

**APPLICATION N° 20872/92**

**A B v/SWITZERLAND**

**DECISION** of 22 February 1995 on the admissibility of the application

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**Article 3 of the Convention** *Requirement that a prisoner produce a urine sample in the course of a campaign against drug addiction does not attain the minimum level of severity necessary to constitute inhuman or degrading treatment*

**Article 5, paragraph 1 of the Convention** *The conditions of detention are not governed by this provision*

**Article 6, paragraph 1 of the Convention** *Not applicable to proceedings concerning the enforcement of a sentence*

**Article 8, paragraph 1 of the Convention** *A compulsory medical intervention even minor - in this case a requirement to undergo a urine test - constitutes an interference with the right to respect for private life*

**Article 8, paragraph 2 of the Convention** *The requirement, subject to disciplinary sanctions, that a prisoner provide a urine sample to be tested for drugs*

*Interference prescribed by law, necessary in a democratic society in the interests of public safety, for the prevention of disorder or crime, for the protection of health, and proportionate to the aims pursued. The necessity for interference with a convicted prisoner's right to respect for private life must be evaluated having regard to the ordinary and reasonable requirements of imprisonment, a greater degree of interference may be justified than in the case of a person at liberty*

**Article 13 of the Convention** *The right recognised by this provision may be exercised only in respect of an arguable claim as defined by the case-law of the Convention organs*

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## **THE FACTS**

The applicant is a Swiss citizen. He was born in 1955 and lives in Castelrotto (Tessin canton). He is currently imprisoned in "La Stampa" prison in Lugano.

The facts of the case, as submitted by the applicant, may be summarised as follows:

In a judgment delivered on 6 November 1989 by the Tessin Cantonal Assize Court (corte delle assise criminali) in Lugano, as amended on 6 April 1990 by the Tessin Cantonal Court of Cassation (corte di cassazione e revisione penale), the applicant was sentenced to 17 years' imprisonment for his part in the murder of a judge and for three counts of attempted armed robbery, all these offences having been committed in Rome. The applicant has been held in "La Stampa" prison in Lugano since 1988.

On 17 October 1990, the Prison Governor decided to test the inmates' urine at regular intervals, in close collaboration with the prison health centre, and to impose disciplinary sanctions on those refusing to cooperate, pursuant to sections 31 and 34 of the Regulations on the Enforcement of Penalties and Preventive Measures.

On 18 October 1990, the applicant filed a complaint against this measure with the Tessin Cantonal Department of Justice.

On 11 March 1991, the Cantonal Department of Justice rejected the applicant's complaint on the grounds that the measure in question had been taken in accordance with the recommendations drawn up by the Tessin Cantonal Supervisory Commission on handling the problem of drug abuse inside the prison. The Cantonal Department of Justice considered that the decision complained of was one of the measures available to the Prison Governor to maintain order, which was being compromised by the circulation of drugs within the prison community.

On 13 March 1991, the applicant refused to provide urine samples.

On 14 March 1991, he filed a public-law appeal with the Federal Court against the decision of the Cantonal Department of Justice of 11 March 1991.

The Federal Court dismissed this appeal in a judgment of 4 December 1991, served on the applicant on 2 March 1993

The Federal Court held that taking urine samples from a prisoner affected his personal freedom which was his protection against violations of respect for his private life. However, the requirement that a prisoner occasionally provide urine samples for tests did not amount to an inordinately serious infringement of his personal freedom. There did not have to be a specific rule to justify an infringement of this nature, which could be based on general provisions relating to the maintenance of order in the prison or those governing compulsory medical testing of prisoners. In this case, the decision complained of had been approved on 2 February 1991 by the Supervisory Commission set up under Article 2 of the Tessin Law of 2 July 1974 on the Enforcement of Penalties and Preventive Measures for Adults. Under section 29 of the Prison Rules dated 23 November 1978, in the interests of prison safety, prisoners must observe order and discipline (para. 1) and comply with the rules and regulations governing prison life (para. 2). The Federal Court held that these provisions were undoubtedly a sufficient legal basis for such a measure. Having regard to the fact that drugs had been circulating inside the prison, the Federal Court was not convinced by the applicant's arguments that the decision in question was not justified by an overriding public interest. The tests were, moreover, carried out with due respect for the prisoners' privacy. The Federal Court noted finally that the disciplinary sanctions were based on sections 31, para. 1 and 33 of the Prison Rules.

On 27 June 1992, the Prison Governor ordered the applicant to provide urine samples.

On 28 June 1992, the applicant submitted a request to the Prison Governor and prison hospital for dispensation from this measure.

In a letter of 2 July 1992, the Prison Governor refused to grant the applicant dispensation, specified a date by which he was to comply with the decision being challenged and warned him that disciplinary measures would be taken against him should he refuse to co-operate.

## COMPLAINTS

1 The applicant complains of the obligation to provide urine samples. He submits that this measure constitutes inhuman and degrading treatment contrary to Article 3 of the Convention and amounts to an interference with his right to physical integrity and private life. He alleges that the obligation to provide a urine sample is not based on any accessible and precise legal provision, is imposed on prisoners by an authority lacking the necessary power and cannot be justified on grounds of public interest.

2 The applicant also complains that the disciplinary measures he is likely to incur if he refuses to provide urine samples may result in an extension of his period of detention in so far as he will lose any entitlement he may have to prison leave, to day

release to pursue an occupation or to release on parole. He argues that these measures therefore deprive him of his personal liberty. He alleges a violation of Article 5 of the Convention.

3 The applicant further complains that the procedure for taking urine samples does not provide for any protection of the rights of the defence. A disciplinary sanction is applied automatically. The prisoner is not informed of the grounds, the aims, the choice of experts or the methods used to take the samples. He alleges that there is no possibility of applying to an independent tribunal either before or after the penalty is enforced.

Invoking the principle of the presumption of innocence, the applicant further complains that the burden is on him to prove that he has not committed a drug offence, despite the lack of any grounds to warrant such a suspicion.

The applicant complains of the length of the proceedings relating to the examination of his appeal against the decision being challenged.

He alleges a violation of Article 6 of the Convention.

4 The applicant complains finally under Article 13 of the Convention that he has no effective remedy under Swiss law enabling him to bring his case before an independent tribunal.

## THE LAW

1 The applicant complains of the obligation to provide urine samples imposed on him by the Prison Governor. He alleges that this measure constitutes an unjustified and disproportionate interference with his personal freedom.

a) The applicant alleges a violation of Article 3 of the Convention which provides:

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

The Commission recalls that treatment may be termed degrading if it insultingly humiliates an individual in front of others or incites him to act against his will or conscience (Greek case, Yearbook 12, p. 186, para. 2) and it may be described as inhuman if it deliberately causes serious mental or physical suffering (*ibid*).

The Commission further recalls that ill treatment must attain a minimum level of severity to fall within the scope of Article 3, and the assessment of this minimum depends on all the circumstances of the case, such as the nature and context of the treatment (Eur. Court H.R., Case of Ireland v. United Kingdom, judgment of 18 January 1978, Series A no. 25, p. 65, para. 162).

The Commission notes, however, that the treatment complained of by the applicant does not attain the minimum level of severity necessary to fall within the scope of Article 3 of the Convention and that this complaint is therefore manifestly ill-founded and must be rejected pursuant to Article 27 para 2 of the Convention

b) The Commission also considers that the issue raises questions under Article 8 of the Convention which is worded as follows

"1 Everyone has the right to respect for his private and family life, his home and his correspondence

2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others

The Commission recalls that even minor interference with the physical integrity of an individual against his or her will must be regarded as an interference with the right to respect for private life under Article 8 (see No 8239/78 Dec 4 12 78, D R 16 p 184, No 10435/83, Dec 10 12 84, D R 40 p 251) The Commission therefore recognises that the requirement, subject to a penalty, that the applicant produce urine samples amounts to such interference (see No 21132/93, Dec 6 4 94, D R 77 A p 75)

It remains to be determined whether this interference is justified under paragraph 2 of Article 8 of the Convention The Commission must examine whether the interference was prescribed by law, pursued a legitimate aim and was necessary in a democratic society for the pursuit of that aim

Having regard to the first of these conditions, the Commission notes that the Prison Governor ordered the taking of urine samples in a decision of 17 October 1990, on the recommendation of the Supervisory Commission for the Tessin canton set up under Article 2 of the Tessin Law of 2 July 1974 on the Enforcement of Penalties and Preventive Measures for Adults The contested decision was approved by the Supervisory Commission on 2 February 1991 It was based on section 29 of the Prison Rules dated 23 November 1978, which provides that, in the interests of prison safety, prisoners must observe order and discipline (para 1) and comply with the standards and rules governing prison life (para 2) The sanctions applicable in the event of refusal to co operate with these tests are based on sections 31 para 1 and 33 of the Prison Rules As the interference in question was not particularly serious, the Commission agrees that these provisions may be deemed to be a sufficient legal basis The Commission therefore considers that the contested decision was prescribed by law

Secondly, as regards the purpose of the measure in question, the Commission having regard to section 29 of the Prison Rules, considers that the interference complained of may be justified on grounds of public safety, the prevention of disorder or crime, or the protection of health

Finally, Article 8 para 2 of the Convention provides that the interference must be necessary in a democratic society. According to the Court's case law, the concept of necessity means that the interference must be based on a pressing social need and, in particular, be proportionate to the legitimate aim being pursued. However, the national authorities enjoy a margin of appreciation of which the extent depends not only on the aim, but also the actual nature of the interference (see Eur. Court H.R., Olsson judgment of 24 March 1988, Series A no 130, pp 31-32, para 67)

The Commission observes that the 'necessity' of interference with the exercise of the convicted prisoner's right to respect for his physical and psychological integrity must be evaluated having regard to the ordinary and reasonable requirements of imprisonment. The 'prevention of disorder or crime', for example, may justify wider measures of interference in the case of a prisoner than in that of a person at liberty (see No 21132/93, Dec 6 4 94, D.R. 77-A p 75, *mutatis mutandis*, European Court H.R., Golder judgment of 21 February 1975, Series A no 18, p 21, para 45)

Having regard to the foregoing, the Commission considers that the Swiss authorities did not exceed the margin of appreciation available to them in this area. The contested measure may reasonably be deemed "necessary in a democratic society" and therefore proportionate to the legitimate aims pursued, for example the prevention of disorder. It was therefore justified under paragraph 2 of Article 8 of the Convention.

It follows that this part of the application is manifestly ill founded and must be rejected pursuant to Article 27 para 2 of the Convention.

2. The applicant also complains that as a result of the disciplinary sanctions which he is likely to incur for refusing to provide urine samples, he may be refused advantages such as prison leave, day release to pursue an occupation or release on parole and would therefore be deprived of his liberty contrary to Article 5 of the Convention. The Commission notes in this connection that the applicant does not complain of incurring possible criminal penalties for drug abuse.

The Commission notes however, that the deprivation of liberty is inherent to the normal conditions of prison life, regardless of the freedom of action which the prisoner may enjoy within the prison. Measures applied to a prisoner serving a sentence cannot therefore be deemed to constitute a deprivation of liberty, because such measures are only modifications of the conditions of lawful imprisonment. The conditions of

imprisonment, including the disciplinary measures applied to the applicant, are not therefore governed by Article 5 para 1 of the Convention (see No 11703/85, Dec 9 12 87, D R 54 p 116)

The Commission notes, moreover, that the applicant does not evoke the possibility of being detained in prison beyond the term to which he was sentenced by the Tessin Cantonal Court of Cassation (see Eur Court H R , Kemmache judgment of 24 November 1994, to appear in Series A no 296-C, para 37)

In so far as a problem may nonetheless arise under Article 5 of the Convention, the Commission has not found any appearance of a violation of this provision

It follows that this part of the application is manifestly ill founded and must be rejected pursuant to Article 27 para 2 of the Convention

3 The applicant also complains of the length of the proceedings relating to the examination of his appeal against the measure at issue, of a violation of his right to a defence and a violation of the principle of the presumption of innocence in so far as he is obliged to provide urine samples despite the lack of any evidence warranting a suspicion that he has taken drugs He invokes Article 6 of the Convention in this regard

Article 6 para 1 of the Convention provides, *inter alia*, that in the determination of civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair hearing by an independent tribunal

The Commission considers, however, that the decision requiring the applicant to provide urine samples concerns neither the determination of his civil rights and obligations nor any criminal charge against him The Commission refers to its own case-law according to which complaints relating to the prison service are governed by public law (see No 4984/71, Dec 5 10 72, Collection 43, p 28) Article 6 of the Convention is therefore inapplicable in this case

It follows that the application must be rejected on this point as incompatible *ratione materiae* with the provisions of the Convention, pursuant to Article 27 para 2 of the Convention

4 The applicant complains finally that there is no effective remedy under Swiss law for a complaint of this nature He alleges a violation of Article 13 of the Convention which provides that

“Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity”

The Commission recalls that Article 13 guarantees such a remedy only in respect of grievances which can be regarded as "arguable" in terms of the Convention (see Eur Court H R , Powell and Rayner judgment of 21 February 1990, Series A no 172, p 14, para 31), whereas, in the instant case, the Commission has found the grievances on which the applicant bases his complaint under Article 13 to be inadmissible pursuant to Article 27 of the Convention

It follows that the remainder of the application is manifestly ill-founded and must be rejected pursuant to Article 27 para 2 of the Convention

For these reasons, the Commission, by a majority,

**DECLARES THE APPLICATION INADMISSIBLE**