



An institutional therapeutic measure applied to a prisoner, extending his period of detention, breached his right to liberty

In today's Chamber judgment¹ in the case of [Kadusic v. Switzerland](#) (application no. 43977/13) 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,

no violation of Article 7 (no punishment without law), and

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

The case concerned an institutional therapeutic measure ordered in the case of a convicted prisoner suffering from a mental disorder, a few months before his expected release, as a result of which he remained in prison.

The Court found that the therapeutic measure – which constituted a deprivation of liberty – had been ordered a few months before the applicant's expected release, on the basis of psychiatric reports that had not been sufficiently recent, and observed that the applicant had still not been transferred to an institution appropriate to his mental disorder. It followed that his detention following the application of the therapeutic measure had been incompatible with the purpose of the original conviction.

However, the Court found that there had been no retroactive application of a heavier penalty than the one laid down by the law in force at the time the offences had been committed.

Lastly, the Court noted that the domestic authorities, who had regarded the re-assessment of Mr Kadusic's mental state as a newly discovered circumstance, had amended the original judgment "in accordance with the law and penal procedure of the State".

Principal facts

The applicant, Mihret Kadusic, is a Swiss national who was born in 1982. He is currently detained in Bostadel Prison (Menzingen, Switzerland).

In May 2005 the applicant was sentenced to eight years' imprisonment for offences committed between 2000 and 2004, and was transferred to Bostadel Prison. In addition, the court declared enforceable a 12-month custodial sentence that had been suspended when handed down in 2001. The appeals lodged by the applicant were dismissed by the Court of Appeal and the Federal Court respectively in January and May 2007.

Reports written by the prison governor and psychiatric assessments carried out in 2008 and 2010 stressed the prisoner's dangerousness and the high risk of his re-offending. In particular, he was diagnosed with paranoid and narcissistic personality disorders of medium severity, an inability to

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.

develop empathy and a refusal to reflect and change his attitude towards the offences he had committed.

Following one psychiatric report the sentence execution authority asked the Court of Appeal, in July 2010, to ascertain whether the conditions for post-sentence preventive detention or an institutional therapeutic measure were met. At the end of the proceedings, in a judgment of 22 August 2012, that court ordered an institutional therapeutic measure and suspended the portion of the sentence still to be served. An appeal by the applicant was dismissed by the Federal Court in May 2013 and he continued to be detained in Bostadel Prison.

Complaints, procedure and composition of the Court

Relying on Article 5 § 1 (right to liberty and security), the applicant alleged that his detention following the ordering of an institutional therapeutic measure in his case amounted to a breach of his right to liberty and security. Under Article 7 (no punishment without law) he complained that the measure in question, which had existed in the Swiss Criminal Code only since 1 January 2007, had been applied to him retroactively, since the offences for which he had been imprisoned had been committed before that date. Relying on Article 4 of Protocol No. 7 (right not to be tried or punished twice), the applicant also maintained that he had been punished twice, taking the view that he should have finished serving his sentence in the spring of 2013.

The application was lodged with the European Court of Human Rights on 1 July 2013.

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

Helena **Jäderblom** (Sweden), *President*,
Branko **Lubarda** (Serbia),
Luis **López Guerra** (Spain),
Helen **Keller** (Switzerland),
Pere **Pastor Vilanova** (Andorra),
Alena **Poláčková** (Slovakia),
Georgios A. **Serghides** (Cyprus),

and also Stephen **Phillips**, *Section Registrar*.

Decision of the Court

Article 5 § 1

It was not disputed that the judgment of 27 May 2005 sentencing Mr Kadusic to eight years' imprisonment had made no provision for a therapeutic measure. Therapeutic measures could be regarded as a correction of the original judgment following the discovery of new circumstances in the context of revision proceedings.

The Court observed that the measure complained of had been taken more than seven years after Mr Kadusic's original conviction and shortly before he was due to be released. Furthermore, it considered that the period that had elapsed between the psychiatric reports and the ordering of the measure had been excessive. The Court also noted that, although the psychiatric expert questioned during the proceedings had mentioned several prisons with therapy centres that should be taken into consideration, Mr Kadusic had continued to be detained in Bostadel Prison. Pointing to Article 62 (c) of the Criminal Code, which stipulated that the measure in question should be lifted if no appropriate institution could be found, the Court held that Mr Kadusic was not being treated in a setting appropriate to his mental disorder.

The Court concluded that the measure complained of, which had been ordered only when the original sentence was close to completion and which remained in force to date, had been based on expert assessments that were not sufficiently recent, and that Mr Kadusic, more than four and a half years after the expiry of his initial prison sentence, was being held in an institution that was manifestly unsuitable in view of the disorder from which he suffered. His detention following the judgment of 22 August 2012 was incompatible with the aims of his original conviction.

There had therefore been a violation of Article 5 § 1.

Article 7

The Court observed that in the period between 2000 and 2004, when Mr Kadusic had committed the offences leading to his conviction in 2005, the judge could have ordered “measures concerning offenders with mental disorders”, in particular on the basis of Article 43 § 1, sub-paragraph 2a, of the Criminal Code as in force at that time. The Federal Court had stated that, although institutional therapeutic measures were to be regarded as a penalty, the ordering of such a measure in Mr Kadusic’s case did not result in a heavier penalty than that laid down by the law applicable at the time the offences had been committed. The Government maintained that the institutional therapeutic measure ordered by the court had been no more severe than the measure that could have been ordered even at the time of the original judgment. The Court noted that Mr Kadusic had not advanced any convincing arguments capable of casting doubt on that assertion.

The Court concluded that there had been no retroactive imposition of a heavier penalty and hence no violation of Article 7.

Article 4 of Protocol No. 7

The domestic authorities had viewed the re-assessment of Mr Kadusic’s mental state as a newly disclosed circumstance and had amended the original judgment by applying the rules on revision by analogy. The Court noted that the applicant had not explained in what sense the reopening of the case had not taken place “in accordance with the law and penal procedure of the State concerned”.

There had therefore been no violation of Article 4 of Protocol No. 7.

Just satisfaction (Article 41)

The Court held that Switzerland was to pay the applicant 20,000 euros (EUR) in respect of non-pecuniary damage and EUR 12,000 in respect of costs and expenses.

The judgment is available only in 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.