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Regeste

Urteilskopf 6232/09 Mäder Davic gegen Schweiz Urteil no. 6232/09, 08 décembre 2015

Regeste Diese Zusammenfassung existiert nur auf Französisch. SUISSE: Art. 5 par. 4 CEDH. Internement du requérant à des fins d'assistance décidé par l'autorité tutélaire et durée d'examen des demandes d'élargissement. L'obligation d'obtenir une décision administrative de l'autorité tutélaire avant de pouvoir introduire un recours devant un tribunal a eu pour effet de priver le requérant de son droit à ce qu'il soit statué à bref délai sur sa privation de liberté (ch. 56 - 67). Conclusion: violation de l'art. 5 par. 4 CEDH. Inhaltsangabe des BJ (4. Quartalsbericht 2015) Recht auf Überprüfung der Rechtmässigkeit des Freiheitsentzuges innert kurzer Frist (Art. 5 Abs. 4 EMRK); Recht auf ein faires Verfahren (Art. 6 Abs. 1 EMRK); Fürsorgerische Freiheitsentziehung. Die Angelegenheit betraf eine Klinikeinweisung des Beschwerdeführers durch die Vormundschaftsbehörde im Rahmen einer (altrechtlichen) fürsorgerischen Freiheitsentziehung und die Dauer der Überprüfung seiner Entlassungsbegehren. Der Beschwerdeführer behauptete insbesondere eine Verletzung von Artikel 5 Absatz 4 EMRK, weil er vor der Anrufung eines Gerichts zunächst eine Entscheidung der Vormundschaftsbehörde habe erwirken müssen. Weiter rügte er in Bezug auf seinen Haftentlassungsantrag die Verletzung seines Rechts auf eine begründete Entscheidung (Art. 6 Abs. 1 EMRK). Vorliegend dauerte es nach dem ersten Antrag auf Entlassung beinahe fünf Monate, bis eine Entscheidung erging, die es dem Beschwerdeführer ermöglichte, ein Gericht anzurufen. Was die Einreichung eines Rechtsmittels betrifft, erlaubt dieses lediglich die Prüfung eines Anspruchs auf Schadenersatz und Genugtuung, nicht aber die Anordnung der Entlassung. Vorliegend verletzt daher die Pflicht des Beschwerdeführers, vor der Anrufung eines Gerichts die Entscheidung der Verwaltung zu erwirken, dessen Recht auf Entscheidung über seine Freiheitsentziehung innerhalb kurzer Frist. Verletzung von Artikel 5 Absatz 4 EMRK (einstimmig). Die behauptete Verletzung von Artikel 6 Absatz 1 EMRK wies der Gerichtshof als offensichtlich unbegründet ab (einstimmig). Sachverhalt TROISIÈME SECTION AFFAIRE MÄDER c. SUISSE (Requêtes nos 6232/09 et 21261/10) ARRÊT STRASBOURG 8 décembre 2015 Cet arrêt deviendra définitif dans les conditions définies à l'article 44 § 2 de la Convention. Il peut subir des retouches de forme. En l'affaire Mäder c. Suisse, La Cour européenne des droits de l'homme (troisième section), siégeant en une chambre composée de : Luis López Guerra, président, George Nicolaou, Helen Keller, Helena Jäderblom, Johannes Silvis, Dmitry Dedov, Branko Lubarda, juges, et de Marialena Tsirli, greffière adjointe de section , Après en avoir délibéré en chambre du conseil le 10 novembre 2015, Rend l'arrêt que voici, adopté à cette date : PROCÉDURE 1. À l'origine de l'affaire se trouvent deux requêtes (nos 6232/09 et 21261/10) dirigées contre la Confédération suisse et dont un ressortissant, M. David Mäder (« le requérant »), a saisi la Cour les 23 janvier 2009 et 18 février 2010 respectivement en vertu de l'article 34 de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales (« la

Convention »). 2. Le requérant a été représenté par Me Marti, avocat à Wila. Le gouvernement suisse (« le Gouvernement ») a été représenté par son agent suppléant, A. Scheidegger, de l'Office fédéral de justice. 3. Invoquant l'article 5 § 4 de la Convention, le requérant allègue en particulier que les juridictions nationales n'ont pas statué sur sa demande à bref délai et qu'il a été mis dans l'impossibilité d'obtenir une décision sur la légalité de sa privation de liberté. Il avance en outre qu'en ne répondant pas de façon motivée à son grief tiré de l'article 5 § 4 de la Convention, les juridictions nationales auraient violé l'article 6 § 1. 4. Le 27 août 2009 et le 10 septembre 2010, les requêtes ont été communiquées au Gouvernement. EN FAIT I. LES CIRCONSTANCES DE L'ESPÈCE 5. Le requérant est né en 1982 et réside à Kreuzlingen. 1. Premier internement psychiatrique 6. Le 2 avril 2008, le requérant fut interné dans la clinique psychiatrique de Münsterlingen par décision de l'autorité tutélaire (Vorumundschaftsbehörde) de Kreuzlingen (« l'autorité tutélaire ») au titre de la privation de liberté à des fins d'assistance. 7. Le requérant entama deux procédures contre cette décision, l'une judiciaire, l'autre administrative. a) La procédure judiciaire en matière de levée de l'internement psychiatrique 8. Le 13 mai 2008 le requérant demanda à l'autorité tutélaire de lever son internement psychiatrique. Sa demande fut transmise à la clinique psychiatrique le 16 mai 2008 pour observation. 9. Le 20 mai 2008, avant que l'autorité tutélaire se fût prononcée, le requérant demanda son élargissement immédiat par requête adressée au vice-président du tribunal de district de Kreuzlingen (Vize-Gerichtspräsidium des Bezirk

Erwägungen

E. 2

Joint au fond l'exception préliminaire soulevée par le Gouvernement relative à l'épuisement des voies de recours internes en tant qu'elle porte sur l'obligation d'obtenir une décision de l'autorité tutélaire avant de pouvoir saisir les tribunaux et la rejette ;

E. 3

Déclare les requêtes recevables quant au grief tiré de l'obligation d'obtenir une décision de l'autorité de tutelle préalablement à l'examen de la privation de liberté par les tribunaux et irrecevables pour le surplus ;

E. 4

Dit qu'il y a eu violation de l'article 5 § 4 de la Convention ;

E. 5

Dit a) que l'État défendeur doit verser au requérant, dans les trois mois à compter du jour où l'arrêt sera devenu définitif conformément à l'article 44 § 2 de la Convention, les sommes suivantes, à convertir en francs suisses au taux applicable à la date du règlement : i) 10 000 EUR (dix mille euros), plus tout montant pouvant être dû à titre d'impôt, pour dommage moral ; ii) 10 000 EUR (dix mille euros), plus tout montant pouvant être dû par le requérant à titre d'impôt, pour frais et dépens ; b) qu'à compter de l'expiration dudit délai et jusqu'au versement, ces montants seront à majorer d'un intérêt simple à un taux égal à celui de la facilité de prêt marginal de la Banque centrale européenne applicable pendant cette période, augmenté de trois points de pourcentage ;

E. 6

Rejette la demande de satisfaction équitable pour le surplus. Fait en français, puis communiqué par écrit le 8 décembre 2015, en application de l'article 77 §§ 2 et 3 du règlement de la Cour. Marialena Tsirli Greffière adjointe Luis López Guerra Président

Au présent arrêt se trouve joint, conformément aux articles 45 § 2 de la Convention et 74 § 2 du règlement, l'exposé de l'opinion séparée du juge Nicolaou. L.L.G. M.T.

CONCURRING OPINION OF JUDGE NICOLAOU Article 5, which protects the right to liberty and security, lies at the heart of the rule of law. Articles 2, 3, 4 and 5 contain what are called the core rights of the Convention. Article 5 § 4 serves, in particular, as the habeas corpus procedure of the Convention, meaning "a procedure whereby a detained person may make an urgent application for release from custody on the basis that his detention is unlawful" (see *R v. Royal Army Service Corp. Colchester*, ex parte Elliott [1949] 1 All England Law Reports at p. 373, cited in *Hood v. the United Kingdom* [GC], no. 27267/95, ECHR 1999-I). The case of *Benjamin & Wilson v. the United Kingdom* (no. 28212/95, 26 September 2002) made it clear that the court in question "...must have not merely advisory functions but must have the competence to "decide" the "lawfulness" of the detention and to order release if the detention is unlawful (see the above-mentioned *Weeks* judgment, loc. cit., *Singh v. the United Kingdom* judgment of 21 February 1996, Reports 1996-I, para. 66, *D.N. v. Switzerland*, [GC], no. 27154/95, ECHR 2001-III, § 39)." This was reiterated in the context of a wider review undertaken in *A. and Others v. the United Kingdom* ([GC], no. 3455/05, ECHR 2009), where it was said that "The reviewing "court" must not have merely advisory functions but must have the competence to "decide" the "lawfulness" of the detention and to order release if the detention is unlawful (see *Ireland v. the United Kingdom*, cited above, § 200; *Weeks v. the United Kingdom*, 2 March 1987, § 61, Series A no. 114; and *Chahal*, cited above, § 130)." The speediness requirement is a necessary component of the Article 5 § 4 procedure. Without it, the right to release would become illusory. It is no answer to say that the delay in the release of a person can itself, whatever its extent, be compensated in monetary terms. That is not the aim of Article 5 § 4. Article 5 § 4 has meaning and purpose only for as long as the person is in detention. It was said in the case of *Louled Massoud v. Malta* (no. 24340/08, 27 July 2010), that "The remedies must be made available during a person's detention with a view to that person obtaining speedy judicial review of the lawfulness of his or her detention capable of leading, where appropriate, to his or her release. The accessibility of a remedy implies, inter alia, that the circumstances voluntarily created by the authorities must be such as to afford applicants a realistic possibility of using a remedy (see *Conka v. Belgium*, no. 51564/99, §§ 46 and 55, ECHR 2002-I). Article 5 para. 4 of the Convention refers to domestic remedies that are sufficiently certain, otherwise the requirements of accessibility and effectiveness are not fulfilled (see *Kadem v. Malta*, cited above, § 41)." A remedy which is incapable of providing a speedy determination of the issue of lawfulness with a view to securing release from detention is inherently deficient and, therefore, inappropriate. Consequently, it need not be exhausted. The right to compensation under Article 5 § 5, where detention is shown to have been unlawful, although significant, is a subsequent, ancillary matter. It is to be noted that Article 5 § 5 does not presuppose a domestic finding under Article 5 § 4 or otherwise. The case of *Slivenko v. Latvia* ([GC], no. 48321/99, ECHR 2003-X), makes it clear that if detention has already come to an end, Article 5 § 4 will be inapplicable: "The Court observes in this context that Article 5 § 4 deals only with those remedies which must be made available during a person's detention with a view to that person obtaining speedy judicial review of the lawfulness of the detention capable of

leading, where appropriate to his or her release. The provision does not deal with other remedies which may serve to review the lawfulness of a period of detention which has already ended, including, in particular, a short-term detention such as in the present case." In the Swiss system in force at the time, a person detained had first to apply to an administrative authority for release and, once a decision was taken to refuse it, application could then be made to the court. If the administrative authority did not respond within a reasonable time or at all, the person detained had to complain to a supervisory authority and again await a decision before he could apply to the court. If the supervisory authority itself did not respond or there was otherwise no progress in obtaining a decision, there would be an impasse, since the court could not assume jurisdiction unless an administrative decision had come into existence. These various elements constitute, in my view, what is intended to be a single remedy. This was, until recently, the system which Switzerland had in place for securing the right to liberty under Article 5 § 4. The Court has had the opportunity to examine it on a number of occasions. In *G.B. v. Switzerland* (no. 27426/95 , 30 November 2000) and in *M.B. v. Switzerland* (no. 28256/95 , 30 November 2000), both of which concerned detention and in which a violation was found for a procedure lasting 21 days, the Court made the following identical statement, at §§ 38 and 42 of the respective judgments: "The Court observes that Switzerland has chosen, for such cases involving release from detention on remand, a two tier-procedure which includes as the first instance an administrative authority and, as the second, the Federal Court, which is the highest judicial authority in Switzerland. However, these circumstances cannot in themselves serve to justify the applicant's being deprived of his rights under Article 5 § 4 of the Convention. It is for the State to organise its judicial system in such a way as to enable its courts to comply with the requirements of that provision (see, *mutatis mutandis* , *R.M.D. v. Switzerland*, 26 September 1997, Reports of Judgments and Decisions 1997-VI, p. 2015, § 54)." In *S.M. v. Switzerland* (no. 26900/95 , 21 January 1998), which concerned detention in a psychiatric hospital clinic and in which no violation was found in respect of a procedure that took 20 days, the Court again referred to the two-tier system: "According to the Convention organs' case-law, Article 5 para. 4 (Art. 5-4) of the Convention does not exclude that a request for release from detention must first be filed with an administrative body, as long as thereafter a court meeting the requirements of Article 5 para. 4 (Art. 5-4) of the Convention is able to examine the request (see, *mutatis mutandis* , *Eur. Court HR, Sanchez-Reisse v. Switzerland*, judgment of 21 October 1986, Series A no. 107, p. 17, § 45)" Although the Court has recognised the right of the State to choose such a composite remedy, it is incumbent on the State to show that the remedy is practical and effective in terms of Article 5 § 4. In the present case the State has failed to do that. The way in which matters had developed soon made it obvious that the remedy in question was quite inadequate. We have unanimously come to the conclusion that there has been a violation of Article 5 § 4 because it took the administrative authorities nearly five months to issue a decision on the basis of which the applicant might apply to a court for release under Article 5 § 4. However, in my view the violation is not limited to that aspect alone. As I have already stated, I regard the Swiss remedy for dealing with the protection afforded by Article 5 § 4 as an indivisible entity. My colleagues think otherwise. They have split the remedy up into two parts. In examining, by way of a preliminary question, an objection raised by the Government that the applicant had failed to exhaust an available remedy concerning the lawfulness of his detention, they have decided to uphold the objection. In my view, this is in direct conflict with the subsequent unanimous finding of the Chamber that there has been a violation of Article 5 § 4. Failure to

exhaust one part of a remedy is, in my view, tantamount to failure to exhaust the whole, whereupon one would then have to dismiss the claim for non-exhaustion. Yet that is not how the judgment goes. It seems to me, with respect, that two opposite directions are being taken simultaneously and, further, that the approach taken conflates the *raison d'être* of Article 5 § 4 with the subsequent possibility of compensation under Article 5 § 5. The judgment in this case also gives rise to another, quite different, matter on which my view does not entirely coincide with that of my colleagues. It concerns the approach to Article 6. It is more a practical matter than one of principle. I would have preferred a finding that, in the circumstances, no separate issue arises in respect of Article 6. That would be consistent with what I regard as the current practice of the Court. An Article 5 § 4 matter is examined exclusively under that provision and not in conjunction with or also by reference to Article 6, which is of wider scope: see, indicatively, *A. and Others v. the United Kingdom* (above). Resort can only be had to Article 6 where there remains an issue that is unconnected with Article 5 § 4 or where, after release of the person detained, Article 5 § 4 no longer applies: see *Laidin v. France* (no. 2), no. 39282/98 , 7 January 2003, read together with *Reinprecht v. Austria*, no. 67175/01 , ECHR 2005-XII. In the present case the matter examined under Article 6 § 1 is the alleged failure of the Federal Court to provide reasons for its decision by reference also to the substance of the Article 5 § 4 complaint. In fact, in its own way, the Federal Court did give an answer, which, although implicit, was nonetheless clear. The answer was that the court did not ordinarily have power or jurisdiction to examine such complaint where an applicant had not taken steps to exhaust the administrative part of the remedy. This answer is intrinsically linked to what is at stake under Article 5 § 4. In my opinion, therefore, no separate issue arises under Article 6 § 1.

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