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

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Retrospective preventive detention of convicted murderer was justified from the moment when he was placed in a centre for psychiatric treatment

The case of Ilnseher v. Germany (application nos. 10211/12 and 27505/14) concerned the lawfulness of a convicted murderer's preventive detention. Mr Ilnseher, the applicant, has been in preventive detention since 2008, when he finished serving a ten-year sentence for having murdered, as a juvenile, a woman in 1997 while she was out jogging. The crime was sexually motivated. His detention was retrospectively extended by subsequent court orders, based upon psychiatric assessments which revealed a high risk that he could commit similar serious crimes of a sexual and violent nature if released.

In today's **Chamber** judgment[1] in the case the European Court of Human Rights held, unanimously, that there had been:

no violation of Article 5 § 1 (right to liberty and security) or Article 7 (no punishment without law) of the European Convention on Human Rights on account of Mr Ilnseher's retrospective preventive detention from the moment when he was placed in a centre for psychiatric treatment, namely 20 June 2013 onwards,

no violation of Article 5 § 4 (right to liberty and security) of the European Convention on account of the duration of the proceedings for review of Mr Ilnseher's provisional preventive detention, and

no violation of Article 6 (right to fair trial) on account of the alleged lack of impartiality of one of the judges who had ordered his retrospective preventive detention.

The Court found in particular that the German courts had been justified in finding that Mr Ilnseher's mental disorder was such as to warrant his detention as a person of unsound mind. It further found that, because his preventive detention had been ordered because of and with a view to addressing his mental condition, the retrospective preventive detention order in question could not be considered a "penalty" and so could not fall foul of the principle of 'no punishment without law.'

Furthermore, the Court **decided, unanimously, to strike out of its list of cases the part of the application concerning Mr Ilnseher's preventive detention from 6 May 2011 (namely, the date when the preventive detention order in question was issued) until 20 June 2013**, in view of the Government's declaration recognising that Mr Ilnseher had not been detained in a suitable institution for the detention of mental health patients during that period and awarding him compensation.

Principal facts

The applicant, Daniel Ilnseher, is a German national who was born in 1978 and is currently detained in a centre for persons in preventive detention on the premises of Straubing Prison (Germany).

In 1999, Mr Ilnseher was convicted of murder in the Regensburg Regional Court and sentenced to ten years' imprisonment under the criminal law applicable to young offenders. The court found that

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.

in June 1997, Mr Ilnseher, then aged 19, had strangled a woman who had been jogging on a forest path.

From July 2008 onwards, after he had served his full prison sentence, Mr Ilnseher was remanded in provisional preventive detention. In June 2009, the Regensburg Regional Court ordered his retrospective preventive detention. The court, having regard to reports by a criminological expert and a psychiatric expert, found that Mr Ilnseher was still harbouring violent sexual fantasies and that there was a high risk that he would again commit serious violent and sexual offences if released, including murder for sexual gratification.

From March 2010 until December 2013, Mr Ilnseher engaged in proceedings before the German courts challenging the lawfulness of his preventive detention. In May 2011, he successfully appealed to the Federal Constitutional Court, which quashed the order for his preventive detention and remitted his case to the Regional Court. On 6 May 2011, the Regional Court, however, once again ordered Mr Ilnseher's provisional preventive detention. After a series of appeals, the courts ultimately found that his preventive detention had been necessary, as a comprehensive assessment of Mr Ilnseher, his offence, and his development during the enforcement of his sentence revealed that there was a high risk that he could commit serious crimes of a violent and sexual nature, similar to the one he had been found guilty of, if released. It was further noted that he still suffered from a sexual preference disorder (sexual sadism) which had caused and been manifested in his offence and that the therapy he had undergone until 2007 had not been successful. Since 20 June 2013, Mr Ilnseher has been detained in a newly-built preventive detention centre at Straubing Prison. He has refused all offers of therapy at that centre.

In the new main proceedings on his retrospective preventive detention before the Regensburg Regional Court, Mr Ilnseher also lodged a motion for bias against one of the judges of that court, Judge P., who had ordered his retrospective preventive detention in June 2009 and a subsequent order in 2012. Judge P. had allegedly made a remark in a private meeting between Mr Ilnseher's counsel and judges of the Regional Court in 2009, warning Mr Ilnseher's lawyer to be careful after his release not to find him standing in front of her door waiting to "thank" her in person. The case was dismissed and was also dismissed on appeal to the Federal Court of Justice and the Federal Constitutional Court.

The proceedings for review of Mr Ilnseher's provisional preventive detention lasted in total 11 months and one day over three levels of jurisdiction; and in particular eight months and 22 days before the Federal Constitutional Court.

Complaints, procedure and composition of the Court

Relying on Article 5 § 1 (right to liberty and security) and Article 7 § 1 (no punishment without law), Mr Ilnseher complained that his retrospective preventive detention had violated his right to liberty, and his right not to have a heavier penalty imposed than the one applicable at the time of his offence. Lastly, he complained under Article 5 § 4 (right to have lawfulness of detention decided speedily by a court) about the duration of the proceedings for review of his provisional preventive detention and under Article 6 § 1 (right to a fair trial) about the lack of impartiality of one of the judges who had ordered his retrospective preventive detention.

The applications were lodged with the European Court of Human Rights on 24 February 2012 and 4 April 2014 respectively.

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

Erik **Møse** (Norway), *President*,
Angelika **Nußberger** (Germany),
Ganna **Yudkivska** (Ukraine),

Faris **Vehabović** (Bosnia and Herzegovina),
Yonko **Grozev** (Bulgaria),
Síofra **O'Leary** (Ireland),
Mārtiņš **Mits** (Latvia),

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

Decision of the Court

Article 5 § 1 (right to liberty and security) and 7 § 1 (no punishment without law)

Mr Ilnseher complained that his preventive detention from 6 May 2011 until 20 June 2013 had breached his right to liberty and the prohibition on retrospective punishment. After failing to reach a friendly settlement with him, the Government proposed to make a unilateral declaration recognising that Mr Ilnseher's rights under Articles 5 and 7 of the Convention had been breached during the above period, due to the fact that he had not been detained in a suitable institution for the detention of mental health patients, and proposing compensation of 12,500 euros (EUR).

In view of the Government's declaration, the Court considered that it was no longer justified to continue its examination of Mr Ilnseher's complaint about his preventive detention from 6 May 2011 until 20 June 2013. It took into account its well-established practice concerning complaints about retrospective prolongation or imposition of preventive detention as well as the amount of compensation proposed, which was consistent with the amounts awarded in similar cases. It therefore decided to strike that part of the application out of its list of cases.

Article 5 § 1 (right to liberty and security)

Regarding Mr Ilnseher's retrospectively ordered preventive detention from 20 June 2013 onwards, the Court found that the German courts had been justified in finding that Mr Ilnseher's mental disorder was such as to warrant his compulsory confinement. The Court also noted that the Straubing Prison preventive detention centre at which Mr Ilnseher had been detained since 20 June 2013 provided a suitable therapeutic environment for him and therefore his detention had been justified under Article 5 § 1 (e) as the lawful detention of a person "of unsound mind." There had accordingly been no violation of Article 5 § 1.

Article 7 § 1 (no punishment without law)

Regarding Mr Ilnseher's preventive detention from 20 June 2013, the Court found that, because his preventive detention had been ordered because of and with a view to addressing his mental condition, the retrospective preventive detention orders in question could not be considered a "penalty". It could therefore not fall foul of the principle of 'no punishment without law'.

Article 5 § 4 (right to have lawfulness of detention decided speedily by a court)

The Court noted that the proceedings in Mr Ilnseher's case had been relatively complex, both from a legal and a factual point of view. Having considered the length of proceedings before each of the domestic courts in light of the complexity and circumstances of the case, the Court found that the speediness requirement under Article 5 § 4 had been complied with. It considered, in particular, that having regard to the special features of constitutional complaint proceedings, to the complexity of the proceedings in the instant case before the Federal Constitutional Court and to the particular circumstances of this case, the requirement of speediness under Article 5 § 4 has been respected also before that court. There had accordingly been no violation of that article.

Article 6 § 1 (right to a fair trial)

The Court found that Judge P.'s alleged remark had amounted in substance to a confirmation of the Regional Court's finding in the judgment it had just delivered – namely, that Mr Ilnseher was dangerous and posed a risk of reoffending if released. It further found that the mere fact that Judge P. had already been a member of the bench in Mr Ilnseher's case was not enough to raise objectively justified doubts as to his impartiality. Moreover, the statement in question had not given any legitimate reason to fear that Judge P. would not have carried out the necessary fresh assessment of the level of danger posed by Mr Ilnseher when his case came before Judge P. again in 2012. There had therefore been no violation of Article 6 § 1.

The judgment is available only in English.

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