



## Extension of preventive detention despite acquittal at first instance is in breach of the Convention

In today's Chamber judgment<sup>1</sup> in the case of [I.S. v. Switzerland](#) (application no. 60202/15) the European Court of Human Rights held, unanimously, that there had been:

**a violation of Article 5 (right to liberty and security) of the European Convention on Human Rights.**

In this case, I.S. complained about the extension of his preventive detention (between April and December 2015) despite his acquittal at first instance.

The Court found in particular that I.S.'s preventive detention following his acquittal at first instance did not fall within the exceptions provided for in Article 5 § 1 of the Convention. For the purposes of Article 5 § 1 (c)<sup>2</sup> of the Convention, detention ended with the person's acquittal, even by a court of first instance. Accordingly, domestic law should provide for measures that were less invasive than deprivation of liberty to guarantee an individual's appearance in the appeal proceedings. Lastly, a general concern that the applicant might commit further offences while the appeal proceedings were ongoing could not be regarded as sufficiently concrete and specific to fall under Article 5 § 1 (b)<sup>2</sup>.

### Principal facts

The applicant, I.S., is a Turkish national who was born in 1973 and lives in Baden (Switzerland).

On 4 August 2014 I.S.'s partner lodged a criminal complaint against him. I.S. was placed in pre-trial detention the same day on suspicion of offences including multiple counts of rape. Subsequently, in December 2014 the public prosecutor filed an indictment and I.S. was placed in preventive detention.

On 16 April 2015 the District Court unanimously acquitted I.S. However, he was kept in preventive detention on the basis of Article 231 of the Code of Criminal Procedure. The following day, the Cantonal Court ordered the extension of his preventive detention pending the outcome of an appeal by the public prosecutor against the acquittal.

On 12 May 2015 I.S. submitted a first application for release, which was rejected. The Federal Supreme Court found, in particular, that I.S. risked a heavy custodial sentence, which constituted a significant incentive to abscond. It further noted that I.S. had taken precautions to be able to travel

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](http://www.coe.int/t/dghl/monitoring/execution).

2. Extract from Article 5 of the Convention (right to liberty and security):

"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:

...

(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; ..."

to Turkey, the country he had left at the age of 17, where he knew the language and still had a network of acquaintances.

On 19 October 2015 I.S. submitted a further application for release, which the Federal Supreme Court allowed in November 2015. He was released on 2 December 2015.

## Complaints, procedure and composition of the Court

Relying on Article 5 § 1 (right to liberty and security), I.S. complained that he had been kept in preventive detention between 16 April and 2 December 2015, despite having been acquitted at first instance on 16 April 2015.

The application was lodged with the European Court of Human Rights on 28 November 2015.

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

Paul **Lemmens** (Belgium), *President*,  
Georgios A. **Serghides** (Cyprus),  
Helen **Keller** (Switzerland),  
Dmitry **Dedov** (Russia),  
Alena **Poláčková** (Slovakia),  
Lorraine **Schembri Orland** (Malta),  
Ana Maria **Guerra Martins** (Portugal),

and also Milan **Blaško**, *Section Registrar*.

## Decision of the Court

### Article 5 § 1 (right to liberty and security)

The Court observed that the periods of I.S.'s detention from 4 August 2014 until 16 April 2015 (the date of his acquittal at first instance) were covered by Article 5 § 1 (c) of the Convention. That was not the case, however, for the period of detention between 16 April and 2 December 2015, which had been based on Article 231, paragraph 2, of the Code of Criminal Procedure.

While it was true that the text of Article 5 § 1 (c) of the Convention did not contain any limitation on pre-trial detention at the first level of jurisdiction, the Court had clarified that issue in 1968 in the case of *Wemhoff v. Germany*<sup>3</sup>. Subsequently, it had confirmed its position in a number of Grand Chamber and Chamber judgments: detention under Article 5 § 1 (c) of the Convention ended with the acquittal of the person concerned, even by a court of first instance.

That approach also applied in the present case. After examining the facts at issue in adversarial proceedings, the Baden District Court had unanimously formed the view that I.S. could not be convicted of the criminal offences with which he had been charged in the indictment. In such circumstances, following an acquittal at first instance – even where the judgment was only delivered orally and was not yet final – an order for detention under Article 5 § 1 (c) of the Convention lapsed.

The Government had argued, in general terms, that preventive detention ordered after an acquittal at first instance was necessary to ensure that dangerous individuals did not escape criminal justice and commit further offences because they had been acquitted “in error” at first instance.

In that connection, the Court emphasised that in the present case, no such allegation had been levelled at the District Court, either expressly or in substance, at any stage of the domestic proceedings. On the contrary, there was no indication of any error in the administration of justice,

<sup>3</sup> *Wemhoff v. Germany*, 27 June 1968, Series A no. 7.

especially as the acquittal by first-instance court, for which ample reasons had been given in a 44-page written judgment, had been unanimous.

Furthermore, the Court took the view that domestic law should provide for measures that were less invasive than deprivation of liberty to guarantee an individual's appearance during the appeal proceedings. In the present case, the confiscation of I.S.'s identity papers and other official documents could have constituted a sufficient alternative measure to ensure his presence at the appeal stage.

The Government had also submitted that a dangerous person who was acquitted "in error" at first instance might commit a further offence while the appeal proceedings were ongoing. The Court found it self-evident that if there were specific reasons to suspect that such an eventuality might occur, there would be nothing to prevent the criminal justice authorities from ordering the person's further detention on the basis of the first limb of Article 5 § 1 (c) of the Convention. However, the Court could not be satisfied merely by the general concern, as expressed by the Government, that I.S. might have committed further offences during the appeal proceedings. In that connection it reiterated its findings in *S., V. and A. v. Denmark*<sup>4</sup> and pointed out that the duty not to commit a criminal offence in the imminent future could not be considered sufficiently concrete and specific to fall under Article 5 § 1 (b), at least as long as no specific measures had been ordered which had not been complied with.

Accordingly, the Court concluded that I.S.'s preventive detention following his acquittal at first instance did not fall within the exceptions provided for by Article 5 § 1 of the Convention. There had therefore been a violation of that provision.

#### Just satisfaction (Article 41)

The Court held that Switzerland was to pay the applicant 25,000 euros (EUR) in respect of non-pecuniary damage and EUR 7,000 in respect of costs and expenses.

*The judgment is available only in French.*

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**The European Court of Human Rights** was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.

<sup>4</sup>*S., V. and A. v. Denmark* [GC], nos. 35553/12 and 2 others, 22 October 2018.