

**APPLICATION N° 24722/94**

**Léon GUENAT v/SWITZERLAND**

**DECISION of 10 April 1995 on the admissibility of the application**

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**Article 5 of the Convention**

- a) *The "right to liberty" concerns physical liberty and freedom from arbitrary arrest or detention. It does not relate to mere restrictions on liberty of movement.*
- b) *In order to determine whether a person is 'deprived of his liberty' it is necessary to examine his actual situation and take into account the type, duration, effects and manner of implementation of the measure in question.*

**Article 5, paragraph 1 of the Convention** *A person who, on grounds of fears for his mental condition, spends almost three hours at a police station without asking to leave, is not deprived of his liberty.*

**Article 5, paragraph 5 of the Convention** *The right to compensation under this provision presupposes that a violation of one of the paragraphs 1 to 4 of Article 5 has been established, either by a domestic authority or by one of the Convention institutions.*

**Article 26 of the Convention** *In order to have exhausted domestic remedies an applicant must have expressly raised before the national authorities the complaint brought before the Commission.*

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## THE FACTS

The applicant, a Swiss citizen, born in 1928, is retired and lives in Geneva. He is a litigant in person before the Commission.

The facts of the case, as submitted by the applicant, may be summarised as follows:

The applicant has been receiving medical attention since 1975 for an affection of the nervous system which takes the form of recurrent paralyses and provokes sensory and motor disorders, a condition which may, among other things, make him walk unsteadily as though drunk.

On 21 July 1989, while he was returning home in the early afternoon, the applicant suspected a fire in the block of flats where he lived and alerted the fire brigade. The firemen arrived and inspected the premises but found there to be no danger, as the smoke was coming from insulation works being carried out in the building.

As is customary, the firemen informed the police that they had been called out. They also reported the presence of an individual - the applicant - who was behaving strangely.

The applicant was with the firemen when the police arrived.

The police checked the applicant's identity. Finding his behaviour abnormal, they asked him to accompany them to the police station, which he did without protesting.

They arrived at the police station at approximately 1.30 p.m. After trying in vain to obtain details of the applicant's condition by contacting clinic B, whose name he had given them, the police sent for a doctor from the Academic Institute of Psychiatry.

One of the applicant's friends told a lawyer what had happened and, feeling concerned, they telephoned the police station to ask for information. They were informed that the applicant had been taken ill, that he had been brought to the police station for his personal safety and that a doctor had been sent for.

While waiting, the applicant was allowed to walk about in the police station. He sang intermittently, to relax.

A doctor arrived at the police station at approximately 3.15 p.m. and spoke on the telephone to the applicant's friend, who had called the police again. The applicant was examined. The medical certificate records that he was exhibiting a behavioural disorder, had lost all sense of time and was stopping up his ears, suggesting that he was suffering from auditory hallucinations. Without ruling out a physical disorder, the doctor considered that the applicant constituted a danger to himself and that he should

be admitted to a specialist institution for treatment. She therefore made out an order for his compulsory admission to a psychiatric institution and he was admitted at approximately 4 p.m.

On admission, the applicant was given a physical examination and found to have extremely high blood pressure. He went into convulsions whereupon he was immediately transferred to the cantonal hospital and remained there until 1 August 1989 receiving treatment for three epileptic fits.

According to his usual doctor the applicant had never had an epileptic fit before.

The applicant took proceedings against the State of Geneva claiming 10,000 Swiss francs (CHF) for non-pecuniary damage as a result of his wrongful arrest and detention at the police station and his subsequent admission against his will to a psychiatric institution, arguing that these measures had brought on the subsequent fainting fits and hence his detention in hospital for nearly ten days, mainly as a result of his being unable to take his medicine.

At a hearing of the witnesses on 24 April 1991, one of the police officers stated that the applicant had not asked to leave the police station.

In a judgment of 21 November 1991, Geneva tribunal de premiere instance ordered the State of Geneva to pay the applicant CHF 2,000 mainly on the grounds that the police officers had acted unlawfully in taking the applicant to the police station and keeping him there, as his identity was known to them and the mere fact of singing "On n'a pas tous les jours vingt ans" ("You can't be twenty every day") did not justify such a measure.

On appeal by the State of Geneva, the Court of Justice set that judgment aside on 17 June 1992 on the grounds that the police officers had taken the applicant to the police station on account of his disturbing mental condition which required immediate assistance.

The Court of Justice found, *inter alia*, that

"As soon as they arrived at the police station, the police officers attempted to contact the doctor named by L. G. (the applicant), before sending for a doctor from (the Academic Institute of Psychiatry). L. G. remained at the police station, without apparently making the slightest protest, for less than two and a half hours, that is, no longer than the time necessary for the doctor to arrive, examine him and order his immediate transfer to the clinic. Thus the police officers had done no more than send for medical assistance which L. G. evidently needed. Their action was justified by the concern to protect L. G. from the danger he was presenting to himself."

Overriding the decision of the lower court, the Court of Justice ordered the applicant to pay the State of Geneva CHF 375 00, i.e. the cost of taking him by ambulance from the police station to the psychiatric clinic

On 23 June 1993 the Federal Court dismissed the applicant's public-law appeal. It found, *inter alia*, that the applicant could have asked to leave the police station, but chose not to do so, and considered that the police had acted, not on the basis of an express legal provision but according to their 'general duty to maintain public order' which allows the authorities to take measures curtailing, if need be, the exercise of certain liberties where necessary to protect public order, State property or citizens' property against serious, direct and imminent threat. The Federal Court also accepted that the police had not breached the principle of proportionality, as the applicant had neither been subjected to any force nor put in a cell and the doctor had been sent for promptly and had arrived within a reasonable time.

## COMPLAINTS

The applicant invokes Article 5 para. 2 of the Convention, claiming that he was arbitrarily arrested without an arrest warrant at his home on 21 July 1989 and taken to the police station where he stayed for nearly three hours without any explanation being offered to him as to the grounds for his arrest.

Invoking Article 5 para. 2 of the Convention, the applicant also complains that he was wrongfully admitted to a psychiatric institution on the basis of a medical examination ordered by the police and without being informed of the reasons for these measures.

For these reasons, and considering that these events had serious repercussions on his health, in particular his hospitalisation for nearly ten days, the applicant claims compensation. He invokes Article 5 para. 5 of the Convention in this respect.

## THE LAW

1. The applicant invokes Article 5 para. 2 of the Convention, complaining that he was arbitrarily and wrongfully arrested, as the police failed to inform him of the reasons for his arrest and, moreover, did not have an arrest warrant.

The Commission considers that the applicant's complaints must be examined from the standpoint of Article 5 paras. 1 (e) and 2 of the Convention, which are worded as follows:

"1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases, and in accordance with a procedure prescribed by law:

e the lawful detention of persons of unsound mind

2 Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him "

The Commission recalls the case-law of the Convention institutions to the effect that Article 5 concerns only a person's physical liberty and not mere restrictions on liberty of movement, which are governed by Article 2 of Protocol No 4 to the Convention. In order to determine whether a person is deprived of his liberty, it is necessary to examine his actual situation and take into account a range of criteria such as the type, duration, effects and manner of implementation of the measures in question. Thus, the difference between deprivation and restriction of liberty is a difference of degree and intensity, and not of nature or essence (No 16360/90, Dec 23 94, D R 76-A p 13)

The Commission recalls further that Article 5 para 1 of the Convention may apply to deprivation of liberty of a very short length (No 8819/79, Dec 19 81, D R 24 p 158)

In this case the Commission notes that the police acted out of humanitarian considerations, given the applicant's strange behaviour, and that on their arrival at the police station they immediately took steps to obtain details of his mental condition and to assist him. The Commission also notes that the police used no force whatsoever, as there was never any question of arresting the applicant who was not locked up, but remained free to walk about in the police station. It also notes the police officer's statement that the applicant never asked to leave the police station. A friend of the applicant and a lawyer, having learned of the events, telephoned the police but did not request that the applicant be allowed to return home.

The Commission considers in the circumstances that the measures complained of were not sufficiently severe for the applicant's position to be considered as a deprivation of liberty, and that Article 5 para 1 of the Convention cannot therefore be applied in this case.

As a person's right to be informed of the reasons for his arrest presupposes that there has been deprivation of liberty within the meaning of Article 5 para 1, the applicant cannot raise any complaint under Article 5 para 2 of the Convention.

It follows that this part of the application is manifestly ill founded and must be rejected pursuant to Article 27 para 2 of the Convention.

2 The applicant invokes Article 5 para 2 of the Convention, complaining that he was wrongfully and unlawfully admitted to a psychiatric institution against his will.

The Commission does not, however, have to decide whether the facts alleged by the applicant show any appearance of a violation of the Convention. Under Article 26 of the Convention it "may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law"

This condition is not met merely by the applicant having brought his case before the various competent courts. The complaint brought before the Commission must also first have been raised, at least in substance, during the proceedings in question (No 11425/85, Dec 5 10 87, D R. 53 p. 76).

The Commission notes in this respect that the applicant did not invoke before the Federal Court either the unlawfulness or wrongfulness of his compulsory admission to a psychiatric institution.

It follows that the applicant has not met the "exhaustion of domestic remedies" requirement and that this part of the application must be rejected pursuant to Article 27 para. 3 of the Convention.

3. Invoking Article 5 para. 5 of the Convention, the applicant finally claims compensation for the mental and physical damage caused by his unlawful and unjustified arrest, detention and subsequent admission to a psychiatric institution.

Article 5 para. 5 of the Convention provides that

"Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

The right to compensation within the meaning of this provision therefore presupposes that a violation of one of the other paragraphs of Article 5 has been established, either by a domestic authority or by the Convention institutions (L v Sweden, Comm Report 3 10 88, para. 79, D R. 61 p. 62).

On the facts, the Commission considered first that the applicant was not deprived of his freedom and that Article 5 para. 1 of the Convention was therefore inapplicable, and secondly that the applicant had failed to exhaust domestic remedies in respect of his allegations regarding his admission to a psychiatric institution.

It follows that the applicant is not entitled to compensation within the meaning of Article 5 para. 5 of the Convention.

For these reasons, the Commission, by a majority,

**DECLARES THE APPLICATION INADMISSIBLE.**