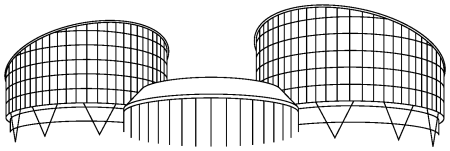

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF KUTTNER v. AUSTRIA

(Application no. 7997/08)

JUDGMENT

STRASBOURG

16 July 2015

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

PARTLY CONCURRING AND PARTLY DISSENTING OPINION OF JUDGE PINTO DE ALBUQUERQUE

1. I agree with the Chamber that there has been a violation of Article 5 § 4 of the European Convention on Human Rights ("the Convention"), on the basis of the excessive length of the proceedings relating to the second application, namely the period of sixteen months between the final decisions in the first and the second set of proceedings (that is to say, between 9 May 2006 and 10 September 2007). But I disagree with its decision not to consider the applicant's other grievances regarding the entire proceedings, including the period of two years between the Court of Appeal's final decision in the second set of proceedings, issued on 10 September 2007, and the Regional Court's order terminating the applicant's psychiatric detention, suspending the remaining seven months of his prison sentence and releasing him subject to a number of conditions, issued on 10 September 2009. I cannot understand that the Chamber took issue with a delay of sixteen months in the second set of proceedings, but did not find it necessary to censure a delay of twenty-four months in the third set of proceedings and still less the overall duration of the proceedings for release.

I also regret the fact that the Chamber did not take the opportunity to clarify the nature of the procedural guarantees applicable to offenders made subject to preventive measures such as the one applied to the applicant. By so doing, the Chamber also left unsaid what it thinks about the applicant's complaint of a violation of Article 6 § 3 (d) of the Convention on account of the Linz Regional Court's alleged failure to take the evidence requested by him during the proceedings for the review of the preventive measure.

Finally, and above all, I am disappointed that the Chamber did not address the broader issue of the compatibility of the preventive measure under section 21 § 2 of the Austrian Criminal Code with the guarantees of lawfulness and proportionality under Article 5 of the Convention. In the light of the "serious human rights problems" (*ernstzunehmende menschenrechtliche Probleme*) involved in this issue and the need for measures against "the increasing duration of detention in the light of the principle of proportionality according to Article 5 of the ECHR" (*die zunehmende Anhaltedauer im Lichte des Verhältnismässigkeitsprinzips gemäss Art. 5 EMRK*), which the Government themselves acknowledge[1], I

[1] *Arbeitsgruppe Massnahmenvollzug – Bericht an den Bundesminister fur Justiz über die erzielten Ergebnisse* (led by Michael Schwanda), January 2015, pp. 8 and 14. Nowak/Krisper, "Der österreichische Massnahmenvollzug und das Recht auf persönliche Freiheit", in EuGRZ, 2013, p. 657, talk about an "alarming and grave human rights deficit" as does Krisper in "Der Massnahmenvollzug in Österreich und das Recht auf persönliche Freiheit", in NEOS, *Moderner Massnahmenvollzug, Beiträge zur Reformierung*, June 2015, p. 23.

thought it wise to further discuss the case at the point where the Chamber concluded its analysis.

The international standards on the treatment of offenders with mental health problems

2. Disability-based arrest, detention or imprisonment is in breach of Article 14 § 1 (b) of the Convention on the Rights of Persons with Disabilities ("the CRPD"). Detention based on the perceived danger of mentally ill persons to themselves or to others breaches Article 14, the approach taken in the 1991 Principles for the Protection of Persons with Mental Illness, which condoned deprivation of liberty in the field of mental health, having been rejected[2].

When persons with disabilities are subjected to arrest, detention or imprisonment, Article 14 § 2 of the CRPD guarantees non-discrimination, including by the provision of reasonable accommodation on an individualised basis, in other words, accommodation with the necessary and appropriate modification and adjustments to secure to each person with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms. Deprivations of liberty based on the existence of a disability are intrinsically discriminatory. Detention

[2] Specifically with regard to Austria, the Committee on the Rights of Persons with Disabilities ("the Committee") concluded as follows: "The Committee is of the opinion that the legislation is in conflict with article 14 of the Convention because it allows a person to be deprived of their liberty on the basis of their actual or perceived disability. The Committee urges the State Party to take all necessary legislative, administrative and judicial measures to ensure that no one is detained against their will in any kind of mental health facility. It urges the State party to develop deinstitutionalization strategies based on the human rights model of disability." (CRPD/C/AUT/CO/1, 13 September 2013, paragraphs 29-30; see also CRPD/C/CZE/CO/1, 15 May 2015, paragraphs 26-28; CRPD/C/MNG/CO/1, 13 May 2015, paragraphs 24-25; CRPD/C/TKM/CO/1, 13 May 2015, paragraphs 25-26; CRPD/C/HRV/CO/1, 17 April 2015, paragraphs 19-22; CRPD/C/DOM/CO/1, 17 April 2015, paragraphs 26-29; CRPD/C/COK/CO/1, 17 April 2015, paragraphs 27-28; CRPD/C/DEU/CO/1, 17 April 2015, paragraphs 29-32; CRPD/C/NZL/CO/1, 31 October 2014, paragraph 34; CRPD/C/DNK/CO/1, 30 October 2014, paragraph 36; CRPD/C/BEL/CO/1, 28 October 2014, paragraph 29; CRPD/C/MEX/CO/1, 27 October 2014, paragraph 30; CRPD/C/SWE/CO/1, 12 May 2014, paragraphs 35-36; CRPD/C/CRI/CO/1, 12 May 2014, paragraph 28; CRPD/C/AZE/CO/1, 12 May 2014, paragraph 29; CRPD/C/SLV/CO/1, 8 October 2013, paragraphs 31-32; CRPD/C/PRY/CO/1, 15 May 2013, paragraph 32; CRPD/C/CHN/CO/1, 15 October 2012, paragraph 26; CRPD/C/HUN/CO/1, 22 October 2012, paragraph 28; CRPD/C/ARG/CO/1, 8 October 2012, paragraphs 23-26; CRPD/C/PER/CO/1, 20 April 2012, paragraph 29; CRPD/C/ESP/CO/1, 19 October 2011, paragraph 36; and CRPD/C/TUN/CO/1 13 May 2011, paragraph 25). This jurisprudence has been summarised in the Committee's Statement on article 14 of the Convention on the Rights of Persons with Disabilities of September 2014. (CRPD/C/12/2, annex IV).

regimes which by their own terms discriminate on the basis of disability constitute arbitrary detention. The involuntary detention of persons with disabilities based on presumptions of risk or dangerousness linked to disability labels is contrary to the right to liberty[3]. In the criminal-law context, the automatic and involuntary transfer to mental health facilities within or outside of an ordinary prison facility, or the automatic imposition of mental health treatment as a condition of probation, parole or a transfer to a softer or "normal" prison regime, cannot be considered a reasonable individualised accommodation for persons with a disability. Thus, States parties should ensure that each detained person with disabilities has access to voluntary, suitable, timely health care that is in keeping with his or her state of health as well as full access to rehabilitation therapy on a regular basis[4].

3. The United Nations Special Rapporteur on Torture has called for the replacement of Rules 82 and 83 of the Standard Minimum Rules on the Treatment of Prisoners, which mandate transfers of "insane and mentally abnormal prisoners" to mental health facilities and placement under medical supervision. The new provisions should not only articulate certain rights enshrined in the CRPD, but also state clearly that inmates with disabilities are entitled to be eligible for all programmes and services available to others, including voluntary engagement in activities and community release programmes, and to be housed in the general prison population on an equal basis with others without discrimination[5].

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[3] The Committee expresses its concern that persons with disabilities who are deemed unfit to stand trial due to an intellectual or psychosocial disability can be detained indefinitely in prisons or psychiatric facilities without being convicted of a crime and for periods that can significantly exceed the maximum period of custodial sentence for the offence (CRPD/C/AUS/CO/1, 21 October 2013, paragraph 31). The Committee is also concerned that declaring persons with disabilities unfit to stand trial is a pretext for applying preventive measures involving their indefinite deprivation of liberty and that they are not entitled to the same guarantees as other persons in the criminal justice system (CRPD/C/ECU/CO/1, 27 October 2014, paragraph 28). *A fortiori*, the same concerns could be expressed in relation to persons declared criminally responsible who are detained indefinitely on the basis of their "abnormality".

[4] *Mr. X. v. Argentina*, CRDP Communication No. 8/2012 (CRPD/C/11/D/8/2012), 18 June 2014.

[5] Report of the Special Rapporteur on Torture, 9 August 2013, A/68/295, paragraph 72, following the 2008 report, A/63/175, paragraphs 38 and 53. This could also apply to Rule 100 of the European Prison Rules, which is similar to the UN model. Rule 12 of the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules) is different, in view of its individualised and voluntary approach to the problem of mental health of women prisoners. Rule 41 also provides that women with mental health care needs are housed in accommodation which is not restrictive, and at the lowest possible security level, and receive appropriate treatment, rather than being placed in higher security level facilities solely due to their mental health problems.

This call was followed by the Observations on the Standard Minimum Rules for the Treatment of Prisoners, adopted by the Committee on 20 November 2013. The Committee insisted that the denial of reasonable accommodation in custody facilities or any other detention institutions should be considered as a form of discrimination, and in some instances as a form of torture and ill-treatment. Detentions conditions should never amount to causing increased suffering to inmates with disabilities. In no case should the disability entail added forms of suffering for persons in detention. Improper health conditions in prisons and detention centres could result in the creation of further disabilities in addition to the existing ones. These conditions should be properly identified and preventive measures adopted to avoid the progression of an existing disability or further disabilities in the prisoner. Prison authorities should be obliged to implement appropriate measures to enable persons with disabilities to attain and maintain maximum independence, full physical, mental, social and vocational ability and full inclusion and participation in all aspects of prison life, on an equal basis with others. Rehabilitation and habilitation programmes should be put in place in order to achieve these goals.

4. The Court has adopted the approach taken by the Committee. According to well-established case-law, States must provide reasonable accommodations for disabled detainees, and failure to do so amounts to inhuman and degrading treatment, regardless of any positive intention to humiliate or debase the detainee[6]. The placement of detainees in conditions not suitable for their mental health status and needs represents an unlawful deprivation of liberty[7]. There must be some relationship between the ground of permitted deprivation of liberty relied on and the conditions of detention[8].

The legal treatment of offenders with mental health problems in Austria

5. In Austria, offenders who are found to be criminally responsible (*zurechnungsfähige Rechtsbrecher*) may be punished by a criminal penalty (*Strafe*) and those found not to be criminally responsible (*unzurechnungsunfähige Rechtsbrecher*) may be punished by a preventive detention measure (*vorbeugende Massnahme der Unterbringung*).

In addition, Austrian law provides for three other groups of offenders who may be punished for the same criminal conduct (fact or omission) by both a criminal penalty and a preventive measure, in the framework of a

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[6] *Price v. the United Kingdom*, no. 33394/96, 7 October 2001; *Arutyunyan v. Russia*, no. 48977/09, 10 January 2012; and *Z.H. v. Hungary*, no. 28973/11, 8 November 2012.

[7] *Bouamar v. Belgium*, 29 February 1988, Series A no. 129, and *D.G. v. Ireland*, no. 39474/98, 16 May 2002.

[8] *Aerts v. Belgium*, 30 July 1998, § 46, *Reports of Judgments and Decisions* 1998-V.

"dual system" of criminal sanctions (*Zweispurigkeit von Strafen and Massnahmen*), which provides in certain cases for the interchangeable execution of both the criminal penalty and the preventive measure (*Vikariieren von Strafe und Massnahme im Vollzug*).

The third group of offenders includes those in need of treatment for alcohol or drug addiction (*entwöhnungsbedürftige Rechtsbrecher*) who committed an offence while in a state of intoxication or in any other way related to their addiction (*wegen einer im Rausch oder sonst im Zusammenhang mit seiner Gewöhnung begangenen strafbaren Handlung oder wegen Begehung einer mit Strafe bedrohten Handlung im Zustand voller Berauschung*). These offenders may be made subject to a preventive measure and a criminal penalty (section 22 of the Austrian Criminal Code). In this case, the criminal penalty is executed after the preventive measure (section 24 § 1 of the Criminal Code), but the maximum duration of the preventive measure is limited to two years (section 25 § 1 of the Criminal Code).

A fourth group of offenders may be made subject to a criminal penalty and a preventive detention measure: the so-called "dangerous recidivists" (*gefährliche Rückfallstäter*). These are offenders who have committed certain types of offences owing to an "inherent tendency to commit these offences" (*wegen seines Hanges zu strafbaren Handlungen*: section 23 of the Criminal Code). In this case, the criminal penalty is executed before the preventive measure (section 24 § 2 of the Criminal Code), but the maximum duration of the preventive measure is limited to ten years (section 25 § 1 of the Criminal Code).

Finally, a fifth group of offenders encompasses so-called "mentally abnormal offenders" (*geistig abnorme Rechtsbrecher*). According to section 21 § 2 of the Criminal Code, this legal classification depends on the following cumulative conditions: (1) the commission of a criminal offence punishable by a term of imprisonment exceeding one year (*Anlasstat*)[9];

[9] The wide and heterogeneous range of offences covered by the notion of *Anlasstat* has been described as a "scarcely reliable and transparent criterion" (Nowak/Krisper, cited above, p. 653), and "a formal, abstract parameter which is fictitious for the offender and independent from the facts" (Frottier, "Freiheit, die sich nicht erobern lässt: Die österreichische Massnahme nach § 21 Abs. 2", in *Journal für Neurologie, Neurochirurgie und Psychiatrie*, 2010, p. 13), which allows for less serious crimes to be punished with disproportionately long periods of psychiatric detention (Schwaighofer, "Reformbedarf beim Massnahmenvollzug nach § 21 Abs. 2 StGB", in *Blickpunkte, SonderAusgabe Massnahmenvollzug*, 2012, p. 63; Helmreich, "Erfahrungen in der Begleitungen von Insassen, über die die Massnahme nach § 21 Abs. 2 StGB verhängt ist", in Klopf/Holzbauer (ed.), *Zum österreischischen Massnahmenvollzug nach § 21 Abs. 2 StGB*, Wien, 2012, p. 95; and Bertel, "Die Unterbringung nach § 21 Abs. 2 StGB", in Reindl-Krauskopf and others (ed.), *Festschrift für Helmut Fuchs*, Wien, 2014, p. 22). In 2010, a reform introduced a restriction regarding offences against the property of others. Recently, the Austrian Ministry of Justice (BMJ) study entitled *Arbeitsgruppe*

(2) the commission of a criminal offence "under the influence of a severe mental or emotional abnormality" (*unter dem Einfluss seiner geistigen oder seelischen Abartigkeit von höherem Grad*)[10] which must not exclude responsibility (*ohne unzurechnungunfähig zu sein*)[11]; (3) a prognosis of

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Massnahmenvollzug, cited above, pp. 56, 57, 62 and 86, concluded that the legal parameter should be worded in a "stricter form" in order to avoid false positives under section 21.

[10] The terminology of the law has been criticised, quite rightly, for being not only outdated (Helmreich, cited above, p. 95), but imprecise and, even worse, as being a means of conveying "social resentments against mentally ill persons" (Nowak/Krisper, cited above, p. 653). The 2015 BMJ study cited above, p. 66, concedes this criticism, considering the legal formula "under the influence" as being "frequently difficult to understand". As Frottier put it, psychiatrists face an "almost unsolvable dilemma", since they have to evaluate whether the person suffered from a severe mental disorder which influenced the offending conduct decisively, but nonetheless was still sufficiently capable of understanding and determining freely his or her conduct (Frottier, cited above, p. 11). Although severe, the mental disorder required under section 21 § 2 must not exclude responsibility. Otherwise, the offender would have to be considered as a person lacking responsibility, to whom a preventive measure under section 21 § 1 may be applicable. Hence, courts include among the mental disorders covered by section 21 § 2 paranoiac or neurotic personality disorders, "sexual deviations" and "unsocial" personality disorders. In fact, the decisive criterion for establishing the mental disorder is the "abnormality of the offence" (Frottier, cited above, p. 14, confirmed by the reference made by Bien, "Vorbeugende Massnahmen aus staatsanwaltlicher Sicht", in Soyer/Stuefer (ed.), *Strafverteidigung – Kritik vorbeugender Massnahmen/Sicherheit*, Wien, 2012, p. 65, to facts that are "especially incomprehensible or without apparent motive or especially ruthless, brutal or cruel" as evidence of a mental disorder).

[11] The poor quality of forensic psychiatric expert assessments has been confirmed by psychiatrists, lawyers, scholars and even the Government. Experts do not necessarily base their judgment on clinically acknowledged theories and empirically controllable data, the expert assessments sometimes have a moralistic overtone and the causal link between the offence and the mental disorder is not always confirmed. Frequently, reference is made to a "combined personality disorder" (*kombinierte Persönlichkeitsstörung*) as a vague, catch-all concept in order to ground "empty" expert reports which the judges do not call in question (Frottier, cited above, p. 14; Schwaighofer, cited above, p. 64; Brugger, "Psychologie und Psychiatrie Sachverständigengutachten zur bedingten Entlassung Untegebrachter nach § 21 Abs. 2 ÖStGB", in Gutiérrez-Lobos and others, *25 Jahre Massnahmenvollzug – eine Zwischenbilanz*, Baden-Baden, 2002, pp. 31-40; Klopf, "Bemerkugen zum österreichischen Massnahmevollzug nach § 21 Abs. 2 StGB", in Klopf/Holzbauer (ed.), *Zum österreichischen*…, cited above, p. 99; Minkendorfer, "Wie lang sind 8 Monate?", in Klopf/Holzbauer (ed.), *Zum österreichischen*…, cited above, p. 70; Helmreich, cited above, p. 91; Schroll, "Kritische Anmerkungen und Judikatur zu den vorbeugenden Massnahmen nach § 21 StGB aus richterlicher Sicht", in Soyer/Stuefer (ed.), *Strafverteidigung...*, cited above, p. 57; Nowak/Krisper, cited above, pp. 654 and 655; and Bertel, cited above, p. 22). It is worth mentioning in this context conclusion 19 of the study made by the *Institut für Rechts- und Kriminalsoziologie* (IRKS) on behalf of the Austrian Government, entitled "Welcher organisatorischer Schritte bedarf es, um die Zahl der Einweisungen in den Maßnahmenvollzug zu verringern?" (led by Wolfgang Stangl), 2012, p. 63, on the need to restrict the legal criteria under section 21 in so far as people with autism, low IQ, organic brain syndrome or advanced dementia should not be made subject to preventive measures, as well as the 2015 BMJ study cited above, p. 68, which did not refrain from criticising the same lack of quality in expert assessments, confirming the criticisms made in the Court of

future commission of one or more punishable offences with "serious consequences" (*mit schweren Folgen*) under the influence of that same mental or emotional "abnormality" (*Prognosetat*)[12]. When these conditions are met, the mentally "abnormal" offender is punished by both a criminal penalty (*Strafe*) and a preventive measure (*vorbeugende Massnahme*). According to section 24 § 1 of the Criminal Code, the period of preventive detention in an institution for mentally "abnormal" offenders should be executed prior to the prison term, and the time spent in the institution should be "taken into account" (*angerechnet*), that is to say, subtracted from the prison term. There is no time-limit for the preventive measure in this case. If the preventive measure is lifted prior to the end of the prison term, the offender will serve the remainder of the prison term (*Strafrest*) in an ordinary prison facility for persons who are criminally responsible (*Strafvollzugsanstalt or Justizanstalt*). Following the reform of the Law on Enforcement of Penalties (*Strafvollzugsgesetz*) in 1987, these offenders may also be placed in a specialised wing of an ordinary prison facility (*besondere Abteilungen der Anstalten zum Vollzug von Freiheitsstrafen*, section 158(5) of the above-mentioned Law)[13].

6. Bearing in mind the intrinsic vagueness of the legal provision of section 21 § 2 of the Austrian Criminal Code, aggravated by a discretionary psychiatric practice and a lack of proper judicial oversight, the lawfulness and proportionality of the preventive detention of "abnormal" criminally responsible persons in Austria is very questionable. The lack of a scientific basis for the outdated "abnormality" concept facilitates a perverse circle whereby offences which are not common, or have uncommon traits, are considered in themselves as reflecting a personality disorder, which is automatically equated to a sign of dangerousness[14]. Like many other "abnormal" offenders, the applicant in the present case was caught in such a perverse circle, having been labelled a dangerous "abnormal" on the basis of a "combined personality disorder" (*kombinierte Persönlichkeitsstörung*).

Auditors' report entitled *Massnahmenvollzug für geistig abnormen Rechtsbrecher*, 29 October 2010.

[12] The total lack of precision, both with regard to the gravity and the nature of the future offences, has been noted. Here again the practice is eloquent, showing that a large percentage of detainees had either never been convicted of offences or never been imprisoned prior to their first placement in psychiatric detention (Frottier, cited above, pp. 11 and 15; Minkendorfer, cited above, pp. 70 and 72, speaking of "astrological prognosis" and considering this practice "highly questionable"; Nowak/Krisper, cited above, p. 655; and Bertel, cited above, p. 22, who calls this practice a "grave failure"). The 2012 IRKS study cited above, p. 63 (conclusion 21) concludes that the praxis has expanded the "concept of dangerousness" with regard to section 21 § 2 offenders. The 2015 BMJ study cited above, p. 66, acknowledges the vagueness of the legal concept "it is to be feared" (*zu befürchten*) and suggests its replacement.

[13] On this provision, see Drexler, *Strafvollzugsgesetz Kommentar*, 3. Auflage, Wien, 2014, pp. 319 and 320.

[14] Klopf, cited above, p. 105, and Bertel, cited above, p. 26.

The failure of the "therapy instead of penalty" model

7. Statistics show a trend towards a constant increase of the population subject to preventive measures under section 21 § 2 of the Austrian Criminal Code, caused by two factors: an increase in the number of offenders placed in psychiatric detention and an increase in the duration of their placement[15]. Put another way, the number of people being released from psychiatric detention does not cover the number of people being placed there[16]. Moreover, in the last ten years, the measure set out in section 21 § 2 has been applied increasingly to petty offences, with the trial court combining the application of a short prison term with the cumulative application of the preventive measure[17]. In the large majority of cases, the conditional release (*bedingte Entlassung*) from psychiatric detention takes place only after, and sometimes many years after, the end of the prison term owing to a strict interpretation of the legal requirements of section 47 § 2[18]. The courts are also very reluctant in practice to apply the conditional discount (*bedingter Nachlass*) provided for in section 45 to these offenders[19].

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[15] I have used the following statistical studies for the purposes of this opinion: the 2015 BMJ study cited above; the 2012 IRKS study cited above; the 2010 report of the Court of Auditors; the study by Gutiérrez-Lobos and others, "Der österreichische Massnahmenvollzug nach § 21 Abs. 2 öStGB – eine empirische Bestandaufnahme der Unterbringung zurechnungsfähiger geistig abnormer Rechtsbrecher", in *25 Jahre Massnahmenvollzug…*, cited above, pp. 43-80; and the study by Heinz Katschnig and others entitled "Legalbewährung nach dem Massnahmenvollzug nach § 21 Abs. 2 öStGB – eine Sonderauswertungen von Strafregisterdaten", also in *25 Jahre Massnahmenvollzug*, cited above, pp. 81-98.

[16] This is also the result of a line of case-law which finds support in scholarly opinion, according to which psychiatric detention is not an *ultima ratio* and thus may be imposed even when there are less intrusive alternatives (Nimmervoll, point no. 21 of preliminary commentary on §§ 21-25 of the *Salzburger Kommentar zum StGB*, 25 Lfg, November 2011). The 2015 BMJ study cited above, pp. 59-60, proposes solving this dispute by stating the principle of *ultima ratio* clearly.

[17] The 2012 IRKS study cited above, pp. 30 and 62 (conclusion 13); Minkendorfer, cited above, p. 70; and Gutiérrez-Lobos and others, cited above, p. 62, who speak about a "levelling function" of preventive measures in so far as these tend to prolong short prison sentences.

[18] The 2012 IRKS study cited above, p. 61 (conclusion 12); Schwaighofer, cited above, p. 64; Schroll, cited above, p. 58; and Gutiérrez-Lobos and others, cited above, p. 67. The 2015 BMJ study cited above, pp. 62-63, admits the need to reform this regime in order to facilitate its application. The insufficient provision of public out-patient therapeutic services contributes to the prolongation of persons' psychiatric detention.

[19] The 2012 IRKS study cited above, pp. 38-41, 63 (conclusion 17: no existing *Salzburger* praxis for section 21 § 2 offenders); the 2015 BMJ study cited above, p. 50; and Birklbauer, point no. 42 of the commentary on § 45 of the *Salzburger Kommentar zum StGB*, 24 Lfg, May 2011. The conditional discount can only be applied to the section 21 § 2 preventive measure simultaneously with the conditional discount of the penalty, which follows

8. In reality, owing to a lack of places in institutions for mentally "abnormal" offenders, the large majority of these offenders are placed in ordinary prison facilities where the punitive character of the penalty prevails over the therapeutic one[20]. Frequently, the offender is considered as "not amenable to therapy" (*nicht therapiebar*) or to the "existing therapeutic possibilities" (*mit den bestehenden therapeutischen Möglichkeiten nicht helfen zu können*)[21]. Thus, the purported legal model of "therapy instead of penalty" (*Therapie statt Strafe*) is replaced by the opposite praxis, with the unavoidable consequence of the dividing line between imprisonment as a criminal penalty and psychiatric detention as a preventive measure being blurred[22]. In practical terms, the psychiatric detention of "abnormal" offenders plays the same incapacitating and neutralising role (*unschädlich zu machen*) as the 1933 German *Sicherungsverwahrung*[23] or, even closer, the 1936 Portuguese "pragmatic defensive penal law" (*pragmatisches Verteidigungsstrafrecht*)[24].

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different rules (section 43). This additional factor of complexity hinders the applicability of the provisions of section 45 § 1).

[20] As the Court of Auditors established in its 2010 report, p. 85, and conclusion 3, p. 105. In p. 86 of this study, and in its conclusion 13, p. 106, this institution criticised the fact that many detainees did not even undergo a psychiatric expert assessment after being convicted, having to wait for years before having one. Bertel, cited above, p. 33, calls the analysis of the Court of Auditors a "devastating judgment". The situation has been described as a "horror scenario" by Minkendorfer, cited above, p. 69, or a "grave shortcoming" by Gutiérrez-Lobos and others, cited above, p. 71. See also the criticism by Holzbauer, "Die Heilkraft der Staatsgewalt", in Klopf/Holzbauer (ed.), *Zum österreischischen*…, cited above, pp. 26, 30, 33 and 37; Schroll, cited above, p. 57; and Frottier, cited above, p. 12.

[21] Holzbauer, cited above, p. 30.

[22] Holzbauer, cited above, p. 37. This failure is particularly grave, since offenders placed in psychiatric detention under section 21 § 2 have a "subjective public right" to medical, and especially psychiatric, psychotherapeutic and pedagogical treatment, according to national law (Drexler, cited above, p. 327, referring to two judgments of the Austrian Administrative Court of 2008 and 2010).

[23] Holzbauer, cited above, p. 40, and Frottier, cited above, p. 19, who note the disproportionately high percentage of "abnormal" offenders placed in psychiatric detention in Austria in comparison with dangerous offenders placed in *Sicherungsverwahrung* in Germany. This overrepresentation of "abnormal" offenders is a clear sign that something is fundamentally wrong in the Austrian criminal sanctions system.

[24] To use the expression of Hünerfeld, *Die Entwicklung der Kriminalpolitik in Portugal*, Bonn, 1971, p. 216, when referring to the 1936 Portuguese prison reform, which resembles the present Austrian system (see also Cannat, *Droit Pénal et Politique Pénitentiaire au Portugal*, Paris, 1946, pp. 114 to 117; Ancel, *Les Mesures de Sûreté en Matière Criminelle*, Melun, 1950, pp. 38 and 39; Jescheck, "Principes et solutions de la politique criminelle dans la réforme pénale allemande et portugaise", in *Estudos in Memoriam do Prof. Doutor José Beleza dos Santos*, I, Coimbra, 1966, p. 458; and Nils Robert, *La Participation du Juge à l'application des Sanctions Pénales*, Genève, 1972, p. 104; and the whole of chapter 8 of my own doctoral dissertation, *A reforma da justiça criminal em Portugal e na Europa*, Coimbra, 2003).

9. In view of these shortcomings in the legal and institutional framework, it comes as no surprise that offenders are mislabelled (*Etikettenschwindel*) as "abnormal" persons in order to impose truly incapacitating sanctions on them which allow the incarceration of persons who are criminally responsible to be artificially prolonged, if need be for their entire lives (section 25 § 1 of the Austrian Criminal Code). In other words, the preventive measure provided for in section 21 § 2 has become the epicentre of Austrian criminal policy for criminally responsible offenders perceived by society as dangerous, the specific provision of section 23 on "dangerous recidivists" being "dead law" (*Totes Recht*)[25]. The fact that section 23 § 2 provides that placement in an institution for mentally "abnormal" offenders, which is not time-limited, prevails over placement in an institution for "dangerous recidivists", which is time-limited, evidently contributes to the increased mislabelling of offenders[26]. Looking behind appearances, labelling offenders with intellectual and psychosocial impairments as "abnormal" serves the purpose of formally transferring them from the *Normalvollzug* regime to the *Massnahmenvollzug* regime; in fact, most of them never leave the former, the significant difference being that since they are nominally under the latter regime their incarceration may last forever[27]. Consequently, the respondent State does not provide reasonable accommodations in the above-mentioned sense to "abnormal" offenders, imposing a disproportionate and discriminatory punishment on them.

The lack of judicial oversight

10. The specific duration of the psychiatric detention of "abnormal" offenders is decided by a court which conducts an annual, *ex officio* review of the situation of the detained person (section 25 § 3 of the Austrian Criminal Code) and hears evidence from him or her every two years (section 167(1) of the Law on Enforcement of Penalties). During this procedure, "the convicted person has the rights of an accused person" (*der Verurteilte hat die Rechte des Beschuldigten*), according to the explicit wording of section 17(1)(3) of the Law on Enforcement of Penalties.

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[25] Schanda, "Die aktuelle Psychiatriegesetzgebung in Österreisch: Zivil und Strafrecht aus psychiatrischer Sicht", in *Recht und Psychiatrie*, 23. Jahr, Heft 4, 2005, p. 163; Minkendorfer, cited above, pp. 66 and 70; and Drexler, cited above, p. 298.

[26] This is precisely the reason why the applicant requested his transfer to the *Normalvollzug* regime: as the Steyr Regional Court quite well understood, in its decision of 31 July 2007, the applicant feared that the moment of his *bedingte Entlassung* could be postponed indefinitely.

[27] As in *M. v. Germany*, no. 19359/04, § 128, 17 December 2009, having regard to the realities of the situation of "abnormal" persons in psychiatric detention, it is patent that psychiatric detention under section 21 § 2, like preventive detention in Germany, serves a purely preventive purpose.

11. In the light of this provision, it is obvious that the procedural rights under the criminal limb of Article 6 of the Convention apply to the release proceedings. In Austrian law, "abnormal" persons in psychiatric detention have a set of procedural rights which cannot be disposed of on a discretionary basis by the court. Yet since its implementation, strong criticism has been voiced of the courts' practice in the context of the placement review mechanism, namely of courts hearing detained persons very briefly, rejecting requests by detained persons for evidence to be produced or for the psychiatric expert to be questioned before the court and summoning detainees at very short notice, which does not allow for consultation of the file or with a lawyer or submission of an alternative psychiatric expert report[28]. Of particular importance is the right to call witnesses and to question the psychiatric expert, it being open to the court to reject these requests only within the limited terms of section 55 of the Code of Criminal Procedure[29]. For example, the court cannot reject a request to take evidence on the assumption that it is not necessary, as happened in the present case.

Furthermore, the lack of effective judicial oversight of the psychiatric detention of "abnormal" offenders is aggravated by the Austrian Supreme Court's case-law with regard to the interpretation of section 25 § 3 of the Austrian Criminal Code, in so far as it establishes that the law guarantees review at regular intervals, but does not fix a time-limit for the actual court decision to be taken. According to the Supreme Court, the court's decision may be taken outside the legal one year time-limit. The guarantee of regular

[28] Krisper, cited above, p. 22; Nowak/Krisper, cited above, p. 657; Schwaighofer, cited above, p. 64; Schmeikal, "Debasement of state by the law and how to reconstruct social life", in *Zum österreichischen*…, cited above, p. 83; and Bertel, cited above, p. 28, who refers to "grave grievances" with regard to this review procedure and to an "apparent review". The CPT has already recommended that the Austrian authorities take steps to ensure, in the context of the placement review procedure, that prisoners have legal representation, including legal assistance to prisoners who are not in a position to pay for a lawyer themselves (CPT/Inf (2005) 13, para. 118). The same request was made by the UN Special Rapporteur on Torture. Rule 93 of the Standard Minimum Rules on the Treatment of Prisoners should ensure that all persons detained, arrested or imprisoned, suspected or accused, or convicted (including death row inmates), and at all stages of the criminal justice process, including whenever there is a complaint of torture or other ill-treatment, are provided with prompt, independent and effective legal representation of the detainee's own choosing, if available, and otherwise at the State's expense, on the basis of principles 3, 7 and 12 of the United Nations Principles and Guidelines on Access to Legal Aid, and principle 18 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Report of the Special Rapporteur on Torture, 9 August 2013, A/68/295, paragraph 74).

[29] Bertel, cited above, pp. 29-32: "In practice lawful hearings are not frequent"; "These situations bear no relation to the rule of law and the protection of fundamental rights". Hence, I cannot accept the position of the Government in their observations, page 21, disputing the applicability of Article 6 of the Convention and calling for "a certain flexibility of the procedural guarantees".

judicial review of the person's detention is hence more virtual than real. As this case-law provided the basis for the Linz Regional Court's judgment of 10 September 2007, the finding of a breach of Article 5 of the Convention in the present case directly calls into question this excessively tolerant case-law on the part of the Supreme Court[30].

Conclusion

12. The psychiatric detention provided for in section 21 § 2 of the Austrian Criminal Code is a vague and disproportionate form of involuntary transfer of criminally responsible persons to mental health facilities within or outside of an ordinary prison facility. Moreover, it is a form of discrimination based on mental disability in the context of criminal sanctions and violates Article 14 CRDP. The unlawful, disproportionate and discriminatory nature of this interference with the liberty of "abnormal" offenders also breaches Article 5 of the Convention. The applicant was the victim of such a violation. The protracted proceedings for review of the applicant's detention until his release are not a unique situation in Austria. The groundless rejection of his request for the taking of evidence is also a common feature of the review procedure mechanism. Both shortcomings reflect the widespread failure to comply with the guarantees of Article 5 and 6 of the Convention in proceedings for the release of these offenders.

With a helping hand from attentive scholarly opinion, the national authorities have undertaken a serious assessment of this situation with several well-founded studies, to which I have made reference above[31]. It is now high time for them to take action and reform the deficient legal and institutional framework in accordance with Austria's international obligations.

[30] The majority's indirect criticism of this case-law is not sufficient. In my view, the judgment would have been bound to gain in terms of clarity if the majority had explicitly stated that this line of case-law is not admissible under Article 5.

[31] I refer to the 2010 Court of Auditors' report, the 2012 IRKS study and the 2015 BMJ study.