By the Constitutional Court:

SECOND SECTION

JUDGMENT

IN THE APPLICATION OF EREN YILDIZ

Application Number		**: 2013/759**
Date of Judgment		**: 7/7/2015**
President		**:** Alparslan ALTAN
Judges	**:**	Serdar OZGULDUR
		Osman Alifeyyaz PAKSUT
		Muammer TOPAL
		M. Emin KUZ
Rapporteur		**:** Elif CELIKDEMIR ANKITCI
Applicant		**:** Eren YILDIZ

I. SUBJECT-MATTER OF THE APPLICATION

1. The application concerns the allegations that the applicant's right to communication was violated as the letter sent to the applicant was not delivered to him by being seized by the penitentiary institution; and that his right to a reasoned decision was violated as the penitentiary institution's decision on seizure did not specify which statements in the letter were found unfavourable.

II. APPLICATION PROCESS

2. The application was lodged with the Constitutional Court on 24/12/2012 through the 2nd Assize Court of Edirne. Deficiencies identified during the preliminary examination of the application were completed by the applicant, and it was subsequently decided that there is no deficiency which would prevent its submission to the Commission.

3. The First Commission of the Second Section decided on 26/3/2013 that the examination on admissibility be made by the Section, and therefore the case-file be referred to the Section.

4. Having stated that he had no financial means to meet the fees and expenses of the individual application, the applicant requested legal aid.

5. The applicant's request for legal aid was accepted with the interim decision of the Second Section on 3/9/2014.

6. The President of the Section decided on 24/9/2013 that the admissibility review and the review on merits of the application be conducted jointly, and one copy thereof be submitted to the Ministry of Justice for receiving its opinion.

7. The facts of the application were notified to the Ministry of Justice on 5/9/2014. The Ministry submitted its opinion to the Constitutional Court on 7/11/2014 at the end of the time extension granted.

8. The observations submitted by the Ministry of Justice to the Constitutional Court were notified to the applicant on 12/6/2015. The applicant submitted his counter-statements on 22/6/2015.

III. THE FACTS

A. The circumstances of the Case

9. The summary of relevant facts deduced from the application, annexes thereof and the case-file are as follows:

10. By the judgment of the (abolished) Erzurum State Security Court dated 29/4/1998, (Docket No. 1997/174, Decision No. 1998/139), the applicant was sentenced to heavy imprisonment for a term of 36 years for the crime of *"attempting to change constitutional order by force and being a member of the Revolution Party of Turkey ("TDP")"*.

11. During the period when the applicant was serving his imprisonment sentence at the Edirne F-Type High Security Prison, his friend named Haydar Celik sent a letter to him. The letter in question consists of two separate letters in fact. It has been determined that the first letter starts with the expression *"Dear Eren, hi, ... I want to share the article I have just written"* and consists of approximately 4 pages while the second letter starts with the expression *"Hello, Dear Eren .... I firstly want to express my affection and respect"* and consists of 4 pages.

The first letter includes a part titled *"How we remember R.S."* which forms almost the whole content of the letter. This part of the letter praises R.S., who was found dead by the security forces following an armed conflict in 1994 in Siirt, Kurtalan, and his actions. In the second letter, a convict mentions in general on his days in prison, other convicts he is staying with, his family life and state of health and his dissatisfaction about the transfers between prisons.

12. These letters, which are subject-matter of the application, were assessed as a single letter by the Prison's Disciplinary Board, and the Board decided not to deliver the letters to the convict by seizing them on the grounds that "*... the letter in question consists of statements praising the offender and the offence and also making propaganda of the organization"*. (Decision dated 1/11/2012 and No. 2012/589)

13. The applicant filed an objection to the above-cited decision of the Disciplinary Board before the Office of the Edirne 1st Enforcement Judge. The applicant's objection was rejected by the decision of the Enforcement Judge on 16/11/2012(Docket No. 2012/1221 and decision No. 2012/1234). Relevant part of this decision is as follows:

"... Pursuant to Article 68/3 of the Law No. 5275 and Article 91/3 of the Enforcement Regulation, letters received or sent by the convicts or detainees are required not to pose a threat to the safety of prison; pose any explicit and imminent danger in this regard and contain any acts which are expressly classified as offence and illegal organization propaganda and not to influence and manipulate others.

The applicant's objection with regards to the letter found in breach of the above-cited provisions is to be dismissed as the objection was found irrelevant considering the justifications and opinions of the disciplinary board …"

14. The applicant's objection against the above-mentioned dismissal decision was rejected by Edirne 2nd Assize Court on 7/12/2012 (Miscellaneous Work No. 2012/1662).

15. This decision was notified to the applicant on 12/12/2012. The applicant lodged an individual application on 24/12/2012.

B. Relevant Domestic Law

16. Article 68 of the Law on the Execution of Penalties and Security Measures (dated 13/12/2004 and No. 5275) is as follows:

" (1) Subject to the restrictions specified below, the convict shall have the right to receive letters, fax messages and telegrams sent to him, and to send letters, fax messages and telegrams at his own cost and expense.

(2) Letters, fax messages and telegrams sent by the convict or arriving for him shall be inspected by the letter-reading committee or, if this committee does not exist, by the highest authority of the institution.

(3) Letters, fax messages and telegrams endangering the order and security of the institution, holding up officers as a target, serving for communication between members of terrorist or interest-seeking criminal organisations or other criminal organisations, containing false and untrue information which would lead to panic, or containing threats or insults, shall not be delivered to the convict, or shall not be sent if they are written by the convict.

(4) Letters, fax messages and telegrams sent by the convict to official authorities or to his lawyer for the purpose of defence shall not be subject to inspection."

17. Article 91 § 3 of the Regulation on the Administration of Penitentiary Institutions and the Execution of Penalties and Security Measures (dated 20/3/2006 and No. 2006/10218), which was issued on the basis of Article 121 of the Law No. 5275 and published on the Official Gazette dated 6/4/2006 and No. 26131, is as follows:

"Letters, fax messages and telegrams endangering the order and security of the institution, holding up officers as a target, serving for communication, for organizational purposes, between members of terrorist or interest-seeking criminal organisations or other criminal organisations, containing false and untrue information which would lead to panic, or containing threats or insults, shall not be delivered to the convict, or shall not be sent if they are written by the convict."

18. Article 122 of the Regulation on the Administration of Penitentiary Institutions and the Execution of Penalties and Security Measures provides for:

"Letters, fax messages and telegrams written by convicts within the scope of the right to receive and send letters pursuant to Article 91 shall be, without being enveloped, delivered to personnel of the security and supervision service, which will be subsequently submitted to the letter-reading committee, established under the chairmanship of the second manager who is charged with this task and comprising of an administrative officer and two high-school

graduate guardians. Subsequent to the examination made, letters which are considered appropriate for being sent shall be sealed as "examined", enveloped and delivered to the post office.

(2) Provision set out in Article 91 § 4 shall apply to the letters which are sent by the convicts to official authorities or to his lawyer for the purpose of defence.

(3) Letters, fax messages and telegrams which are received by the convicts and are not found inappropriate to be delivered to the convicts after being subject to examination shall be delivered to the convicts together with their envelopes."

19. Article 123 of the Regulation on the Administration of Penitentiary Institutions and the Execution of Penalties and Security Measures provides for:

"Letters found unfavourable for being sent to addressee or delivered to the convict shall be submitted to the disciplinary board within, at the latest, twenty-four hours. In the event that the disciplinary board wholly or partially finds the letter inappropriate, it shall be stored, without being crossed out or destroyed, until the end of the complaint and objection period. If the letter is found partially inappropriate, the original copy shall be kept by the administration, and the parts found unfavourable shall be crossed out so as to make the unfavourable statements illegible and then notified to the addressee together with the decision of the disciplinary board. If whole content of the letter is found unfavourable, only the decision of the disciplinary board shall be notified. After notifying such decision, the administration shall wait for a certain period of time during which the convict may lodge an application to the Enforcement Judge against the decision of the Board. . If any application is not lodged with the Office of the Enforcement Judge within this period, the decision rendered by the disciplinary board shall be enforced. If an application is lodged with the Enforcement Judge, the administration shall notify the decision of the Enforcement Judge to the convict and wait for a certain period of time during which the convict may object to decision of the Enforcement Judge. If any objection is not raised, procedures shall be performed pursuant to the Enforcement Judge's decision; but if an objection is raised, then procedures shall be performed pursuant to the court's decision.

(2) The convict shall be notified that, t if any objection is not raised before the Enforcement Judge within fifteen days as from the notification date or that any objection is not raised against the Enforcement Judge's decision before any assize court within one week as

from the notification date, the decision of the disciplinary board shall become final and that parts of the letter found unfavourable shall be crossed out so as to make them unreadable and subsequently it shall be delivered, or if whole letter is found unfavourable, it shall not be delivered to the convict.

(3) Letters which are partially or wholly found unfavourable shall be reserved by the administration to be referred subsequently if the relevant party avails himself / herself of any domestic or international remedies."

20. Article 215 of the Turkish Criminal Code (dated 26/9/2004 and No. 5237), which was in full force at the time when the letter was seized:

"Any person who publicly praises an offence, or a person on account of an offence he has committed, shall be sentenced to a penalty of imprisonment up to two years."

21. Article 7 § 2 of the Anti-Terror Law (dated 12/4/1991 and No. 3713), which was in full force at the time when the letter was seized:

"Those who make propaganda for a terrorist organization shall be punished from one to five years imprisonment. If the offence is committed via press and publication, sentence to be imposed shall be increased in one-half. Moreover, editors who do not participate in committing of the offence of press and publication organs shall be a punitive fine from one thousand days to ten thousand days. However, maximum limit for editors in charge is five thousand days…"

IV. ASSESSMENT AND GROUNDS

22. At the Constitutional Court's session held on 7/7/2015, the applicant's individual application dated 15/1/2013 and No. 2013/759 was assessed, and the Constitutional Court accordingly held:

A. The Applicant's Allegation

23. The applicant stated that the letter in question was sent by his friend who was in prison at the relevant time; that if there had been any unfavourable statement in the letter, then the relevant prison administration would not have allowed it to be sent; that he was deprived of his means to exchange opinions. He also stated that the decisions rendered did not clearly indicate which statements in the letter were found unfavourable and propaganda of which organization

was made. Accordingly, he alleged that his freedom of communication and right to defence were violated.

24. The applicant requested pecuniary and non-pecuniary damages in his petition of 22/6/2015 which was submitted in reply to the observations of the Ministry.

B. Assessment

25. Although the applicant alleges in the application form and annexes thereto that the freedom of communication set out in Article 22 of the Constitution and, as it was not clearly indicated that which statements in the letter were found unfavourable and propaganda of which terror organization was made, Article 36 of the Constitution have been violated, these allegations are, in essence, related to restriction imposed on the freedom of communication on the ground that the letter in question was seized by the prison administration. The Constitutional Court is not bound by the legal classification of the case made by the applicant. Therefore, all allegations submitted by the applicant have been assessed within the scope of the freedom of communication.

1. Admissibility

26. The applicant's complaints that his constitutional rights have been violated as the letter sent by his friend, who was another prison at the relevant time, was not delivered to him and seized by the administration are not manifestly ill-founded. The application must be declared admissible as there are no other reasons which would render the application inadmissible.

2. Merits

a. Opinions of the Applicant and the Ministry

27. The applicant alleges that his freedom of communication and right to defence have been violated by stating that the letter in question was sent by his friend who was at prison at the relevant time, he was deprived of means to exchange opinions; that the decisions did not clearly indicate which statements included in the letter were found unfavourable and propaganda of which terror organization was made.

28. In its opinion, the Ministry of Justice recalls the case-law of the European Court of Human Rights (the ECtHR) and states that the applicant's allegations must be assessed in line with the ECtHR's judgments.

29. The applicant states, in his reply to the Ministry's opinions, that the Ministry has referred to the case-law and that there is nothing in this case-law which is to the detriment of his case, and he also claims compensation for his pecuniary and non-pecuniary damage.

b. General Principles

30. Article 22 of the Constitution reads as follows:

"Everyone has the freedom of communication. Privacy of communication is fundamental.

Unless there exists a decision duly given by a judge on one or several of the grounds of national security, public order, prevention of crime, protection of public health and public morals, or protection of the rights and freedoms of others, or unless there exists a written order of an agency authorized by law in cases where delay is prejudicial, again on the above-mentioned grounds, communication shall not be impeded nor its privacy be violated. The decision of the competent authority shall be submitted for the approval of the judge having jurisdiction within twenty-four hours. The judge shall announce his 11 decision within forty-eight hours from the time of seizure; otherwise, seizure shall be automatically lifted.

Public institutions and agencies where exceptions may be applied are prescribed in law"

31. Article 8 of the Convention titled *"Right to respect for private and family life"* 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 wellbeing 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."

32. The ECtHR examines the complaints concerning the freedom of communication under Article 8 of the Convention. However, the Constitution does not include any single provision corresponding to Article 8 of the Convention. The freedom of communication, which forms a basis for the applicant's allegations, is set out in Article 22 of the Constitution.

33. Article 22 of the Constitution ensures that everyone has the freedom of communication and privacy of communication is fundamental. Article 8 of the Convention sets out that everyone has the right to respect for his correspondence. Common objective of the Constitution and Convention is to ensure privacy of the correspondence, regardless of its content and type, as well as to protect the freedom of communication. Within the context of communication, privacy of the individuals' statements used in their mutual and collective oral, written and visual communications must be ensured. Communicative activities conducted through mails, e-mails, telephone, fax and internet must be assessed within the scope of the freedom of communication and privacy of communication (see, *Mehmet Koray Eryaşa*, Application No. 2013/6693, 16/4/2015, § 49).

34. One of the guarantees provided in the Constitution and the Convention is to prevent the public authorities from making arbitrary interference in the individual's freedom of communication and the privacy of communication. Inspecting the contents of the communication constitutes a serious interference in the privacy of communication and therefore the freedom of communication. Nevertheless, freedom of communication is not an absolute right and is subject to certain legitimate restrictions. Specific criteria for restrictions are specified in Article 22 § 2 of the Constitution and Article 8 § 2 of the Convention (*Mehmet Koray Eryaşa,* § 50).

35. According to the ECtHR's judgments, the interference in the freedom of communication must be prescribed by law. The legislation forming a legal basis for the interference must be "*accessible*", adequately explicit and "*foreseeable*" in respect of results led by a certain act. Secondly, the restriction in question must pursue "*a legitimate aim*". Moreover, the interference must be necessary in a democratic society and proportionate (*Silver and Others v. the United Kingdom*, application no. 5947/72, ..., 25/3/1983, §§ 85-90; *Klass and Other v. Germany*, application no. 5029/71, 6/10/1978, §§ 42-55; *Campbell v. the United Kingdom;* application no. 13590/88, 25/3/1992, § 34).

36. Therefore, lawfulness and the issue as to whether there are grounds justifying the interference in question must be assessed according to specific circumstances of each case in examination as to whether the interference alleged to be made in the freedom of communication.

c. Application of the General Principles to the Present Case

i. Whether there is any interference

37. In the present case, it was decided by the disciplinary board of the prison where the applicant served his imprisonment sentence that the letter sent by the applicant's friend, who was staying in another prison, to the applicant be seized as it was found unfavourable for praising the offence and offender and also including statements classified as organizational propaganda. Therefore, the public authorities interfered in the applicant's freedom of communication.

ii. Whether the interference constitute a violation

38. Unless the above-cited interference relies on any of the justified reasons set out in Article 22 § 2 of the Constitution and meets the conditions set out in Article 13 of the same, it would constitute a violation of Article 22 of the Constitution. It is therefore determined whether the restriction in question is incompliance with the conditions set out in Article 13 of the Constitution such as not infringing upon the essence of this provision, being specified in the relevant articles of the Constitution, being prescribed by law and not being in conflict with the letter and spirit of the Constitution and the requirements of the democratic order of the society and the secular Republic and the principle of proportionality (see *Ahmet Temiz,* Application No. 2013/1822, 20/5/2015, § 36).

Lawfulness

39. Restrictions imposed on the freedom of communication must primarily be prescribed by law. The criterion of being prescribed by law, as expressed in the case-law of the ECtHR, consists of three main principles in itself. The first principle is that the interference in question must have some basis in domestic law. Furthermore, the law must be adequately accessible for the relevant person. Lastly, legal regulation in question must be formulated with sufficient precision to enable the individuals to regulate their conduct and be able to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (see, *Silver and Others v. the United Kingdom,* §§ 86-88).

40. It cannot be said that the lawfulness requirement be fulfilled by making a general legal arrangement posing any restriction on the freedom of communication. Accordingly, fundamental principles that must be included in a legal regulation and may be defined as *"quality of law"* are required to be determined, and the limits of the authorities to use discretionary power must be clarified. In this respect, as cited in the decision rendered by the

Plenary of the Constitutional Court, fundamental principles, rules and the relevant framework must be set forth by law. (see, the Constitutional Court, Docket No. 1984/14, Decision No. 1985/7, Date of Decision 13/6/1985). At this point, in circumstances where the law grants discretionary power to the administrative authorities in making interference in the freedom of communication, the relevant law must establish limits of this power to a certain degree of explicitness (see, *Mehmet Nuri Özen and Others v. Turkey*, application no. 15672/08, ..., 11/1/2011, § 56; *Tan v. Turkey*, application no. 9460/03, 3/7/2007, § 21).

41. For lawfulness of the interference, it is important to determine into which paragraph of Article 22 of the Constitution the prison administration's interference in the convicts' or detainees' communication falls. If it is accepted to fall into scope of the second paragraph, the interference made without a decision or approval of the judge would not meet the lawfulness requirement. On the other hand, if the third paragraph comes into question, it would be assessed whether the legislator accepts the prison as an exceptional public institution or not (*Ahmet Temiz*, § 39).

42. Article 6 § 1 (b) of the Law No. 5275 entitled "*Principles to be observed in the execution of prison sentences"* reads as follows:

> *"It shall be ensured that convicts maintain an orderly life in penal execution institutions. The lack of freedom that is made necessary by the prison sentence shall be suffered under material and moral conditions that ensure respect for human dignity. Other rights of convicts which are laid down in the Constitution may be restricted in accordance with the rules envisaged in this Law, subject to the fundamental goals of execution."*

43. In this respect, prisons have been accepted as exceptional public institutions where freedom of communication may be restricted pursuant to the provision set out in Article 6 § 1 (b) of the Law No. 5275, *"... Other rights of convicts which are laid down in the Constitution may be restricted in accordance with the rules envisaged in this Law, subject to the fundamental goals of execution"* (*Mehmet Koray Eryaşa,* § 76).

44. In the present case, Article 68 of the Law No. 5275 and Articles 91, 122 and 123 of the Regulation on the Administration of Penitentiary Institutions and the Execution of Penalties and Security Measures form the legal basis for control and restriction of the correspondences made by the convicts in prisons.

45. Article 68 of the Law No. 5275 and Article 91 of the above-cited Regulation sets out that the convict shall have the right to receive letters, fax messages and telegrams sent to him, and to send letters, fax messages and telegrams; that letters, fax messages and telegrams sent by the convict to official authorities or to his lawyer for the purpose of defence shall not be subject to inspection; and that "*letters, fax messages and telegrams endangering the order and security of the institution, holding up officers as a target, serving for communication between members of terrorist or interest-seeking criminal organisations or other criminal organisations, containing false and untrue information which would lead to panic, or containing threats or insults",* shall not be delivered to the convict, or shall not be sent if they are written by the convict.

46. Both the Law No. 5275 and the mentioned Regulation were published in the Official Gazette, and there is no doubt as to accessibility of these legislations. Provisions concerning the disciplinary actions in prisons, convicts' right to send and receive letters, fax messages and telegrams, restrictions imposed on this right and procedures to be applied are formulated in these legislations in an adequately precise and comprehensible manner. It has been also concluded that the relevant legal arrangements also set out the control process to which the convicts' letters are subject to, measures to be applied when letters are found partially or wholly unfavourable and legal remedies that may be applied by the convicts against these acts, and that these legal arrangements are adequately precise, comprehensible and foreseeable (*Ahmet Temiz,* § 44).

47. In the *Gülmez v. Turkey* judgment by the ECtHR, it was established that the Law No. 5275 did not call for any comment when examined by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment and that its provisions were sufficiently clear and detailed to afford appropriate protection against any unlawful interference by the authorities with the convicts' rights (see, *Gülmez v. Turkey*, application no.16330/02, 20/5/2008, §51).

48. As is seen, the legal provision, which forms a basis for the interference in question, is an accessible and foreseeable arrangement which adequately clarifies the limits of interferences likely to be made in the rights and freedoms. As a result of the assessments made, it has been held that Article 68 of the Law No. 5275 meets the criterion of "*lawfulness".*

Legitimate Aim

49. In order to consider an interference made in the freedom of communication as legitimate, this interference must rely on any of the grounds of national security, public order, prevention of crime, protection of public health and public morals, or protection of the rights and freedoms of others, which are set out in Article 22 of the Constitution.

50. Article 8 § 2 of the Convention also sets forth that any interference in the right to freedom of communication must be lawful and necessary in a democratic society and must rely on grounds such as national security, public order, country's economic welfare, prevention of crime or any disorder, protection of public health and public morals or protection of the rights and freedoms of others. Any interference which is not made for such purposes is prohibited.

51. Article 22 of the Constitution envisages that any interference in the privacy of communication may be made for the purposes specified in the second paragraph thereof. Moreover, interference must be made on the basis of purposes specified therein and in pursuance of any judicial decision. However, it is set out in the third paragraph that certain public institutions and organizations may be subject to an exception by law. This exception referred to in the third paragraph should be considered to be related to taking of judicial decision and should not be construed in a manner which would lead to expansion of the grounds for restrictions specified in Article 22 § 2. In the presence of Article 13 of the Constitution which envisages that fundamental rights and freedoms may only be restricted on the basis of grounds cited in the relevant articles of the Constitution and the requirement that restrictions imposed on freedoms be construed narrowly, it is not possible to expand by law the grounds for restrictions likely to be imposed on the right to freedom of communication set out in Article 22 § 2 of the Constitution by invoking the third paragraph of the same (*Ahmet Temiz*, § 49).

52. As explained above, prisons are accepted as exceptional public institutions which fall within the scope of Article 22 § 3 of the Constitution, and this exception means that these institutions may take any action likely to constitute an interference in the freedom of communication without the need for any judicial decision. However, these institutions' actions constituting an interference in the freedom of communication may be considered legitimate only if they rely on the grounds for restriction set out in Article 22 § 2 of the Constitution (*Ahmet Temiz*, § 50).

53. It is set forth in Article 68 § 3 of the Law No. 5275 that "*letters, fax messages and telegrams endangering the order and security of the institution, holding up officers as a target, serving for communication between members of terrorist or interest-seeking criminal*

organisations or other criminal organisations, containing false and untrue information which would lead to panic, or containing threats or insults", shall not be delivered to the convict, or shall not be sent if they are written by the convict. It can be concluded that the grounds set out herein aim to ensure security and discipline in prisons within the framework of the general objectives of ensuring public order and prevention of crime, which are set out in Article 22 § 2 of the Constitution.

54. In the present case, the decision of the Disciplinary Board of the Penitentiary Institution dated 1/11/2012 for seizure of the letter sent to the applicant is based on the ground that the letter in question includes statements praising the offence and the offender and amounting to organizational propaganda.

55. The applicant's objection against this decision was dismissed by the decision of the Edirne 1st Execution Judge, on 16/11/2012, (Docket No. 2012/1221 and decision No. 2012/1234).

56. Praising an offence or an offender and making propaganda of any organization are acts and actions, which constitute an offence, in pursuance of, respectively, Article 215 of the Turkish Criminal Code No. 5237 and Article 7 of the Anti-Terror Law No. 3713.

57. Accordingly, it has been concluded that interference in the right to freedom of communication by subjecting the applicant's letter to control by the disciplinary board pursues the aims of ensuring public order and prevention of crime and that these aims are legitimate within the scope of Article 22 § 2 of the Constitution concerning the right to freedom of communication.

Being Necessary in A Democratic Society and Proportionality

58. The applicant stated that the letter in question was sent by his friend who was in prison at the relevant time; that if there had been any unfavourable statement in the letter, then the relevant prison administration would not have allowed it to be sent; that he was deprived of his means to exchange opinions. He also stated that the decisions rendered did not clearly indicate which statements in the letter were found unfavourable and propaganda of which organization was made. Accordingly, he alleged that his freedom of communication was violated.

59. The Ministry of Justice notes in its observations that the ECtHR's judgments underline that control of correspondences of those staying in the penitentiary institutions to a certain

extent would not, in itself, lead to violation of the Convention, and that ordinary and reasonable requirements of the penitentiary institution must be taken into account in making an assessment in this regard.

60. The phrase "necessary in a democratic society" cited in the ECtHR's case-law summarizes principles that the interference must, inter alia, correspond to a "pressing social need" and be "proportionate to the legitimate aim pursued" (*Silver and Others v. the United Kingdom*, above-cited, § 97).

61. The ECtHR has also held that, in assessing whether an interference with a convicted prisoner's freedom of communication was "necessary" in a democratic society, regard has to be paid to the ordinary and reasonable requirements of imprisonment. Indeed, the Court recognises that some measure of control over prisoners' correspondence is called for and is not of itself incompatible with the Convention (*Mehmet Nuri Özen and Others v. Turkey*, § 51; *Silver and Others v. the United Kingdom*, above-cited, § 98)

62. The ECtHR invites public authorities to take into account, 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 (see, *Campbell v. the United Kingdom*, § 45).

63. The right to freedom of communication is not an absolute right and may be subject to certain legitimate restrictions. It must be assessed whether the restrictions to be imposed on this right as set out in Article 22 § 2 of the Constitution are in compliance with the requirements of the democratic order of the society and the principle of proportionality enshrined in Article 13 of the Constitution or not (*Yasemin Çongar and Others*, application no. 2013/7054, 6/1/2016, §§ 57-58).

64. Democracy defined in the Constitution must be construed with a modern and liberal understanding. The criterion of *"democratic society"* explicitly reflects the parallelism between Article 13 of the Constitution and Articles 8, 9, 10 and 11 of the ECHR which include the criterion of *"requirements of a democratic society"*. In this regard, the criterion of democratic society must be construed on the basis of pluralism, tolerance and open-mindedness (*Fatih Taş*, application no. 2013/1461, 12/11/2014, § 92).

65. In fact, pursuant to the established case-law of the Constitutional Court, *"Democracies are regimes in which fundamental rights and freedoms are ensured and guaranteed to the*

largest extent. Restrictions which impair the essence of fundamental rights and freedoms and render them completely unenforceable are not considered to be in accordance with the requirements of a democratic society. Therefore, fundamental rights and freedoms may only be exceptionally restricted by law, on condition of not impairing their essence and to the extent restriction is compulsory for sustainability of social order of a democratic society" (the Constitutional Court, Docket No. 2006/142, Decision No. 2008/148, and date of decision: 24/9/2008). In other words, if the restriction imposed impairs the essence of the right and freedom, suspends or hampers its enforceability, makes it inefficient or if the balance between the means of restriction and the aim thereof is disturbed in breach of the principle of the proportionality, this restriction would be contrary to the social order of the democratic society (the Constitutional Court, Docket No. 2009/59, Decision No. 2011/69, Date of Decision: 28/4/2011; the Constitutional Court, Docket No. 2006/142, Decision No. 2008/148, Date of Decision: 17/4/2008; *Fatih Taş,* § 93).

66. According to the decisions of the Constitutional Court, the principle of proportionality reflects the relation between aims and means of restrictions imposed on the fundamental rights and freedoms. Control of proportionality means supervision of the means chosen for attaining the aim pursued. For this reason, in assessment of interferences in the right to freedom of communication, it must be taken into account whether the interference chosen to attain the aim pursued is expedient, necessary and proportionate or not (*Sebahat Tuncel*, application no. 2012/1051, 20/2/2014, § 84; *Fatih Taş*, §§ 92-93).

67. For a measure to be regarded as proportionate, the possibility of recourse to an alternative measure that would cause less damage to the fundamental right in issue whilst fulfilling the same aim must be ruled out (*Nada v. Switzerland,* application no. 10593/08, 12/9/2012, § 183).

68. Convicts and detainees in general continue to enjoy all the fundamental rights and freedoms guaranteed under both the Constitution and the Convention save for the right to liberty, where lawfully imposed detention expressly falls within the scope of Article 19 of the Constitution (see *İbrahim Uysal*, application no. 2014/1711, 23/7/2014, §§ 29-33; see similarly, *Hirst v. the United Kingdom (No. 2)*, application no. 74025/01, 6/10/2005, § 69). However, their rights and freedoms may be restricted in the event that there are reasonable requirements, as an inevitable outcome of imprisonment, for ensuring security in the prison such as prevention

of offence and securing discipline (*Turan Günana*, application no. 2013/3550, 19/11/2014, § 35).

69. What may be regarded as "reasonable cause" in terms of interferences to be made in correspondences received or sent by the penitentiary institutions 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 (*Campbell v. the United Kingdom*, above-cited, § 48). In addition, regard has to be paid to execution regime and the grounds of imprisonment in the assessment to be made (*Silver and Others v. the United Kingdom*, § 98, § 102; *Atilla and Others v. Turkey* (dec.), application no. 18139/07, 11/5/2010.

70. In this scope, main point of the assessments to be made in the present case would be the fact that whether the grounds relied on by the courts, giving rise to interference, in their decisions are explained in a plausible manner so as to demonstrate that these grounds are in compliance with the principles of *"being necessary in a democratic society"* and *"proportionality"* (*Sebahat Tuncel,* § 87).

71. In the present case, it must be emphasized that although both the decision of prison's disciplinary board and the decisions of the Execution Judge and the Assize Court mention of *the letter sent to the applicant*, it must be emphasized that there are two separate letters sent by the same person to the applicant in the same envelope.

In respect of the First Letter

72. Following the examination of the first letter subject-matter of this applicant and written on 21/10/2012, it has been revealed that it starts with the expression *"Dear Eren, hi, ….. I want to share the article I have just written"* includes a part entitled *"How we remember R.S."*. It is therefore understood that this letter is concerning R.S.

73. As a result of the inquiry made concerning R.S., it has been found out that R.S., who was known to be one of the leaders of the terror organization called the Revolution Party of Turkey ("TDP") in 1992, was found dead in 1994 in Siirt, Kurtalan after the armed conflict between the PKK ("the Kurdistan Workers' Party") and the security forces as his terror organization had acted together with the PKK since 1993.

74. In the first letter, the part concerning R.S. includes statements generally praising him and he was described as a leader with these words: *"… he has become fundamental ideological-*

political milestone of our battle since the date he was shot…"; "… R.S., as a military-political commander…"; "… it is nearly impossible to encounter with someone like R. in each revolutionist movement…"; "… he is a model of a revolutionist leader…"; "Behind his military-political ideological firm conducts, there is a splendid humanism and labourer fellowship."; "… because he is real shaper of history…"; "… Praises for R.S. go beyond the scope of self-styled historiography."; "R has such a personality that a revolutionist must have…". Moreover, the part including such statements *"The revolutionist leaders such as R.S. attract all reactions of ....., regime, system due to their acts. Such revolutionist personalities are brave knifes stuck in carotid of the established system and the private ownership." "R. has solved the mind map of the regime and is an activist who could destroy border-ends of the regime."; "the speech "… When we transfer the Kurdish revolution to the Black Sea Region, the region of Toros Mountains, the Anatolia, we would indeed perform our international revolutionist task-role" shows us the historical and current dimensions of the revolutionist movement."; "…R.S., who managed to be executive leader of the resistance by his mineworker comrades in the mines, is a revolutionist, making organization in difficult times."* describes the illegal acts carried out by R.S. as *"revolutionary struggle"* and declares this person a hero as he was found dead as a result of an armed conflict.

75. It is beyond doubt that one of the leaders of the terror organization namely TDP, who died, was mentioned by praising his illegal acts in the above-cited part of the first letter, which was sent to the applicant and nearly comprising the full content of the letter. While mentioning the acts in question, scope of the organization acts and activities is explained, and thereby these aims are pointed as a target. In line with these aims, armed attacks inevitably formed of violence are justified and qualified as "*battle*" and even *"war"*. By indicating that this war is still going on, violence is being promoted by means of formulating R.S.'s illegal acts and actions as *"ordinary course of conduct".* The applicant is convicted for the offences of changing the constitutional order by force and being a member of TDP. One of the aims of *"punishment"* is to prevent those who have previously committed an offence from committing new offences and to chasten them. In this regard, as the prison administration was of the opinion that the letter included incitement to crime by means of praising and making propaganda of a leader of the organization, which was classified as an illegal armed terror organization by the Turkish Judicial Authority, and his acts, the administration decided to seize the first letter containing such statements.

76. Accordingly, it cannot be concluded that the restriction imposed on the applicant's right to freedom of expression in respect of the first letter is not, within the meaning of Article 22 of the Constitution, contrary to the requirements of a democratic society required for protection of public order and prevention of crime and to the principle of proportionality on the ground that the part concerning R.S. nearly composes the whole letter.

77. For the above-mentioned reasons, it must be held that there has not been any violation of the right to freedom of communication enshrined in Article 22 of the Constitution as it is concluded that restriction imposed in respect of the first letter does not constitute a violation.

In respect of the Second Letter

78. It has been concluded that although it is held in the decision of the disciplinary board of the prison for seizure of the letter sent to the applicant (two separate letters were considered as a single letter; see, above, §§ 11-12) that the second letter contains statements praising the offence and the offender and also making propaganda of an organization, these were given as justification without clarifying which statements in this letter are described as such.

79. As a result of the complaint raised against the decision of the disciplinary board in question, the Office of the Edirne 1st Enforcement Judge did not specify which statements were considered to have the characteristics of praising the offence and offender and making propaganda of the organization although these grounds were relied on in that decision. In the dismissal decision of the 2nd Chamber of the Edirne Assize Court, no assessment was made as to the content of the letter giving rise to the complaint.

80. It has been understood that the second letter dated 22/10/212 and starting with the expression *"Hello, Dear Eren .... I firstly want to express my affection and respect"* and consisting of 4 pages is a correspondence in which a convict generally mentions his days in prison, other convicts he is staying with, his family life and state of health and his dissatisfaction about transfers between prisons. Therefore, it could be deduced neither from the content of the letter nor from the justifications given by the disciplinary board and the relevant courts that which statements included in the letter were determined to be such as to praise the offence and the offender and to make propaganda of an organization. Accordingly, it has been concluded that the justification of reasonable necessity for prevention of the offence, which is foreseen in respect of the second letter in question, was not given on the basis of concrete information and facts; and that seizure of the second letter sent to the applicant is excessive and disproportionate

in terms of aims pursued and does not, therefore, comply with the principles of being necessary in a democratic society and proportionality.

81. For the reasons given above, it has been concluded that the restriction imposed on the applicant's right to freedom of communication, in terms of the second letter, is not "*necessary in a democratic society"* and "*proportionate".* It has been therefore held that there has been a violation of the applicant's right to freedom of communication guaranteed under Article 22 of the Constitution.

3. In respect of Article 50 of the Law No. 6216

82. The applicant did not submit any claim for compensation in the application form. Although he requested pecuniary and non-pecuniary damage in his letter of 22/6/2015, which was submitted in reply to the Ministry's opinion, this request for his damages must be dismissed as it is not lodged in due time.

83. Regard being had to the fact that the right to freedom of communication was violated in the present case, it has been decided that a copy of the decision be submitted to the Ministry of Justice and the Office of the Edirne 1st Enforcement Judge for information.

V. JUDGMENT

For the above-cited reasons, it has been **UNANIMOUSLY** decided on 7/7/2015 that

A. The applicant's

1. Complaints concerning the violation of right to freedom of communication enshrined in Article 22 of the Constitution are ADMISSIBLE;

2. Right to freedom of communication enshrined in Article 22 of the Constitution,

a. in respect of the first letter, HAS NOT BEEN VIOLATED;

b. in respect of the second letter, HAS BEEN VIOLATED;

B. As the applicant did not make a request for compensation within due period of time, his request for compensation is DISMISSED;

C. A copy of this decision be submitted to the applicant, the Ministry of Justice and Office of the Edirne 1st Enforcement Judge pursuant to Article 50 § 3 of the Law No. 6216.