EUROPEAN COURT OF HUMAN RIGHTS
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German courts should have considered alternatives to preventive detention for offender with mental health problem who had served his full prison sentence

In today's Chamber judgment in the case of **Glien v. Germany** (application no. 7345/12), which is not final[1], the European Court of Human Rights held, unanimously, that there had been:

a violation of Article 5 § 1 (right to liberty and security) of the European Convention on Human Rights, and

a violation of Article 7 § 1 (no punishment without law).

The case concerned Mr Glien's preventive detention which was retrospectively extended beyond the maximum period of ten years permissible at the time of his offences and conviction.

The Court considered the German Government's argument that Mr Glien had been detained as a person "of unsound mind" for the purpose of Article 5 § 1 (e). However, the Court noted that the conditions of his detention in prison had not significantly differed from normal imprisonment. It was therefore not convinced that he had been provided with an environment appropriate to a person detained as a mental health patient. The Court stressed that the German courts could have ordered his transfer to a psychiatric hospital or to a suitable institution under the Therapy Detention Act and that his immediate release would therefore not have been the only alternative to his continued preventive detention.

Moreover, the Court found that Mr Glien's preventive detention as executed at the relevant time was to be classified as a "penalty" for the purpose of Article 7. Its retrospective extension had therefore been in breach of his right not to have a heavier penalty imposed on him than the one applicable at the time of his offence.

Principal facts

The applicant, Christian Glien, is a German national who was born in 1947 and is currently detained in Diez Prison (Germany). In 1997 he was convicted of several counts of sexual abuse of children and sentenced to four years' imprisonment. At the same time, the sentencing court ordered his preventive detention. It found that Mr Glien, who had been diagnosed by a psychiatric expert with a sexual deviation which was not so severe as to be pathological, had acted with full criminal responsibility.

After having fully served his prison sentence, in 2001, Mr Glien was placed in preventive detention. Since January 2004, he has been detained in a separate wing of Diez prison for persons in preventive detention. After an unsuccessful attempt at therapy, he has rejected all offers for treatment.

1 Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.
Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution

In May 2011, Mr Glien requested the courts to order his release. He referred to the leading judgment of the Federal Constitutional Court of 4 May 2011, which – taking into consideration the case-law of the European Court of Human Rights[2] – found that the competent courts had to apply strict standards when examining, without delay, whether detainees whose preventive detention had been prolonged retrospectively were to remain in detention. However, his request to be released was rejected by the Koblenz Regional Court in September 2011, which found that the strict standards set by the Constitutional Court's judgment had been met. In particular the court considered that Mr Glien was still highly likely to reoffend and commit most serious offences which would severely harm the victims. It further found, relying on the report of a psychiatric expert, that Mr Glien suffered from dissocial personality disorder and paedophilia, which were not pathological but which were to be considered a mental disorder for the purpose of the Therapy Detention Act. The decision not to release him was finally upheld by the Federal Constitutional Court on 19 January 2012 (file no. 2 BvR 2754/11).

Mr Glien's subsequent requests to be released were also dismissed by the courts. In June 2013, after the proceedings here at issue, he was transferred to a new building of the prison for detainees in preventive detention which had been newly constructed with the aim to provide an environment significantly different from normal imprisonment.

Complaints, procedure and composition of the Court

Relying on Article 5 § 1 (right to liberty and security), Mr Glien complained of his disproportionately long preventive detention, and in particular of his detention beyond the period of ten years, which had been the maximum for such detention under the legal provisions applicable at the time of his offences and conviction. He further complained of a breach of the prohibition of retrospective punishment under Article 7 § 1 (no punishment without law).

The application was lodged with the European Court of Human Rights on 30 January 2012.

Judgment was given by a Chamber of seven judges, composed as follows:

Mark **Villiger** (Liechtenstein), *President*,
Angelika **Nußberger** (Germany),
Boštjan M. **Zupančič** (Slovenia),
Ann **Power-Forde** (Ireland),
Ganna **Yudkivska** (Ukraine),
Helena **Jäderblom** (Sweden),
Aleš **Pejchal** (the Czech Republic),

and also Claudia **Westerdiek**, *Section Registrar.*

Decision of the Court

Article 5 § 1

The Court underlined that only Mr Glien's continued preventive detention in Diez prison as ordered by the German courts in September 2011 and confirmed in January 2012 – and not the decisions concerning his subsequent requests – was at issue in the case.

The German Government had argued that Mr Glien's continued preventive detention was justified under sub-paragraph (e) of Article 5 § 1 as detention of a person "of unsound mind". The Court was satisfied that it had been established before a competent legal authority that Mr Glien suffered from a mental disorder as defined by German law. When reviewing the need for him to remain in

[2] In particular the judgment in *M. v. Germany* (*19359/04)* of 17 December 2009

preventive detention, the German courts had – in accordance with the standards set up by the Constitutional Court's judgment of 4 May 2011 – expressly established that he suffered from a mental disorder for the purpose of the German Therapy Detention Act.

While in its case-law the Court had not established a precise definition of the term "persons of unsound mind", it underlined that the permissible grounds for deprivation of liberty under Article 5 were to be interpreted narrowly. It considered that a mental condition had to be of a certain gravity in order to be considered as a "true" mental disorder for the purposes of Article 5 § 1 (e). Under its well-established case-law, the detention of a person as a mental health patient was only covered by Article 5 if effected in a hospital, clinic or other appropriate institution.

It appeared that the notion of "persons of unsound mind" in Article 5 § 1 (e) of the Convention might be more restrictive than the notion of "mental disorder" referred to in the Therapy Detention Act. The Court doubted whether Mr Glien's dissocial personality alone, which had been found by the German authorities not to be pathological, could be considered as a sufficiently serious mental condition so as to be classified as a "true" mental disorder for the purposes of Article 5. However, those authorities had considered Mr Glien to have a mental disorder for the purposes of the Therapy Detention Act also because he had been diagnosed with – non-pathological – paedophilia.

The Court noted the Government's argument that Mr Glien's detention in a separate prison wing for persons in preventive detention had differed significantly from the execution of a normal prison sentence. In particular, the Government had referred to the fact that detainees had more freedom of movement in the prison wing and more possibilities for leisure activities. However, the Court was not persuaded that he had been provided with a medical or therapeutic environment appropriate to a person detained as a mental health patient.

The Court took note of the extensive measures Germany had initiated, following the Court's judgments concerning preventive detention and the Federal Constitutional Court's judgment of 4 May 2011, with a view to adapting the execution of preventive detention to constitutional and Convention requirements. In particular, it acknowledged steps taken to provide people in preventive detention with an environment significantly different from normal imprisonment in the future. It also accepted that transitional periods might be necessary for a State to adapt national law and its implementation to Convention standards.

However, the Court was not convinced that the German courts would not have had the possibility, at the time of the proceedings in Mr Glien's case, to adapt his detention conditions so as to be appropriate for a person "of unsound mind". It would have been open to them to order his transfer to a psychiatric hospital or another institution appropriate for people suffering from a mental disorder. The German Therapy Detention Act expressly provided for that possibility. Therefore, the only alternative to prolonging his preventive detention in a separate prison wing would not have been his immediate release.

In view of those considerations, the Court did not find that Mr Glien's continued preventive detention, as executed in prison, had been justified under Article 5 § 1 (e). It could not be justified under any of the other subparagraphs of Article 5 § 1, as had been acknowledged by the German Government. There had accordingly been a violation of Article 5 § 1.

Article 7 § 1

As in the case of *M. v. Germany*, in which the Court had found a violation of Article 7, Mr Glien's preventive detention had been extended retrospectively beyond the maximum duration permitted at the time of his offence and conviction. In the case of *M. v. Germany*, the Court had found that the applicant's preventive detention was to be classified as a "penalty" for the purpose of Article 7 § 1 despite the fact that this measure was not considered a penalty under German criminal law. Its retrospective extension had therefore been in breach of his right not to have a heavier penalty imposed on him than the one applicable at the time of his offence.

A weighty factor in the assessment whether the measure concerned was a penalty was whether it had been imposed following the conviction of a criminal offence. Mr Glien's preventive detention had been imposed together with his conviction of criminal offences.

Furthermore, the Court was not convinced that the execution of Mr Glien's preventive detention in practice had substantially changed. That detention had therefore not differed from a normal prison sentence to the extent that it was not to be classified as a penalty. Preventive detention, as executed in his case, remained among the most severe measures which may be imposed under German criminal law. The Court concluded that his preventive detention during the period at issue still had to be classified as a penalty within the meaning of Article 7. There had accordingly been a violation of Article 7 § 1.

Just satisfaction (Article 41)

The court held that Germany was to pay Mr Glien 3,000 euros (EUR) in respect of non-pecuniary damage.

The judgment is available only in English.

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