



Subsequent preventive detention of convicted murder did not violate the Convention

In today's **Grand Chamber** judgment¹ in the case of [Ilseher v. Germany](#) (application nos. 10211/12 and 27505/14) the European Court of Human Rights held, by a majority, that there had been:

no violation of Article 5 § 1 (right to liberty and security) of the European Convention on Human Rights on account of the applicant's preventive detention from 20 June 2013 onwards as a result of the impugned order for his subsequent preventive detention and

no violation of Article 7 § 1 (no punishment without law) on account of the applicant's preventive detention from 20 June 2013 onwards as a result of the impugned order for his subsequent preventive detention.

It further held, unanimously, that there had been **no violation of Article 5 § 4 (right to have lawfulness of detention decided speedily by a court)** of the Convention on account of the duration of the proceedings for review of the applicant's provisional preventive detention and,

by a majority, that there had been

no violation of Article 6 § 1 (right to a fair trial) of the Convention on account of the alleged lack of impartiality of Judge P. in the main proceedings concerning the order for the applicant's subsequent preventive detention.

The case concerned the lawfulness of a convicted murderer's subsequent preventive detention.

The Court found in particular that Mr Ilseher's preventive detention both fell within the permissible ground for deprivation of liberty under sub-paragraph (e) of Article 5 § 1 and was "lawful" for the purposes of that provision, and thus complied with Article 5 § 1.

Regarding Article 7 § 1 the Court observed that Mr Ilseher's preventive detention was imposed because of and with a view to the need to treat his mental disorder, having regard to his criminal history. The nature and purpose of his preventive detention, in particular, was substantially different from those of ordinary preventive detention executed irrespective of a mental disorder.

It further considered, making an overall assessment, that Mr Ilseher's right to a speedy decision was complied with in the proceedings concerning the lawfulness of his provisional preventive detention. Lastly, the Court found that the conduct of Judge P., in the circumstances of the case, neither showed that he was personally biased against the applicant nor that there were justified doubts as to his impartiality in the proceedings at issue.

Principal facts

The applicant, Daniel Ilseher, 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).

Mr Ilseher has been in preventive detention since 2008, when he finished a ten-year juvenile sentence for having murdered, at the age of 19, a woman in 1997 while she was out jogging. The crime was sexually motivated. His detention was subsequently extended by court orders, based

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.

upon psychiatric assessments which revealed a high risk that he could commit similar serious crimes of a sexual and violent nature if released.

On 4 May 2011, the Federal Constitutional Court granted the applicant's constitutional complaint and quashed the order for his subsequently extended preventive detention and remitted the case to the Regional Court.

On 6 May 2011, the Regional Court, however, once again ordered Mr Ilseher's provisional preventive detention. The applicant was mainly detained in the preventive detention wing of Straubing Prison.

After a series of appeals the courts ultimately found that his preventive detention had been necessary, as a comprehensive assessment of Mr Ilseher, his offence, and his development during the enforcement of the 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.

In the new main proceedings on his subsequent preventive detention before the Regensburg Regional Court, Mr Ilseher also lodged a motion for bias against one of the judges of that court, Judge P., who had ordered his subsequent preventive detention in June 2009. Judge P. had allegedly made a remark in a private meeting between Mr Ilseher's counsel and judges of the Regional Court in 2009, warning Mr Ilseher'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 motion was dismissed. The applicant's appeals against the preventive detention order to the Federal Court of Justice and the Federal Constitutional Court were likewise dismissed.

Since 20 June 2013, Mr Ilseher has been detained in a newly-built preventive detention centre at Straubing Prison. He took up one-to-one psychotherapy from June 2015 until June 2017.

The proceedings for review of Mr Ilseher's provisional preventive detention lasted in total 11 months and one day over three levels of jurisdiction, of which eight months and 22 days were 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 Ilseher 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 subsequent preventive detention.

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

In a Chamber [judgment](#) of 2 February 2017, the Court held, unanimously, that there had been no violation of Mr Ilseher's rights under Article 5 § 1 or Article 7 § 1 on account of the subsequent preventive detention from the moment he was placed in a centre for psychiatric treatment, namely 20 June 2013 onwards, no violation of Article 5 § 4 on account of the duration of proceedings for review of Mr Ilseher's provisional preventive detention and no violation of Article 6 § 1 on account of the alleged lack of impartiality of one of the judges who had ordered his subsequent preventive detention.

It decided furthermore, unanimously, to strike out of its list of cases the part of the application concerning Mr Ilseher's preventive detention from 6 May 2011 until 20 June 2013, in view of the Government's unilateral declaration recognising that the applicant had not been detained in a

suitable institution for the detention of mental health patients during that period and awarding him compensation.

On 15 March 2017 the applicant requested that the case be referred to the Grand Chamber under Article 43 (referral to the Grand Chamber) and on 29 May 2017 the panel of the Grand Chamber accepted that request.

A [hearing](#) in the case was held on 29 November 2017.

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

Guido **Raimondi** (Italy), *President*,
Angelika **Nußberger** (Germany),
Linos-Alexandre **Sicilianos** (Greece),
Helena **Jäderblom** (Sweden),
Robert **Spano** (Iceland),
Vincent A. **De Gaetano** (Malta),
Kristina **Pardalos** (San Marino),
Paulo **Pinto de Albuquerque** (Portugal),
Aleš **Pejchal** (the Czech Republic),
Dmitry **Dedov** (Russia),
Iulia **Motoc** (Romania),
Jon Fridrik **Kjølbro** (Denmark),
Stéphanie **Mourou-Vikström** (Monaco),
Georges **Ravarani** (Luxembourg),
Alena **Poláčková** (Slovakia),
Pauliine **Koskelo** (Finland),
Lətif **Hüseynov** (Azerbaijan),

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

Decision of the Court

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

The Court noted firstly that where parts of the applications were struck off the Court's list of cases, they do not form part of the "case" referred to the Grand Chamber. Consequently, the period from 6 May 2011 to 20 June 2013 did not fall within the Grand Chamber's jurisdiction.

The Court pointed out that Mr Ilseher's preventive detention could only be justified under subparagraph (e) of Article 5 § 1. In this context it was necessary to assess whether the person concerned was of unsound mind, on the basis of objective medical expertise, at the date of adoption of the measure depriving that person of his liberty. The Court observed that the domestic courts, based on two opinions of experienced external experts, found Mr Ilseher to suffer from a form of sexual sadism which must be considered as being of a serious nature. His condition necessitated comprehensive therapy, to be provided either in the preventive detention centre or in a psychiatric hospital. The Court was therefore satisfied that the condition with which Mr Ilseher was diagnosed amounted to a true mental disorder for the purposes of Article 5 § 1 (e) and that this mental disorder was of a kind or degree warranting compulsory confinement.

The Court was furthermore satisfied that Mr Ilseher was offered the therapeutic environment appropriate for a person remanded as a mental health patient and was thus detained in an institution suitable for the purposes of Article 5 § 1 (e).

The Court further noted that the domestic courts established that there was a high risk that Mr Ilseher would commit another murder for sexual gratification if released and did not consider

measures less severe than a preventive detention to be sufficient to safeguard the individual and public interest. It was therefore satisfied that Mr Ilseher's deprivation of liberty had been shown to have been necessary in the circumstances, that his detention had not been arbitrary and that it had consequently been "lawful" in the sense of Article 5 § 1 (e).

The Court concluded that Mr Ilseher's subsequently ordered preventive detention from 20 June 2013 until 18 September 2014 in the Straubing preventive detention centre, in so far as it was executed as a result of the impugned judgment, was justified under sub-paragraph (e) of Article 5 § 1 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)

The Court clarified that "ordinary" preventive detention which is not executed with a view to treating the detainee's mental disorder still constituted a penalty for the purposes of Article 7 § 1.

The Court noted that the German authorities have taken substantive measures in order to improve the conditions of persons remanded in preventive detention. It further observed that under domestic law read in conjunction with the requirements set out in the Federal Constitutional Court's judgment of 4 May 2011, subsequent preventive detention could only be ordered under the new and additional precondition that the applicant was found to suffer from a mental disorder. Moreover, although it remained a precondition for ordering subsequent preventive detention that the person was found guilty of a serious offence, the Court was satisfied, having regard to the setting in which Mr Ilseher's preventive detention was executed since 20 June 2013, that the focus of the measures lied on his medical and therapeutic treatment. This fact altered the nature and purpose of the detention of Mr Ilseher and transformed it into a measure focused on the medical and therapeutic treatment of persons with a criminal history. The punitive element of preventive detention and its connection with the criminal offence committed by Mr Ilseher was erased to such an extent in these circumstances that the measure was no longer a penalty.

The Court found accordingly that the preventive detention had been ordered because of and with a view to the need to treat his mental disorder. Therefore, the subsequent preventive detention orders could not be considered a "penalty" within the meaning of article 7 § 1. Consequently, there had been no violation of that article.

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

The Court found that in view of the complexity of the case, both from a legal and a factual point of view, the length before the domestic courts complied with the speediness requirement under Article 5 § 4. It considered, in particular, that having regard to the complexity of the proceedings before the Federal Constitutional Court and the conduct of these proceedings, including the adoption of a reasoned interim decision and the possibility for the applicant to obtain a fresh judicial review of his detention by the ordinary courts while the proceedings were still pending before the Federal Constitutional Court, the requirement of speediness under Article 5 § 4 had been respected also before that court. There had accordingly been no violation of Article 5 § 4.

Article 6 § 1 (right to a fair trial)

The Grand Chamber stressed that if Judge P. had actually made the highly inappropriate remark in question, he would have displayed unprofessional behaviour. However, it considered that, for the reasons set out in detail by the Chamber which it endorsed, this conduct, in the circumstances of the present case, neither showed that Judge P. was personally biased against Mr Ilseher nor that there were objectively justified doubts as to his impartiality in the proceedings at issue.

There had accordingly been no violation of Article 6 § 1.

Separate opinions

Judge Ravarani expressed a concurring opinion and Judge Sicilianos expressed a partly dissenting opinion. Judge Pinto de Albuquerque expressed a dissenting opinion, joined by Judge Dedov. These opinions are annexed to the judgment.

The judgment is available in English and 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.