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

FIFTH SECTION

DECISION

Application no. 77306/12
A.K.
against Germany

The European Court of Human Rights (Fifth Section), sitting on 1 July 2014 as a Committee composed of:

Ganna Yudkivska*, President*,
Angelika Nußberger,
André Potocki, *judges,*
and Stephen Phillips, *Deputy Section Registrar,*

Having regard to the above application lodged on 27 November 2012,

Having regard to the President's decision to grant the applicant anonymity,

Having deliberated, decides as follows:

THE FACTS

1. The applicant is a German national who was born in 1972 and is currently confined in a psychiatric hospital in Lippstadt.

A. The circumstances of the case

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

1. Background to the case

(a) The applicant's first trial

3. In 1991 the applicant assaulted a middle-aged woman, attempted to rape her, strangled her and cut her throat with a knife. The victim survived - severely harmed - only because the applicant left her for dead. On 7 November 1991 he was sentenced to seven years' imprisonment for this

crime after a psychologist and a psychiatric expert had come to the conclusion that the applicant was retarded in his sexual development, but did not suffer from a mental disorder. He was released from prison after having served two thirds of his sentence on 27 May 1996.

(b) The applicant's relapse after release

4. On 30 May 1996 - three days after his release from prison - the applicant murdered a prostitute with 78 knife cuts. The motive for the crime – according to the trial court in 2002 – was to receive further sexual satisfaction from watching a woman die. The applicant was only suspected of this murder after a DNA analysis of a saliva sample given in 1999.

(c) The applicant's second trial and placement in a psychiatric hospital

5. On 8 October 1997 the applicant was again taken into custody for public masturbation and sexual assault towards women.

6. The court ordered two expert reports, one by a psychiatrist, the other by a psychologist, in order to determine whether the applicant's responsibility for his actions was diminished due to a mental disorder. The psychiatrist came to the conclusion that the applicant suffered from a schizoid personality disorder with an additional sexual disorder. The combination of these two disorders constituted a severe psychopathology (*schwere seelische Abartigkeit*). The prognosis was unfavourable, as it was likely that the applicant would commit similar crimes. The second report by the psychologist came to a corresponding diagnosis: the applicant suffered from a severe psycho-sexual disorder that would lead with a high likelihood to similar crimes. Both experts did not know of the murder in 1996 at that time. Neither did the court.

7. On 3 March 1998 the applicant was sentenced to one year and three months' imprisonment. Additionally, his open-ended placement to a psychiatric hospital was ordered according to Article 63 of the German Criminal Code, as the court was convinced that the applicant posed a danger to the public and that his responsibility for his actions was limited due to a mental condition.

8. Since 3 June 1998 the applicant was placed in a psychiatric hospital. His detention was subject to regular reviews before which the court ordered reports by the attending doctors.

(d) The applicant's third trial

9. After it became known to the authorities that the applicant could be traced to the murder victim of 30 May 1996, criminal proceedings were instituted against him, during which two further expert opinions were ordered by the court, one by a psychologist and the other by a psychiatrist.

10. On 13 November 2002 the applicant was sentenced to 13 years' imprisonment for the murder committed in 1996. The compulsory life

sentence for murder was reduced because of the limited responsibility of the applicant for his actions. The sentence of the 1998 conviction was included, so that an accumulated sentence of 14 years was pronounced. The applicant's placement in a psychiatric hospital under Article 63 of the Criminal Code was confirmed.

11. The court motivated the continuation of the placement in a psychiatric hospital with the high likeliness that the applicant would commit similar crimes due to his personality disorder (progressing severe sadistic perversion, combined with a complete lack of empathy). The court noted that the applicant had admitted in the interviews with the experts that he still used fantasies about sex and violence against women in connection with masturbation and that the memories of the 1996 murder still aroused him intensely. The court followed the experts in the evaluation that the applicant had lost the inhibition to kill human beings which made it likely that he would further kill for making his sexual fantasies become reality. The court established that the applicant had frequented further prostitutes in the months after the murder until his arrest in October 1997 and that at least in two cases had already been prepared with tape and a knife to assault.

12. The conviction became final, as the applicant did not appeal.

(e) Previous reviews of the applicant's detention in a psychiatric hospital

13. The applicant's placement in a psychiatric hospital has been reviewed annually since 1998 by the competent Regional Court. In 2007 and 2010 the Paderborn Regional Court ordered an external expert opinion. On 4 March 2010, Professor K. rendered a detailed report in which he first recapitulated all prior reports and then presented his current findings. The diagnosis corresponded with all prior ones: sexual sadism combined with a personality disorder with dissocial and avoiding elements. The prospects of conditional release or even relaxations of the hospital regime were esteemed very low, as the therapy had hitherto not been successful regarding the sadism, because the applicant was not accessible to psychological treatment. On 17 December 2010, the Paderborn Regional Court ordered the continuation of the placement, following the expert conclusions.

2. The proceedings at issue

(a) The decision of the Paderborn Regional Court

14. On 16 December 2011 the Paderborn Regional Court, in a procedure concerning the annual review of the applicant's placement, ordered the continuation of his placement in a psychiatric hospital.

15. Relying on a statement of the Lippstadt psychiatric hospital of 13 October 2011, the Regional Court found that the applicant was suffering from a multiple personality disorder that combined schizoid, dissocial and avoiding elements. The report also noted that the treatment of the sexual

sadism of the applicant had not even been rudimentarily successful and would not be in the foreseeable future. The applicant was not accessible to a psychological therapy in order to reduce his sadistic fantasies. The report mentioned that the applicant himself suggested chemical castration by anti-androgen drugs as he felt increasingly tormented by his fantasies. This therapy was however not supported by the psychiatric hospital for fear of side-effects. The hospital further noted that viewed from the outside the applicant had arranged himself with the situation and was well integrated among the patients and had even become their speaker. In conflict situations, however, it could be shown that his conflict solution techniques were limited. Because of the continuous danger of him committing serious criminal acts against women a release from the psychiatric hospital could not be recommended. The applicant and his legal counsel were heard in the court proceedings. The applicant requested to receive additional treatment including psychological therapy and remarked that he did not understand why his wish for anti-androgen chemical treatment or even surgical castration was not supported by the hospital.

16. The court left open whether the clinic was obliged to offer further treatment to the applicant, noting that these proceedings only concerned the continuation of the placement. It held that the duration of the placement was not disproportionate, in particular when considering the dangers to the public and the lack of a favourable prognosis for the applicant. The court also referred to the external expert report by Professor K. of 4 March 2010.

(b) The decision of the Hamm Court of Appeal

17. On 13 February 2012 the Hamm Court of Appeal dismissed the immediate appeal of the applicant, adding to the reasoning of the Paderborn Regional Court that according to the Federal Court of Justice the legitimacy of the placement in a psychiatric hospital did not depend on prospects of recovery or treatment.

(c) The decision of the Federal Constitutional Court

18. On 24 October 2012 the Federal Constitutional Court in a panel of three judges declined to review the constitutional complaint (2 BvR 804/12).

B. Relevant domestic law

19. The German Criminal Code distinguishes between penalties and correction and prevention measures (*Maßregeln der Besserung und Sicherung*). One measure of correction and prevention is the placement in a psychiatric hospital (Article 63 of the Criminal Code). Article 63 provides that if someone commits an unlawful act with limited responsibility pursuant to Article 21, the court orders their placement in a psychiatric

hospital if a comprehensive assessment of the defendant and his act reveals that, as a result of his condition, he can be expected to commit serious unlawful acts and that he is therefore dangerous to the general public. The measure must, however, be proportionate to the gravity of the offences committed by, or to be expected from, the defendants concerned, as well as to the danger they present (Article 62 of the Criminal Code). The duration of such a measure is not fixed but is subject to annual judicial review.

COMPLAINTS

20. The applicant complained under Articles 5 § 1 (e) and 6 § 1 of the Convention about his placement in a psychiatric hospital and the decisions to order the continuation of this placement. He complained in particular that the proceedings were unfair, as the medical expert reports lacked quality and were not reliable as they were copied and pasted from prior reports and that the allegations against him became from report to report more serious, as he was now considered to suffer from "pronounced sadism" whereas the former reports only mentioned "sadism". He also complained about a lack of treatment, as he was placed in a so-called "long-stay station", where he had allegedly not received any therapy for the past four years. He therefore complained of being locked away forever without a prospect of regaining his liberty.

21. He further complained that his placement in a psychiatric hospital constituted a violation of Article 7 of the Convention, as it amounted in practice to preventive detention, to which he had not been sentenced.

THE LAW

22. The Court observes at the outset that the applicant only exhausted domestic remedies in respect of the continuation of his placement in a psychiatric hospital. This delimits the scope of the instant complaint.

A. Complaint under Article 5 § 1 of the Convention

23. The applicant complained that his continued detention in a psychiatric hospital, as confirmed in the proceedings at issue, failed to comply with Article 5 § 1 (e) of the Convention which, in so far as relevant, reads 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 for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants..."

24. The Court notes that the applicant had been deprived of his liberty by virtue of the Paderborn Regional Court's judgment of 3 March 1998 as confirmed in the decision of the Paderborn Regional Court of 13 November 2002. The Court further notes that on 16 December 2011 the Paderborn Regional Court ordered the continuation of his placement in a psychiatric hospital for an unlimited duration.

25. In view of the fact that the applicant's detention is primarily based on a finding of a mental disorder and thus a state of "unsound mind" by the domestic courts – a finding that is contested by the applicant – the Court considers it appropriate to examine the complaint under Article 5 § 1 (e) (see *Graf v. Germany*, no. 53783/09, 18 October 2011; *X v. the United Kingdom*, 5 November 1981, § 39, Series A no. 46).

26. The Court reiterates that in order to comply with Article 5 § 1(e) the confinement in question must have been ordered "in accordance with a procedure prescribed by law", have been lawful and have involved a "person of unsound mind".

1. Whether the applicant is of unsound mind

27. In determining whether the applicant was of unsound mind within the meaning of Article 5 § 1 (e), the Court reiterates that an individual cannot be deprived of his liberty on the basis of unsoundness of mind unless three minimum conditions are satisfied: he must reliably be shown to be of unsound mind, that is, the existence of a true mental disorder must be established before a competent authority on the basis of objective medical evidence; the mental disorder must be of a kind or degree warranting compulsory confinement; and the validity of continued confinement must depend upon the persistence of such a disorder (see *Winterwerp v. the Netherlands*, 24 October 1979, § 39, Series A no. 33, and *Shtukaturov v. Russia*, no. 44009/05, § 114, 27 March 2008).

28. The Court observes that when examining whether the applicant has reliably been shown to be of unsound mind of a kind or degree warranting compulsory confinement on the occasion of the regular reviews of the applicant's continued detention, the domestic courts made reference to the results of the various statements of the relevant clinics and attending doctors regularly established over the period of the applicant's confinement as well as the external expert opinion obtained – inter alia – in 2010.

29. As regards the proceedings at issue, the Paderborn Regional Court relied in particular on a statement of the Lippstadt psychiatric hospital, which had been drawn up on 13 October 2011. On that basis, the domestic courts had considered that it was established that the applicant was suffering

from sexual sadism and a personality disorder, also, that his therapy had not led to any progress and that for the time being the risk persisted that he would commit further serious unlawful acts if released on probation.

30. The Court is therefore satisfied that the existence of a true mental disorder of a kind and degree warranting the applicant's confinement for the protection of the public was established by the domestic courts on the basis of objective and sufficiently recent medical expert opinion.

31. The Court therefore concludes that the applicant was of unsound mind within the meaning of Article 5 § 1 (e).

2. Lawfulness of the applicant's detention

32. The Court reiterates that the lawfulness of detention depends on conformity with the procedural and the substantive rules of domestic law, the term "lawful" overlapping to a certain extent with the general requirement in Article 5 § 1 to observe a "procedure prescribed by law" (see *Graf*, cited above; *Winterwerp*, cited above, § 39, and *H.L. v. the United Kingdom*, no. 45508/09, § 114, ECHR 2004-IX). A necessary element of the "lawfulness" of the detention within the meaning of Article 5 § 1 (e) is the absence of arbitrariness. The detention of an individual is such a serious measure that it is only justified where other, less severe, measures have been considered and found to be insufficient to safeguard the individual or public interest which might require that the person concerned be detained. The deprivation of liberty must be shown to have been necessary in the circumstances (see *Varbanov v. Bulgaria*, no. 31365/96, § 46, ECHR 2000-X).

33. In determining whether the applicant's detention has been in keeping with the purpose of Article 5 § 1, the Court notes that in their decisions ordering that the applicant's detention be continued, the domestic courts paid particular attention to the increasing length of the applicant's detention and, relying in particular on the statements of the attending doctors rendered in the course of the proceedings, came to the conclusion that milder means than the applicant's continued confinement in a psychiatric hospital could not be envisaged. The courts also relied on the external expert opinion of Professor K. which had been delivered in the review procedure of 2010. The expert opinion was established after Professor K. had conducted an interview with the applicant and had also run several standardised tests. His report first summarised all prior reports and then presented its current findings, first by analysing the interview with the applicant and then the findings resulting from standardised test materials. It was not a copy of earlier reports, but a carefully drafted detailed report of the expert's finding. The diagnosis corresponded with all prior ones: sexual sadism combined with a personality disorder with dissocial and avoiding elements. The Court finds that, following this material, in the courts' opinion the applicant still posed a danger to the general public given his persisting mental illness, the

fact that he had not made sufficient progress in therapy, and the resulting risk that he would reoffend if released on probation. The Court observes in particular that the domestic court took into account the fact that, according to the attending physicians, adverse side-effects to an anti-androgen therapy were to be feared, so that such a therapy could not count as a milder means when compared with the continuation of the detention.

34. In this context the Court reiterates that in order not to deprive persons placed in a psychiatric hospital of a prospect of release, the national authorities should see to it that any such placement is accompanied by efficient and consistent therapeutic measures. On the occasion of the periodic reviews of a continued detention and when weighing a detainee's interest to be released against the safety interest of the public, the implementation of such measures should be subject to particular scrutiny by the domestic courts (see *Frank v. Germany* (dec.) no. 32705/06, 28 September 2010).

35. In view of the above considerations, the Court, while noting that the proportionality of a continuing placement in a psychiatric hospital should be subject to particular scrutiny the longer the detention lasts, is of the opinion that there is nothing to establish that at the time of the proceedings at issue the Paderborn Regional Court in its decision of 16 November 2011, as confirmed by the respective decisions of the Hamm Court of Appeal of 12 February 2012 and the Federal Constitutional Court of 24 October 2012, did not strike a fair balance between the applicant's interest to be released and the safety interest of the public, or that the decisions of the domestic courts at that time had been arbitrary.

36. Consequently, the applicant's deprivation of liberty was justified under Article 5 § 1 (e) of the Convention.

37. The Court therefore holds that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

B. Other complaints

1. Alleged unfairness of the proceedings

38. As far as the applicant submitted that the proceedings had been unfair, the Court considers that the complaint falls to be examined under Article 5 § 4 of the Convention, which provides:

> "4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

39. The Court notes that the issues raised by the applicant under this head have already been examined in the context of his complaint under Article 5 § 1 (e). In particular, the Court is satisfied that the applicant, who

was represented by counsel throughout the proceedings, had the opportunity to present his own case and to challenge the medical evidence adduced in support of his detention.

40. It follows that this part of the applicant's complaint is also manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

2. Alleged violation of Article 7 of the Convention

41. As far as the applicant complains that his placement in a psychiatric hospital amounts – in practice – to a preventive detention according to Article 66 of the Criminal Code, to which he has not been sentenced, the Court notes that the applicant has been sentenced on 3 March 1998 and again on 13 November 2002 to a placement in a psychiatric hospital according to Article 63 of the Criminal Code, so that his allegation is not correct.

42. The Court further notes that Article 63 of the Criminal Code provides a legal basis for the applicant's placement in a psychiatric hospital, and also that the legal requirements of this provision were met, so that he cannot claim to have been punished without law.

43. It follows that this part of the applicant's complaint is also manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Stephen Phillips
Deputy Registrar

Ganna Yudkivska
President