



Domestic authorities failed to thoroughly examine which therapy was appropriate for long-term drug addict in detention

In today's **Chamber judgment**¹ in the case of **Wenner v. Germany** (application no. 62303/13) the European Court of Human Rights held, unanimously, that there had been:

a violation of Article 3 (prohibition of inhuman or degrading treatment) of the European Convention on Human Rights.

The case concerned the complaint by a long-term heroin addict that he had been denied drug substitution therapy in prison.

While the Court did not have to decide whether Mr Wenner had indeed needed drug substitution therapy, its task was to determine whether the German authorities had adequately assessed his state of health and the appropriate treatment. The Court came to the conclusion that the authorities, despite their obligation to that effect, had failed to examine with the help of independent and specialist medical expert advice, against the background of a change in Mr Wenner's medical treatment, which therapy was to be considered appropriate.

Principal facts

The applicant, Wolfgang Adam Wenner, is a German national who was born in 1955. He has been addicted to heroin since 1973 and has been HIV-positive since 1988. Since 2001 he has been considered 100% disabled.

Over time Mr Wenner has unsuccessfully tried to overcome his addiction with various types of treatment. From 1991 to 2008 his addiction was treated with medically prescribed and supervised drug substitution therapy.

In 2008 Mr Wenner was arrested on suspicion of drug trafficking and placed in detention on remand in Kaisheim Prison, in the *Land* of Bavaria, where his drug substitution treatment was interrupted against his will. In June 2009 he was convicted of drug trafficking and – taking into account a previous conviction – sentenced to a total of six years' imprisonment. The trial court also ordered his placement in a drug detoxification facility, to be executed after a period of six months' detention. In accordance with that order, in December 2009, he was transferred to a drug rehabilitation centre in Bavaria, where he underwent abstinence-based treatment for his addiction, without additional substitution treatment. In April 2010 he was transferred back to Kaisheim Prison, as ordered by the competent court. Mr Wenner's appeal against that decision was dismissed by the Munich Court of Appeal, finding that it was not to be expected with sufficient probability that he could be cured from his drug addiction or could be prevented for a considerable time from relapsing into drug abuse.

In June 2011 Mr Wenner made a request to the prison authorities for treatment with a heroin substitute for his addiction. Alternatively, he requested that the question of whether such substitution treatment was necessary be examined by a drug addiction specialist. Mr Wenner claimed that, as suggested, in particular, by an external doctor for internal medicine who had

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.

examined him on the prison authorities' request, his serious chronic neurological pain could be considerably alleviated by drug substitution treatment, as had been the case during his previous substitution treatment. The prison authorities dismissed his request, arguing that substitution treatment was neither necessary for the purposes of the Bavarian Execution of Sentences Act, nor a suitable measure for his rehabilitation. They pointed out, in particular, that while treated in the drug rehabilitation centre for five months he had not been given substitution treatment, and after three years in detention he no longer suffered from physical withdrawal symptoms.

Mr Wenner appealed, submitting that the prison authorities had failed to examine, under the relevant criteria laid down in the Federal Medical Association's Guidelines for the Substitution Treatment of Opiate Addicts, whether drug substitution therapy was necessary. In March 2012 the Augsburg Regional Court dismissed his appeal, endorsing the reasons given by the prison authorities. The Munich Court of Appeal upheld that decision and, on 10 April 2013, the Federal Constitutional Court declined to consider his constitutional complaint without giving reasons (file no. 2 BvR 2263/12).

Following his release from prison in December 2014, Mr Wenner was examined by a doctor, who prescribed him drug substitution treatment.

Complaints, procedure and composition of the Court

Relying on Article 3 (prohibition of inhuman or degrading treatment), Mr Wenner complained that the refusal to grant him drug substitution therapy in prison, which had made him suffer considerable pain and had caused damage to his health, and the refusal to have the necessity of drug substitution therapy examined by an external medical expert had amounted to inhuman treatment.

The application was lodged with the European Court of Human Rights on 30 September 2013.

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

Ganna **Yudkivska** (Ukraine), *President*,
Angelika **Nußberger** (Germany),
Khanlar **Hajiyev** (Azerbaijan),
Erik **Møse** (Norway),
André **Potocki** (France),
Carlo **Ranzoni** (Liechtenstein),
Mārtiņš **Mits** (Latvia),

and also Milan **Blaško**, *Deputy Section Registrar*.

Decision of the Court

Article 3

It was contested between the parties whether in Mr Wenner's case drug substitution therapy was to be regarded as a necessary medical treatment which had to be provided in order for the State to comply with its obligation under Article 3 to ensure that his health was adequately secured during his detention. The Court accepted that States had some room for manoeuvre ("margin of appreciation") in respect of the choice between different suitable types of treatment for a prisoner's diseases. In principle this was true also for the choice between abstinence-oriented drug therapy and drug substitution therapy.

The Court did not have to decide whether Mr Wenner indeed needed drug substitution therapy, but it had to determine whether Germany had provided convincing evidence showing that his state of

health and the appropriate treatment had been adequately assessed and that he had accordingly received adequate medical care in detention.

A number of strong elements indicated that drug substitution treatment could be regarded as the requisite treatment for Mr Wenner. He was a manifest and long-term opioid addict. As the German courts themselves had confirmed – when deciding his appeal against the decision to transfer him back to prison from the rehabilitation centre – it was not to be expected with sufficient probability that he could be cured from his drug addiction or could be prevented for a considerable time from relapsing into drug abuse. His drug addiction had been treated with medically prescribed drug substitution therapy for 17 years prior to his detention.

The Court also noted that according to a study commissioned by the German Ministry of Health, drug substitution treatment was the best possible therapy for manifest opiate addiction. Opioid substitution therapy programmes were operational in 41 out of 47 of the Council of Europe Member States and 30 out of 47 States also provided such therapy to prisoners. In Germany, such therapy was, in principle, available in prison and was provided in practice in prison in several *Länder* other than Bavaria. Such practice was in line with the Council of Europe's principles in respect of health care services in prison. Both the standards of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) and the European Prison Rules laid down the principle of equivalence of care, under which prisoners were entitled to medical treatment in conditions comparable to those enjoyed by patients in the outside community.

Furthermore, in Mr Wenner's case, an external doctor commissioned by the prison authorities had suggested that the prison medical service reconsider providing him with drug substitution treatment which he had received prior to his imprisonment. The fact that following his release from prison he was again provided with such treatment also indicated that this was the requisite therapy for him.

The Court was not convinced by the German authorities' argument that by the time Mr Wenner applied for drug substitution treatment he had not received that therapy for several months and no longer suffered from physical withdrawal symptoms. In this respect the Court noted in particular that his state of health while in detention had been characterised by the chronic pain he suffered independently of previous physical withdrawal symptoms, and that his previous drug substitution treatment had been interrupted against his will. Moreover, given that, in the domestic authorities' own view, the abstinence-oriented therapy had failed, the authorities had been called upon to assess anew which therapy was suitable for Mr Wenner. In these circumstances, the refusal of drug substitution treatment could not be based on the unattainable objective to make him overcome his drug addiction. In order to ensure that he received the necessary medical treatment in prison, the domestic authorities, and in particular the courts, had therefore been required to verify, in a timely manner and with the help of an independent doctor skilled in drug addiction treatment, whether Mr Wenner's condition was still adequately treated without such therapy.

The Court was further satisfied that the physical and mental strain Mr Wenner had suffered as a result of his health condition as such could, in principle, attain the threshold of Article 3.

Despite these circumstances and the authorities' obligation to properly evaluate which was the adequate treatment for Mr Wenner's disease, they had failed to examine with particular scrutiny and with the help of independent and specialist medical expert advice, against the background of a change in his medical treatment, which therapy was to be considered appropriate. There had accordingly been a violation of Article 3.

Just satisfaction (Article 41)

The Court rejected Mr Wenner's claim in respect of his alleged pecuniary damage and it considered that the finding of a violation of Article 3 constituted in itself sufficient just satisfaction for any non-pecuniary damage suffered. Furthermore the Court held that Germany was to pay Mr Wenner 1,801.05 euros (EUR) in respect of costs and expenses.

The judgment is available only in English.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.