EUROPEAN COURT OF HUMAN RIGHTS
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Court confirms in a further three cases: retroactive extension of prisoners' preventive detention not justified

In today's Chamber judgments in the cases **Kallweit v. Germany** (application no. 17792/07), **Mautes v. Germany** (no. 20008/07) and **Schummer v. Germany** (nos. 27360/04 and 42225/07), which are not final[1], the European Court of Human Rights held, unanimously, that there had been **a violation of Articles 5 § 1 (right to liberty and security) and 7 § 1 (no punishment without law)** of the European Convention on Human Rights in all three cases.

The cases concerned the applicants' preventive detention which was retrospectively extended beyond the maximum period permissible at the time of their offences.

Principal facts

The applicants, Rüdiger Kallweit, Manuel Mautes and Martin Schummer, are three German nationals who were born in 1955, 1960 and 1959 respectively. The first two applicants are currently detained in Aachen Prison (Germany) and the third applicant lives in Freiburg (Germany).

All three of them were given prison sentences for serious offences after a history of previous convictions: The Bochum Regional Court convicted Mr Kallweit of sexual assault and sexual abuse of a minor committed in 1992 and sentenced him to three years and six months' imprisonment in May 1993. The Duisburg Regional Court convicted Mr Mautes of dangerous assault combined with joint coercion, with sexual coercion, with joint extortion and coercion and with attempted sexual assault committed in 1990. It sentenced him to six years' imprisonment in July 1991. The Stuttgart Regional Court in March 1985 convicted Mr Schummer of two counts of rape and abduction and of one count of attempted rape and deprivation of liberty committed in 1984 and sentenced him to five years' imprisonment. In all three cases, the sentencing courts, together with the applicants' respective conviction, ordered their placement in preventive detention.

After having served their full prison sentence, all three applicants were placed in preventive detention, the continuation of which was ordered by the courts on several occasions. The courts in all three cases ordered the applicants' continued preventive detention beyond the period of ten years, relying on psychiatric expert reports in the cases of Mr Kallweit and Mr Mautes respectively and on a neurologic expert report in Mr Schummer's case, all of which found that the applicants, if released, were likely to commit serious offences resulting in considerable psychological or physical harm to the victims.

1 Under Articles 43 and 44 of the Convention, these Chamber judgments are not final. During the three-month period following their delivery, any party may request that the case/s 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/s 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

The courts relied on Article 67 d § 3 of the Criminal Code, as amended in 1998. Under that provision, applicable also to prisoners whose preventive detention had been ordered prior to the amendment, the duration of a convicted person's first period of preventive detention could be extended to an unlimited period of time. Under the version of the Article in force at the time of the applicant's offence and conviction, a first period of preventive detention could not exceed ten years.

All three applicants lodged constitutional complaints against the courts' decisions, which the Federal Constitutional Court declined to consider. In the cases of Mr Schummer and Mr Kallweit, the court, in March 2004 and January 2007 respectively, referred to its leading judgment of 5 February 2004 in which it had found that Article 67 d § 3 of the Criminal Code was constitutional.

In subsequent judgments, the Cologne Court of Appeal in July and August 2010 respectively, refused to declare the preventive detention of Mr Mautes and Mr Kallweit terminated in view of the European Court of Human Rights' judgment in the case of *M. v. Germany*[2], in which it had found that the retroactive extension of the applicant's preventive detention beyond the maximum period of ten years permissible at the time of his offence violated Article 5 § 1 and 7 § 1. The Cologne Court of Appeal in Mr Mautes' and Mr Kallweit's case found that German law as it stood at present could not be interpreted in compliance with that judgment and that it was therefore up to the legislator to execute its findings.

By contrast, the Karlsruhe Court of Appeal in September 2010 declared Mr Schummer's preventive detention terminated and ordered his supervision of conduct. It argued that it was possible to interpret the German Criminal Code so as to comply with the judgment in the case of *M. v. Germany*. Accordingly, in relation to preventive detention, the application of a new legal provision retrospectively to the detriment of the person concerned was prohibited and the law in force at the time of the offence had to be applied. Mr Schummer was released on the same day and has since been under constant police surveillance.

Complaints, procedure and composition of the Court

Relying in particular on Articles 5 § 1 and 7 § 1, all three applicants complained of their preventive detention after having served their full sentences and of the retrospective extension of their preventive detention beyond the maximum period permissible at the time of their offences.

Mr Kallweit's application was lodged with the European Court of Human Rights on 17 April 2007, Mr Mautes' application was lodged on 24 April 2007 and Mr Schummer's applications, which the Court decided to join, were lodged on 10 July 2004 and 4 September 2007 respectively.

Judgments were given by a Chamber of seven, composed as follows:

Peer **Lorenzen** (Denmark), *President*,
Renate **Jaeger** (Germany),
Rait **Maruste** (Estonia),
Isabelle **Berro-Lefèvre** (Monaco),
Mirjana **Lazarova Trajkovska** ("the Former Yugoslav Republic of Macedonia"),
Zdravka **Kalaydjieva** (Bulgaria),
Ganna **Yudkivska** (Ukraine)*, Judges*,

[2] *M. v. Germany (19359/04)* of 17.12.2009

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

Decision of the Court

Article 5 § 1

All three cases were follow-up cases, in terms of the temporal course of events, to the application of *M. v. Germany*. The Court therefore saw no reason to depart from its findings in that judgment.

As in the case of *M. v. Germany*, the applicants' preventive detention before expiry of the ten-year-period was covered by Article 5 § 1 (a) as being detention "after conviction" by the sentencing court.

As regards their preventive detention beyond the ten-year period, however, the Court found that there was no sufficient causal connection between the applicants' conviction and their continued deprivation of liberty to satisfy Article 5 § 1 (a). At the time the sentencing courts ordered their preventive detention, those decisions meant that they could be kept in that form of detention for a clearly-defined maximum period. Without the amendment of the Criminal Code in 1998 the courts responsible for the execution of sentences would not have had jurisdiction to extend the duration of the detention.

The applicants' continued detention had not been justified under any of the other sub-paragraphs of Article 5 § 1. In particular, it had not been justified by the risk that they could commit further serious offences if released, as those potential offences were not sufficiently concrete and specific so as to fall under sub-paragraph (c) of Article 5 § 1.

There had accordingly been a violation of Article 5 § 1 in all three cases in so far as the applicants' preventive detention beyond the ten-year period was concerned.

The Court welcomed the fact that the domestic courts in the case of Mr Schummer had terminated the preventive detention in compliance with the Convention as interpreted by the Court's case-law. His release did not, however, alter the fact that, as regards his preventive detention beyond the ten-year period until his release, he might claim to have been a victim of a breach of Article 5.

Article 7 § 1

As regards the complaint under Article 7 § 1, the Court equally referred to its findings in *M. v. Germany*. In that judgment, the Court had concluded that preventive detention was to be qualified as a penalty for the purpose of Article 7 § 1. Like a prison sentence, preventive detention entailed a deprivation of liberty. In practice in Germany, people subject to preventive detention were detained in ordinary prisons. There were minor alterations to the detention regime, but no substantial difference could be discerned between the execution of a prison sentence and that of a preventive detention order.

Following the amendment of the German Criminal Code in 1998, preventive detention no longer had a maximum duration and the condition for its suspension on probation – there being no danger the detainee would re-offend – was difficult to fulfil. The measure was therefore among the severest which could be imposed under the German law.

Given that at the time of their offences the applicants could have been kept in preventive detention only for a maximum of ten years, the extension constituted an additional penalty which had been imposed on them retrospectively.

There had accordingly been a violation of Article 7 § 1 in all three cases.

Article 46 (Binding force and execution of judgments)

The Court noted that the Cologne Court of Appeal had prolonged the preventive detention of Mr Mautes and Mr Kallweit although being aware, in view of the judgment in *M. v. Germany*, that that detention was in breach of the Convention. In contrast, in other cases, several German courts of appeal and the Federal Court of Justice had considered it possible to interpret German law in compliance with the judgment in *M. v. Germany*, and in its submissions in Mr Mautes' and Mr Kallweit's case, the German Government had agreed with that view. In the light of that, the Court did not consider it necessary to indicate any specific or general measures Germany had to take in the execution of the judgments in Mr Mautes' and Mr Kallweit's case. However, the Court urged the national authorities, in particular the courts, to assume their responsibility for speedily implementing and enforcing the two men's right to liberty, a core right guaranteed by the Convention.

Article 41

Under Article 41 (just satisfaction) of the Convention, the Court held that Germany was to pay Mr Kallweit 30,000 euros (EUR), Mr Mautes EUR 25,000 and Mr Schummer EUR 70,000 in respect of non pecuniary damage.

The judgments are available only in English.

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