BGE 20140218_55137_12 vom 18. Februar 2014

Bundesgericht (BGE), 2014-02-18, FR

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Regeste

Regeste Diese Zusammenfassung existiert nur auf Französisch. DÉCISION D'IRRECEVABILITÉ de la CourEDH: SUISSE: Art. 6 par. 1 CEDH. Accès à un tribunal pour contester une condamnation suite à la levée du secret médical d'un psychiatre. L'administration et l'appréciation des preuves n'ont pas été arbitraires et la procédure était équitable dans son ensemble. Le fait de délier un médecin du secret médical, tel que prévu par le droit cantonal lors de soupçon de délits particulièrement graves, était justifié car le risque menaçant la vie de l'ex-amie était très probable. Conclusion: requête déclarée irrecevable.

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Volltext

Bundesgericht (BGE) EGMR 18.02.2014 20140218_55137_12 (Cimendag Fikret gegen Schweiz) Tribunal fédéral (ATF) CEDH 18.02.2014 20140218_55137_12 (Cimendag Fikret gegen Schweiz) Tribunale federale (DTF) CEDU 18.02.2014 20140218_55137_12 (Cimendag Fikret gegen Schweiz)

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Urteilskopf 55137/12 Cimendag Fikret gegen Schweiz Nichtzulassungsentscheid no. 55137/12, 18 février 2014 Regeste Diese Zusammenfassung existiert nur auf Französisch. DÉCISION D'IRRECEVABILITÉ de la CourEDH: SUISSE: Art. 6 par. 1 CEDH . Accès à un tribunal pour contester une condamnation suite à la levée du secret médical d'un psychiatre. L'administration et l'appréciation des preuves n'ont pas été arbitraires et la procédure était équitable dans son ensemble. Le fait de délier un médecin du secret médical, tel que prévu par le droit cantonal lors de soupçon de délits particulièrement graves, était justifié car le risque menaçant la vie de l'ex-amie était très probable. Conclusion: requête déclarée irrecevable. Sachverhalt SECOND SECTION DECISION Application no. 55137/12 Fikret CIMENDAG against Switzerland The European Court of Human Rights (Second Section), sitting on 18 February 2014 as a Chamber composed of: Guido Raimondi, président, I■■l Karaka■, Peer Lorenzen, Nebojša Vu■ini■, Helen Keller, Paul Lemmens, Egidijus K■ris, juges, and Stanley Naismith, Section Registrar, Having regard to the above application lodged on 17 August 2012, Having deliberated, decides as follows: THE FACTS 1. The applicant, Mr Fikret Cimendag, is a Turkish national who was born in 1977 and is currently detained in Thorberg Prison in Krauchtal, Canton of Bern. A. The circumstances of the case 2. The applicant entered Switzerland in 1993. From 2003 onwards he had a relationship with A., another Turkish national living in Switzerland. The couple's relationship was marked by conflict, and the applicant repeatedly threatened and also committed major assaults against A. Numerous criminal proceedings were instituted but subsequently closed because A. withdrew her accusation or refused to institute criminal proceedings. 3. On 15 January 2010 the applicant was however found guilty by the appeal court of the Canton of Basel-Stadt (Appelationsgericht des Kantons Basel-Stadt, "the appeal court") of endangering A.'s life by pushing her into the Rhine and of raping her. He was sentenced to twenty-seven months' imprisonment, of which fourteen months suspended for four years. It was planned that the applicant would serve the prison sentence from April 2011 onwards. 4. On 13 September 2010 the Migration Office of Basel-Stadt ordered the expulsion of the applicant from Swiss territory. It is unknown whether that decision became final. 5. On 17 February 2011 the criminal court of the Canton of Basel-Stadt (Strafgericht des Kantons Basel-Stadt, "the criminal court") sentenced the applicant for threatening behaviour towards A. to twelve months imprisonment. Since the applicant was sentenced during the probation period under the former conviction of 15 January 2010, the criminal court decided that the previously suspended fourteen months' imprisonment was to be enforced as well. 6. The applicant was sentenced on the basis of the following event. On

12 November 2010, during an appointment with his psychiatrist, who had been treating him since 2002, the applicant had declared that he was planning to take revenge on his ex-girlfriend, A., whom he considered to be the cause of all his problems. He had stated that he would find her, rape her and kill her, and that he did not care if he were sentenced again. As later stated by the psychiatrist, this was not the first time that the applicant had expressed feelings of revenge against A. This time, however the psychiatrist had had the impression that the applicant was very determined to accomplish those acts, especially because at the end of the session the applicant had thanked him "for everything" and refused to make another appointment. Fearing for A.'s life, the psychiatrist had therefore sought authorisation from the Health Department of the Canton of Basel-Stadt to be released from his duty of professional confidentiality, and subsequently informed the police. The same day the police informed A. about the applicant's threats. Anxious about what could happen to her, she made a criminal complaint against the applicant for threatening behaviour.
7. During the proceedings before the criminal court, the applicant denied that he had threatened to kill A. He stated that his psychiatrist had misunderstood him and that he had effectively said that he was going to kill himself. Partly contradicting himself, the applicant also claimed that he "had not meant seriously" what he had said. In defence of the applicant, his representative further submitted that the applicant had made those statements to his psychiatrist, who was acting under professional confidentiality. He could not have anticipated that his psychiatrist was going to inform the police, and he had therefore not acted with the intention to threaten his ex-girlfriend. 8. In its judgment of 17 February 2011 the criminal court however found that the applicant had fulfilled all the elements of threatening behaviour as established in Article 180 § 1 of the Swiss Criminal Code ("the SCC", see paragraph 12 below). On the one hand, it was not necessary for the applicant to have made the threat directly to A; it was sufficient that she had become aware of it. On the other hand, the criminal court held that the applicant could have anticipated, in the light of the seriousness of his threats and his general behaviour during the session with the psychiatrist, that his psychiatrist would take action to prevent him from carrying them out; even more so as his psychiatrist knew his former criminal record and had been treating him for many years. The criminal court found that it must have been clear to the applicant that his psychiatrist, especially as a doctor, would give more weigh to the health of a third person than to his duty of professional confidentiality. Furthermore, at a later time, when the applicant's sister informed him that the police were looking for him, he had immediately known the reason for it. He had hence anticipated his psychiatrist's acts and acted with the intention of threatening his ex-girlfriend. He therefore fulfilled all the elements of threatening behaviour according to Article 180 § 1 of the SCC. 9. The applicant appealed against this decision. He claimed in particular that he had not acted with the intention of threatening A. He could not have anticipated that his psychiatrist would be released from his duty of professional confidentiality and would subsequently inform the police, who would in their turn inform A. He had therefore not fulfilled the subjective elements of threatening behaviour as established in Article 180 § 1 of the SCC. 10. On 28 November 2011 the appeal court endorsed the decision of the criminal court. It established that during questioning the applicant had never stated that he was relying on the psychiatrist's duty of professional confidentiality. He had only disputed that he had ever said that he was planning to rape and kill A. The appeal court further held that from the applicant's decisive behaviour on that day in not making another appointment and saying goodbye to his psychiatrist in a dramatic manner, it could even be concluded that he wanted his psychiatrist

to do something. Even if the applicant had wished to provoke his psychiatrist into taking action other than seeking an intervention by the police, the psychiatrist would have been obliged to be released from the duty of professional confidentiality in any event, and A. would have come to know about the threats anyway. The appeal court therefore concluded that the applicant had intended to threaten A. and that he was guilty under Article 180 § 1 of the SCC. 11. On an appeal by the applicant, the Federal Supreme Court upheld the appeal court's decision on 5 March 2012. It reasoned that in the given circumstances the applicant could have predicted that the psychiatrist would give more weight to A.'s life higher than to his duty of professional confidentiality. In behaving as he did that day the applicant had at least regarded this as possible and accepted that the threats would come to be known by A. The applicant had therefore been correctly sentenced. B. Relevant domestic law
12. Articles 12, 180 § 1 and 321 of the SCC, as in force at the relevant time, read as follows: Article 12 Intention and negligence " 1. Unless the law expressly provides otherwise, a person is only liable to prosecution for a felony or misdemeanour if he commits it wilfully. 2. A person commits a felony or misdemeanour wilfully if he carries out the act in the knowledge of what he is doing and in accordance with his will. A person is acting wilfully as soon as he regards the realisation of the act as being possible and accepts this. 3. A person commits a felony or misdemeanour through negligence if he fails to consider or disregards the consequences of his conduct due to a culpable lack of care. A lack of care is culpable if the person fails to exercise the care that is incumbent on him in the circumstances and is commensurate with his personal capabilities. " Article 180 Threatening behaviour " 1. Any person who places another in a state of fear and alarm by making a serious threat is liable on complaint to a custodial sentence not exceeding three years or to a monetary penalty ..." Article 321 Breach of professional confidentiality " 1. Any person who in his capacity as a member of the clergy, lawyer, defence lawyer, notary, patent attorney, auditor subject to a duty of confidentiality under the Code of Obligations, doctor, dentist, pharmacist, midwife, psychologist or as an auxiliary to any of the foregoing persons discloses confidential information that has been confided to him in his professional capacity or which has come to his knowledge in the practice of his profession is liable on complaint to a custodial sentence not exceeding three years, or to a monetary penalty ... 2. No offence is committed if the person disclosing the information does so with the consent of the person to whom the information pertains or on the basis of written authorisation issued in response to his application by a superior authority or supervisory authority ..."
13. Paragraphs 26 and 27 of the Health Act of the Canton of Basel-Stadt (hereinafter "the Health Act") as in force at the relevant time read as follows: § 26 Basic Principles " ... 2. In well-grounded cases the competent body can release a person from the duties of confidentiality provided in Article 321 (1) and (2) of the Swiss Criminal Code. " § 27 Exceptions " ... 3. Information can be provided to the authorities of investigation and prosecution, also upon their own request, if if there is a suspicion that one of the following crimes might be committed (" Verdacht auf Erfüllung einer der folgenenden Straftatbestände "): a) homicide; b) grave bodily assault ... j) criminal acts against the sexual integrity of a person ..." COMPLAINTS
14. The applicant complained under Article 6 of the Convention that he had been denied the right to a fair hearing. He alleged that he had never intended to threaten his girlfriend, and that he could therefore not be condemned for threatening behaviour according to Article 180 § 1 of the SCC. He claimed that the domestic authorities had completely ignored the fact that he had only revealed his thoughts to his psychiatrist and that he had never behaved in a threatening way towards his now

ex-girlfriend. He could never have anticipated that his psychiatrist would request release from his duty of professional confidentiality and would inform the police. 15. The applicant claimed under Article 7 of the Convention that his conviction was not sufficiently based on domestic law, because he should have been protected by his psychiatrist's duty of professional confidentiality as established in Article 321 of the SCC and the codes of conduct for doctors. Erwägungen THE LAW A. On the complaint raised under Article 6 of the Convention 16. The applicant claimed under Article 6 of the Convention that he was denied the right to a fair hearing because he had never intended to threaten A. He had only revealed his thoughts to his psychiatrist, who was bound by his duty of professional confidentiality, and could never have anticipated that the psychiatrist would inform the police. The evidence obtained from the psychiatrist had therefore wrongfully been taken into account by the domestic authorities. 17. In its case-law the Court has repeatedly held that it is not its function to deal with errors of fact or of law allegedly committed by a national court unless and in so far as they may have infringed rights and freedoms protected by the Convention. While Article 6 guarantees the right to a fair hearing, it does not lay down any rules on the admissibility of evidence as such, which is primarily a matter for regulation under national law (see Schenk v. Switzerland , 12 July 1988, §§ 45-46, Series A no. 140; Teixeira de Castro v. Portugal , 9 June 1998, § 34, Reports of Judgments and Decisions 1998-IV; and Heglas v. the Czech Republic , no. 5935/02 , § 84, 1 March 2007). 18. It is, therefore, not the role of the Court to determine, as a matter of principle, whether particular types of evidence - for example, evidence obtained unlawfully in terms of domestic law - may be admissible. The question which must be answered is whether the proceedings as a whole, including the way in which the evidence was obtained, were fair. This involves an examination of the unlawfulness in question and, where the violation of another Convention right is concerned, the nature of the violation found (see, inter alia , Khan v. the United Kingdom , no. 35394/97 , § 34, ECHR 2000-V; P.G. and J.H. v. the United Kingdom , no. 44787/98 , § 76, ECHR 2001-IX; and Allan v. the United Kingdom , no. 48539/99 , § 42, ECHR 2002-IX). 19. In determining whether the proceedings as a whole were fair, regard must also be had to whether the rights of the defence have been respected. In particular, it must be examined whether the applicant was given an opportunity to challenge the authenticity of the evidence and to oppose its use. In addition, the quality of the evidence must be taken into consideration, as must the circumstances in which it was obtained and whether these circumstances cast doubt on its reliability or accuracy. While the question of fairness does not necessarily arise where the evidence obtained is unsupported by other material, it may be noted that where the evidence is very strong and there is no risk of its being unreliable the need for supporting evidence is correspondingly weaker (see Gäfgen v. Germany [GC], no. 22978/05 , § 164, ECHR 2010, and the case-law referred to therein). In this connection, the Court further attaches weight to whether the evidence in question was or was not decisive for the outcome of the proceedings (compare in particular Khan , cited above, §§ 35 and 37). 20. With respect to the way the evidence was obtained from the applicant's psychiatrist in the present case, the Court notes that the applicant had not given his consent for the psychiatrist to be released from the duty of professional confidentiality. Before informing the police, the psychiatrist had however been released from his duty by the competent domestic body in accordance with Art. 321 § 2 of the SCC. Furthermore, according to § 26 (2) of the Health Act (see paragraph 13 above), the domestic authorities were authorised to release the psychiatrist from his duty of professional confidentiality in well-grounded cases. Since the assumption

that A.'s life was at risk was very plausible, the Court is of the view that the authorisation was justified and it hence accepts the conclusion of the domestic courts that the way in which the evidence was obtained from the psychiatrist was lawful under domestic law. 21. The Court further notes that the applicant, who was represented by a lawyer, was given the opportunity to challenge the evidence at all levels of jurisdiction. The domestic courts however considered that the evidence was reliable and accurate, since the psychiatrist's statements were credible and coherent during the entire proceedings, while the applicant's behaviour was at times inconsistent and contradictory. Furthermore, no reason could be identified as to why the psychiatrist, who had no personal interest in the applicant's being convicted, should have incriminated him on false grounds. The Court therefore finds that there was no arbitrariness in the way in which the domestic courts admitted and assessed the evidence and that the domestic proceedings, viewed on a whole, were fair. 22. The Court therefore concludes that the applicant's complaint under Article 6 of the Convention is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention. B. On the complaint raised under Article 7 of the Convention 23. The object and purpose of the guarantee in Article 7 is to provide effective safeguards against arbitrary prosecution, conviction and punishment (see Streletz, Kessler and Krenz v. Germany [GC], nos. 34044/96, 35532/97 and 44801/98 , § 50, ECHR 2001-II). This implies qualitative requirements of the law, including those of accessibility and foreseeability. As regards foreseeability, the Court has held that an individual must be able to know from the wording of the relevant provision and, if need be, with the courts' interpretation of it, what acts and omissions will make him criminally liable and what penalty will be imposed (see Kafkaris v. Cyprus [GC], no. 21906/04 , § 140, ECHR 2008). The applicant's technical knowledge and background is relevant to foreseeability (see, mutatis mutandis, Chauvy and Others v. France, no. 64915/01 , ECHR 2004-VI). 24. The Court notes that the present case hinges on the question whether it was, on the basis of the domestic provisions, sufficiently foreseeable by the applicant that his psychiatrist would be released from his duty of professional confidentiality and would transmit the information to the police. 25. As considered above (see paragraph 20), the psychiatrist had duly obtained authorisation from the Health Department of the Canton of Basel-Stadt to be released from his duty of professional confidentiality. Moreover, having in mind § 27 (3) of the Health Act (see paragraph 13 above) and the fact that the applicant had declared that he would commit the crimes of rape and homicide, it might even be argued that the psychiatrist would have been allowed to inform the police without previous authorisation from the Health Department. In those circumstances, and recalling that A.'s life was at stake, the Court holds that the domestic provisions were sufficiently clear for the applicant to have been able to foresee that his psychiatrist would not be bound by his duty of professional confidentiality. 26. The Court further agrees with the domestic authorities that, in the light of the seriousness of his threats and his previous conviction, the applicant must have known that his psychiatrist would take steps to prevent him from accomplishing those acts. It even appears to the Court that with his decisive behaviour on that day, namely saying goodbye to his psychiatrist in a dramatic manner and demonstrating very clearly that he was determined to accomplish the threats even if this meant he would receive a further sentence, the applicant wanted to provoke a reaction from his psychiatrist. Moreover, after his refusal to make another appointment, it must also have been clear to him that his psychiatrist had no alternative but to inform the police. This was also supported by the fact that when his sister informed him that the police were looking for him, the applicant immediately knew the reason why. In

view of these factors, the Court holds that the applicant's behaviour allowed the conclusion that he had at least considered it possible and accepted that his psychiatrist would inform the police and that A. would thus learn about his threats and be put in a state of fear. The Court sees no reason to disagree with the domestic authorities' findings that the applicant had therefore acted with the intention of threatening A., according to Article 12 § 2 in combination with Article 180 § 1 of the SCC (see paragraph 12 above). The Court hence concludes that, based on the domestic provisions, the consequences of his acts had been sufficiently foreseeable for the applicant to satisfy the requirements of Article 7 of the Convention. 27. The Court holds that the applicant's complaint under Article 7 of the Convention is also manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention. Entscheid For these reasons, the Court Declares, unanimously, the complaint under Article 6 of the Convention inadmissible; Declares, by a majority, the complaint under Article 7 of the Convention inadmissible. Stanley Naismith Registrar Guido Raimondi President