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

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Violations in preventive detention of mentally ill serious offender

In today's **Chamber** judgment[1] in the case of W.A. v. Switzerland (application no. 38958/16) the European Court of Human Rights held, unanimously, that there had been:

a violation of Article 5 § 1 (right to liberty and security) of the European Convention on Human Rights,

a violation of Article 7 § 1 (no punishment without law) of the European Convention, and

a violation of Article 4 of Protocol No. 7 (right not to be tried or punished twice) to the Convention.

The case concerned the ordering of preventive detention in respect of W.A. – a man who had serious psychiatric issues – after he had served a 20-year sentence for two homicides.

The Court found in essence that by this detention, ordered in a reopening procedure in which there had not been any new evidence concerning the nature of the offence or the extent of the applicant's guilt, he had been punished twice for the same offences. Moreover, while the applicant could indeed have been detained as a person "of unsound mind" in accordance with the Convention, his detention had not been lawful as he had not been detained in an institution suitable for mentally ill patients.

Principal facts

The applicant, W.A., is a Swiss national who was born in 1960 and is incarcerated in Pöschwies Prison, Regensdorf (Switzerland).

In the early 1990s the Zürich Jury Court sentenced W.A. to 20 years' imprisonment for two homicides.

W.A. suffered from a personality disorder which was difficult to treat and was diagnosed by a psychiatric expert as having carried out the crimes under diminished capacity. However, the court held that the applicant presented a threat to society that could be dealt with only with a long-term sentence, rather than preventive detention, which in practice rarely lasted more than five years.

W.A. served his sentence until 2010, when he was detained on remand following a prosecutorial application to have him placed in preventive detention under new amendments to the Criminal Code. In 2012 the Federal Court, contrary to the lower courts, reopened the proceedings, citing certain facts that in its view had not been known to the original jury in the case, including the untreatability of his condition.

In 2013 his preventive detention was ordered by the Zürich District Court. Although it did not re-examine the original offences, the court referred to a recent psychiatric report and to the conditions for preventive detention, which had been met in the early 1990s and which, in its view, continued to be met. It also held that W.A. would highly likely again commit violent offences, and that there was little prospect of successful psychiatric treatment. He continued to be held at Pöschwies Prison.

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.

W.A. appealed, but his appeals were dismissed at the appellate and federal levels. The Federal Court found that the prohibition on retrospective punishment applied to orders for preventive detention under Articles 64-65 of the Criminal Code, holding that preventive detention and the imposition of a penalty were similar in their punishing effect. As the new Code provisions on preventive detention were not more severe than the older ones, they could be retroactively applied. The Code, in effect, also allowed for the reopening of proceedings to the detriment of the convicted person in both its older and newer versions. For the Federal Court, the "no punishment without law" principle had not been breached. It emphasised that because of the seriousness of W.A.'s illness and the risk he posed his detention was necessary.

Complaints, procedure and composition of the Court

Relying on Articles 5 § 1 (right to liberty and security) and 7 § 1 (no punishment without law) of the European Convention on Human Rights and Article 4 of Protocol No. 7 (right not to be tried or punished twice) to the Convention, the applicant complained about his preventive detention, that he was being punished retrospectively, and that he had been punished twice for the same crimes.

The application was lodged with the European Court of Human Rights on 28 June 2016.

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

Georges **Ravarani** (Luxembourg), *President*,
Georgios A. **Serghides** (Cyprus),
Dmitry **Dedov** (Russia),
Darian **Pavli** (Albania),
Anja **Seibert-Fohr** (Germany),
Andreas **Zünd** (Switzerland),
Frédéric **Krenc** (Belgium),

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

Decision of the Court

Article 5 § 1

"Conviction", within the meaning of the Court's case-law, referred to both the finding of an offence and the consequent imposition of a penalty. Only the judgment finding a person guilty of an offence meets the requirements of a "conviction" under Article 5 § 1 (a).

The Court noted that unlike the applicant's initial trial and judgment, the 2013 detention order had not met the Convention requirements of a stand-alone "conviction". The Court furthermore found that the reopening procedure had not created a sufficient link between the initial conviction and the subsequent preventive detention. The original offences had not been re-examined and no new facts established in that procedure, only whether the applicant had met the requirements for preventive detention. This had amounted to a *de facto* additional punishment.

Regarding the deprivation of liberty of persons suffering from mental disorders, the Court stated that the applicant was indeed a person "of unsound mind" for the purposes of Article 5 § 1 (e), but in order for his detention to be lawful, it would have been necessary to detain him in a suitable institution for mental health patients and not in an ordinary prison even if he was not amenable to treatment.

There had been a violation of Article 5 § 1 of the Convention.

Article 7 § 1

The Court affirmed that the applicant's detention was a "penalty".

The detention order had amounted to a "heavier" penalty being imposed on the applicant. In particular, at the time of the applicant's offences, it had not been possible to place him in preventive detention by a retrospective order made after his convictions from the 1990s had become final. Moreover, under the new version of the Criminal Code, owing to the fact that the term of imprisonment imposed was now executed prior to a preventive detention order, the person concerned was liable to be detained for a longer period of time.

There had accordingly been a violation of Article 7 § 1 of the Convention.

Article 4 of Protocol No. 7

The Court reiterated that legal certainty could not be absolute. The Convention expressly permitted reopening of criminal cases where new facts emerged which are so significant as to potentially affect the "outcome of the case".

The Court had already found that the case had not been reopened in accordance with the Convention as no new facts had been established and no fresh determination of a criminal charge in a new decision had been, or was to be, made.

There had therefore been a violation of Article 4 of Protocol No. 7 to the Convention.

Just satisfaction (Article 41)

The Court held that Switzerland was to pay the applicant 40,000 euros (EUR) in respect of non-pecuniary damage and EUR 6,000 in respect of costs and expenses.

Separate opinion

Judge Zünd expressed a concurring opinion, which is annexed to the judgment.

The judgment is available only in English.

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