EUROPEAN COURT OF HUMAN RIGHTS
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Retrospectively extended preventive detention of dangerous offender justified in view of his mental disorder and treatment in adequate institution

In today's **Chamber** judgment[1] in the case of Bergmann v. Germany (application no. 23279/14) the European Court of Human Rights held, unanimously, that there had been:

no violation of Article 5 (right to liberty and security) of the European Convention on Human Rights**, and**

no violation of Article 7 (no punishment without law).

The case concerned Mr Bergmann's preventive detention which was retrospectively extended beyond the maximum period of ten years permissible at the time of his offences and conviction.

This was the first case in which the Court examined the compatibility with the Convention of a convicted offender's preventive detention for therapeutic treatment purposes under the new legal framework governing preventive detention in Germany. The amendments to the Criminal Code, which entered into force on 1 June 2013, were adopted following the German Federal Constitutional Court's finding that all provisions on the retrospective extension of preventive detention and on the retrospective imposition of such detention were unconstitutional.

The Court came to the conclusion that Mr Bergmann's preventive detention could be justified under Article 5 § 1 (e) as detention of a person "of unsound mind". It observed in particular that the German courts had found that he suffered from a mental disorder, namely a sexual deviance, necessitating both treatment with medication under medical supervision and therapy. Since being placed in a new detention centre, he was being provided with the therapeutic environment appropriate for a person detained as a mental health patient. Moreover, his preventive detention was not arbitrary, the courts having found that despite his advanced age he could still be considered a risk to the public.

Furthermore, the Court concluded that in cases such as Mr Bergmann's, where preventive detention was extended because of and with a view to the need to treat a mental disorder, its nature and purpose changed to such an extent that it was no longer to be classified as a "penalty" within the meaning of Article 7.

Principal facts

The applicant, Karl-Heinz Bergmann, is a German national who was born in 1943 and is currently detained in a centre for persons in preventive detention on the premises of Rosdorf Prison (Germany).

After a history of previous convictions, the Hanover Regional Court convicted Mr Bergmann, in April 1986, of two counts of attempted murder, combined with attempted rape in one case, and of two counts of dangerous assault. It sentenced him to 15 years' imprisonment and ordered his preventive detention (*Sicherungsverwahrung*) under Article 66 of the Criminal Code. Relying on the assessment

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.

by two medical experts, it considered that as a result of a sexual deviance and a personality disorder he had a propensity to commit serious offences and that there was a high risk that, if released, he would again commit violent offences under the influence of alcohol.

Mr Bergmann served his full prison sentence and was placed in preventive detention in June 2001. After he had spent ten years in preventive detention, the courts responsible for the execution of sentences ordered the continuation of the measure at regular intervals. While at the time of his offences and conviction the maximum period for preventive detention had been ten years, under the Criminal Code as amended in 1998, the duration of a convicted person's preventive detention could be extended to an unlimited period of time.

Since June 2013 Mr Bergmann has been detained in a newly constructed centre for persons in preventive detention, a separate building on the premises of Rosdorf Prison ("the Rosdorf centre"), where persons in preventive detention are placed in individual apartment units and extensive possibilities for therapeutic treatment are being provided. The preventive detention regime in that centre was developed in order to comply with the constitutional requirement that preventive detention be distinguished from normal imprisonment, in accordance with a leading judgment of the Federal Constitutional Court of 4 May 2011, which held that all provisions on the retrospective extension of preventive detention and on the retrospective order of such detention were unconstitutional.

In July 2013 the Lüneburg Regional Court again ordered that Mr Bergmann remain in preventive detention, finding that the requirements for a continuation of the measure laid down in the Introductory Act to the Criminal Code, as in force since 1 June 2013, were met. Namely, he suffered from a mental disorder within the meaning of the Therapy Detention Act – which had entered into force on 1 January 2011, following the European Court of Human Rights' finding that the retrospective extension of preventive detention violated the Convention – and there was a high risk that he would commit serious sexually motivated offences if released.

Mr Bergmann's appeal against the decision was dismissed by the appeal court. On 29 October 2013 the Federal Constitutional Court declined to consider his constitutional complaint (file no. 2 BvR 2182/13).

According to the personal treatment plan drawn up for Mr Bergmann by the Rosdorf centre, he started attending several types of group sessions for detainees after being placed there and had regular meetings with a psychologist. Subsequently he stopped participating in those meetings, however; as from August 2014 he no longer participated in any therapy measures. He has also repeatedly refused offers to start treatment with medication aiming to reduce his libido.

In April 2014 and January 2015, a regional court again ordered the continuation of Mr Bergmann's preventive detention.

Complaints, procedure and composition of the Court

Relying on Article 5 § 1 (right to liberty and security), Mr Bergmann complained that his right to liberty had been breached by the court order extending his preventive detention beyond the maximum period of ten years permissible under the legal provisions applicable at the time of his offences and conviction. He further maintained that the retrospective extension of his preventive detention beyond the ten-year maximum period had been in breach of Article 7 § 1 (no punishment without law).

The application was lodged with the European Court of Human Rights on 18 March 2014.

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

Ganna **Yudkivska** (Ukraine), *President*,
Angelika **Nußberger** (Germany),
Khanlar **Hajiyev** (Azerbaijan),
Faris **Vehabović** (Bosnia and Herzegovina),
Yonko **Grozev** (Bulgaria),
Síofra **O'Leary** (Ireland),
Carlo **Ranzoni** (Liechtenstein),

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

Decision of the Court

Article 5

The Court observed that Mr Bergmann was held in preventive detention beyond the statutory maximum duration of ten years applicable at the time of his offences and his conviction in 1986. Having regard to its findings in a previous case, *M. v. Germany*[2], the Court therefore considered that his preventive detention could no longer be justified as detention "after conviction" by a competent court within the meaning of sub-paragraph (a) of Article 5 § 1.

As regards the question of whether Mr Bergmann's preventive detention could be justified under sub-paragraph (e) of Article 5 § 1 as detention of a person "of unsound mind", the Court observed that the German courts had found that he suffered from a mental disorder, namely a sexual deviance, necessitating both treatment with medication under medical supervision and therapy. Furthermore, the German courts had found that there was a high risk that he would commit the most serious sexually motivated violent offences, similar to those of which he had been convicted, if released. The Court was thus satisfied that his mental disorder was of a kind or degree warranting compulsory confinement. It followed that he was a person "of unsound mind" for the purposes of Article 5 § 1 (e).

Moreover, the Court noted that throughout the period in question in the case before it, that is, after the Lüneburg Regional Court's decision of July 2013, Mr Bergmann had been detained in the newly constructed Rosdorf centre. The Court came to the conclusion that since being placed there, Mr Bergmann was being offered the appropriate therapeutic environment in an institution suitable for a person detained as a mental health patient.

The Rosdorf centre had been set up in order to comply with the judgment of the Federal Constitutional Court of 4 May 2011 and the new legislation, enacted following that judgment, which stipulated that preventive detention had to be executed in institutions that offered detainees individual and intensive care and encouraged them to participate in psychiatric or other forms of treatment aimed at reducing the risk they posed to the public. The centre, where up to 45 persons could be placed, was staffed, in particular, with one psychiatrist, four psychologists and five social workers, which put the authorities in a position to address Mr Bergmann's mental disorder. The Court, observing that similar centres had been constructed on the premises of a number of prisons in Germany, welcomed the extensive measures which had been taken by the authorities with a view to adapting preventive detention to the requirements of the fundamental right to liberty.

Furthermore, the Court was satisfied that Mr Bergmann's preventive detention was not arbitrary; it was therefore "lawful" and "in accordance with a procedure prescribed by law" for the purposes of Article 5 § 1. The Court noted in particular that the German courts had addressed the question of

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

whether Mr Bergmann, in view of his advanced age, could still be considered a risk to the public. Taking into account the findings of a psychiatric expert, they had found that his sexual deviance had not yet been considerably alleviated as a result of his age.

The Court concluded that Mr Bergmann's preventive detention could be justified under Article 5 § 1 (e) as detention of a person "of unsound mind". There had accordingly been no violation of Article 5 § 1.

Article 7

As in the case of *M. v. Germany*, in which the Court had found a violation of Article 7, Mr Bergmann's preventive detention had been extended with retrospective effect, under a law enacted after he had committed his offences. In order to assess whether the measure in Mr Bergmann's case was in accordance with Article 7, the Court had to assess whether his preventive detention, in view of the substantial changes in the law and in the practical implementation of the measure, still constituted a "penalty" for the purposes of Article 7.

The Court noted that Mr Bergmann's preventive detention had been imposed following his conviction for a criminal offence and its implementation had been determined by the courts responsible for the execution of sentences, which belonged to the criminal justice system. In those respects, his situation did not differ from that at issue in the case of *M. v. Germany* or other similar cases.

However, the Court found that the changes to the nature of preventive detention following the legislative changes in Germany were fundamental for persons who were detained, as Mr Bergmann, as mental health patients. It was of particular importance that under the Introductory Act to the Criminal Code, as amended, a new additional condition had to be met if preventive detention was to be prolonged retrospectively, namely that the person concerned had to be found to suffer from a mental disorder. The individualised and reinforced medical and therapeutic care which was now provided to mental health patients, as shown in Mr Bergmann's case, constituted a substantial change in the nature of the measure.

Moreover, in these circumstances the preventive purpose pursued by the amended legislation became of key significance. Mr Bergmann's preventive detention could only be prolonged because of his dangerousness as a result of his mental disorder. That disorder had not been a precondition for the sentencing court's original decision to order his preventive detention. It was thus a new, additional element, independent of the initial sanction imposed.

It had to be noted that, in contrast to prison sentences, there was no minimum duration for preventive detention. Instead, the duration of the measure depended considerably on the concerned person's cooperation. While the new legislative framework put a person in Mr Bergmann's situation into a better position than previously, his release was still subject to a court finding that he was no longer highly likely to commit serious crimes of violence or sexual offences as a result of his mental disorder. Preventive detention remained among the most severe measures which might be imposed under the Criminal Code.

In view of these considerations, the Court found that preventive detention under the new legislative framework in Germany, as a rule, still constituted a "penalty". However, it came to the conclusion that in cases such as Mr Bergmann's, where the measure was extended because of and with a view to the need to treat his mental disorder, its nature and purpose changed to such an extent that it was no longer to be classified as a "penalty" within the meaning of Article 7 § 1. There had accordingly been no violation of Article 7.

The judgment is available only in English.

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