § 2 of Protocol No. 11 to the Convention, the case fell to be examined by the Court in accordance with the provisions of that Protocol.

THE LAW

1. The applicant complains about interference by the prison authorities with his correspondence with the Commission as well as with his other correspondence.

The Government contest the admissibility of the present application arguing that the applicant has not exhausted domestic remedies. They submit that the applicant had effective judicial and administrative remedies available to him under Estonian law. First, pursuant to Article 15 of the Constitution, the applicant could have lodged a complaint with the competent ordinary court alleging violations of Article 43 of the Constitution and of Articles 8 and 25 of the Convention (now Article 34) with a further opportunity of appealing to higher courts. Since the Convention is directly applicable in the Estonian legal system and prevails in case of its conflict with ordinary law, the courts would have been bound to apply the Convention and to give it precedence over the legislation governing the applicant's correspondence and the resulting administrative practice.

Secondly, the applicant could have lodged an administrative complaint to the Director of Murru prison, the Director General of the Prison Administration and/or the Minister of Justice. The decisions of these administrative bodies could have then been appealed to the administrative court. An appeal to the Minister of Justice in August-September 1997 would have drawn attention to the urgency of the problem arising under Articles 8 and 25 of the Convention, would have resulted in new provisional instructions to the prison authorities and would have accelerated the legislative reform which took place in June 1998.

The applicant questions the effectiveness of any appeal to government bodies. He states that the replies received from state institutions in Estonia, in particular from the office of the President and from the Public Prosecutor's office, are not addressed to him, but to the prison governor with a request to bring their contents to his attention. According to the applicant, this indicates that interference with prisoners' correspondence has been sanctioned at the highest level and constitutes government policy. In these circumstances, to appeal to the Minister of Justice would be pointless.

The applicant also questions the practicability of instituting judicial proceedings against the prison administration. He refers to the problem of availability of legal services in prison and states that during four years of imprisonment he does not recall a single case of a prisoner suing the prison administration.

The Court observes that the rule of exhaustion of domestic remedies contained in Article 35 § 1 of the Convention requires that normal recourse should be had by an applicant to remedies which are available and sufficient to afford redress in respect of the breaches alleged (see, among other authorities, the Akdivar and Others v. Turkey judgment of 16 September 1996, *Reports of Judgments and Decisions* 1996-IV, p. 1210, § 65). The existence of the remedies in question must be sufficiently certain not only in theory but in practice, failing which they will lack the requisite accessibility and effectiveness (ibid.).

It recalls that in the area of the exhaustion of domestic remedies there is a distribution of the burden of proof. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available in theory and practice at the relevant time, that is to say, that it was accessible, was one which was capable of providing redress in respect of the applicant's complaints and offered reasonable prospects of success. However, once this burden has been satisfied it falls to the applicant to establish that the remedy advanced by the Government was in fact exhausted or was for some reason inadequate and ineffective in the particular circumstances of the case or that there existed special circumstances absolving him or her from the requirement (ibid., p. 1211, § 68).

In addition, the application of the rule must make due allowance for the fact that it is being applied in the context of machinery for the protection of human rights that the Contracting Parties have agreed to set up (ibid., § 69). Accordingly, the Court has recognised that Article 35 § 1 (formerly Article 26) must be applied with some degree of flexibility and without excessive formalism (see, for example, the Cardot v. France judgment of 19 March 1991, Series A no. 200, p. 18, § 34). It has further recognised that the rule of exhaustion is neither absolute nor capable of being applied automatically; in reviewing whether it has been observed it is essential to have regard to the particular circumstances of each individual case (see, for example, the Van Oosterwijk v. Belgium judgment of 6 November 1980, Series A no. 40, p. 18, § 35). This means amongst other things that it must take realistic account not only of the existence of formal remedies in the legal system of the Contracting Party concerned but also of the general legal and political context in which they operate as well as the personal circumstances of the applicants (see the Akdivar judgment cited above, p. 1211, § 69).

In the circumstances of the present case, having regard in particular to the domestic legislation authorising the opening of the applicant's correspondence with the Commission and others, the Court considers that the Government have not shown that at the material time the applicant had at his disposal an adequate administrative remedy to deal effectively with his complaints. It recalls that recourse to the administrative bodies could be considered an effective remedy in respect of complaints concerning the application or implementation of prison regulations (see, among other authorities, the Boyle and Rice v. the United Kingdom judgment of 27 April 1988, Series A no. 131, p. 26, § 65, and the Silver and Others judgment of 25 March 1983, Series A no. 61, p. 43, § 116). It considers that it has not been demonstrated that an appeal to the administrative bodies, in a case such as the present, which challenged the compatibility of the relevant rules with the Convention, offered the applicant the possibility of securing redress for his complaints.

As regards remedies before the ordinary courts, the Government have not provided any examples of cases where redress was afforded to a prisoner in a comparable situation following the filing of a constitutional complaint invoking the provisions of the Convention directly before the domestic courts. The existence of such a remedy, therefore, has not been established with sufficient certainty.

In these circumstances, the Court considers that the applicant's complaints cannot be rejected for failure to exhaust domestic remedies.

2. The applicant complains about interference with his correspondence with the Commission under Article 25 § 1 of the former Convention (now Article 34), which, in so far as relevant, provides as follows:

> "Those of the High Contracting Parties who have made such a declaration undertake not to hinder in any way the effective exercise of this right."

The Court considers that this complaint also raises issues under Article 8 of the Convention which reads as follows:

> "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 interest 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."

The Government acknowledge that the opening of the letter of 25 July 1997 from the Commission to the applicant was not in conformity with Article 25 of the Convention. The Government refer to the lacunae in the 1994 Internal Prison Regulations which, having been promulgated prior to Estonia's ratification, did not foresee an exception concerning correspondence with the Commission. However, on becoming aware of the lacunae in point 101 of the Regulations, the Minister of Justice, on 10 May 1996, issued new instructions to the prison governors ordering them to dispatch, unopened and without delay, all letters addressed to the Convention institutions. No similar instructions were given with regard to incoming mail. The Government further refer to the amendments introduced on 30 June 1998 in the Law on the Code on Procedure for the Execution of Judgments and in related laws and state that the term "court" in Article 98, section 1(7) obviously covers the European Commission and Court of Human Rights. The Government submit that, as a result of the new legislation, no incident similar to that complained of would occur in the future.

The applicant regards the legislation governing his correspondence and the practice under it as unlawful.

The Court considers, in the light of the parties' submissions, that this part of the case raises complex issues of law and of fact under the Convention, the determination of which should depend on an examination of the merits of the application. The Court concludes, therefore, that this part of the application is not manifestly ill-founded, within the meaning of

Article 35 § 3 of the Convention. No other grounds for declaring it inadmissible have been established.

3. The applicant also complains of interference by the prison administration with his other correspondence. He refers to the regular opening of his mail by the prison staff and to delays in forwarding letters to him.

The Government submit that the interference with the applicant's correspondence satisfied the conditions laid down in paragraph 2 of Article 8 of the Convention and was in accordance with the jurisprudence of the Court recognising some degree of control over prisoners' correspondence to be legitimate. They point out that, although the applicant's correspondence was opened and delayed, it was never stopped or censured by the prison administration. Nor was there ever a question of preventing the applicant from sending or receiving letters or restricting their number.

The applicant does not contest that some form of supervision of his mail takes place. However, he maintains that interferences with his correspondence are unacceptable.

The Court considers, in the light of the parties' submissions, that this part of the case also raises complex issues of law and of fact under the Convention, the determination of which should depend on an examination of the merits of the application. It concludes, therefore, that this part of the application is not manifestly ill-founded, within the meaning of Article 35 § 3 of the Convention. No other grounds for declaring it inadmissible have been established.

For these reasons, the Court, by a majority,

DECLARES THE APPLICATION ADMISSIBLE, without prejudging the merits of the case.

Michael O'Boyle
Registrar

Josep Casadevall
President