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

FOURTH SECTION

DECISION

Application no. 10410/10
Jarno Kalevi HELANDER
against Finland

The European Court of Human Rights (Fourth Section), sitting on 10 September 2013 as a Chamber composed of:

Ineta Ziemele, *President,*
David Thór Björgvinsson,
Päivi Hirvelä,
George Nicolaou,
Paul Mahoney,
Krzysztof Wojtyczek,
Faris Vehabović, *judges,*

and Françoise Elens-Passos, *Section Registrar,*

Having regard to the above application lodged on 19 February 2010,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Jarno Kalevi Helander, is a Finnish national who was born in 1972 and lives in Konnunsuo. He was represented before the Court by Mr Ari Nieminen, a lawyer practising in Tampere.

2. The Finnish Government ("the Government") were represented by their Agent, Mr Arto Kosonen of the Ministry for Foreign Affairs.

A. The circumstances of the case

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

4. In February 2008 the applicant was placed in pre-trial detention in Pyhäselkä prison. On Saturday 2 February 2008 at 8.15 p.m. his lawyer sent him an e-mail to the prison mailbox concerning another pending court case.

5. On Monday morning 4 February 2008 at 9.57 a.m. a prison official transferred the message to the prison director's official e-mail address. On the same day at 2.38 p.m. the prison director contacted the sender of the message, informing him of the prison's practice according to which confidential messages to prisoners should not be sent via the prison's official e-mail address. Instead, he advised the sender to send a letter, telephone or visit to convey his message. As a ground for the refusal to receive e-mail messages, the prison director stated that the prison could not sufficiently verify the identity of the senders of such messages or their legitimacy as proper parties. Apparently, ten minutes later a new message was sent to the prison director's e-mail address, insisting that he transmit the previous message, copied in this message, to the applicant. The sender referred to section 5 of the Act on Electronic Services and Communication in the Public Sector. In addition, the sender asked to be notified of the receipt of the message by the applicant, referring to a possibility of filing a complaint about the prison director, should he fail to comply with this request.

6. On 5 February 2008 the prison director replied to the sender, stating that the aforementioned Act did not impose any obligation to comply with the sender's request, and that the prison was not going to transmit the message. He also repeated the reasoning already stated in his reply of 4 February 2008.

7. On 5 February 2008 the applicant asked the Joensuu District Court (*käräjäoikeus, tingsrätten*) to order the prison director to transmit the message to him and accused him of committing a crime in office.

8. On 13 February 2008 the prison director reported the matter to the police, asking them to investigate whether he had committed a crime in office. In this context he transmitted the message destined for the applicant to the police.

9. By letter dated 23 February 2008 the applicant asked the District Court to apply an interim measure ordering the prison director, under threat of payment of a penalty, to transmit the message to the applicant.

10. On 25 February 2008 the police completed the pre-trial investigation and sent the matter to the public prosecutor for consideration of possible charges.

11. On 7 March 2008 the District Court rejected the request for an interim measure. The court found that the conditions for granting an interim measure were not fulfilled.

12. By letter dated 13 March 2008 the applicant appealed to the Itä-Suomi Court of Appeal (*hovioikeus, hovrätten*) against the decision of 7 March 2008.

13. On 15 April 2008 the Court of Appeal upheld the District Court's decision.

14. On 20 April 2008 the applicant requested the public prosecutor to order the police to conduct an additional investigation into the matter to see whether the prison director had violated the confidentiality of the message by reading it and by transmitting it to the police. He also requested that charges be pressed. The applicant accepted the fact that the prison director had printed the message on paper but claimed that from that moment onwards it had to be considered as a letter, the confidentiality of which was protected by the Constitution. As the message had been included in the pre-trial investigation report, it had become public. The applicant's counsel had been sending e-mails destined for his clients imprisoned in different prisons in Finland for years and had never before encountered any problems in this respect.

15. By letter dated 9 May 2008 the public prosecutor informed the applicant that he was not going to press charges against the prison director. Moreover, he was not going to order any additional investigation into the matter.

16. On 13 May 2008 the applicant himself asked the police to investigate the additional issue, which the public prosecutor had refused to do. He also requested that charges be pressed.

17. On 4 June 2008 the police completed the additional investigation and sent the matter to the public prosecutor for consideration of possible charges.

18. By letter dated 12 June 2008 the public prosecutor informed the applicant that the additional investigation would not lead to any action on his part.

19. On 14 October 2008 the Joensuu District Court dismissed the charges against the prison director and rejected the applicant's request that the message be transmitted to him. It found that everybody had a right to contact the authorities via e-mail if the technical or economic considerations allowed it. This right only applied to official matters and not to private issues, such as the matter in question in the present case. Therefore, the prison director had no obligation to pass on the message, nor had the applicant any right to receive it.

20. By letter dated 13 November 2008 the applicant appealed to the Itä-Suomi Court of Appeal. The applicant pointed out that all correspondence destined for a detainee, whether a letter or an e-mail, arrived in the prison mail box and was scrutinised and passed on by the prison authorities. There was no reason to treat a printed e-mail differently from a letter. In fact, the former was safer as nothing extra could be passed to a detainee. The prison authorities could not rely on lack of technical or human resources as a ground to prevent lawyer-client contacts. No valid

technical reason prevented the prison director from passing on the message to the applicant, since he had been able to pass it on to the police.

21. On 7 April 2009 the Itä-Suomi Court of Appeal upheld the District Court's judgment.

22. By letter dated 3 June 2009 the applicant appealed to the Supreme Court (*korkein oikeus, högsta domstolen*), reiterating the grounds of appeal already presented before the Court of Appeal. He also pointed out that the law provided no restrictions as concerned the form in which correspondence to a detainee had to be conveyed. If the prison authorities received a message destined for a detainee, they had an obligation to pass it on to him or her.

23. On 21 August 2009 the Supreme Court refused the applicant leave to appeal.

B. Relevant domestic law and practice

1. Constitution

24. According to Article 10 of the Constitution of Finland (*Suomen perustuslaki, Finlands grundlag*, Act no. 731/1999), the secrecy of correspondence, telephony and other confidential communications is inviolable. Provisions concerning limitations of the secrecy of communications which are necessary in the investigation of crimes that jeopardise the security of the individual or society or the sanctity of the home, at trials and security checks, as well as during the deprivation of liberty may be laid down by an Act.

25. According to Article 7 of the Constitution, the rights of individuals deprived of their liberty shall be guaranteed by an Act. The rights of convicted prisoners and pre-trial detainees and the necessary restrictions on these rights are regulated by the Prison Sentences Act and the Detention Act.

2. Prison Sentences Act

26. Chapter 12, section 1, subsection 1, of the Prison Sentences Act (*vankeuslaki, fängelselagen*, Act no. 767/2005) provides that a prisoner has the right of correspondence. Any closed letter or other mail destined for the prisoner or sent by the prisoner may be checked by X-ray or by similar methods without opening the mail, in order to examine whether it contains prohibited substances or objects referred to in Chapter 9, section 1, subsection 1 or 2, of the Act.

27. Chapter 12, section 4, of the Act prohibits checking or reading a letter or other mail addressed by a prisoner to his or her advocate or other attorney or counsel referred to in Chapter 15, section 2, of the Code of Judicial Procedure (*oikeudenkäymiskaari, rättegångsbalken*, as in force at

the relevant time). If the cover of a letter or other mail destined for a prisoner or other circumstances reliably show that the sender is an attorney referred to in Chapter 12, section 4, subsection 1, of the Act, the mail may be opened and its contents may be checked without reading the message, and only in the presence of the prisoner, if there is reason to suspect that the letter or mail contains substances or objects referred to in Chapter 9, section 1, subsection 1 or 2.

28. Chapter 12, section 9, of the Act contains provisions on electronic communications by prisoners. This section provides that a prisoner may, for a special reason, be permitted to contact persons outside the prison by using electronic communications, telecommunications or other similar technical connections, provided that these connections do not endanger prison security. The provisions of Chapter 12, sections 2-5, 7, 10 and 11 of the Prison Sentences Act apply, *mutatis mutandis*, to the supervision of electronic communications.

29. The *travaux préparatoires* concerning Chapter 12, section 9, of the Act (Government Bill HE 263/2004 vp) read as follows:

> "At present prisoners have no right to have mobile phones or to contact persons outside the prison by using electronic communications, telecommunications or other similar technical connections. Most often telecommunications take place by mobile phone. The concept of 'other electronic communications' refers to contacts over the Internet. The use of electronic communications would be subject to a permit and require a special reason. As a rule, the provision would be applicable in open institutions. A special reason refers, for example, to the prisoner's need to arrange his or her housing and employment before forthcoming release. If a prisoner is given the right to such contacts, the contacts could be supervised in the same manner as correspondence and telephone calls. This would mean the possibility of reading prisoners' e-mails on the same conditions as their correspondence. This would also permit checking their e-mail addresses."

3. Detention Act

30. Chapter 8, section 6, of the Detention Act (*tutkintavankeuslaki, häktningslagen*, Act no. 768/2005) provides that a pre-trial detainee must be given an opportunity to contact persons outside the prison by telephone at his or her own expense unless this right has been restricted under Chapter 1, section 18b, of the Coercive Measures Act (*pakkokeinolaki, tvångsmedelslagen*, Act no. 450/1987). The prison regulations may set out rules concerning the time for using the telephone if such rules are necessary for the activities and order in the prison. Furthermore, a pre-trial detainee must be permitted to telephone his or her attorney and other persons outside the prison to deal with business which cannot be dealt with by letter or a visit.

31. According to Chapter 8, section 4, of the Detention Act (as modified by Act no. 266/2007), a letter or other mail addressed to a detainee by his counsel may be opened and its content checked, without reading the

message, and only in the presence of the detainee, if there is reason to suspect that the letter contains an object or a substance capable of harming persons or destroying property.

32. Chapter 8, section 5, of the Act provides that a letter, mail or message destined for a detainee may be withheld, if passing it on would endanger the purpose of the pre-trial detention or if the withholding is necessary for the prevention or solving of crime, prevention of disorder in the prison or for the safety of the detainee or other persons.

4. Act on Electronic Services and Communication in the Public Sector

33. The Act on Electronic Services and Communication in the Public Sector (*laki sähköisestä asioinnista viranomaistoiminnassa, lagen om elektronisk kommunikation i myndigheternas verksamhet*, Act no. 13/2003), contains provisions on electronic communications related to authorities' activities. Section 2 of the Act provides that the Act applies to:

> "lodging of administrative, judicial, prosecution and enforcement matters, to the consideration and to the service of decisions of such matters by electronic means, unless otherwise provided by statute. The Act applies, where appropriate, also to other activities of the authorities."

34. According to section 5 of the Act:

> "an authority in possession of the requisite technical, financial and other resources shall, within the bounds of these, offer to the public the option to send a message to a designated electronic address or other designated device in order to lodge a matter or to have it considered. Furthermore, the authority shall offer to the public the option to deliver statutory or ordered notifications, requested accounts and other similar documents and messages by electronic means."

35. The Parliamentary Ombudsman, in his decision of 24 August 2010 (no. 2335/4/08) concerning a certain case in a Finnish prison, considered that, by virtue of the current legislation, prison authorities have no obligation to deliver electronic messages to prisoners, and that obliging them to deliver an electronic message to a prisoner requires more precise provisions in the relevant legislation. In this connection, the Parliamentary Ombudsman has generally stated that it would be desirable that such messages be delivered to prisoners in individual cases, provided that this does not endanger prison security and the confidentiality of the message can be secured.

C. Relevant international standards

36. The Council of Europe Recommendation Rec(2006)2 on European Prison Rules, adopted by the Committee of Ministers on 11 January 2006, provides, *inter alia*, the following:

"24.1 Prisoners shall be allowed to communicate as often as possible by letter, telephone or other forms of communication with their families, other persons and representatives of outside organisations and to receive visits from these persons.

24.2 Communication and visits may be subject to restrictions and monitoring necessary for the requirements of continuing criminal investigations, maintenance of good order, safety and security, prevention of criminal offences and protection of victims of crime, but such restrictions, including specific restrictions ordered by a judicial authority, shall nevertheless allow an acceptable minimum level of contact.

24.3 National law shall specify national and international bodies and officials with whom communication by prisoners shall not be restricted.

...

24.5 Prison authorities shall assist prisoners in maintaining adequate contact with the outside world and provide them with the appropriate welfare support to do so."

COMPLAINTS

37. The applicant complained under Article 6 § 3 (b) and (c) of the Convention that he had not been able to prepare his defence or defend himself through legal assistance as the lawyer-client correspondence had been hindered by the prison authorities. He complained that the right to respect for his correspondence under Article 8 of the Convention had been violated when his lawyer's e-mail message was not delivered to him and it became public by being submitted to the police and included in the pre-trial investigation report. Finally, he claimed that this fact also violated his right to receive messages under Article 10 of the Convention.

THE LAW

A. Alleged violation of Article 8 of the Convention

38. The applicant complained under Article 8 of the Convention that his right to respect for correspondence had been violated when his lawyer's e-mail message was not delivered to him by the prison authorities and it became public due to the fact that it had been included in the pre-trial investigation report.

39. Article 8 of the Convention 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 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."

40. The Government argued that as the electronic message in question had been submitted to the common electronic mailbox of a prison, it did not fall within the scope of the applicant's correspondence. The recipient of the letter was the prison, not the applicant. Even though the message had been accompanied by a request to transmit it to the applicant, it had not been clear whether it had been intended for the applicant or the prison. This complaint should therefore be rejected as being incompatible *ratione materiae* with the provisions of the Convention. In any event, the applicant had not suffered any significant disadvantage. The electronic mail message in question had neither been of significant importance to the applicant, nor urgent in its nature. The sender had been clearly and promptly informed that the message could not be submitted by e-mail and had been instructed to use other means of communication. In any event, the Government claimed that this complaint was manifestly ill-founded.

41. The Government pointed out that the prison director had immediately informed the sender that the message had not been delivered to the applicant and had informed him of the proper ways of communicating with prisoners in the said prison. After this it had been up to the sender to deliver the message anew by using the accepted means of communication and any failure to do so could not be imputed to the Government. In the Government's view the applicant's right to communicate with his lawyers had not been restricted, nor had it been demonstrated that he suffered any harm. There was thus no interference with the applicant's right to respect for his correspondence.

42. The Government stressed that the main principle in both the Prison Sentences Act and the Detention Act was that a prisoner's contacts with his or her attorney took place by post, telephone or visits. A prisoner held in an open institution might, for a special reason, be permitted to use electronic communication, telecommunication or other technical connections if such permission was given by the prison director. In the present case the applicant had not requested such permission for his correspondence with his attorney or notified the prison of an upcoming e-mail. The prison in question was a closed one and it did not even grant the prisoners permission to use electronic mail or mobile phones. At the relevant time, the applicant had been both a convicted prisoner and in pre-trial detention and fell thus mainly under the Prison Sentences Act. However, that Act, or the Detention Act, did not contain any provision giving civilians or attorneys a possibility to send e-mail messages to prisoners. Nor did the Act on Electronic Services and Communication in the Public Sector apply to such situations. The domestic legislation thus did not impose any positive obligation on prison authorities to transmit messages sent to their e-mail addresses to prisoners.

43. The Government noted that Finnish prisons did not currently have technical facilities for verifying the identity of the sender of an e-mail. In cases in which an attorney contacted a prisoner through the prison e-mail address, it was not possible to verify the authorisation of the attorney to act as an agent either. Permitting the use of e-mail in such cases would require legislative amendments. The introduction of such amendments was currently being examined by the Ministry of Justice. However, there was an additional problem because in such situations the prison authorities were compelled to read the contents of the attorney's messages and thus violate the express confidentiality prohibitions laid down in the Prison Sentences Act and in the Detention Act. The content of a confidential e-mail might be disclosed when the prison staff opened it or when it was printed out to be delivered to a prisoner. Moreover, the Government pointed out that the applicant's attorney had only become a member of the Bar Association three months after the impugned e-mail message was sent.

44. The Government maintained that the delivery of the e-mail message to the pre-trial investigation authorities was necessary in the present case for investigative purposes. The e-mail message was not made public but was represented as a piece of evidence in the police investigation, which was not public. Moreover, the prison authorities had no right to disclose the fact that a person was in prison. Therefore the domestic legislation was so designed that only a prisoner had the right to initiate contacts. The impugned measures were thus in compliance with the Prison Sentences Act, the Detention Act and the current prison practice. They were necessary in a democratic society and pursued the legitimate aims of ensuring the security of prisons and prisoners as well as prevention of crime.

45. The applicant pointed out that the Court had expressly stated in its case-law that e-mails were protected by Article 8 of the Convention. He also disagreed with the Government that there had been no significant disadvantage. The significance of correspondence between him and his attorney or the disclosure of such a message was not to be assessed afterwards by the prison director, nor by the Government. Interference with the correspondence between an attorney and a client did constitute a significant disadvantage.

46. The applicant argued that the level of privacy of his correspondence with his attorney in the prison was his own decision. If he wanted to send postcards to his attorney, no law could prevent it even if that practice raised the same questions as the present case. The fact that the message could be read by others did not make it public. Moreover, the verification of the sender of an attorney's e-mail was much easier than verifying the sender of postcards or even letters. The official e-mail addresses of attorneys could be found on the internet site of the Finnish Bar Association. In the present case the sender's identity was clear, at least after the telephone call made by the

prison director. As there had been no doubt about the sender, the message should have been passed on to the applicant.

47. The applicant denied having given permission to make his correspondence public outside the prison. Even if he was used to the idea that correspondence within the prison was not necessarily private, at least it should be so outside the prison walls. It was absurd that a prisoner could send e-mails but not receive them even though correspondence was by definition reciprocal.

48. The Court notes first of all that even though the electronic message in question was submitted to the prison's common electronic mailbox, it was nevertheless destined for the applicant and accompanied with a request that it be transmitted to him. There is therefore an issue about correspondence which falls within the scope of Article 8 and which the applicant may have the right to receive. In such circumstances the applicant might expect that the correspondence he receives is protected by Article 8 of the Convention (compare and contrast *Copland v. the United Kingdom*, no. 62617/00, §§ 41-42, ECHR 2007-I). The electronic message sent to the applicant would then fall within the scope of his correspondence for the purposes of Article 8 § 1 of the Convention.

49. The Court reiterates that the essential object of Article 8 is to protect the individual against arbitrary action by public authorities. There may in addition be positive obligations inherent in ensuring effective "respect" for the rights guaranteed by that Article. These obligations may involve the adoption of measures designed to secure respect for rights even in the sphere of the relations of individuals between themselves (see, for example, *Kroon and Others v. the Netherlands*, 27 October 1994, § 31, Series A no. 297-C; and *Mikulić v. Croatia*, no. 53176/99, § 57, ECHR 2002-I). However, the boundaries between the State's positive and negative obligations under this provision do not lend themselves to precise definition. The applicable principles are nonetheless similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation (see *Keegan v. Ireland*, 26 May 1994, § 49, Series A no. 290; and *Kroon and Others v. the Netherlands*, cited above).

50. The Court reiterates that its task is not to substitute itself for the competent domestic authorities in regulating prisoners' correspondence at the national level, but rather to review under the Convention the decisions that those authorities have taken in the exercise of their power of appreciation (see, *mutatis mutandis*, *Różański v. Poland*, no. 55339/00, § 62, 18 May 2006; *Mikulić v. Croatia*, cited above, § 59; and *Hokkanen v. Finland*, 23 September 1994, § 55, Series A no. 299-A). The Court will therefore examine whether the respondent State has in the present case complied with its positive obligations under Article 8 of the Convention.

51. The Court notes that, at the time of the relevant facts, the domestic legislation did not provide for a possibility for a prisoner to receive e-mails. The Government noted in their observations that neither the Prison Sentences Act nor the Detention Act contained any provision giving civilians or attorneys a possibility to send e-mail messages to prisoners. Nor did the Act on Electronic Services and Communication in the Public Sector apply to such situations. The domestic legislation thus did not impose any positive obligation on prison authorities to transmit messages sent to their e-mail addresses to prisoners.

52. The Court notes that the domestic law is based on the principle that a prisoner's contacts with his or her attorney are made by post, telephone or visits. Similar principles are found in the European Prison Rules, adopted by the Committee of Ministers on 11 January 2006. In the present case the question arises of whether these existing means of communication are sufficient or whether a prisoner should also have the right to receive e-mails. The Government have put forward several considerations supporting the view that the above-mentioned means are sufficient or that, at least, the choice of introducing a possibility of receiving e-mails should be left to the legislators, as with the Ministry of Justice which is currently examining this possibility.

53. The Court agrees with the Government. The Finnish legal system in respect of prisoners' correspondence is drafted clearly and fulfils the requirements of the Convention and the positive obligations imposed on the respondent State. Even though no positive obligation to allow the use of e-mails exists, there are alternative means of effective communication. Moreover, there are legitimate reasons not to allow e-mails as long as the legislation remains unchanged. One of the main reasons is that the current legislation cannot guarantee lawyer-client confidentiality if the communication is made by e-mail.

54. As to the proportionality, the Court finds that in the present case the refusal by the domestic authorities to transmit the e-mail message to the applicant cannot be regarded as disproportionate either. The sender of the e-mail message was immediately informed about the non-delivery of the message and he was instructed to use the proper means of communication. He thus had available several means of communication which provided the same effectiveness and rapidity of communication as the use of e-mails. The fact that he failed to use these means is not attributable to the respondent State.

55. Moreover, the fact that the e-mail message in question was included in the pre-trial investigation file cannot be regarded as disproportionate either. This measure was necessary for the investigation of the applicant's complaints before the domestic courts. Contrary to the applicant's claims, this inclusion did not mean that the e-mail message in question became public as the pre-trial investigation records remain confidential.

56. Hence, having regard to the margin of appreciation left to the State, the Court considers that the refusal by the domestic authorities to transmit the e-mail message in question to the applicant cannot be regarded as unjustified for the purposes of Article 8 of the Convention. In particular, a fair balance was struck between the different interests involved. In sum, the applicant's right to respect for his correspondence was secured. Accordingly, this part of the application must be rejected as manifestly ill-founded and declared inadmissible pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

B. Remainder of the application

57. The applicant also complained under Article 6 § 3 (b) and (c) of the Convention that he could not prepare his defence or defend himself through legal assistance as the lawyer-client correspondence had been prevented by the prison authorities. Lastly, he complained that the fact that he did not receive the e-mail also violated his right to receive messages under Article 10 of the Convention.

58. Having regard to the case file, the Court finds that the matters complained of do not disclose any appearance of a violation of the applicant's rights under the Convention. Accordingly, also this part of the application is manifestly ill-founded and must be rejected pursuant to Article 35 §§ 3 and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Françoise Elens-Passos
Registrar

Ineta Ziemele
President