

## **BGE 20140520\_8346\_07 vom 20. Mai 2014**

Bundesgericht (BGE), 2014-05-20, FR

Quelle: [https://mcp.opencaselaw.ch/entscheid/bge\\_20140520\\_8346\\_07](https://mcp.opencaselaw.ch/entscheid/bge_20140520_8346_07)

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### **Regeste**

Regeste Diese Zusammenfassung existiert nur auf Französisch. DÉCISION D'IRRECEVABILITÉ de la CourEDH: SUISSE: Art. 5 par. 3 CEDH. Indépendance du préfet pour prononcer la mise en détention provisoire. Le requérant estimait, sur la base d'un e-mail échangé, que le préfet n'était pas indépendant du Ministère public lors de la mise en détention provisoire. Or l'e-mail litigieux concernait prioritairement le mandat d'arrêt international et ne comportait aucune instruction de la part du Ministère public. Au surplus, il est intervenu plusieurs jours après l'ordonnance de mise en détention, de sorte que le préfet était un magistrat autorisé par la loi à exercer des fonctions judiciaires au sens de l'art. 5 par. 3 CEDH. Conclusion: requête déclarée irrecevable. Inhaltsangabe des BJ (2. Quartalsbericht 2014) Recht auf Freiheit und Sicherheit (Art. 5 Abs. 3 EMRK); Unabhängigkeit des Untersuchungsrichters. Gestützt auf Art. 5 Abs. 3 EMRK machte der Beschwerdeführer geltend, dass der Untersuchungsrichter nicht unabhängig vom Staatsanwalt war und seine Untersuchungshaft deshalb nicht durch "einen Richter oder eine andere gesetzlich zur Wahrnehmung richterlicher Aufgaben ermächtigte Person" im Sinne dieser Bestimmung angeordnet worden war. Er verwies insbesondere auf einen E-Mail-Austausch zwischen dem Staatsanwalt und dem Untersuchungsrichter. Der Gerichtshof nahm zur Kenntnis, dass der Untersuchungsrichter den Beschwerdeführer persönlich angehört hatte, dass er die Umstände für oder gegen die Untersuchungshaft geprüft hatte, dass der Beschwerdeführer dessen Unabhängigkeit weder im Zeitpunkt der Entscheidung über die Untersuchungshaft noch in seiner Beschwerde an die Beschwerdeinstanz geltend machte, sondern die fehlende Unabhängigkeit des Untersuchungsrichters erst nach Kenntnisnahme des E-Mail-Austausches rügte. Nach Auffassung des Gerichtshofs sicherten die gesetzlichen Bestimmungen die Unabhängigkeit des Untersuchungsrichters anlässlich der Anordnung der Untersuchungshaft in genügender Weise. Ferner enthielt das E-Mail des Staatsanwaltes keine Anweisung an den Untersuchungsrichter betreffend die Untersuchungshaft des Beschwerdeführers; dazu hatte der E-Mail-Austausch einige Tage nach der Entscheidung über die Untersuchungshaft stattgefunden. Unzulässig infolge offensichtlicher Unbegründetheit (einstimmig).

Regeste DÉCISION D'IRRECEVABILITÉ de la CourEDH: SUISSE: Art. 5 par. 3 CEDH. Indépendance du préfet pour prononcer la mise en détention provisoire. Le requérant estimait, sur la base d'un e-mail échangé, que le préfet n'était pas indépendant du Ministère public lors de la mise en détention provisoire. Or l'e-mail litigieux concernait prioritairement le mandat d'arrêt international et ne comportait aucune instruction de la part du Ministère public. Au surplus, il est intervenu plusieurs jours après l'ordonnance de mise en détention, de sorte que le préfet était un magistrat autorisé par la loi à exercer des fonctions judiciaires au sens de l'art. 5 par. 3 CEDH. Conclusion: requête déclarée irrecevable. Synthèse de l'OFJ (2ème rapport trimestriel 2014) Droit à la liberté et à la sûreté (art. 5 § 3 CEDH); indépendance du juge d'instruction. Invoquant l'art. 5 § 3 CEDH,

le requérant a allégué que le juge d'instruction n'était pas indépendant du procureur et, par conséquent, que la détention préventive n'avait pas été ordonnée par "un juge ou un autre magistrat habilité par la loi à exercer des fonctions judiciaires" au sens de cette disposition. Il s'est référé, en particulier, à un échange de courriers électroniques entre le procureur et le juge d'instruction. La Cour a pris note que le juge d'instruction a entendu personnellement le requérant et qu'il a examiné les circonstances qui militent pour ou contre la détention préventive; que le requérant n'a invoqué l'indépendance du juge d'instruction ni au moment où la décision de détention préventive a été rendue, ni dans son recours à la Cour d'appel et qu'il a allégué le manque d'indépendance du juge d'instruction seulement après la prise de connaissance du courrier électronique. La Cour a constaté que les dispositions légales ont suffisamment garanti l'indépendance du juge d'instruction lors de l'ordonnance de la détention préventive. Elle a constaté que le courrier électronique du procureur ne contenait aucune instruction au juge d'instruction concernant la détention préventive du requérant et que l'échange des courriers électroniques a pris place quelques jours après la décision de la détention préventive. Irrecevable pour défaut manifeste de fondement (unanimité).

Regesto Questo riassunto esiste solo in francese. DÉCISION D'IRRECEVABILITÉ de la CourEDH: SUISSE: Art. 5 par. 3 CEDH. Indépendance du préfet pour prononcer la mise en détention provisoire. Le requérant estimait, sur la base d'un e-mail échangé, que le préfet n'était pas indépendant du Ministère public lors de la mise en détention provisoire. Or l'e-mail litigieux concernait prioritairement le mandat d'arrêt international et ne comportait aucune instruction de la part du Ministère public. Au surplus, il est intervenu plusieurs jours après l'ordonnance de mise en détention, de sorte que le préfet était un magistrat autorisé par la loi à exercer des fonctions judiciaires au sens de l'art. 5 par. 3 CEDH. Conclusion: requête déclarée irrecevable. Sintesi dell'UFG (2° rapporto trimestriale 2014) Diritto alla libertà e alla sicurezza (art. 5 par. 3 CEDU); indipendenza del giudice istruttore. Invocando l'articolo 5 paragrafo 3 CEDU il ricorrente ha fatto valere che il giudice istruttore non era indipendente dal procuratore pubblico e che pertanto la sua carcerazione preventiva non era stata ordinata da "un giudice o da un altro magistrato autorizzato dalla legge ad esercitare funzioni giudiziarie" ai sensi di questa disposizione. Ha fatto riferimento in particolare a uno scambio di e-mail tra il procuratore e il giudice istruttore. La Corte ha preso atto che il giudice istruttore aveva sentito personalmente il ricorrente e aveva esaminato le circostanze che deponevano contro o a favore della carcerazione preventiva, che il ricorrente non aveva fatto valere l'indipendenza del giudice istruttore né quando era stata emanata la decisione di carcerazione preventiva né nel ricorso al Tribunale d'appello, bensì aveva invocato la mancanza d'indipendenza del giudice istruttore soltanto dopo essere venuto a conoscenza dello scambio di e-mail. A parere della Corte, le disposizioni legali hanno garantito a sufficienza l'indipendenza del giudice istruttore al momento della disposizione della carcerazione preventiva. La Corte ha inoltre constatato che il messaggio elettronico del procuratore non conteneva alcuna istruzione al giudice istruttore in merito alla carcerazione preventiva del ricorrente e che lo scambio di e-mail era avvenuto alcuni giorni dopo la decisione di carcerazione preventiva. Ricorso irricevibile per manifesta mancanza di fondamento (unanimità).

## **Erwägungen**

### **E. 1**

The accused normally remains at liberty.

## **E. 2**

The Government's submissions 22. With regard to the domestic legal provisions, the Government reiterated that, pursuant to Articles 153 and 154 of the CCP, the public prosecutor had been tasked with supervising the Prefect's management of the case. In order to carry out that supervision he had been empowered to give instructions in specific cases and participate in investigative activities. However, it had been clearly stated in Article 154bis of the CCP that the Prefect took decisions regarding pre-trial detention freely and independently from the prosecutor. In addition, Article 129 of the CCP prevented any overlap between investigative tasks and the indictment of the accused by providing that the Prefect could not make an application regarding the accused's guilt and the penalty to be imposed if he had previously ordered the accused's pre-trial detention. Those provisions therefore ensured that the Prefect could not simply follow instructions received from the prosecuting authority when ordering pre-trial detention or act in such a manner in the course of the proceedings. The Government therefore concluded that the Prefect had been acting impartially and independently when ordering the applicant's pre-trial detention and could therefore be considered as an "other officer authorised by law to exercise judicial power", within the meaning of Article 5 § 3 of the Convention. In the view of the Government, the system established in the CCP had thus been in full conformity with the Court's case-law.

23. With respect to the applicant's argument that the e-mail exchange of 20 September 2006 (see paragraph 10 above) had demonstrated the Prefect's lack of independence from the prosecutor, the Government reiterated, making reference to the judgments of the Court of Appeal and the FSC, that only the detention order of 12 September 2006 was pertinent in this regard under Article 5 § 3 of the Convention. The Prefect had, however, taken that decision completely independently, after having questioned the applicant in person and examined whether his detention was warranted. Furthermore, the applicant had never denied that this had taken place. The Government could not therefore see how the prosecutor's e-mail of 20 September 2006 could have had any influence on the Prefect's detention order, which had been issued a week earlier. The Government concluded that the application was manifestly ill-founded and had to be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

## **E. 3**

The Court's assessment 24. The Court reiterates that the judicial review of interference by the executive with the individual's right to liberty is an essential feature of the guarantee embodied in Article 5 § 3. Before an "officer" can be said to exercise "judicial power" within the meaning of this provision, he or she must satisfy certain conditions providing a guarantee to the person detained against any arbitrary or unjustified deprivation of liberty. Thus, the "officer" must be independent of the executive and the parties. In this respect, objective appearances at the time of the decision on detention are material: if it appears at that time that the "officer" may later intervene in subsequent criminal proceedings on behalf of the prosecuting authority, his independence and impartiality may be open to doubt. The "officer" must hear the individual brought before him in person and review, by reference to legal criteria, whether or not the individual's detention is justified. If it is not so justified, the "officer" must have the power to make a binding order for the detainee's release (see *Huber v. Switzerland*, 23 October 1990, § 43, Series A no. 188, and *Assenov and others v. Bulgaria*, 28 October 1998, § 146, Reports of Judgments and Decisions 1998-VIII).

25. The Court firstly notes that the applicant did not deny that the Prefect had

questioned him in person before placing him in pre-trial detention and that he had examined the circumstances militating for and against his pre-trial detention. Furthermore, the applicant never claimed that the legal provisions in force allowed the Prefect to intervene in the subsequent criminal proceedings as a representative of the prosecuting authority and that his impartiality would hence have been capable of appearing open to doubt. The Court therefore considers that the only issue that arises concerns the Prefect's independence, in particular whether he met the conditions of an "officer authorised by law to exercise judicial power" within the meaning of Article 5 § 3 of the Convention. 26. The Court further notes that the applicant did not raise the question of the Prefect's independence at the time of the issuing of the detention order. Nor did he do so in his appeal to the Court of Appeal of 15 September 2006. Only after he had obtained knowledge of the e-mail exchange of 20 September 2006 (see paragraph 10 above) did he claim that the Prefect had been acting under the instructions of the public prosecutor and that the domestic provisions in force did not create sufficient legal safeguards to ensure the Prefect's independence. 27. With regard to the legal provisions in force at the time of the domestic decisions, the Court finds that they did, in fact, sufficiently guarantee the Prefect's independence when ordering pre-trial detention. Article 154bis of the CCP clearly stated that the Prefect took decisions regarding pre-trial detention freely and independently. The Prefect also had the power to take legally binding decisions as to the detention or release of the accused (see, a contrario, Assenov and others, cited above, § 148). Meanwhile, the prosecutor's responsibilities were limited, according to Articles 153 and 154 of the CCP, to the supervision of the Prefect's investigative and case management activities. 28. The question therefore remains whether the e-mail exchange between the public prosecutor and the Prefect on 20 September 2006 shows that the Prefect had, contrary to the legal provisions of the CCP, acted under the prosecutor's instruction when ordering the applicant's pre-trial detention on 12 September 2006. In this regard the Court notes that the prosecutor's e-mail mainly concerned the amendment of the international arrest warrant and was only secondarily related to the Prefect's investigative activities in the applicant's case. The Court further finds that the prosecutor's e-mail did not contain any instruction to the Prefect regarding the applicant's pre-trial detention or any indication that the prosecutor had previously instructed the Prefect with regard to the issue of the detention order. In this regard the Court also takes into account that, as established by the domestic authorities, the e-mail exchange occurred some days after the issuing of the Prefect's detention order and could therefore hardly have influenced it. The Court hence holds that the e-mail exchange could not have given rise to doubts as to the Prefect's independence when ordering the applicant's pre-trial detention. The Court therefore concludes that the Prefect acted as an "officer authorised by law to exercise judicial power" within the meaning of Article 5 § 3 when ordering the applicant's pre-trial detention. 29. It follows that the applicant's complaint under Article 5 § 3 of the Convention is 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 unanimously Declares the application inadmissible. Stanley Naismith Registrar Guido Raimondi President