H.W. v. GERMANY

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I. INTRODUCTION

This case concerns the application of sub-paragraph (a) of Article 5 § 1 of the European Convention on Human Rights ("Convention"). Specifically, the European Court of Human Rights ("Court") is asked to consider whether Mr. H.W.'s ("the applicant") preventive detention violated his right to liberty under Article 5 § 1 of the Convention.

A. Background

The applicant was born in 1959 and is currently being detained in Berlin-Tegel Prison. In 1995, the Braunschweig District Court convicted the applicant of attempted coercion and attempted extortion of a fourteen-year-old girl and three counts of sexual abuse of children by exhibitionist acts. The District Court sentenced him to one year and three months imprisonment and granted him probation. On November 26, 1997, the Berlin Regional Court convicted the applicant on several grounds, including rape, sexual coercion, and sexual abuse of a nine-year-old girl and of two ten-year-old girls in their apartments. For these offenses, the Regional Court sentenced him to nine years and six months imprisonment with preventive detention.

After consultation with a neurologic and psychiatric expert, the Regional Court found that the applicant, who had confessed to the offenses, had acted with full criminal responsibility, but suffered from a dissocial and narcissistic personality disorder and a sexual deviation that required therapeutic treatment. The report indicated that he had a propensity to commit serious offenses, in particular sexual offenses, and was therefore dangerous to the public.

On November 1, 2007, the Berlin Regional Court ordered the execution of the preventive detention order against the applicant.

Relying on the psychiatric report from May 29, 1997, the court held that the applicant was still dangerous to the public. Moreover, the court held that the conclusions in the report were still valid because the applicant's personality and attitude exhibited no significant changes. Also, while in prison, he had refused to attend therapy to address his offenses.

On December 24, 2007, the applicant served his full sentence, but since then he has been held in preventive detention in the Berlin-Tegel Prison.

B. Procedural History

On September 29, 2009, the applicant asked the Berlin Public Prosecutor's Office and the Berlin Regional Court to inform him of the progress of his proceedings pursuant to Article 67e of the Criminal Code. In this written request, he asked for review of whether the further execution of the preventive detention order against him was necessary. In his letter, he requested to have a lawyer appointed to him and to consult an expert on his dangerousness.

On November 9, 2009, the Berlin Regional Court asked the Berlin Public Prosecutor's Office to obtain the information necessary to conduct proper review proceedings. On November 11, 2009, the Berlin Public Prosecutor's Office asked the Berlin-Tegel Prison authority to make a statement on the applicant's situation and development in preventive detention. The request, however, was never received. On December 2, 2009, the Public Prosecutor made a second request for a statement, which was eventually received on December 17, 2009.

On December 28, 2009, the Berlin-Tegel Prison authority submitted its statement to the Berlin Public Prosecutor's Office. The statement recommended against suspending the execution of the applicant's preventive detention, citing to the applicant's refusal to attended therapy.

On January 20, 2010, the Berlin Regional Court, after hearing the applicant and his counsel, ordered the applicant's preventive detention to continue, dismissing his request to interrupt the execution of that detention. Relying upon the applicant's conduct in prison and his written and oral statements, the Regional Court concluded that he would likely reoffend if released. Moreover, because of these facts, the Regional Court found it unnecessary to consult a psychiatric expert on the applicant's dangerousness.

On February 1, 2010, the applicant lodged an appeal against the Regional Court's decision. He argued that the Regional Court failed to draw any consequences from the delays caused by the Public Prosecutor's Office, which extended the time limit for the review of his preventive detention. On June 17, 2010, the Berlin Court of Appeal dismissed the applicant's appeal, affirming the Regional Court's finding that the applicant would likely commit more unlawful acts upon his release.

The applicant, who was no longer represented by counsel, subsequently filed a constitutional complaint with the Federal Constitutional Court. He argued in particular, that his constitutional right to liberty had been violated. Specifically, since December 24, 2009, there was no longer a legal basis for his preventive detention. He further complained that the proceedings before the courts dealing with the execution of his sentences had been unfair as the courts had never sufficiently established the facts on which they had based their conclusion that he was still dangerous to the public. In particular, he argued that the 1997 expert report was out of date and thus unreliable. Instead, a more recent expert report on his dangerousness should have been obtained.

On September 16, 2010, the Federal Constitutional Court, without explanation, declined to consider the applicant's constitutional complaint.

C. Domestic Law

Under Article 66 of the Criminal Code, a sentencing court may, at the time of an offender's conviction, order his preventive detention, known as a measure of correction and prevention, under certain circumstances, if the offender has been shown to be dangerous to the public.

Article 67d of the Criminal Code governs the duration of preventive detention. Paragraph 2, first sentence, of that Article, in its version in force at the relevant time, provides that if a maximum duration is not established or if the time limit has not yet expired, the court shall suspend on probation the further execution of the detention order as soon as the offender is considered rehabilitated and unlikely to commit any other unlawful acts on his or her release.

Under Article 67e of the Criminal Code, the court may review at any time whether further execution of the preventive detention order should be suspended and a measure of probation applied or whether preventive detention should be terminated. The court is obligated to do so within fixed time limits. For persons in preventive detention, this time limit is two years.

Article 458 § 1 of the Code of Criminal Procedure provides that if objections are raised to the lawfulness of the execution of a penalty, a court decision shall be obtained. The further execution of the penalty shall not be suspended; the court may, however, order a suspension of execution. Pursuant to Article 463 § 1 of the Code of Criminal Procedure, Article 458 applies, *mutatis mutandis*, to the execution of measure of correction and prevention.

Under Article 463 § 3, third sentence, read in conjunction with Article 454 § 2, of the Code of Criminal Procedure, the courts dealing with the execution of sentences have to consult an expert on the convicted person's dangerousness in proceedings under Article 67d 2 of the Criminal Code.

D. European Convention on Human Rights

Article 5 § 1 of the Convention, which, in so far as relevant, reads as follows:

> 1. Everyone has the right to liberty and security of person. 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;

II. DISCUSSION

The Court's discussion is broken down into two sections. The first section concerns whether the Regional Court's failure to comply with the two-year time limit laid down in Article 67e of the Criminal Code had breached the applicant's right to liberty under Article 5 § 1 of the Convention. The second section addresses the Court's analysis of whether it was unlawful to continue the applicant's preventive detention without ordering a new psychiatric expert report that evaluated his dangerousness to the public.

A. Court's Assessment of the Alleged Violation of Article 5 § 1 of the Convention on Account of Non-Compliance with the Time Limit for Judicial Review

Beginning with the first issue, the Court remarked, "[c]ompliance with the rules of national law primarily requires any arrest or detention to have a legal basis in domestic law but also relates to the quality of the law, requiring it to be compatible with the rule of law, a concept inherent in all the Articles of the Convention." The Court interpreted "quality of the law" to mean that where a national law authorizes deprivation of liberty, it must be "sufficiently accessible, precise and foreseeable in its application, in order to avoid all risk of arbitrariness." Therefore, under the Convention, compliance with national law is not sufficient. Rather, Article 5 § 1 of the Convention requires that any deprivation of liberty should be

in keeping with the purpose of protecting the individual from arbitrariness.

One of the factors the Court considers when assessing whether a person's detention is arbitrary for purposes of Article 5 § 1 is "the speed with which the domestic courts replaced a detention order which had either expired or had been found to be defective." In this respect, the Court referenced two cases where review of the applicants' detention order had been delayed for eighty-two days and nine and a half months, respectively. In both cases, the judges ruled that the applicants' liberty rights had been violated. In contrast, other case rulings stated that a delay in the replacement of a detention order lasting two weeks in one case and one month in another did not violate the applicants' liberty interest under Article 5 § 1 of the Convention.

In such preventive detention cases, the court has also previously examined the following factors when assessing whether a person's detention must be considered arbitrary for the purposes of Article 5 § 1 of the Convention: (1) whether adequate safeguards existed to ensure the applicant's release from detention would not be unreasonable delayed; (2) whether the applicant contributed in any way to the delays caused in the procedure; (3) whether the applicant objected to a foreseeable delay in the proceedings; and (4) whether the delay could be attributed to the complexity of the proceedings.

Before applying the factors to the case at hand, the Court briefly analyzed the domestic court's holding and concluded that *under domestic law*, the applicant's preventive detention following December 24, 2009 was lawful. However, the Court quickly pointed out that "national law must also be of a certain quality: it must contain clear and accessible rules governing the circumstances in which deprivation of liberty is permissible." Thus, "despite…compliance with domestic law," a person's detention may still be arbitrary and thus contrary to Article 5 §1 of the Convention, if the relevant factors weigh in favor of the applicant.

As such, the Court first examined the speed with which the domestic courts replaced the expired detention order. The Court

found that the delay of 27 days was not a negligible period of time. Moreover, "a delay of almost one month is at the upper limit of what it could still consider as reasonable, depending on all the circumstances."

Next, the Court concluded that the applicant cannot be said to have contributed to delays in the review procedure. As evidence of this, the Court noted the applicant's ongoing inquiries about the progress of his review proceedings prior to the expiration of the two-year limit. On the contrary, the Court found that the delays "in the review proceedings were mainly caused by the fact that the Berlin Regional Court…initiated the review proceedings belatedly, only some six weeks before the expiry of the statutory time-limit for review." Thereafter, "delays caused, in particular, by the fact that the letter to the Berlin-Tegel Prison authority was lost, could no longer be made up." For these reasons, the Court ruled that the delays in the procedure were not "caused by an unforeseeable complexity of the proceedings," but rather by mistakes made by the Public Prosecutor's office.

Finally, the Court found that there were no "sufficiently clear safeguards to ensure that a decision on the applicant's release from detention would not be unreasonably delayed." In this respect, the Court emphasized the applicant's lack of contribution to the delays. Moreover, "the threshold applied by the domestic courts, which examined whether the procedure followed in the review proceedings disclosed a 'flagrant irregularity,' was too high and thus failed to afford the applicant sufficient protection from excessive delays." As a final remark, the Court noted "the lack of adequate safeguards was once again demonstrated by the fact that the time limit under Article 67e…was once again exceeded – by some two months – in the fresh review proceedings following those at issue in the present case."

Thus, the Court concluded that the applicant's detention between December 24, 2009 and January 20, 2010 was arbitrary and thus unlawful for the purposes of Article 5 §1 of the Convention.

B. Court's Assessment of Alleged Violation of Article 5 §1 of the Convention of the Convention for Failure to Obtain a Recent Medical Expert Report

The Court also considered whether it was unlawful to continue the applicant's preventive detention without ordering a new psychiatric expert report evaluating his dangerousness to the public.

The Court began by pointing out that "the word 'after' in sub-paragraph (a) does not simply mean that the 'detention' must follow the 'conviction' in point of time." Rather, "[t]here must be a sufficient causal connection between the conviction and the deprivation of liberty at issue." This causal link may be broken if the reasons for the applicant's current detention are incompatible with the grounds for his initial detention.

Thus, at issue here is *how* the reviewing court came to the conclusion that the applicant was *still* dangerous to the public. It is the applicant's contention that the reviewing court made its decision "without any recent expert report and on the basis of insufficient reasons." In this respect, the Court agreed with the applicant. The Court considered "the only psychiatric expert report available to the domestic courts examining whether the applicant was dangerous to the public… was more than twelve and a half years old." The Court further stated that "[i]n such circumstances, a sufficient establishment of the relevant facts concerning a person's current dangerousness, which resulted from personality disorders and a sexual deviation and thus from a condition the persistence of which is difficult to evaluate by persons without medical expertise, will, as a rule, necessitate obtaining recent expert advice."

Based on these facts, the Court concluded that the failure of the domestic courts to at least attempt to obtain "fresh advice from an external medical expert on the necessity of the applicant's continuing preventive detention" violated the applicant's liberty rights under Article 5 §1 of the Convention.

III. ANALYSIS

The applicant alleged, "in particular, that the domestic courts' failure to comply with the statutory time limit for review of the necessity of his preventive detention and their refusal to consult a medical expert on his dangerousness violated Article 5 §1 of the Convention."[1] The following analysis will take a closer look at the case law relied upon by the Court to support its holdings. It is my contention that the Court misapplied the case law as to the first holding, but properly applied it as to the second holding.

A. Revisiting Erkalo, Schönbrod, Rutten, and Winterwerp

Beginning with the first issue, the Court listed five factors relevant in assessing whether a person's detention must be considered arbitrary for the purposes of Article 5 § 1 of the Convention:[2] (1) the speed with which the domestic courts replaced a detention order which had either expired or had been found defective;[3] (2) whether adequate safeguards existed to ensure that the applicant's release from detention would not be unreasonably delayed;[4] (3) whether the applicant contributed in any way to the delays caused in the procedure;[5] (4) whether the applicant objected to a foreseeable delay in the proceedings;[6] and (5) whether the delay could be attributed to the complexity of the proceedings.[7]

Although no single factor is dispositive on the question of whether a person's detention must be considered arbitrary for purposes of Article 5 § 1 of the Convention, the Court in the present

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[1] H.W. v. Germany, App. No. 17167/11, ¶ 3 (Eur. Ct. H.R. 2013), http://www.echr.coe.int.
[2] *Id.* ¶ 68-73.
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Id.*

case, as well as in prior cases, gave more weight to the first two factors.[8] For this reason, this analysis, too, will emphasize the first two factors, namely: (1) the speed with which the domestic courts replaced a detention order which had either expired or had been found defective; [9] and (2) whether there had been adequate safeguards to ensure that the applicant's release from detention would not be unreasonably delayed.[10]

B. Erkalo v. The Netherlands

In Erkalo v. The Netherlands, review of the applicant's detention was delayed by eighty-two days.[11] The applicant in *Erkalo* had been convicted on two counts of manslaughter.[12] The court sentenced him to five years imprisonment and placed him in a psychiatric institution for a two-year period commencing on July 3, 1991.[13] On May 17, 1993, the public prosecutor prepared a request for a one-year extension of the applicant's placement. [14] The applicant was also informed of this request. [15] However, the prosecutor's request did not arrive to the registry of the Regional Court; instead, it was accidentally placed in the court's archives.[16]

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[8] *See* Erkalo v. The Netherlands, App. No. 89/1997/873/1085 (Eur. Ct. H.R. 1998), http://www.echr.coe.int; Schönbrod v. Germany, App. No. 48038/06 (Eur. Ct. H.R. 2011), http://www.echr.coe.int; Rutten v. The Netherlands, App. No. 32605/96 (Eur. Ct. H.R. 2001), http://www.echr.coe.int; Winterwerp v. The Netherlands, App. No. 6301/73 (Eur. Ct. H.R. 1979), http://www.echr.coe.int.
[9] *H.W.*, App. No. 17167/11, ¶ 68.
[10] *Id.* ¶ 73.
[11] *Erkalo*, App. No. 89/1997/873/1085, ¶57 (Eur. Ct. H.R. 1998).
[12] *Id.* ¶ 9.
[13] *Id.* ¶ 10.
[14] *Id.* ¶ 12.
[15] *Id.*
[16] *Id.*

Because of the filing error, the Regional Court did not receive the public prosecutor's request for the extension of the placement order "until two months after the expiration of the statutory period, and, as a result, for eighty-two days, the placement of the applicant was not based on any judicial decision."[17]

The Court also observed that that there was a lack of adequate safeguards to ensure that the applicant's release from detention would not be unreasonably delayed.[18] This was evidenced by the fact that it was the "applicant's own initiative that set in motion the judicial proceedings."[19]

For these reasons the Court concluded that the "detention of the applicant between the date of the expiry of the initial placement order and the date on which the Regional Court rendered its decision," was not compatible with the purpose of Article 5 § 1 of the Convention, and thus it was unlawful.[20]

The *Erkalo* case shares some important similarities with the present case. For instance, like the applicant in *Erkalo*, the applicant in the present case also took the initiative by asking authorities about the progress of the review proceedings for his preventive detention.[21] Thus, the applicant had nothing to do with the delay of his case review.[22] This suggests that the second factor, namely, whether there had been adequate safeguards to ensure that the applicant's release from detention would not be unreasonable delayed, should be weighed in the applicant's favor. Indeed, it was not the applicant's fault, but rather, the public prosecutor's error that caused the delay of the review proceedings.[23]

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[17] *Id.* ¶ 57.
[18] *Id.*
[19] *Id.*
[20] *Id.* ¶ 60.
[21] *H.W.*, App. No. 17167/11, ¶ 85.
[22] *Id.*
[23] *Id.* ¶ 87.

However, unlike the applicant in *Erkalo* the applicant here was only placed in detention for an additional 27 days.[24] In contrast, the applicant in *Erkalo* was placed in detention for an additional 82 days.[25] That is over three times the length that the applicant in the present case was detained. Thus, even if, for arguments sake, adequate safeguards were not in place to ensure that the applicant's release from detention would not be unreasonably delayed, the length of the applicant's stay in this case was much shorter than the applicant in *Erkalo.*

C. Schönbrod v. Germany

Similarly, the applicant in Schönbrod v. Germany had his review proceedings delayed by about nine and a half months.[26] The applicant in *Schönbrod* had a long history of convictions ranging from theft to aggravated armed robbery.[27] On May 20, 1996, three years after being released from jail, the applicant was arrested again and sentenced to ten years imprisonment.[28] The applicant was set to complete his preventive detention on June 7, 2005, but his detention was not reviewed until March 30, 2006 – a delay of nine and a half months.[29]

The Court observed that a delay of nine and a half months was a "considerable time" for the applicant to be in detention without the necessary court order.[30] The Court also noted that "nothing indicate[d] that the applicant contributed in any way to the delays caused in the procedure."[31] Quite the contrary, the Court found that

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[24] *Id.* ¶ 27.
[25] *Erkalo*, App. No. 89/1997/873/1085, ¶57 9Eur. Ct. H.R. 2011).
[26] *Schönbrod*, App. No. 48038/06, ¶ 103.
[27] *Id.* ¶¶ 7-8.
[28] *Id.* ¶ 16.
[29] *Id.* ¶¶ 25-26.
[30] *Id.* ¶ 78.
[31] *Id.* ¶ 107.

while the Regional Court had already initiated the proceedings at issue nine months before the end of the applicant's prison sentence, the proceedings were subsequently delayed for several reasons.[32] One of these reasons was that the public prosecutor's office took six months to send the case file to the Regional Court.[33] For these reasons, the Court held that the applicant's detention was arbitrary and thus unlawful for purposes of Article 5 § 1 of the Convention.[34]

Like *Erkalo*, *Schönbrod* also has many similarities with the present case. For instance, like the applicant in *Schönbrod*, the applicant in this case had nothing to do with the delays caused in the review proceedings.[35] Moreover, like both *Erkalo* and *Schönbrod*, the public prosecutor's mistakes caused the delay in the applicant's detention review.[36] However, there is a staggering difference between the present case and *Schönbrod* in that the applicant in *Schönbrod* had his review proceedings delayed by nine and a half months compared to only twenty-seven days in the present case.[37]

C. Rutten v. The Netherlands

In contrast, the applicant in Rutten v. The Netherlands had only experienced a delay of about one month in his review proceedings.[38] In *Rutten*, the applicant had been convicted of attempted homicide and sentenced to eight months imprisonment.[39] In addition, "the Court of Appeal imposed a TBS order (similar to

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[32] *Id.*
[33] *Id.*
[34] *Id.*
[35] *H.W.*, App. No. 17167/11, ¶ 85.
[36] *Id.* ¶ 87.
[37] *Id.* ¶ 27.
[38] Rutten v. Netherlands, App. No. 32605/96, ¶ 54 (Eur. Ct. H.R. 2001).
[39] *Id.* ¶ 9.

preventive detention) with confinement to a secure institution."[40] The "TBS order took effect on September 4, 1992 and expired two years later on September 4, 1994."[41] On September 9, 1994, "the Regional Court prolonged the TBS order by one year, now set to expire on September 4, 1995."[42] On July 18, 1995, "the public prosecutor requested that the TBS be further prolonged based on the advice of the secure institution where the applicant was being held."[43]

The Regional Court examined the prosecutor's request in a hearing held on September 22, 1995.[44] The applicant "argued that the prolongation should be inadmissible because the TBS order had expired on September 4, 1995."[45] On October 6, 1995, the Regional Court rejected the applicant's argument and prolonged his TBS order for an additional year.[46]

In its analysis, the Court observed that the "prosecutor's request was filed within the statutory time limit and the applicant was informed on July 28, 1995 that the Regional Court would consider the request for a prolongation of the order at the hearing on September 22, 1995."[47] However, it was only at the actual hearing on September 22, 1995 that the applicant expressed objections against the delay in the examination of the review proceedings.[48] Based on these facts, the Court held that the "applicant's detention between the expiry of his TBS order and the determination of the Regional Court of the request for the prolongation" could not be regarded as involving an arbitrary deprivation of liberty.[49]

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[40] *Id.*
[41] *Id.*
[42] *Id.* ¶ 10.
[43] *Id.* ¶ 11.
[44] *Id.* ¶ 12.
[45] *Id.*
[46] *Id.* ¶ 13.
[47] *Id.* ¶45.
[48] *Id.*
[49] *Id.* ¶ 46.

In the present case, the Court distinguished *Rutten*.[50] It pointed out that "unlike the applicant in the present case, the applicant in the case of *Rutten* could be considered to have accepted the foreseeable delay in the examination of his case by domestic courts" because he never objected to it.[51] Although this is in fact true, it only supports a finding that one of the factors, namely, whether the applicant objected to a foreseeable delay in the proceedings, should be weighed in the applicant's favor. Moreover, although the Court stated that the present case can be distinguished from *Rutten* in "several respects," the Court only listed the one mentioned above.[52] Thus, although the applicant in the present case was never given prior notice of a delay in his review proceedings, that factor still does not outweigh the short length that his review proceedings were delayed, i.e., 27 days.

D. Winterwerp v. The Netherlands

Lastly, in Winterwerp v. The Netherlands, the applicant had only experienced a delay of about two weeks before his detention was reviewed.[53] On December 16, 1969, "the Regional Court made an order authorizing the prolongation of the detention of the applicant by one year."[54] On December 14, 1970, "the public prosecutor at 's-Hertogenbosch requested the renewal of the detention order for a further year, on the basis of the monthly records of the doctors who had successively treated Mr. Winterwerp."[55] On January 7, 1971, two weeks after the previous order expired, the Regional Court authorized further detention for another year.[56]

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[50] *H.W.*, App. No. 17167/11, ¶ 84.
[51] *Id.*
[52] *Id.*
[53] *Winterwerp*, App. No. 6301/73, ¶ 49.
[54] *Id.* ¶ 26.
[55] *Id.* ¶ 27.
[56] *Id.*

The applicant argued that "his confinement became unlawful insofar as it continued beyond the term fixed."[57] The government responded that under the Mentally Ill Persons Act, the important date is not when the Regional Court gave its ruling, but when the public prosecutor filed his request.[58] Thus, because the public prosecutor had filed his request within the permitted period required by domestic law, his conduct was not unreasonable or unlawful.[59] The Court agreed with the government.[60] The Court held that the "interval of two weeks between the expiry of the earlier order and the making of the succeeding renewal order can in no way be regarded as unreasonable or excessive."[61]

Just like in *Winterwerp*, the present case complied with domestic law.[62] In the present case, the threshold applied by the domestic courts, which examined whether the procedure followed in the proceedings disclosed a "flagrant irregularity,"[63] was proper and consistent with case law.[64] Indeed, the Court admits "the applicant's preventive detention after [December 24 2009] remained lawful under domestic law."[65] Moreover, this finding shows that the domestic courts did have adequate safeguards in place to ensure that applicant's release from detention would not be unreasonably delayed. Indeed, under domestic law, the applicant would have been deprived of his liberty if the procedure followed had "*unjustifiable disrespected* Article 67e of the Criminal Code."[66] Of course, since the delay in this present case was caused by an *accident* and not

[57] *Id.* ¶ 49.
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] *H.W.*, App. No. 17167/11, ¶ 90.
[63] *Id.* ¶ 89.
[64] *Id.* ¶ 90.
[65] *Id.*
[66] *Id.* ¶ 27 (emphasis added).

some "flagrant irregularity," the applicant's liberty interests were not violated.[67]

After a closer analysis of the four cases cited by the Court in support of its first holding, I disagree with its conclusion.

First, the Court did not give enough weight to the first factor, namely, the speed with which the domestic courts replaced a detention order that had either expired or had been found defective. As evidenced in *Erkalo* and *Schönbrod*, a delay in the review proceedings of a person's preventive detention, for purposes of Article 5 § 1 of the Convention, should be considered arbitrary if the delay is at least eighty-two days[68] and certainly if the delay is over nine months.[69] However, in this case, the applicant's delay was for only twenty-seven days.[70] Thus, this case is closer to the facts in *Winterwerp* and *Rutten*, where the Court held that delays of one month[71] and two weeks,[72] respectively, were not long enough to be deemed arbitrary and thus unlawful for purposes of Article 5 § 1 of the Convention.

Secdon, the Court did not give sufficient deference to the domestic courts holding that the Regional Court had not unjustifiably disrespected the said provision of the Criminal Code, which safeguarded the constitutional right to liberty.[73] Put another way, "[t]he procedure followed did not disclose a flagrant irregularity."[74] Instead, the Court insisted that there were no "sufficiently clear safeguards to ensure that a decision on the applicant's release from detention would not be unreasonably delayed."[75] However, this is not

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[67] *Id.* ¶ 31.
[68] *Erkalo*, App. No. 89/1997/873/1085, ¶57.
[69] *Schönbrod*, App. No. 48038/06, ¶ 103.
[70] *H.W.*, App. No. 17167/11, ¶ 27.
[71] *Rutten*, App. No. 32605/96, ¶ 54.
[72] *Winterwerp*, App. No. 6301/73, ¶ 49.
[73] *H.W.*, App. No. 17167/11, ¶ 32.
[74] *Id.* ¶ 31.
[75] *Id.* ¶ 89.

true. The domestic courts could not be any clearer in providing a safeguard to the constitutional right to liberty: there must be a flagrant irregularity in the procedure to find a violation of a right to liberty.[76]

Nevertheless, the Court stated that the "flagrant irregularity" threshold used by the domestic courts "was too high and thus failed to afford the applicant sufficient protection from excessive delays."[77] What the Court essentially asserted, therefore, is that *any mistake or accident* that delays an applicant's detention review (all other factors being considered) by at least one month is unlawful. This to me is too extreme of a conclusion. No constitutional right to liberty has been violated where the duration of the delay in reviewing the person's detention is minimal and there is, in fact, already adequate safeguards to ensure that the applicant's release from detention would not be unreasonably delayed. For these reasons, I would reach the opposite conclusion and hold that the delay in the review of the applicant's detention did not violate Article 5 § 1 of the Convention.

E. Revisiting Dörr v. Germany

As to the second issue, the Court held that "by failing to – at least attempt to – obtain fresh advice from an external medical expert on the necessity of the applicant's continuing preventive detention," there has been a violation of Article 5 of the Convention.[78] I agree with this conclusion although an analysis of Dörr v. Germany, App. No. 2894/08 (Eur. Ct. H.R. 2013) demonstrates this to be a close decision.

In *Dörr*, the applicant was convicted of two counts of rape and one count of attempted rape and bodily assault.[79] The court

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[76] *Id.* ¶ 31.
[77] *Id.* ¶ 89.
[78] *Id.* ¶¶ 113-14.
[79] Dörr v. Germany, App. No. 2894/08 (Eur. Ct. H.R. 2013), http://www.echr.coe.int.

sentenced him to ten years imprisonment and ordered his preventive detention.[80] On January 19, 1999, the applicant completed his prison sentence.[81] However, because he was still deemed a threat to the public, he remained in preventive detention.[82]

One of the applicant's arguments was that the preventive detention "had been based on old and insufficient expert opinion and an insufficient establishment of the facts concerning his dangerousness, which made the proceedings against him unfair."[83]

Specifically, although the applicant's detention was reviewed in 2007, the review relied on an analysis made by an external psychiatric expert in 2001.[84] Moreover, other expert reports from 1999 and 2001 referenced the applicant's personality.[85] Thus, a six to eight year gap existed between the psychiatric experts' reports and the applicant's detention review.[86]

However, the Court in *Dörr* pointed out that what was relied upon in the reports "was the fact that the applicant's dangerousness resulted from the fact that he had refused *all offers* of therapy made to him throughout the execution of his penalty and had not yet reflected on his offenses."[87] Moreover, the "applicant had failed to substantiate that there had been any substantial changes to his personality or attitude towards his offenses since his last examination by an expert."[88] For these and other similar reasons, the Court concluded that its "decision not to release the applicant had not been based on an assessment of his dangerousness that was unreasonable

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[80] *Id.*
[81] *Id.*
[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] *Id.*
[86] *Id.*
[87] *Id.* (emphasis added).
[88] *Id.*

in terms of the objectives of the judgment of the sentencing court to protect the public from significant sexual offenses."[89]

Like the applicant in *Dörr*, the applicant in the present case was a sexual offender that was placed in preventive detention because he posed a threat to the public.[90] In addition, like the applicant in *Dörr*, the applicant here also "had not reflected on his offenses and had not made any therapy."[91] However, unlike the applicant in *Dörr*, the facts in the present case indicate that the applicant was "not entirely unwilling to undergo therapy."[92] The applicant in the present case explained that he would "be willing to work with a therapist he could trust."[93]

In addition, the length of time between the applicant's psychiatric expert report and the review of his detention was twelve and a half years.[94] Indeed, this is significantly longer than the six or eight-year gap in *Dörr*.[95] The Court, thus, appropriately puts a lot of emphasis on the twelve-and-a-half-year gap.[96]

Although this is a close decision, the Court's holding was proper. Despite its similarities with *Dörr*, including the applicant's failure to reflect on his offenses or go to therapy,[97] the differences in this case are significant. Most notably, the applicant in the present case had not received a psychiatric evaluation in twelve and a half years.[98] Moreover, the facts indicate that unlike *Dörr*, the applicant here was "not entirely unwilling to undergo therapy."[99] For these

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[89] *Id.*
[90] *H.W.*, App. No. 17167/11, ¶ 8.
[91] *Id.* ¶ 19.
[92] *Id.* ¶ 110.
[93] *Id.*
[94] *Id.* ¶ 111.
[95] *Dörr*, App. No. 2894/08.
[96] *H.W.*, App. No. 17167/11, ¶ 111.
[97] *Id.* ¶ 19.
[98] *Id.* ¶ 111.
[99] *Id.* ¶ 110.

reasons, failure to obtain a new psychiatric report violated the applicant's liberty interests under Article 5 § 1 of the Convention.

CONCLUSION

The Court held that the applicant's rights had been violated pursuant to Article 5 § 1 of the Convention because: (1) the domestic courts failure to comply with the statutory time limit for review of the necessity of the applicant's preventive detention; and (2) the domestic courts' refusal to consult a medical expert on the applicant's dangerousness to the public.