European Court of Human Rights

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ECHR 2021/6 *Case of Epure v. Romania*, 1 May 2021, no. 73731/17 (Fourth Section)

The Facts

The applicant, born in 1978, suffers from epilepsy and has been diagnosed on several occasions with slight to moderate mental impairment. In 2012 the applicant, a repeat offender, was arrested and in 2014 he was convicted of rape and sentenced to eight years' imprisonment. He was detained in several detention facilities. His complaints only concern the period from 6 December 2016 to 16 June 2019. From 4 October 2016 until 7 August 2018 he was kept under a maximum security prison regime in various prisons.

The Law

Alleged Violation of Article 3 of the Convention

The applicant complained that the maximum security prison regime under which he had been placed was incompatible with his mental condition; that he had not received appropriate medical treatment for his mental disability; and that he had not been provided with a personal care assistant on a permanent basis, as required by the state of his health. He relied on Article 3 of the Convention (prohibition of torture or inhuman or degrading treatment).

1 Concerning the prison regime in which the applicant was placed Even though it cannot be said that detention in a high-security prison facility in itself raises an issue under Article 3 of the Convention, the State must nevertheless ensure that the manner and method of the execution of the measure

do not subject a detainee with mental disorders to distress or hardship of an intensity exceeding that unavoidable level of suffering inherent in detention and that, given the practical demands of imprisonment, the person's health and well-being are adequately secured. The Court notes that obligations under Article 3 may go so far as to impose an obligation on the State to transfer prisoners (including those who are mentally ill) to special facilities in order to receive adequate treatment.

The Court considers that not only have the domestic authorities failed to ensure the applicant's health and well-being through his placement in a special facility where he could have received adequate treatment and supervision on a more consistent basis, but on the contrary, in spite of his complex condition and history of self-aggression, they considered it appropriate to place him under a maximum security prison regime, precisely on the basis of his aggressive behaviour.

The Court finds that the placement of the applicant under such a restrictive prison regime for a significant period of time (more than one year and ten months) has not facilitated the applicant's rehabilitation or deterred him from committing further offences, these being, in the domestic courts' view, the essential aim of his sentence; most importantly, it has had severely negative psychological and emotional effects entailing a deterioration in his mental condition.

2 Concerning the Personal Care Assistant Assigned to the Applicant The Court notes that the applicant had several serious medical conditions which over time required more regular medical care and supervision. The Court further notes that, keeping in mind the applicant's general health and given the vulnerable and difficult situation in which he found himself because of his permanent disability, he should have been entitled, according to the national law, to the help of a personal care assistant, without having to make any special request.

However, during several periods, including while he was in transit between prisons or prison hospitals and in spite of several requests lodged by him in that regard, the applicant was left unaided. This in itself leads to a strong presumption of a violation of Article 3 of the Convention.

Furthermore, although the case file shows that at certain times the applicant had the assistance of various fellow inmates, the Court is particularly concerned about the quality of their assistance, as they had neither been trained nor have the necessary qualifications to provide such assistance to a person such as the applicant with a complex condition in the area of mental disability; indeed, the manner in which the applicant's personal assistants were assigned

appears to have been based on an assessment of their adequate physical shape and of whether they had or had not been subjected to disciplinary sanction, rather than on whether they had followed any type of medical training. In that connection, the Court notes that the applicant's seizures were frequent and could occur at any time of the day or night, and involved episodes of high irascibility, aggressive behaviour and complete loss of self-control. Therefore, the applicant must have known that at any moment he risked a medical emergency with very serious effects and that no qualified medical assistance was available. Hence, leaving him without specialised assistance in such situations must have given rise to considerable anxiety on his part.

3 Concerning the Medical Care Provided to the Applicant

The Court notes that even on the occasions when the applicant was under the care and direct supervision of trained staff, namely while he was in a prison hospital, he managed to severely harm himself by inserting nails in his head. Those incidents, seen against the medical background of the applicant, should have alerted the authorities to a sufficient degree to put in place a more adequate strategy capable of responding consistently and effectively to the applicant's serious mental illness.

The Court further notes the Government's arguments relating to the applicant's lack of therapeutic compliance. However, while it is mindful of the fact that the applicant was a vulnerable individual on account of his health condition and his detention, it considers that his cooperation is only one factor to be taken into account in assessing the effectiveness of the required treatment and that the duty to provide suitable care on the basis of individualised treatment lies primarily with the relevant authorities.

All the evidence in the case file, in particular the fact that the applicant was frequently in a situation of inflicting self-harm, even when under specialised supervision, and the only measures taken repeatedly at prison level were to sanction him for disciplinary misdemeanours, would appear to indicate a failure on the authorities' behalf to correctly identify his medical needs and consequently to provide him with comprehensive therapeutic treatment and supervision, as required by his complex mental condition.

For these reasons, the court, unanimously, holds that there has been a violation of Article 3 of the Convention concerning the failure of the authorities to implement and provide a coherent and appropriate therapeutic strategy capable of responding adequately to the applicant's medical needs during the period from 6 December 2016 to his release on 16 June 2019.

ECHR 2021/7 *Case of Terheş v. Romania*, 20 May 2021, no. 49933/20 (*Fourth Section*)

This decision is available only in French.

The Facts

The applicant, born in 1978, was elected as a member of the European Parliament in 2019 on the list of the Romanian Social Democratic Party. He was in Romania at the time of the events. On 11 March 2020 the World Health Organization declared that the world was facing a pandemic caused by the SARS-CoV-2 coronavirus, responsible for an illness known as COVID-19.

On 16 March 2020 the Romanian President enacted Decree no. 195/2020 introducing a thirty-day state of emergency in Romania with immediate effect. The decree provided for restrictions on the exercise of certain fundamental rights, including freedom of movement. On 21 March 2020 the Minister of the Interior issued an ordinance advising people against leaving home between 6 a.m. and 10 p.m. and prohibiting them from doing so between 10 p.m. and 6 a.m. On 24 March 2020 a further ordinance prohibited all movement outside the home with immediate effect, except in a certain number of exhaustively listed circumstances. Any person leaving home had to carry a document attesting to valid reasons for doing so. Breaches of the rules were punishable by a fine.

On 14 April 2020, after assessing the public-health situation in the country, the Romanian President enacted Decree no. 240/2020 extending the state of emergency for thirty days – until 14 May 2020 – and maintaining the measures taken under Decree no. 195/2020. The state of emergency ended on 14 May 2020 at midnight.

The applicant asserted that he had been personally affected by the measure put in place by the authorities from 24 March 2020 to 14 May 2020. On 7 May 2020 he brought an action in the Bucharest County Court on the basis of Article 5 para. 4 of the Convention (right to a speedy decision on the lawfulness of detention). Alleging that he was being subjected to “administrative detention”, he requested the County Court to order his immediate release and to find that he had the right to leave his home for whatever reason, without having to produce a document attesting to valid reasons and without risking a penalty. He asked the court to examine his case urgently and deliver an enforceable judgment. On 10 June 2020 he asked the County Court to find that his action had become devoid of purpose owing to the lifting of the lockdown.

On 8 and 25 May 2020 the applicant lodged applications for reconsideration of the decrees and the parliamentary decisions approving them, and of the second ordinance issued by the Minister of the Interior. His applications were rejected on the grounds that the legislation in question was not amenable to administrative review.

On 17 March 2020 the Permanent Representation of Romania to the Council of Europe informed the Secretary General of the Council of Europe of Romania's intention to apply the derogation provided for in Article 15 of the Convention. The Romanian authorities subsequently informed the Secretary General at regular intervals of the various measures adopted until the ending of the state of emergency on 14 May 2020 at midnight.

The Law

Alleged Violation of Article 5 para. 1 of the Convention

Relying on Article 5 para. 1 (right to liberty and security), the applicant contended that the lockdown imposed in Romania from 24 March to 14 May 2020, with which he had been required to comply, amounted to a deprivation of liberty.

The Court notes at the outset that the applicant has not relied on Article 2 of Protocol No. 4 (freedom of movement) of the Convention in the proceedings before it. The applicant seeks to demonstrate that the general lockdown imposed has constituted a deprivation of liberty and not simply a restriction of the right to freedom of movement. In order to ascertain whether the measure complained of by the applicant amounts to a deprivation of liberty, the Court examines his individual situation in the light of the criteria established by its case-law.

The Court notes that the measure complained of by the applicant has lasted for fifty-two days, from 24 March to 14 May 2020. It observes that no individual preventive measures have been taken against the applicant. The measure has been a general one, applied to everyone by means of legislation enacted by the various authorities in Romania. As a result of the implementation of the measure the applicant had been obliged to stay at home, only being allowed to leave for the reasons expressly provided for in the legislation, and with the relevant exemption form.

The Court notes that the applicant has been free to leave his home for various reasons and could go to different places, at whatever time of day the situation required. He has not been subject to individual surveillance by the authorities

and does not claim to have been forced to live in a cramped space, nor had he been deprived of all social contact. Accordingly, in view of its degree of intensity, the measure in question could not be equated with house arrest.

The Court also attaches importance to the fact that the applicant had not explained what specific impact the measure has had on his personal situation. He does not allege that he has been confined indoors for the entire duration of the state of emergency. More generally, the Court notes that he has not provided any specific information describing his actual experience of lockdown.

In the Court's view, the level of intensity of the restrictions on the applicant's freedom of movement has not been such that the general lockdown ordered by the authorities can be deemed to constitute a deprivation of liberty. The applicant cannot therefore be said to have been deprived of his liberty within the meaning of Article 5 para. 1 of the Convention.

Lastly, the Court notes that Romania has announced its intention to derogate under Article 15 of the Convention from the obligations flowing from Article 2 of Protocol No. 4 of the Convention guaranteeing freedom of movement, a right which the applicant has not asserted before the Court. As Article 5 para. 1 of the Convention is not applicable in the present case, the Court considers it unnecessary to examine the validity of the derogation notified by Romania to the Council of Europe.

For these reasons, the Court, unanimously, declares the application inadmissible.

ECHR 2021/8 *Case of Denis and Irvine v. Belgium*, 1 June 2021, no. 62819/17 and 63921/17 (*Grand Chamber*)

The Facts

The case concerns two applicants who have been placed in compulsory confinement on the basis of the Social Protection Act of 9 April 1930 after having committed acts classified as theft (the first applicant, a Belgian national, in 2007) and attempted theft (the second applicant, a British national, in 2002). They complain about the fact that they continue to be held in compulsory confinement, although in their view there has been no legal basis for this measure since the entry into force of the Compulsory Confinement Act (Law of 5 May 2014). This Act, which entered into force in October 2016, provides that compulsory confinement can only be imposed after crimes or serious offences

resulting in physical harm or psychological injury to another person, or the threat thereof. The applicants applied for release on the basis of the new legislation, but were unsuccessful. In its Chamber judgment of 8 October 2019, the Court held, unanimously, that there had been no violation of Article 5 para. 1 and of Article 5 para. 4 of the Convention.

The Law

Alleged Violation of Article 5 para. 1 of the Convention

The applicants alleged that, since the entry into force of the Compulsory Confinement Act 2014, their continued compulsory confinement had no longer had a legal basis as required by Article 5 para. 1 of the Convention (right to liberty and security).

In examining whether the applicants' detention could be justified under any of the sub-paragraphs (a) to (f) of Article 5 para. 1, the Court observes at the outset that the applicants have not been convicted. While it was admittedly found that they had physically committed the acts, punishable under criminal law, of which they were accused, the domestic courts had considered that the applicants were suffering from a mental condition which destroyed or seriously affected their discernment or their ability to control their actions within the meaning of the Social Protection Act. They had accordingly ordered the applicants' placement in compulsory confinement which, under domestic law, was a "preventive measure" and not a penalty. It followed that the applicants were not convicted of an offence and no penalty was imposed on them. Their detention could not, therefore, be justified under sub-paragraph (a) of Article 5 para. 1 as detention "after conviction". Moreover, this point has not been disputed by the parties.

It is not in dispute between the parties that the applicants' deprivation of liberty fell within the scope of sub-paragraph (e) of Article 5 para. 1 in so far as it relates to the detention of "persons of unsound mind". The Court agrees with this analysis, given that the applicants were found to lack criminal responsibility on account of the mental disorders from which they suffered, and that compulsory confinement is a security measure, the purpose of which is preventive rather than punitive.

Article 5 para. 1 (e) of the Convention does not specify the possible acts, punishable under criminal law, for which an individual may be detained as being "of unsound mind". Nor does that provision identify the commission of a previous offence as a precondition for detention. It merely requires that

it has reliably been established that the individual is of unsound mind, that the disorder is of a kind or degree warranting compulsory confinement and that the disorder persists throughout the entire period of the confinement (Winterwerp).

Thus, the Convention does not require the authorities, when assessing the persistence of the mental disorders, to take into account the nature of the acts committed by the individual concerned which gave rise to his or her compulsory confinement. It is not contested that the first two conditions were met in the present case. Turning to the third condition, namely the persistence of the disorder, without which the confinement cannot be continued, the Court notes that the applicants expressly state that they do not dispute that this condition is met and that they continue to suffer from the disorders in question.

The Court nonetheless reiterates that it is the individual's current state of mental health which must be taken into consideration. In this respect, the assessment carried out by the domestic courts is necessarily changeable, since it must take into account any changes to the mental condition of the detainee following the adoption of the compulsory confinement order.

The Court observes that the third condition in the Winterwerp judgment has been incorporated into domestic law by the introduction of an automatic periodic review, during which individuals in compulsory confinement are able, among other things, to argue that their mental-health condition has stabilised and that they no longer represent a danger to society, and to request various practical arrangements for the execution of the confinement order, including, as in the applicants' case, their final discharge.

Under the Compulsory Confinement Act, final discharge can only be granted on completion of a three-year probationary period, provided that the mental disorder in question has stabilised sufficiently for there no longer to be reasonable grounds to fear that, on account of his or her mental disorder, possibly combined with other risk factors, the individual concerned will again commit further punishable acts. Thus, only the current mental-health condition of the confined person and the current risk of reoffending, that is, at the time that the review is carried out, are taken into account in deciding whether the individual concerned can be released or whether the continued placement in compulsory confinement is justified.

It was in the light of those considerations that the Belgian courts examined the applicants' requests for final discharge. Thus, they did not take account of the nature of the punishable acts which the applicants had committed, and which had given rise to the compulsory confinement measure. In contrast, they assessed whether the applicants' mental disorders had stabilised to a

sufficient degree. In the light of the information available to them, they considered that they had not. In so doing, the courts examined whether the mental disorders persisted, as required by sub-paragraph (e) of Article 5 para. 1 of the Convention. In any event, the Court notes that during the most recent periodic review of the applicants' situation they considered that there still existed a high risk that they would commit further violent crimes

The Court concludes that the applicants' detention continues to have a valid legal basis and that their deprivation of liberty is lawful. It follows that there has been no violation of Article 5 para. 1 of the Convention.

Alleged Violation of Article 5 para. 4 of the Convention

The applicants also alleged a violation of Articles 5 para. 4 of the Convention. They complained that it was impossible under the law to secure their immediate and final discharge.

The Court notes that the applicants complain only about the fact that it is impossible under the law to secure their immediate and final discharge on account of the three-year probationary period imposed by the Compulsory Confinement Act. In this connection, it notes that this provision places two cumulative conditions for the final discharge of a person in compulsory confinement. This provision requires, firstly, the completion of a three-year probationary period and, secondly, that the mental disorder has stabilised sufficiently for there no longer to be reasonable grounds to fear that, regardless of his or her mental disorder, possibly combined with other risk factors, the individual in compulsory confinement will commit further offences which harm or threaten to harm the physical or mental integrity of another person.

The Court observes, however, that in the present case the domestic courts refused to grant the applicants' request for final discharge on the grounds that neither of the two conditions laid down by the Act had been met: their state of mental health had not improved sufficiently and they had not completed a three-year probationary period. The applicants did not dispute that their mental disorders persisted; nor did they claim that these disorders had stabilised sufficiently for them to represent no further danger to society. The condition of having completed a three-year probationary period was therefore not decisive, since it was only one of the grounds on which the domestic courts refused to grant their immediate and final discharge.

Furthermore, the Court welcomes the fact that in the meantime the Court of Cassation has interpreted the impugned provision in the light of Article 5 paras 1 and 4 of the Convention, holding that an individual in compulsory confinement who is no longer mentally ill and who is no longer dangerous must

be granted final discharge, even if the three-year probationary period has not yet been completed.

The Court concludes that there has been no violation of Article 5 para. 4 of the Convention

For these reasons, the Court, by fourteen votes to three, holds that there has been no violation of Article 5 para. 1 and 4 of the Convention.

Joint dissenting opinion of Judges Serghides and Felici; dissenting opinion of Judge Pavli.

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