EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

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24.11.2011

Court finds further violation of the Convention by old preventive detention regime in Germany but welcomes new judicial review ordered by Constitutional Court

In today's Chamber judgment in the case **O.H. v. Germany** (application no. 4646/08), which is not final[1], the European Court of Human Rights held, by a majority, that there had been **a violation of Article 5 § 1 (right to liberty and security)** of the European Convention on Human Rights and, unanimously, that there had been **a violation of Article 7 § 1 (no punishment without law)**.

The case concerned the applicant's preventive detention after having served his prison sentence in full.

Principal facts

The applicant, O.H., is a German national who was born in 1952 and is currently in Straubing Prison. After a number of previous convictions, Mr H. was convicted by the Munich I Regional Court of two counts of attempted murder and sentenced to nine years' imprisonment in April 1987; at the same time the court ordered his placement in preventive detention. While psychological and neurological experts consulted by the court found that he was suffering from a personality disorder, they held that it was not serious enough to be classified as pathological. The court thus considered that Mr H. had acted with full criminal responsibility.

After having fully served his prison sentence, in November 1996, Mr H. was placed in preventive detention in two different psychiatric hospitals, as ordered by the Regensburg Regional Court. However, in 1999, the court ordered that his preventive detention should take place in prison instead of a psychiatric hospital, as he had persistently refused any of the therapies offered. Since August 1999 he has been detained in a separate wing of Straubing Prison for inmates held in preventive detention.

In October 2006, the Regensburg Regional Court, sitting as a chamber responsible for the execution of sentences, ordered that Mr H. should remain in preventive detention beyond November 2006, when he had served ten years in such detention, holding that he was liable to commit further serious offences if released. Mr H.'s appeal against that decision was dismissed and, on 23 July 2007, the Federal Constitutional Court declined to consider his constitutional complaint (file no. 2 BvR 241/07). 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 Mr H.'s offence and conviction, a first period of preventive detention could not exceed ten years.

1 Under Articles 43 and 44 of the Convention, Chamber judgments are not final. During the three-month period following the delivery of a Chamber judgment, 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

Complaints, procedure and composition of the Court

Relying on Article 5 § 1 (right to liberty and security) and Article 7 § 1 (no punishment without law), Mr H. complained of the retrospective extension of his preventive detention beyond the maximum period of ten years authorised under German law at the time of his offence.

The application was lodged with the European Court of Human Rights ("the ECHR") on 20 January 2008.

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

Dean **Spielmann** (Luxembourg), *President*,
Karel **Jungwiert** (the Czech Republic),
Boštjan M. **Zupančič** (Slovenia),
Mark **Villiger** (Liechtenstein),
Ann **Power-Forde** (Ireland)
Ganna **Yudkivska** (Ukraine),
Angelika **Nußberger** (Germany)*, Judges*,

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

Decision of the Court

Article 5 § 1

Mr H.'s continued preventive detention beyond the ten-year maximum period permissible at the time of his conviction was only possible due to the amendment of the German Criminal Code in 1998. In terms of the temporal course of events, Mr H.'s case was a follow-up case to the application *M. v. Germany*[2], in which the Court found that a prisoner's preventive detention beyond the maximum period of ten years had not been justified. The Court saw no reason to depart from its findings in that judgment. It considered that there had been no sufficient causal connection between Mr H.'s conviction by the sentencing court and his continued deprivation of liberty beyond the period of ten years in preventive detention to be covered by Article 5 § 1 (a) as being detention "after conviction".

The Court further had to examine whether Mr H.'s preventive detention had been justified under Article 5 § 1 (e) as detention of a person "of unsound mind". It noted that, even assuming that the German courts could be said to have established that Mr H. suffered from a true mental disorder, he had been at the time of the proceedings, and continued to be, detained in a separate wing of Straubing Prison for inmates in preventive detention. Under the Court's case-law, a person's detention as a mental health patient would only be lawful if effected in a hospital, clinic or other appropriate institution. However, the Court was not convinced that Mr H. had been offered the appropriate therapeutic environment in Straubing Prison for a person detained as being of unsound mind. The fact that Mr H. had refused therapy did not mean the authorities had no responsibility to provide him with a medical environment appropriate for his condition.

In that context, the Court subscribed, in particular, to the reasoning of the German Federal Constitutional Court in its leading judgment concerning the retrospective extension of preventive detention of 4 May 2011. That court had underlined that both the German Constitution and the European Convention required a high level of individualised care for persons in preventive detention. It had further found that

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

detainees had to be offered an individualised therapy if the standard therapies available in the institution did not have any prospect of success. Given that Mr H. had not been offered such suitable care, his detention had not been covered by Article 5 § 1 (e).

Having further regard to the German Government's argument that Mr H.'s continued preventive detention had been ordered as there was still a risk that he might commit serious offences, the Court underlined that the Convention did not permit a State to protect potential victims from criminal acts of a person by measures which were itself in breach of that person's Convention rights. There had accordingly been a violation of Article 5 § 1.

Article 7 § 1

The Court saw no reason to depart from its finding in the case of *M. v. Germany* that preventive detention under the German Criminal Code, given that it was ordered by the criminal courts following a conviction for a criminal offence and that it entailed a deprivation of liberty, was to be qualified as a "penalty" for the purposes of Article 7 § 1. At the time of Mr H.'s conviction and his preventive detention order, such an order meant that he could be kept in preventive detention for a maximum of ten years. His preventive detention was subsequently extended with retrospective effect, on the basis of the Criminal Code as amended in 1998, hence under a law that was enacted after he had committed his offence.

Minor alterations to the detention regime compared with that of an ordinary prisoner serving his sentence could, in the Court's view, not mask the fact that that there had been no substantial difference between the execution of a prison sentence and that of the preventive detention order against Mr H. In that context, the Court referred again to the recent leading judgment of the German Federal Constitutional Court, in which that Court had found that the provisions of the German Criminal Code on preventive detention did not satisfy the constitutional requirement of establishing a difference between preventive detention and detention for serving a term of imprisonment.

There had accordingly been a violation of Article 7 § 1.

Article 46 (binding force and execution of judgments)

The Court observed that following its judgment in the case of *M. v. Germany* and several follow-up cases, the German Federal Constitutional Court, in its leading judgment of 4 May 2011, held that all provisions on the retrospective prolongation of preventive detention were incompatible with the German Basic Law. That court further ordered that the courts dealing with the execution of sentences had to review without delay the detention of people – such as Mr H. – whose preventive detention had been prolonged retrospectively. They had to examine whether he was likely to commit the most serious crimes and, in addition, whether he suffered from a mental disorder within the meaning of the relevant sections of the new German Therapy Detention Act, which had entered into force in January 2011. As regards the notion of mental disorder, the Federal Constitutional Court explicitly referred to the interpretation of the Convention made in the ECHR's case-law. If those pre-conditions were not met, a detainee in Mr H.'s position would have to be released no later than 31 December 2011.

The Court considered that by that judgment the Federal Constitutional Court had implemented the ECHR's findings on preventive detention in Germany in the domestic legal order. By setting a relatively short time-frame for the domestic courts to reconsider the continuing preventive detention of the people concerned, that court had proposed an adequate solution to put an end to ongoing Convention violations. The Court therefore did not consider it necessary to indicate specific measures to Germany which were called for in the execution of the judgment in Mr H.'s case. At the same time it pointed out that

the new judicial review ordered by the German Federal Constitutional Court did not cover Mr H.'s past preventive detention. The Court consequently did not consider it appropriate to further adjourn the examination of the case.

Article 41

Under Article 41 (just satisfaction) of the Convention, the Court held that Germany was to pay Mr H. 20,000 euros in respect of non-pecuniary damage.

Separate opinion

Judge Zupančič expressed a separate opinion, which is annexed to the judgment.

The judgment is available only in English.

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