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

FIFTH SECTION

DECISION

Application no. 40087/14
M.W.
against Germany

The European Court of Human Rights (Fifth Section), sitting on 24 September 2019 as a Committee composed of:

André Potocki, *President,*
Angelika Nußberger,
Mārtiņš Mits, *judges,*

and Milan Blaško, *Deputy Section Registrar*,

Having regard to the above application lodged on 26 May 2014,

Having regard to the declaration submitted by the respondent Government requesting the Court to strike the application out of the list of cases and the applicant's reply to that declaration,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr W., is a German national who was born in 1982 and is currently detained in the centre for persons in preventive detention on the premises of Straubing Prison ("the Straubing preventive detention centre"). The President granted the applicant's request for his identity not to be disclosed to the public (Rule 47 § 4 of the Rules of Court).

2. The applicant was represented before the Court by Mr A. Ahmed, a lawyer practising in Munich. The German Government ("the Government") were represented by one of their Agents, Mr H.-J. Behrens, of the Federal Ministry of Justice and Consumer Protection.

3. The applicant complained that his subsequently ordered preventive detention was in breach of Article 5 § 1 and Article 7 § 1 of the Convention.

4. On 3 September 2014 notice of the application was given to the Government.

A. The circumstances of the case

1. The applicant's previous conviction and the execution of his sentence

5. On 5 February 2003 the Augsburg Regional Court convicted the applicant of murder. Applying the law relating to young offenders, it sentenced him to the maximum sentence of ten years' imprisonment.

6. The Regional Court found that the applicant, aged nineteen, had killed a twelve-year-old girl in the night of 11-12 February 2002 treacherously and for base motives, with a knife. Disguised as "Death" for carnival the applicant, who had drunk some three litres of beer during the evening, had entered the house in which the girl, who was completely unknown to him, lived. He had then stabbed the sleeping girl in the back at least twenty-one times without any plausible motive, possibly inspired by horror films he had been watching regularly.

7. The Regional Court, which had consulted a psychiatric expert (G.) and a psychology expert (W.), found that the applicant's criminal responsibility had not been diminished for the purposes of Article 21 of the Criminal Code as a result of alcohol consumption. Furthermore, even assuming that the applicant suffered from a personality disorder, the latter was not so serious as to be pathological and thus had not diminished the applicant's criminal responsibility either.

8. The Regional Court further noted that no measures of correction and prevention could be imposed on the applicant. Article 106 § 2 of the Juvenile Courts Act prohibited a preventive detention order under Article 66 of the Criminal Code against the applicant, a young adult. Likewise, the applicant's placement in a psychiatric hospital was not to be ordered under Article 63 of the Criminal Code as the applicant had not committed his crime under diminished criminal responsibility (Articles 20 and 21 of the Criminal Code).

9. During the execution of his sentence, the applicant initially had weekly therapy sessions with a psychiatric expert. From 7 August 2008 to 30 March 2011 the applicant underwent social therapy in Erlangen Prison; he was subsequently retransferred to Straubing Prison where he had therapy sessions with a psychologist once a fortnight.

10. Prior to the applicant having served his full sentence, the Augsburg Regional Court, on 16 January 2012, ordered his provisional preventive detention pending the decision whether or not he was to be placed in preventive detention subsequently. The applicant was in provisional preventive detention since 17 February 2012.

2. The proceedings at issue

(a) The decision of the Augsburg Regional Court

11. On 15 November 2012 the Augsburg Regional Court ordered the applicant's subsequent preventive detention under Article 7 § 2 of the Juvenile Courts Act, read in conjunction with Article 105 § 1 of that Act and Article 316e § 1 of the Introductory Act to the Criminal Code.

12. The Regional Court found that, pursuant to Article 316e § 1 of the Introductory Act to the Criminal Code, Article 7 § 2 of the Juvenile Courts Act in the version adopted on 8 July 2008 was still applicable as the applicant had committed the offence because of which preventive detention was to be ordered prior to 1 January 2011.

13. Furthermore, the requirements under Article 7 § 2 no. 1 of the Juvenile Courts Act for ordering the applicant's subsequent preventive detention were met. The applicant had been convicted on 5 February 2003 by the Augsburg Regional Court to a ten-year prison sentence relating to young offenders for a felony against life, murder. Moreover, there was evidence prior to the end of enforcement of his sentence which indicated that he presented a significant danger to the general public. A comprehensive assessment of his person, his offence and, in addition, his development during the execution of the sentence indicated that it was very likely that he would again commit a similarly serious offence.

14. The Regional Court further considered that the stricter requirements set up in the Federal Constitutional Court's judgment of 4 May 2011 were equally met. It was highly likely that the applicant, owing to specific circumstances relating to his person or his conduct, would commit the most serious crimes of violence. Additionally, he suffered from a mental disorder within the meaning of Article 5 § 1 (e) of the Convention, as transferred into section 1 § 1 of the newly-enacted Therapy Detention Act.

15. As to the applicant's dangerousness, the Regional Court found that it was highly likely that the applicant would again commit the most serious crimes of violence if released, having regard to the reports submitted to it by psychiatric expert S. and psychology expert K. and by endorsing the findings of expert S. The court noted, in particular, that the motive for the applicant's particularly brutal crime, which was still unclear, and the applicant's persisting fantasies of violence had not been sufficiently addressed in therapy. There was also a risk that, if under stress, the applicant would again consume alcohol and video films excessively and thus resume the conduct which had preceded the murder of which he had been found guilty.

16. Moreover, the Regional Court considered that the applicant suffered from a mental disorder as defined by section 1 § 1 of the Therapy Detention Act, which transferred the requirements under Article 5 § 1 (e) of the Convention into domestic law. The notion of mental disorder under the

Therapy Detention Act covered a large range of disorders which, from a psychiatric point of view, were only partly to be classified as mental illnesses. It was notably not necessary that the criminal responsibility of the person concerned be diminished within the meaning of Articles 20 and 21 of the Criminal Code. A mental disorder for the purposes of the said provision therefore covered personality or conduct disorders which went beyond mere social differences and had an effect on the conduct of life by the person concerned, without necessarily amounting to a pathological mental disorder. Having regard to the reports of experts S. and K., the Regional Court found that the applicant suffered from a combined personality disorder, as defined by the ICD-10, with schizoid, dissocial, negativist and emotionally unstable elements. That disorder went beyond a mere accentuation of the personality or a social difference; it impaired the applicant's conduct of life and was therefore a mental disorder for the purposes of section 1 § 1 no. 1 of the Therapy Detention Act. The Regional Court had regard to the fact that expert S. had considered this disorder as pathological and as necessitating therapy.

17. The Regional Court further found that the applicant was not to be transferred to a psychiatric hospital. It noted that expert S. and, previously, expert U. had considered that the applicant should have been placed in a psychiatric hospital. However, there was no legal basis for it to order the applicant's detention in a psychiatric hospital at that stage. Article 67a § 2 of the Criminal Code only permitted the courts dealing with the execution of sentences to order the applicant's subsequent transfer from preventive detention to a psychiatric hospital, following an order for his preventive detention by a criminal court.

(b) The decision of the Federal Court of Justice

18. On 15 November 2012 the applicant lodged an appeal on points of law with the Federal Court of Justice. He argued, in particular, that the order for his preventive detention failed to comply with the requirements of Articles 5 and 7 of the Convention and with those set up by the Federal Constitutional Court. He claimed, in particular, that it had not been proved that he suffered from a "true mental disorder" as required by Article 5 § 1 (e) of the Convention. In any event, a combined personality disorder, if proved, would not be sufficiently serious to justify the order for his preventive detention. Moreover, subsequently ordered preventive detention, a penalty, was in breach of Article 7 § 1 of the Convention.

19. On 7 August 2013 the Federal Court of Justice dismissed the applicant's appeal on points of law as ill-founded. The decision was served on the applicant's counsel on 20 August 2013.

(c) The decision of the Federal Constitutional Court

20. On 18 September 2013 the applicant lodged a constitutional complaint with the Federal Constitutional Court. He claimed that the subsequent order for his preventive detention, a penalty, failed to comply with his right to liberty, with the protection of legitimate expectations in a State governed by the rule of law and with the prohibition on retrospective punishment as protected by the Basic Law and by Articles 5 and 7 of the Convention. He further argued that the criminal courts did not have sufficient regard to the requirements set up by the Federal Constitutional Court in its judgment of 4 May 2011.

21. On 5 December 2013 the Federal Constitutional Court declined to consider the applicant's constitutional complaint (file no. 2 BvR 2062/13). The decision was served on the applicant's counsel on 12 December 2013.

3. The conditions of the applicant's detention during the execution of the preventive detention order

22. Following his transfer from Erlangen Prison on 30 March 2011, the applicant was detained in Straubing Prison until 27 August 2013, when he was transferred to the newly-built Straubing preventive detention centre. The conditions in that centre are described in *Ilnseher v. Germany* [GC], nos. 10211/12 and 27505/14, §§ 46-47, 4 December 2018). Following his transfer, the applicant was offered personalised treatment. Initially, he participated in one-to-one therapy with a psychologist and with a social worker, but discontinued both as of November 2013. He subsequently refused all types of therapy provided at the centre until 2016, despite continual efforts by staff to motivate him to participate in therapy.

4. Subsequent developments

23. The Regensburg Regional Court subsequently reviewed the necessity of the applicant's preventive detention at regular intervals. It decided on 9 July 2015 and on 14 July 2016 that the detention had to continue because the applicant's mental disorder and resulting dangerousness persisted. The Regional Court's review decisions were each based on fresh reports by different psychiatric experts and upheld on appeal by the Nuremberg Court of Appeal on 22 September 2015 and on 26 September 2016, respectively. The applicant is currently still in preventive detention.

B. Relevant domestic law and practice

24. For a comprehensive summary of domestic law and practice, and reforms of the preventive detention regime in Germany, as well as relevant

comparative law and international material, see *Ilnseher* (cited above, §§ 48-98).

COMPLAINTS

25. The applicant alleged that his subsequent preventive detention, ordered by the Augsburg Regional Court on 15 November 2012 and executed in Straubing Prison until 27 August 2013 and in Straubing preventive detention centre from that date onwards, was in breach of Article 5 § 1 and Article 7 § 1 of the Convention.

THE LAW

A. Alleged violation of Article 5 § 1 and Article 7 § 1 of the Convention on account of the applicant's preventive detention from 15 November 2012 until 27 August 2013

26. After the failure to reach a friendly settlement, the Government informed the Court by letter of 6 July 2017 that they proposed to make a unilateral declaration with a view to resolving the issue raised by the application. They further requested the Court to strike out the application in accordance with Article 37 of the Convention.

27. The declaration provided as follows:

> "1. In these proceedings, the Court proposed a friendly settlement, which was accepted by the Federal Government by statement dated 16 June 2017. With its above-referenced letter [of 23 June 2017], the Court has now informed the Federal Government that the Applicant has not replied to the friendly settlement proposal forwarded to him by letter from the Court of 22 June [*sic*] 2017 within the time limit set therein. The Federal Government shares the Court's view expressed in the referenced letter that there appears to be no basis for reaching a friendly settlement in the above case.
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> 2. The Federal Government therefore wishes to acknowledge – by way of a unilateral declaration – that the Applicant, during his detention in Straubing prison from 15 November 2012 until 27 August 2013, was not detained in a suitable institution for mental health patients. Therefore, his right under Article 5 (1) of the Convention was violated in the present case. Furthermore, the Federal Government recognizes that in view of the conditions of detention, the applicant's preventive detention during that period has to be classified as a penalty and was therefore in breach of Article 7 (1) of the Convention.
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> 3. If the Court were to strike this Application from its list of cases, the Federal Government would be willing to accept a claim for compensation in the amount of EUR 5,000.00 ... This sum of EUR 5,000.00 would be deemed to settle all claims of

> the Applicant in connection with the above-mentioned Application against the Federal Republic of Germany and the Land of Bavaria, including in particular compensation for the damage suffered (including non-pecuniary damage) as well as costs and expenses.
>
> 4. The amount shall be payable within three months of the Court's decision to strike the case out of its list becoming final.
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> 5. In the view of the Federal Government, the sum offered constitutes just satisfaction pursuant to Article 41 of the Convention. This follows from the Court's case law in similar cases ...
>
> 6. The Federal Government therefore requests that this Application be struck out of the Court's list of cases pursuant to Article 37 (1) c) of the Convention. The Federal Government's acknowledgement of a violation of Article 5 (1) and Article 7 (1) of the Convention and its acceptance of a claim for compensation in the amount of EUR 5,000.00 constitutes '[an]other reason' within the meaning of that provision."

28. By letter of 14 August 2017 the applicant indicated that he was not satisfied with the terms of the unilateral declaration. He notably referred to the potential change in the Court's case-law in view of *Ilnseher v. Germany* ([GC], nos. 10211/12 and 27505/14, 4 December 2018), which had in the meantime been referred to the Grand Chamber.

29. The Court observes that Article 37 § 1 (c) enables it to strike a case out of its list if:

> "... for any other reason established by the Court, it is no longer justified to continue the examination of the application".

30. Thus, it may strike out applications under Article 37 § 1 (c) on the basis of a unilateral declaration by a respondent Government even if the applicant wishes the examination of the case to be continued (see, in particular, *Tahsin Acar v. Turkey* (preliminary objections) [GC], no. 26307/95, §§ 75‑77, ECHR 2003-VI).

31. The Court has established in a number of cases brought against Germany its practice concerning complaints about a violation of Article 5 § 1 and Article 7 § 1 of the Convention by the subsequent prolongation or imposition of preventive detention executed during the transitional period following the leading judgment of the Federal Constitutional Court of 4 May 2011 until the entry into force of the new preventive detention regime on 1 June 2013 (see, in particular, *Glien v. Germany*, no. 7345/12, 28 November 2013) and has regularly struck applications, or their relevant parts, out of its list of cases following unilateral declarations by the German Government acknowledging breaches of Article 5 § 1 and Article 7 § 1 of the Convention until a person was transferred to a preventive detention centre that was in line with the new preventive detention regime (see *W.P. v. Germany*, no. 55594/13, 6 October 2016; and *Ilnseher*, cited above, §§ 99-103).

32. Having regard to the nature of the admissions contained in the Government's declaration, as well as the amount of compensation proposed

– which is consistent with the amount awarded in similar cases – the Court considers that it is no longer justified to continue the examination of this part of the application (Article 37 § 1 (c)).

33. Moreover, in the light of the above considerations, and in particular given the clear and extensive case-law on the topic, the Court is satisfied that respect for human rights as defined in the Convention and the Protocols thereto does not require it to continue the examination of the application (Article 37 § 1 *in fine*).

34. The Court considers that the above amount should be paid within three months from the date of notification of the Court's decision issued in accordance with Article 37 § 1 of the Convention. In the event of failure to settle within this period, simple interest shall be payable on the amount in question at a rate equal to the marginal lending rate of the European Central Bank, plus three percentage points.

35. Finally, the Court emphasises that, should the Government fail to comply with the terms of their unilateral declaration, the application could be restored to the list in accordance with Article 37 § 2 of the Convention (*Josipović v. Serbia* (dec.), no. 18369/07, 4 March 2008).

36. In view of the above, it is appropriate to strike the case out of the list in so far as it relates to the above complaints.

B. Alleged violation of Article 5 § 1 of the Convention on account of the applicant's preventive detention from 27 August 2013 onwards

1. The parties' submissions

37. The Government submitted that the applicant's preventive detention from 27 August 2013 onwards had complied with Article 5 § 1. It had been justified under sub-paragraph (e) of Article 5 § 1 as detention of a person "of unsound mind". The new Straubing preventive detention centre was a suitable institution for mental health patients and the applicant was offered treatment tailored to his mental disorder aimed at reducing his dangerousness so that he could subsequently be released.

38. The applicant submitted that his preventive detention based on the Regional Court's judgment of 15 November 2012 had violated Article 5 § 1 of the Convention also from 27 August 2013 onwards, as had his preventive detention preceding that date. His detention could be justified neither under sub-paragraph (a) nor under sub-paragraph (e) of Article 5 § 1. He had not been offered adequate therapy for detention as a mental health patient nor were the conditions of his detention adequate. Furthermore, his preventive detention could not be considered "lawful", given that the Federal Constitutional Court, in its judgment of 4 May 2011, considered preventive detention as incompatible with the Basic Law.

2. The Court's assessment

39. The principles in respect of Article 5 § 1 (e) of the Convention, in so far as relevant for the case, have recently been set out in *Ilnseher v. Germany* ([GC], nos. 10211/12 and 27505/14, §§ 127-141, 4 December 2018).

40. The period at issue started on 27 August 2013, when the applicant was transferred from Straubing Prison to the new Straubing preventive detention centre (see paragraph 22 above). The period ended on 9 July 2015, when a fresh decision ordering the continuation of the applicant's preventive detention was adopted in periodical judicial review proceedings (see paragraph 23 above), which the applicant could contest separately before the domestic courts.

(a) Ground for deprivation of liberty

41. As regards the question of whether the applicant was a person "of unsound mind" for the purposes of Article 5 § 1 (e) of the Convention, the Court observes that the Regional Court, which had consulted the external psychiatric expert S. and the expert psychologist K., was convinced that the applicant suffered from a combined personality disorder, as defined by the ICD-10, with schizoid, dissocial, negativist and emotionally unstable elements, and therefore from a mental disorder for the purposes of section 1(1) of the Therapy Detention Act. While noting that it appears that the notion of "persons of unsound mind" in Article 5 § 1 (e) of the Convention might be more restrictive than the notion of "mental disorder" referred to in section 1(1) of the Therapy Detention Act (see *Ilnseher*, cited above, § 150), the Court is satisfied that the condition with which the applicant was diagnosed amounted to a true mental disorder for the purposes of Article 5 § 1 (e) of the Convention. It is equally satisfied that the Regional Court, which thoroughly scrutinised the findings made in the reports by the two experts it had consulted as well as by other experts who had previously examined the applicant, established this based on objective medical expertise.

42. The Court further considers that the Regional Court was justified in considering that the applicant's mental disorder was of a kind or degree warranting compulsory confinement in view of the high risk, as established by that court, that the applicant, as a result of this disorder, would again commit another serious offence similar to the one of which he had been found guilty, if he were released. In accordance with domestic law, the domestic courts could order the continuation of his preventive detention in the subsequent periodical judicial review proceedings only if, and as long as, there was a high risk that he would reoffend as a result of that disorder if released, and they did so in the present case. Hence, the validity of the applicant's continued confinement depended upon the persistence of his

mental disorder. The Court therefore concludes that the applicant was a person "of unsound mind" for the purposes of Article 5 § 1 (e) of the Convention.

(b) "Lawful" detention "in accordance with a procedure prescribed by law"

43. As for the lawfulness of the applicant's detention, the Court notes that the detention was ordered in a judgment of the Regional Court of 15 November 2012, and confirmed on appeal, under Article 7 § 2 of the Juvenile Courts Act, read in conjunction with Article 105 § 1 of that Act and Article 316e § 1 of the Introductory Act to the Criminal Code, and in line with the requirements set up in the Federal Constitutional Court's judgment of 4 May 2011. In this connection, the Court notes that the Federal Constitutional Court, in the said judgment, held that all provisions declared incompatible with the Basic Law remained applicable until the entry into force of new legislation, and until 31 May 2013 at the latest, under additional restrictive conditions (for a summary of the Federal Constitutional Court's judgment, see *Ilnseher*, cited above, §§ 68-75). The Court thus rejects the applicant's submission that the Regional Court's judgment was unlawful, because the Federal Constitutional Court had, in the said judgment, declared the preventive detention regime incompatible with the Basic Law.

44. As regards the requirement that the detention be effected in an appropriate institution for mental health patients, the Court observes that, in the period here at issue, the applicant's preventive detention was effected in the newly-established Straubing preventive detention centre, that is, the same institution as Mr Ilnseher. The Court reiterates its finding that that institution was appropriate for the detention of mental health patients (see ibid., §§ 164 et seq.) and notes that the applicant was offered personalised therapy. Notwithstanding the applicant's decision to refuse all therapeutic provision for most of the period at issue, the Court is satisfied that he was offered the therapeutic environment appropriate for a person remanded as a mental health patient and was detained in an institution suitable for mental health patients.

45. Moreover, the domestic courts, with the help of expert advice, found that there was a high risk that the applicant would commit another serious offence if released and did not consider measures less severe than deprivation of liberty to be sufficient to safeguard the individual and public interest. The Court is therefore satisfied that the applicant's deprivation of liberty had also been shown to have been necessary in the circumstances, and could not be considered arbitrary.

(c) Conclusion

46. It follows that the applicant's subsequently ordered preventive detention, in so far as it was executed as a result of the impugned judgment

from 27 August 2013 onwards in Straubing preventive detention centre, was justified under sub-paragraph (e) of Article 5 § 1 as the lawful detention of a person of unsound mind. Accordingly, this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

C. Alleged violation of Article 7 § 1 of the Convention on account of the applicant's preventive detention from 27 August 2013 onwards

1. The parties' submissions

47. The Government submitted that the applicant's preventive detention complied with Article 7 of the Convention from 27 August 2013 onwards. The conditions of his detention in Straubing preventive detention centre were suitable for mental health patients and his detention was executed with a view to the need to treat his mental disorder. It thus did not constitute a "penalty" within the meaning of Article 7.

48. The applicant submitted that the execution of his subsequently ordered preventive detention had breached Article 7 § 1 of the Convention also from 27 August 2013 onwards, as had his preventive detention preceding that date. His preventive detention constituted a "penalty" within the meaning of Article 7 § 1 of the Convention. It had been imposed on him subsequently, under a provision that had not existed at the time of his offence. At that time, it had not been possible to order the subsequent preventive detention of juvenile offenders.

2. The Court's assessment

49. The principles established in respect of Article 7 § 1 of the Convention, in so far as they are relevant for the case, have recently been set out in *Ilnseher* (cited above, §§ 202-209; see also the summary of the case-law in respect of the different preventive detention regimes in Germany in §§ 210-214), which equally concerned subsequently imposed preventive detention executed, from summer 2013 onwards, in the newly-built Straubing preventive detention centre.

50. As in that case, the applicant's subsequent preventive detention was, and could only be, ordered because he was found to suffer from a mental disorder. In the period here at issue, it was executed in the newly-built Straubing preventive detention centre. Notwithstanding the applicant's decision to refuse all therapeutic provision for most of the period at issue, the Court is satisfied that he was offered personalised and comprehensive therapy addressing his mental condition.

51. Having regard to the foregoing and to its findings in *Ilnseher* (ibid., §§ 215-239), the Court concludes that the applicant's preventive detention

in the period at issue could no longer be classified as a "penalty" within the meaning of Article 7 § 1 of the Convention, but that it was imposed because of, and with a view to, the need to treat his mental disorder.

52. Accordingly, this complaint is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court, unanimously,

1. *Takes note* of the terms of the respondent Government's declaration of 6 July 2017 in relation to the violation of Article 5 § 1 and Article 7 § 1 of the Convention on account of the applicant's preventive detention from 15 November 2012 until 27 August 2013 and of the modalities for ensuring compliance with the undertakings referred to therein;

2. *Decides* to strike that part of the application out of its list of cases in accordance with Article 37 § 1 (c) of the Convention;

3. *Declares* inadmissible the remainder of the application.

Done in English, and notified in writing on 17 October 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško	André Potocki
Deputy Section Registrar	President