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

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ECHR 174 (2021)
01.06.2021

# The compulsory confinement of individuals who were detained prior to a 2016 legislative amendment and whose mental disorders persisted after that date is lawful

In today's **Grand Chamber** judgment[1] in the case of Denis and Irvine v. Belgium (applications nos. 62819/17 and 63921/17) the European Court of Human Rights held, by a majority (14 votes to 3), that there had been:

**no violation of Article 5 § 1 (right to liberty and security)** of the European Convention on Human Rights, **and no violation of Article 5 § 4 (right to a speedy decision on the lawfulness of detention).**

The case concerned two applicants who had been placed in compulsory confinement on the basis of the Social Protection Act of 9 April 1930 after having committed acts classified as theft (Mr Denis, in 2007) and attempted theft (Mr Irvine, in 2002).

Before the Court, the applicants complained about the Belgian courts' refusal to release them following the entry into force (in October 2016) of the Compulsory Confinement Act. Under that legislation, theft and attempted theft could no longer form the basis for a decision ordering a placement in compulsory confinement.

The Court noted that the applicants' deprivation of liberty related to the detention of "persons of unsound mind" and fell within the scope of Article 5 § 1 (e) of the Convention. It specified that this provision required that it had been reliably established that the individual in question was of unsound mind (1st condition), that the disorder was of a kind or degree warranting compulsory confinement (2nd condition) and that the disorder persisted throughout the entire period of the confinement (3rd condition). Thus, the Convention did not require the authorities, when assessing the persistence of the mental disorders, to take into account the nature of the acts committed by the individual which had given rise to his or her compulsory confinement.

The Court noted that it had been in the light of those considerations that the domestic courts had examined the applicants' requests for final discharge. They had not taken account of the nature of the punishable acts which the applicants had committed, but had examined whether the mental disorders had persisted, as required by Article 5 § 1 (e) of the Convention. They had found that there had still existed a high risk that the applicants would commit further violent crimes. In consequence, the Court held that the applicants' detention continued to have a valid legal basis and that their deprivation of liberty was lawful.

The Court also noted that the Compulsory Confinement Act laid down two cumulative conditions for the final discharge of an individual in compulsory confinement, and that neither of those conditions had been met in this case.

## Principal facts

The applicants, Jimmy Denis and Derek Irvine, are both being held in compulsory confinement in Belgium. Mr Denis is a Belgian national who was born in 1984. Mr Irvine is a British national who was born in 1964.

1. Grand Chamber judgments are final (Article 44 of the Convention).
All final judgments are transmitted to the Committee of Ministers of the Council of Europe for supervision of their execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

Mr Denis and Mr Irvine complain in this case about the fact that they continue to be held in compulsory confinement, although in their view there has been no legal basis for this measure since the entry into force of the Compulsory Confinement Act (Law of 5 May 2014).

The Law of 5 May 2014, which entered into force in October 2016, provides that compulsory confinement can only be imposed after crimes or serious offences resulting in physical harm or psychological injury to another person, or the threat thereof. The applicants, who were placed in confinement for acts classified as theft (Mr Denis in 2007) and attempted aggravated burglary (Mr Irvine in 2002), under the Social Protection Act of 9 April 1930, applied to the Belgian courts for release on the basis of the new legislation, but were unsuccessful.

## Complaints, procedure and composition of the Court

Relying on Article 5 § 1 (right to liberty and security) of the European Convention on Human Rights, the applicants alleged that there was no longer a legal basis for maintaining the detention measures against them following the entry into force of the Compulsory Confinement Act 2014.

Relying on Article 5 § 4 (right to speedy review of the lawfulness of detention) and Article 13 (right to an effective remedy) of the Convention, the applicants complained that it had been impossible for them under the law to secure their immediate and unconditional release.

The applications were lodged with the European Court of Human Rights on 21 August 2017.

In its Chamber judgment of 8 October 2019, the Court held, unanimously, that there had been no violation of Article 5 § 1 and of Article 5 § 4 of the Convention.

On 7 January 2020 the applicants requested that the case be referred to the Grand Chamber under Article 43 (referral to the Grand Chamber) and on 24 February 2020 the panel of the Grand Chamber accepted that request. A hearing was held on 21 October 2020.

Judgment was given by the Grand Chamber of 17 judges, composed as follows:

Robert **Spano** (Iceland), *President*,
Ksenija **Turković** (Croatia),
Paul **Lemmens** (Belgium),
Síofra **O'Leary** (Ireland),
Yonko **Grozev** (Bulgaria),
Helen **Keller** (Switzerland),
Aleš **Pejchal** (the Czech Republic),
Krzysztof **Wojtyczek** (Poland),
Egidijus **Kūris** (Lithuania),
Mārtiņš **Mits** (Latvia),
Georgios A. **Serghides** (Cyprus),
Lado **Chanturia** (Georgia),
Gilberto **Felici** (San Marino),
Arnfinn **Bårdsen** (Norway),
Darian **Pavli** (Albania),
Saadet **Yüksel** (Turkey),
Peeter **Roosma** (Estonia),

and also Johan **Callewaert**, *Deputy Grand Chamber Registrar.*

## Decision of the Court

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

***Grounds for the applicants' deprivation of liberty***

The Court noted that the applicants had not been convicted. The domestic courts, having found that the applicants had physically committed the acts of which they were accused, had held that they were suffering from a mental condition which destroyed or seriously affected their discernment or their ability to control their actions. They had accordingly ordered the applicants' placement in compulsory confinement which, under domestic law, was a "preventive measure" and not a penalty. Their deprivation of liberty thus related to the detention of "persons of unsound mind" and fell within the scope of Article 5 § 1 (e) of the Convention.

***The legislative amendment and the question raised in the present case***

Under the legislation in force when the initial decisions were taken to place the applicants in compulsory confinement (Social Protection Act 1930), the fact of committing any act classified as a criminal offence could give rise to the compulsory confinement of the individual concerned, irrespective of the seriousness of the acts committed.

Since the entry into force of the Compulsory Confinement Act, the acts of theft and attempted burglary committed by the applicants could no longer constitute grounds for an individual's placement in compulsory confinement under the new legislation, irrespective of his or her mental health. In addition, although the new law applied in principle to all pending cases, it did not set out a specific transitional measure for persons who had been placed in confinement on the basis of the Social Protection Act 1930 and who had committed acts which did not reach the new threshold required by its section 9.

The question which arose in the present case was therefore whether the applicants' deprivation of liberty could still be considered lawful since the entry into force of the above Act, given that this new legislation no longer provided for the possibility of placing an individual in compulsory confinement for the acts carried out by the applicants which had formed the basis for their detention.

***Application of the new legislation by the domestic courts***

When asked by the applicants to rule on whether the lawfulness of their compulsory confinement was affected by the legislative amendment in issue, the domestic court had considered that this was not the case. In particular, the Court of Cassation held that the decisions issued in the applicants' cases in 2007 and 2002 respectively had become *res judicata* and that the compulsory confinement orders issued against them were final. It also held that Article 5 § 1 of the Convention did not prevent a compulsory confinement order from subsequently giving rise to an execution phase, which was not governed by the same rules as those in force when imposing the order. Thus, the Court of Cassation identified two successive phases of compulsory confinement, governed by different provisions and criteria.

*The first phase*: the Belgian system of compulsory confinement envisaged, firstly, judicial proceedings which resulted in the decision to place an individual in compulsory confinement. The decision of the investigating authorities or the trial court which imposed compulsory confinement in accordance with these provisions remained valid throughout the compulsory confinement of the individual concerned so long as no final judgment granting his or her final discharge was issued. With regard to the applicants, the decisions ordering their placement in compulsory confinement had been issued in 2007 and 2002 respectively, on the basis of section 7 of the Social Protection Act.

*The second phase*: once the measure had been ordered, there began the second phase of compulsory confinement, during which the social protection divisions at the post-sentencing court ("the CPS"), which were specialised courts, reviewed the situation of persons in confinement at

regular intervals. During this evaluation, detainees could also request changes to the practical arrangements for their confinement or request a discharge. Different rules then applied, particularly with regard to the conditions for final discharge of an individual in compulsory confinement, which was the applicants' main request in the present case. Final discharge had previously been governed by section 18 of the Social Protection Act and was now governed by section 66 of the Compulsory Confinement Act.

Under section 66 of the Compulsory Confinement Act, the nature of the punishable acts committed by the individual concerned which had given rise to his or her compulsory confinement was not, as such, taken into account during the periodic review of the confinement. Nevertheless, this provision required that the CPS assess whether the mental disorder of the individual in compulsory confinement had stabilised sufficiently and whether there was a risk that the punishable acts in question would be committed again. Here, the CPS was required to have regard to a range of risk factors including, where appropriate, the acts for which the individual had initially been placed in compulsory confinement.

In short, having regard to the domestic law as interpreted by the Court of Cassation in the present case, and given that the applicants had not been granted final discharge, their deprivation of liberty had continued to be based on valid legal grounds, that is, the compulsory confinement orders imposed in 2007 and 2002 respectively.

The Court noted that the interpretation adopted by the domestic courts in the present case corresponded to the legislature's intention as disclosed by the parliamentary proceedings prior to the enactment of the Law of 4 May 2016 amending the 2014 Act. These indicated that the Compulsory Confinement Act had not been intended to affect decisions in respect of persons suffering from mental disorders who had committed punishable acts which were capable of giving rise to confinement under the Social Protection Act 1930 but for which compulsory confinement would no longer be possible under the new legislation.

The legislature had thus chosen to maintain the binding force of compulsory confinement decisions imposed under the Social Protection Act. It followed that, with regard to individuals placed in compulsory confinement on the basis of a decision which had acquired the force of *res judicata* prior to 1 October 2016, the effects of the Compulsory Confinement Act were limited to decisions on extending the compulsory confinement, the practical arrangements for its execution and on those individuals' possible discharge.

Reiterating that its task was not to express a view on the appropriateness of the methods chosen by the legislature, the Court considered that the approach taken by the domestic courts in the present case was neither arbitrary nor manifestly unreasonable.

***The compatibility of the approach taken by the domestic courts with Article 5 of the Convention***

Article 5 § 1 (e) of the Convention did not specify the possible acts, punishable under criminal law, for which an individual could be detained as being "of unsound mind". Nor did that provision identify the commission of a previous offence as a precondition for detention. It merely required that it had been reliably established that the individual was of unsound mind (first condition), that the disorder was of a kind or degree warranting compulsory confinement (second condition) and that the disorder persisted throughout the entire period of the confinement (third condition). Thus, the Convention did not require the authorities, when assessing the persistence of the mental disorders, to take into account the nature of the acts which had given rise to the individual's compulsory confinement.

In the present case, the first two conditions had been met. With regard to the third condition, namely the persistence of the disorder, without which the confinement could not be continued, the applicants had expressly stated that they did not dispute that this condition was met and that their mental disorders persisted.

The Court nonetheless reiterated that it was the individual's current state of mental health which had to be taken into consideration. In this respect, the domestic courts' assessment of this third condition was necessarily changeable, since it had to take into account any changes to the mental condition of the detainee following the adoption of the compulsory confinement order.

The third condition had been incorporated into Belgian law by the introduction of an automatic periodic review, during which individuals in compulsory confinement were able, among other things, to argue that their mental-health condition had stabilised and that they no longer represented a danger to society, and to request various practical arrangements for the execution of the confinement order, including, as in the applicants' case, their final discharge.

Under section 66 of the Compulsory Confinement Act, final discharge could only be granted on completion of a three-year probationary period, provided that the mental disorder in question had stabilised sufficiently for there no longer to be reasonable grounds to fear that, on account of his or her mental disorder, possibly combined with other risk factors, the individual concerned would again commit further punishable acts. Thus, only the current mental-health condition of the confined person and the current risk of reoffending, that is, at the time that the review was carried out, were taken into account in deciding whether the individual concerned could be released or whether the continued placement in compulsory confinement was justified.

It was in the light of those considerations that the CPS had examined the applicants' requests for final discharge. Thus, they had not taken account of the nature of the punishable acts which the applicants had committed, and which had given rise to the compulsory confinement measures. In contrast, they had assessed whether the applicants' mental disorders had stabilised to a sufficient degree and had concluded that this had not been the case.

Thus, the CPS had examined whether the mental disorders had persisted, as required by Article 5 § 1 (e) of the Convention. In this connection, the Court noted that during the CPS's most recent periodic review of the applicants' situation, they had considered that there still existed a high risk that they would commit further violent crimes.

In consequence, the Court concluded that the applicants' detention continued to have a valid legal basis and that their deprivation of liberty was lawful. **There had been no violation of Article 5 § 1 of the Convention.**

### Article 5 § 4 (right to a speedy decision on the lawfulness of detention)

The Court noted that the applicants complained only about the fact that it was impossible under the law to secure their immediate and final discharge on account of the three-year probationary period imposed by section 66 of the Compulsory Confinement Act. In this connection, it noted that section 66 laid down two cumulative conditions for the final discharge of a person in compulsory confinement. It required, firstly, the completion of a three-year probationary period and, secondly, that the mental disorder had stabilised sufficiently for there no longer to be reasonable grounds to fear that, regardless of his or her mental disorder, possibly combined with other risk factors, the individual in compulsory confinement would commit further offences which harmed or threatened to harm the physical or mental integrity of another person.

In the present case, the Court observed that the domestic courts had refused to grant the applicants' request for final discharge on the grounds that neither of the two conditions laid down by section 66 of the Act had been met: their state of mental health had not improved sufficiently and they had not completed a three-year probationary period. The applicants did not dispute that their mental disorders persisted; nor did they claim that these disorders had stabilised sufficiently for them to represent no further danger to society. The condition of having completed a three-year probationary period had not therefore been decisive, since it was only one of the grounds on which the CPS had refused to grant their immediate and final discharge.

The Court welcomed the fact that in the meantime the Court of Cassation had interpreted the contested provision in the light of Article 5 §§ 1 and 4 of the Convention, holding that an individual in compulsory confinement who was no longer mentally ill and who was no longer dangerous had to be granted final discharge, even if the three-year probationary period had not yet been completed.

**It followed that there had been no violation of Article 5 § 4 of the Convention.**

## Separate opinions

Judges Serghides and Felici expressed a joint dissenting opinion. Judge Pavli expressed a dissenting opinion. These opinions are annexed to the judgment.

*The judgment is available in English and French.*

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**Press contacts**
During the public health-crisis, journalists can continue to contact the press unit via echrpress@echr.coe.int

**Inci Ertekin**
Tracey Turner-Tretz
Denis Lambert
Neil Connolly
Jane Swift