

The Third Section of the European Court of Human Rights (ECHR), with a judgement of November 2nd 2021, ruled against Switzerland for a violation of art. 5 and 7 of the European Convention on Human Rights and art. 4 of Protocol no. 7 to the Convention.

In a judgement of 1993 (amended in 1995), the applicant was convicted of several offences, including homicide and intentional manslaughter, and served his sentence of twenty-years' imprisonment. In 2013, the proceedings against him were reopened and his subsequent preventive detention was ordered, on account of an assessment carried out by a psychiatric expert relating to his mental state which revealed that there was a very high risk that he could commit further violent offences. According to the applicant, the new preventive detention breached his right to liberty and security under art. 5 § 1 of the Convention, the prohibition on retrospective punishment under art. 7 § 1 of the Convention and the right not to be punished twice under art. 4 § 1 of Protocol no. 7 to the Convention.

The European Court, in examining the first complaint of the present case, noted that only the 1993/95 judgment – in which it had been established that the applicant was guilty, in particular, of having committed two capital crimes, and was sentenced to twenty years of imprisonment – could provide an adequate basis for the applicant's preventive detention for the purposes of art. 5 § 1 (a) («No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (a) the lawful detention of a person after conviction by a competent court [...] »). By contrast, the order made by the domestic Court in 2013, for the applicant's subsequent detention, had not itself constituted a "conviction" as required under art. 5 §1 (a) as it had not involved the establishment of new offences and a finding of guilt thereof. Therefore, the Strasbourg judges called upon to determine whether there had been a sufficient causal link between the "conviction" of 1993/95 and the subsequent preventive detention ordered in 2013, found that the reopening of the proceedings de facto amounted to the imposition of an additional sanction aimed at protecting society for an offence which the applicant had previously been convicted of, without there being new elements affecting the nature of the offence or the extent of the applicant's guilt. The 2013 preventive detention breached art. 5 §1 (a) due to the fact that the ECHR did not recognize a sufficient causal link between the 1993/95 conviction and the applicant's subsequent preventive detention. This preventive detention also violated letter (e) of the same article since the applicant, effectively considered a person "of unsound mind" pursuant to this provision, was unlawfully detained in an ordinary prison and not in an institution suitable for the detention of patients affected by ascertained mental problems, such as a severe personality disorder and severe psychopathy.

The European Court then proceeded to verify whether the applicant's preventive detention was «a heavier penalty [...] than the one that was applicable at the time the criminal offence was committed» (art. 7, § 1 of the Convention): well, at the time of the facts, it had not been possible to place the applicant in preventive detention by a retrospective order made after his convictions from the 1990s had become final. Moreover, under the new version of the Swiss Criminal Code, owing to the fact that the term of imprisonment imposed was now executed prior to a preventive detention order, the person concerned was liable to be detained for a longer period of time. Consequently, the subsequent order for the applicant's preventive detention had amounted to a retrospective imposition of a heavier penalty, in violation of art. 7 §1 of the Convention.

Finally, the ECHR reiterated that legal certainty could not be absolute and that «if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case», criminal proceedings can be reopened (art. 4, Protocol no. 7). However, the European Court found a violation of the ne bis in idem principle, enshrined in art. 4 of Protocol No. 7 to the Convention, because the proceeding in question has not been reopened in accordance with the provisions of the Convention, as no new facts have been established. Therefore, no fresh determination of a criminal charge in a new decision had been, or was to be, made against the applicant.



The preventive detention of an offender for the same crimes violates the right to liberty and security, the prohibition of retrospective imposition of a heavier penalty and the «ne bis in idem» principle

Diritto processuale penale Misure cautelari

Denise Campagna

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Riferimenti Normativi:

- art. 5 Convenzione Europea dei Diritti dell'Uomo
- art. 7 Convenzione Europea dei Diritti dell'Uomo
- art. 4 Protocollo n. 7 alla Convenzione Europea dei Diritti dell'Uomo