

**APPLICATION N° 26561/95**

Hocine REBAI and others v/France

**DECISION** of 25 February 1997 on the admissibility of the application

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**Article 2, paragraph 1 of the Convention**

a) *The first sentence of this provision imposes a positive obligation on Contracting Parties. The obligation to protect the right to life is not limited for States to refraining from taking life intentionally but implies the duty to take appropriate steps to safeguard life, without requiring the prevention of every possibility of violence.*

*No breach of positive obligations in this case, having particular regard to the fact that it cannot be assumed that the applicants' son and brother's cell-mate, despite his suicidal tendencies, was dangerous to others or that the prison authorities failed to take the necessary steps to protect the lives of his cell-mates who died in a fire deliberately started in their cell.*

b) *The obligation to protect the right to life includes a procedural aspect. The lack of any effective procedure for an investigation into the cause of a victim's death in unclear circumstances may raise an issue under this provision.*

*In this case, no objective indications to suggest that the events complained of were not satisfactorily examined or that the State failed to set in place a mechanism for establishing the civil or criminal liability of the perpetrators of the fire which cost the applicants' relative his life.*

**Article 6, paragraph 1 of the Convention**

a) *The concept of civil rights and obligations is not to be interpreted solely by reference to the respondent State's domestic law. This provision applies where the*

*outcome of the proceedings is decisive for private rights and obligations, irrespective of the parties' status be it public or private and of the nature of the legislation which governs the manner in which the dispute is to be determined*

- b) This provision is applicable to proceedings for compensation before the administrative courts brought by the applicants following the death of their son and brother*
- c) The right of access to a court secured by this provision may be subject to limitations in the form of regulation by the State, however such limitations must pursue a legitimate aim and must not restrict or reduce access in such a way that the very essence of the right is impaired*
- d) This provision does not require that a decision whereby an appeal tribunal basing itself on a specific legal provision, rejects an appeal as having no chance of success, be accompanied by detailed reasons*

**Article 25 of the Convention** *Close relatives of a deceased prisoner considered to be victims of an alleged violation of Article 2 of the Convention*

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## **THE FACTS**

### **A** *Particular circumstances of the case*

The applicants, who are French nationals, are members of the same family. The parents were born in 1930 and 1941 respectively and their nine children were born between 1961 and 1982. They live in the Escarene. They were represented before the Commission by Mr Alain Chemama, a lawyer practising in Nice.

The facts, as submitted by the parties, may be summarised as follows:

Ahmed Rebai, the son and brother of the applicants, was serving a one-year prison sentence in Nice Prison. At 9.30 p.m. on 29 June 1983 the prison warders noticed that a fire had started in the cell occupied by Ahmed Rebai, O.D. and K.M.

The staff unlocked the cell and removed the three mattresses and prisoners' clothes which were blocking the entrance. They managed to bring the fire under control and to evacuate the occupants, who were unconscious. The latter were taken to hospital. After regaining consciousness, Ahmed and K.M. stated that O.D. had started the fire.

On 30 June 1983 the Governor of Nice Prison submitted the following report to the Regional Director of Marseilles Prison Service

It was about 9 20 p.m. when I was informed of this incident by Mr C, the head prison guard and chief night warder. I went to the cell immediately, Mr C had already alerted the firemen and called for an ambulance. Both arrived at the prison shortly afterwards. I have not been able to ascertain the motive for this act but R and M told me that O started the fire. I have been unable to continue questioning them owing to their critical condition. It is possible that O was the one who started the fire, as he was constantly protesting at his imprisonment, on 15 6 83 he had cut himself in several places and on 21 June he had tried to hang himself.

It was while he was doing his rounds of A block that Mr H heard one of the prisoners in cell 82 knocking on his cell door, the prisoner told him that the inmates of cell 84 had asked him to knock, but without saying why. When Mr H looked through the peep hole of cell 84, he saw flames between the door and the mattresses which had been positioned against it. The warder rang the alarm bell to get help quickly.

Messrs C and L who were registering the new arrivals, rushed to the cells. On opening the cell door two fire extinguishers, which had already been prepared by Mr H, were needed to put out the fire and remove the three mattresses and various personal effects which had been pushed against the door. They could not see the prisoners, however, due to the thick smoke which had spread in the cell. Despite the difficulties and the risk of suffocation Messrs L, H, H L and F went into the cell to rescue the prisoners, who were already unconscious. Shortly after they had been brought out onto the balcony, they all three started to come round. They were already conscious when help arrived.

On 13 August 1983 Ahmed Rebai died from the burns he had sustained in the fire. His two cell mates also died from the after effects of the fire.

On 7 September 1983 the applicants filed a criminal complaint with the Nice senior investigating judge against persons unknown. They also requested leave to join the proceedings as a civil party.

On 16 March 1984 an investigation was commenced in respect of charges of manslaughter and failure to assist a person in danger.

On 23 May 1984 the senior investigating judge issued instructions for evidence to be taken on commission.

Following the investigating judge's instructions dated 12 June 1984, an investigation was carried out by a detective inspector of Marseille Regional Criminal Investigation Department (S R P J).

The inspector took evidence from, among others, C , the chief warden at Nice Prison, who made the following statement on 4 January 1985

While I was registering the new arrivals, I received a call at 9 20 p m from Mr H informing me that a fire had started in cell 84 While on his rounds, he had looked through the peep hole and seen flames between the cell door and a mattress positioned against the door

Mr L , a warden, and myself rushed to the cells We opened the door and used extinguishers to put out the fire The entrance cell was blocked by three mattresses, sheets and clothes The smoke was very thick and we could not see the occupants Assisted by all available staff, we went into the cell to rescue the three prisoners, who were unconscious

At 9 35 p m I called the firemen and alerted the police

The firemen arrived at 9 45 p m They gave the prisoners first aid and left the prison at 10 35 p m

When we brought the three men out of the cell, Rebai Ahmed appeared to be the least injured He said that O was the one who had started the fire and that he had not noticed anything because he was asleep

As I have said, when we arrived at the cell we found three mattresses in front of the cell door (there are only three beds in the cell), sheets and numerous articles of clothing I do not understand how O could have started the fire without his cell-mates' agreement "

In his summary report of 18 January 1985, the chief inspector of Marseille S R P I stated that

"At approximately 9 20 p m on 29 June 1983, one of the Nice Prison warders noticed that a fire had started in cell 84 on the second floor of A block

The prison warders, who were first on the scene, then the officers of Nice C I D detachment, noted that the mattresses and personal effects which had been positioned against the cell door had been set on fire

As help was given very quickly and efficiently, it was possible to bring the three men out of their cell, the firemen arrived at the scene, administered first aid and attended to the burnt prisoners, who were taken to hospital

The inquiry at Nice Prison confirmed that the prisoners had started the fire

After regaining consciousness, Rebat and M stated that O had acted alone

It is difficult, however, to believe that O could have acted alone as the three mattresses and personal effects were positioned against the door

The prisoners were removed from their cell promptly despite the fact that conditions had been made difficult by the thick smoke, similarly, the emergency services arrived no more than half an hour after the fire had been discovered

In conclusion there can be no doubt that the fire was started deliberately it is unlikely that O acted alone, but it has been impossible to ascertain the motive for this act as the prisoners have died

The emergency services gave assistance faultlessly and efficiently

On 13 February 1985 the investigating judge issued further instructions to Nice S R P J , as follows Please continue the investigation and carry out the verifications requested in the letter of 12 January 1985 from the lawyer representing the parties seeking damages Please carry out all necessary hearings confrontations, searches, seizures and other appropriate inquiries

On 29 March 1985 evidence was heard from S , the head custody officer at Nice Prison

On 11 April 1986 the Nice investigating judge made an order discontinuing the proceedings

On 29 April 1986 the applicants appealed against that decision

On 7 November 1986 the applicants withdrew their appeal and filed a claim with *the Minister of Justice for compensation for the loss sustained following the death of their son and brother*

On 21 April 1987 the applicants lodged an application with Nice Administrative Court for judicial review of the implicit rejection of their claim by the Minister of Justice They also requested the court to find the State liable for their loss consequent upon the death of their son and brother and to order it to pay them compensation

In a judgment of 24 September 1992, Nice Administrative Court found the State fully liable as follows

Whereas the investigation shows that the prisoner who started the fire O D , who had been convicted of armed assault, had deliberately injured himself on 15 June 1983 and attempted to hang himself on 21 June 1983 i e 14 and 8 days

before the incident occurred, whereas these circumstances did not, however, induce the authorities to take special measures to avert the consequences of the possible danger posed by O D to himself or to his cell mates,

Whereas, given the knowledge it had of O D 's character, the Prison Service, which is responsible for prisoners' safety, committed an act of gross negligence in failing to take appropriate measures with regard to that prisoner, whereas such gross negligence gives rise to liability on the part of the State for the death of one of the inmates

Whereas there is nothing on the file to indicate that Mr Rebai helped start the fire, whereas the State is therefore fully liable for the loss sustained by the deceased's parents, brothers and sisters "

The court awarded the deceased's parents 80,000 French francs (FRF) under the head of non-pecuniary damages, and FRF 20,000 to each of his brothers and sisters

The Minister of Justice appealed on 27 October 1992

In a judgment of 28 June 1993, Lyons Administrative Court of Appeal set aside the judgment of the lower court on the ground that the investigation had clearly shown that the presumed perpetrator of the fire could not, despite his earlier suicidal behaviour, be considered as dangerous to others or someone who should be placed in an isolated cell. The court relieved the State of all liability. It held that the Prison Service had not committed any act of gross negligence in putting O D in the same cell as Mr Rebai or in failing to prohibit smoking in the cells. Neither could any negligence be attributed to the emergency services, which were mobilised as soon as help was called for.

In a judgment of 7 October 1994, the *Conseil d'Etat*, having heard submissions from the applicant's lawyer and from the Government Commissioner, decided not to allow the applicants leave to appeal, for lack of substantial grounds.

'Whereas, in requesting the judgment to be set aside, Mr and Mrs Rebai argue that the court had failed to address their submission that the rules of strict liability applied in this case, that the court misdirected itself in law in making State liability conditional on an act of gross negligence by the State, that, in failing to confiscate fire making facilities from a prisoner exhibiting suicidal tendencies, in failing to prohibit smoking in the cells and in providing prisoners with inflammable mattresses the Prison Service, contrary to the court's ruling, was guilty of negligence that the Prison Service was guilty of gross negligence in putting Mr Rebai in a cell with a prisoner whose suicidal tendencies put his

cell-mates at risk, that the administrative courts should, in these circumstances, apply the rules of strict liability, whereas not one of these grounds is substantial'.

**B** *Relevant domestic law*

Section 11 of the Law of 31 December 1987

'Leave must first be sought in order to file an appeal on points of law with the *Conseil d'Etat*. The court shall refuse leave if the appeal is inadmissible or is not based on any substantial ground. "

Article 28.1 of the Decree of 30 July 1963, as amended by the Decree of 2 September 1988

"The Board of Admission of Appeals on points of law is composed of a President, a substitute President and judges chosen from the senior members of the *Conseil d'Etat* in ordinary service, junior members of the *Conseil d'Etat* are assigned to the Board as reporting judges. '

**COMPLAINTS** (Extract)

1 The applicants allege a violation of the right to life as set forth in Article 2 of the Convention. They consider that the Prison Service failed to protect this right and should have taken preventive measures in view of the behaviour of a dangerous prisoner.

2 The applicants submit that the *Conseil d'Etat's* failure to state grounds for its decision refusing them leave to appeal constitutes a violation of their right to a fair trial within the meaning of Article 6 para. 1 of the Convention.

**THE LAW** (Extract)

1 The applicants complain first of all of a violation of the right to life as guaranteed by Article 2 of the Convention. They consider that the Prison Service failed to protect this right and should have taken preventive measures in view of the behaviour of a dangerous prisoner.

This provision provides:

"1 Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

The Government point out first of all that there is no proof that O D acted alone in starting the fire. They stress that it is difficult to see how he could have acted alone without encountering resistance on the part of his cell mates and how he could have propped their mattresses up against the cell door if they were asleep. They submit that the positioning of the three mattresses and all the prisoners' clothes looks much more like an attempt to draw attention to themselves or to escape than an individual suicide.

The Government submit further that, even supposing O D had instigated the incident, putting him in that cell could not be considered to be an act of negligence or recklessness on the part of the competent authorities in the light of their duty to take preventive measures.

The Government submit that the Prison Service has to balance two conflicting requirements: that of not isolating a prisoner whose behaviour, anxious frame of mind or previous attempts to commit suicide warrants taking precautionary measures to dissuade him from a suicide attempt and, against that, isolating an individual whose verbal or physical aggressiveness makes him particularly dangerous to others.

The Government add that in this case there is nothing on the file to indicate that O D should have been considered as dangerous to his cell mates and that, on the contrary, putting him in a cell with other prisoners had thwarted his attempt to hang himself on 21 June 1983.

The Government stress that the prison rules are adequate to protect prisoners' lives and point out that the consumption of tobacco has always been regulated.

As regards the emergency medical services, the Government stress that the firemen and the ambulance arrived no more than half an hour after the fire had been discovered and that, in the meantime, the prison warders had themselves attempted to bring the fire under control and rescue the prisoners.

The Government observe further that the holding of public and independent inquiries into the circumstances of the applicants' relative's death and of proceedings before the three levels of the administrative courts satisfied the procedural requirements of Article 2 of the Convention as defined by the Commission.

The Government stress, lastly, that the applicants have not, in introducing their application to the Commission, provided any fresh evidence which was not taken into account by the domestic courts in their examination of the case.

The Government conclude that the complaint under Article 2 of the Convention should be rejected.

The applicants contest the claim that the prisoners started the fire arguing that it has not been possible to reconstruct the events. The applicants' explanation as to why the mattresses were in front of the door is that, as the fire had started there O D 's two cell mates had woken up and had attempted to smother the flames with whatever means they had at their disposal.

The applicants submit further that the suggestion that the prisoners were trying to escape is purely fanciful whereas the theory that O D was attempting to commit suicide is based on his previous suicide attempts. They add that O D was a danger to himself and to others and that, although it might not have been necessary to isolate him, he should have been under close observation, a duty which could not be delegated to the other prisoners, as the Government appear to suggest.

As regards the prison rules, the applicants point out that the synthetic composition of the foam mattresses made it easy to start a fire.

As regards the intervention of the emergency services, the applicants observe that, as the prison warders were informed of the fire at approximately 9.20 p.m., the fire had necessarily started earlier. They consider that as the ambulance and the firemen arrived at approximately 9.45 p.m. - 10 p.m. a considerable period of time elapsed between the fire starting, the emergency services arriving and first-aid treatment being administered.

Turning, lastly, to the inquiries which were carried out, the applicants stress that the criminal investigation was limited to finding that there was insufficient evidence on which to bring charges of manslaughter or failure to assist a person in danger whereas the proceedings before the administrative courts had highlighted the role of instigator of O D who was deemed to have started the fire.

They concede lastly that strictly speaking, their application to the Commission contains no fresh evidence but consider that they have exhibited documents which contradict the position taken by the French Government.

The Commission considers at the outset that, as the father, mother, brothers and sisters of the deceased, the applicants can claim to be victims within the meaning of Article 25 of the Convention (see *inter alia*, No. 16734/90, Dec. 2.9.90, D.R. 72, p. 236).

The Commission recalls next that its approach to the interpretation of Article 2 must be guided by a recognition that it constitutes one of the most important rights in the Convention, from which no derogation is permissible even in times of public danger. Article 2 requires that the right to life shall be protected by law.

The Commission has also held that the first sentence of Article 2 para 1 imposes a positive obligation on Contracting Parties. It requires a State not only to refrain from taking life intentionally but also to take appropriate steps to safeguard life (see *McCann and Others v the United Kingdom*, Comm Report 4 3 94, para 187, Eur Court HR, Series A no 324 p 78). That does not, however, mean that a positive obligation to prevent every possibility of violence can be derived from this provision (see No 16734/90, aforementioned).

The Commission observes that in this case, it is alleged that the Prison Service is responsible for the death of the applicants' son and brother on account of having placed him in a cell with a dangerous prisoner, that no precautionary measures were taken and, lastly, that the delay by the emergency services made it impossible to rescue the prisoners.

The Commission notes at the outset that, according to the documents exhibited in the proceedings, there is still uncertainty as to the identity of the perpetrator of the fire. The various statements which were made during the domestic investigative proceedings show that the prisoners' three mattresses and personal effects were positioned behind the door and that the prison warders, after opening the door, had to remove these various objects before they could enter the cell and assist the prisoners, who were by then unconscious.

The Commission notes that the applicants' contention that O D started the fire is based exclusively on the statements of the other two prisoners who were questioned just after being taken out of the cell and after regaining consciousness and that this theory conflicts with the factual evidence on the file and particularly with the fact that the three mattresses were piled up behind the door.

In the circumstances, the Commission considers that responsibility for starting the fire has not been clearly established. It cannot therefore be assumed that O D, although he was certainly suicidal, was a danger to others and that the Prison Service failed to take the necessary steps to protect the prisoners' lives within the meaning of Article 2 of the Convention.

As regards the intervention of the emergency services, the Commission has not found anything in the file to show that they arrived late or that their delay prevented them from attending to the injured prisoners. It notes, in particular, that, according to the various statements, the firemen and the ambulance arrived at the scene 25 minutes after they were called and that, in the meantime, the prison warders had removed the three prisoners from their cell whereupon they had regained consciousness.

The Commission recalls lastly that the necessity of ensuring the effective protection of the rights guaranteed under the Convention, which takes on added importance in the context of the right to life, has led it to conclude that the obligation imposed on the State may include a procedural aspect. There may be cases where a victim dies in circumstances which are unclear in which event the lack of any effective

procedure to investigate the cause of the deprivation of life could by itself raise an issue under Article 2 of the Convention (see *McCann and others v the United Kingdom*, the above mentioned Comm Report, paras 192 to 193)

The Commission points out in this regard that, after the applicants had filed a criminal complaint and a request for leave to join the proceedings as civil parties, an investigation was opened by the investigating judge in charge of the case. He issued instructions to the S R P J to take evidence on commission and undertook the necessary investigations to ascertain the truth, acceding, moreover, to the civil parties' requests for instructions to be issued to the S R P J to take evidence on commission.

The Commission is therefore of the opinion that there is nothing to suggest that the facts of this case were not satisfactorily examined or that the State failed to set in place a mechanism for establishing civil or criminal liability on the part of those responsible.

In the circumstances, the Commission considers that this application does not reveal any failure on the part of the State to comply with the positive obligations imposed on it under Article 2 of the Convention. It follows that the application must be rejected as manifestly ill founded on this point, pursuant to Article 27 para 2 of the Convention.

2. The applicants go on to submit that the lack of reasons for the decision of the *Conseil d'Etat* refusing them leave to appeal constitutes a violation of their right to a fair trial within the meaning of Article 6 para 1 of the Convention.

The relevant part of this Article provides that

"1. In the determination of his civil rights and obligations or of any criminal charge against him everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

The Government submit at the outset that Article 6 para 1 is inapplicable to the proceedings here in so far as the rules governing the responsibility of the State through the Prison Service are public-law rules based on the principle of gross negligence.

The applicants challenge that submission.

The Commission recalls that the concept of 'civil rights and obligations' is not to be interpreted solely by reference to the respondent State's domestic law and that Article 6 para 1 applies irrespective of the parties' status, be it public or private, and of the nature of the legislation which governs the manner in which the dispute is to be determined, it is sufficient that the outcome of the proceedings should be decisive for private rights and obligations (see Eur Court HR, *H v France* judgment of 24 October 1989, Series A no 162-A, p 20, para 47).

Such is the case here since the applicants applied to the administrative courts for compensation following the death of their son and brother Article 6 para 1 is therefore applicable

As for the merits, the Government contend that the application is manifestly ill founded

They submit that section 11 of the 31 December 1987 Law on the reform of the organisation and functioning of the administrative courts provides that leave must first be sought to bring an appeal on points of law before the *Conseil d'Etat* and that the Decree of 2 September 1988 set up the Board of Admission of Appeals on Points of Law to the *Conseil d'Etat* and specified the composition and role of that Board

The Government refer to the Commission's case law to the effect that the Board of Admission of Appeals on Points of Law to the *Conseil d'Etat*, in giving a concise rendering of its view of the grounds of appeal, provided sufficient reasons for its decision

The applicants accept the purpose of the 31 December 1987 Law They consider, however, that a decision which is confined to asserting that the appellants' grounds of appeal are insubstantial appears condescending not only to the appellants but also to the Government Commissioner and the Administrative Court which, at first instance, had accepted that the grounds raised substantial considerations

The applicants contend that such a decision, which states no reasons and is not subject to appeal, cannot serve as a basis for a fair trial

The Commission recalls that the right of access to the courts secured by Article 6 of the Convention may be subject to limitations in the form of regulation by the State In this respect the State enjoys a certain margin of appreciation However, the limitations applied must not restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right is impaired (see Eur Court HR, *Tolstoy Miloslavsky v the United Kingdom* judgment of 13 July 1995 Series A no 316 B, pp 78 79 para 59)

The Commission notes that on the facts, the Board to which the applicants applied for leave to appeal stated as a ground for refusing to grant them leave that none of the grounds of appeal was substantial

The Commission notes that section 11 of the 31 December 1987 Law provides that the court shall refuse leave to appeal if the appeal is inadmissible or is not based on any substantial ground

The Commission recalls its case law that a right to appeal against a judgment does not feature among the rights and freedoms guaranteed by the Convention If the domestic law subjects the acceptance of the appeal to a decision by the competent court

whether it considers that the appeal raises a legal issue of fundamental importance and whether it has any chances of success, it may be sufficient for this court simply to refer to the provision authorising this procedure (see, among other authorities, No 8769/79, *X v Federal Republic of Germany*, Dec 16.7.81, D R 25, p 242, No 18441/91, *Ouendeno v. France*, Dec. 2 3 94, unpublished and No 20087/92, *E.M. v Norway*, Dec 26 10.95, D R 83-B, p 5)

The Commission notes that, in this case, the Board of Admission of Appeals refused leave to appeal on account of the lack of substantial grounds, that is, for one of the two reasons provided for in section 11 of the 31 December 1987 Law. In the circumstances, the Commission does not find any appearance of a violation of Article 6 para 1 of the Convention

It follows that this aspect of the application is manifestly ill-founded within the meaning of Article 27 para 2 of the Convention.

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