



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

FOURTH SECTION

CASE OF TIM HENRIK BRUUN HANSEN v. DENMARK

(Application no. 51072/15)

JUDGMENT

STRASBOURG

9 July 2019

FINAL

09/10/2019

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Tim Henrik Bruun Hansen v. Denmark,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Faris Vehabović, *President*,

Jon Fridrik Kjølbro,

Paul Lemmens,

Iulia Antoanella Motoc,

Carlo Ranzoni,

Jolien Schukking,

Péter Paczolay, *judges*,

and Marialena Tsirli, *Section Registrar*,

Having deliberated in private on 18 June 2019,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 51072/15) against the Kingdom of Denmark lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Danish national, Mr Tim Henrik Bruun Hansen (“the applicant”), on 9 October 2015.

2. The applicant was represented by Mr Tobias Stadarfeld Jensen, a lawyer practising in Aarhus. The Danish Government (“the Government”) were represented by their former Agent, Mr Tobias Elling Rehfeld, from the Ministry of Foreign Affairs, and their Co-agent, Mrs Nina Holst-Christensen from the Ministry of Justice.

3. The applicant alleged that the High Court decision of 18 January 2015 to maintain his sentence was in breach of Article 5 § 1 of the Convention.

4. On 15 March 2018 notice of the application was given to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1965. He is currently serving a sentence at Herstedvester Institution.

A. The judgment of 1 May 1996 sentencing the applicant to safe custody

6. In 1989, the applicant was sentenced to two years' imprisonment for deprivation of liberty and attempted rape of a child under 15 years of age.

7. In 1991 he was sentenced to imprisonment for a term of three years and six months for deprivation of liberty and sexual activity other than intercourse with a child under 12 years of age.

8. On both occasions, in 1989 and 1991, before he was found guilty he underwent a mental status examination and the Medico-Legal Council (*Retslægerådet*) issued an opinion.

9. On 1 May 1996, by a judgment by the High Court of Eastern Denmark (*Østre Landsret*) (hereinafter "the High Court"), the applicant was found guilty of deprivation of liberty, attempted rape in particularly aggravating circumstances and abandoning a ten-year-old girl. On 7 August 1995 at around 2 p.m. he had forced the girl into his car, tied her up, forced her to swallow a pill and stuffed a sock into her mouth. At around 5 p.m. he had attempted to rape her, by guiding his penis into her genitals, at which time he ejaculated, and at around 5.30 p.m. he had left her helpless, chained to a tree in a gorge. She had managed to escape the next day, 8 August 1995, at 11 a.m. Having regard to the fact that he had previously been sentenced for similar crimes, he was sentenced to safe custody (*forvaring*) under article 70 of the Penal Code (*straffeloven*).

10. In the proceedings before the High Court, in order to evaluate whether the applicant was suited to face an ordinary sentence or whether he should be sentenced to safe custody, the applicant had undergone a new mental status examination carried out by consultant psychiatrist P.L.M. who, in a report of 14 September 1995, concluded as follows:

"On this basis, [the applicant] is found not to suffer from a mental disorder and is deemed not to have suffered from such disorder at the time when the offences with which he has been charged were committed. He has a normal intellectual capacity and does not suffer from any organic brain disease. As regards his characterological position, both clinical and psychological tests showed signs of a character disorder, including a non-existent ability to make multifaceted emotional contact with other people, characterised by contact weakness and lack of empathy. He appears immature and poorly integrated, and his self-esteem is unstable. He applies defence mechanisms usually seen in individuals with a character disorder: outward projection (avoidance of responsibility), splitting, devaluation and idealisation. In terms of diagnosis, it is a schizoid personality disorder.

[The applicant] has had a certain excessive intake of alcohol and maybe cannabis as well, but he was not under the influence of alcohol or cannabis at the time of the offences with which he has been charged, and there is no basis either for assuming that [he was] in an abnormal condition of intoxication.

Accordingly, [the applicant] falls within article 69(1) of the Penal Code. The vigorous attempts to offer him therapy made by both the Sexological Clinic at Copenhagen University Hospital (*Rigshospitalet*) and the physicians and

psychologists at Herstedvester Institution during his past term of incarceration have revealed that [the applicant] is not suited for psychotherapy, the reason being that, due to his distinctive personality characteristics and despite his awareness of the consequences, he exhibits strong mental resistance to psychotherapy attempts by applying his mental defence mechanisms, mainly outward projection, splitting and devaluation. Attempts to convince him to agree to chemical castration have been in vain, and he is not currently motivated for such treatment either. Therefore, it is my opinion that there is no basis for making new attempts to initiate psychotherapy. On the other hand, it would be reasonable to continue to try to motivate him for chemical castration.

If he is found guilty of the charges, there are no measures as listed in the second sentence of article 68 of the Penal Code that are more expedient than a sentence to prevent similar crime in future. As a matter of fact, there is hardly any doubt that [the applicant] would commit a similar crime again if at large. Firstly, he has now committed three similar offences with so many common features that they must be characterised as compulsive actions. Secondly, he has revealed personality characteristics, at least in the two most recent mental status examinations, which reflect that he is not able to identify with his victim's feelings, for which reason he has no natural braking mechanism when he feels an urge to commit the relevant crime. If [the applicant] is found guilty, it is my view that he is deemed to pose such imminent danger to the life, body, health or liberty of others that the use of safe custody rather than imprisonment is required to avert such danger."

11. In the proceedings before the High Court, the Medico-Legal Council had issued an opinion dated 2 November 1995, setting out as follows:

"[the applicant] does not suffer from a mental disorder and is not deemed to have been suffering from a mental disorder at the time when the crime with which he has been charged was committed. He has a normal intellectual capacity. [The applicant] had a difficult childhood and adolescence and was given therapy at the age of 13 through a child psychiatric ward. As an adult, attempts have been made to offer him psychotherapy at the Sexological Clinic at Copenhagen University Hospital and during his term of incarceration at Herstedvester Institution; however, it has not been possible to begin such therapy due to his distinctive personality characteristics. He has had an excessive intake of alcohol and cannabis. In the past, his mental status was observed in connection with similar crimes in 1989 and 1991; in 1989, he was found to be neurotically disposed and in 1991 to suffer from a character disorder and possible deficiency of the mind. Reference is made to the Council's previous medico-legal opinions dated 20 March 1989 and 15 July 1991.

At the current observation, he seemed to suffer from a serious personality disorder: contact weakness, lack of empathy, avoidance of responsibility and unstable self-esteem. The findings were confirmed through psychological tests. There is no evidence of deficiency of the mind (dementia). The Medico-Legal Council finds that [the applicant] falls within article 69(1) of the Penal Code. If he is found guilty, the Medico-Legal Council cannot point to any measures (see the second sentence of section 68 of the same statute) that are more expedient than any sentence deserved to prevent a potentially significant risk of similar crime in future. It is the assessment of the Medico-Legal Council that he poses such imminent danger to the life, body, health or liberty of others that the use of safe custody is advisable to avert such danger."

12. During the proceedings, counsel asked Consultant Psychiatrist P.L.M. whether it was possible that therapy could result in a different

perception of the dangerousness criterion found to exist in the mental status examination report of 14 September 1995, supplemented by the opinion of the Medico-Legal Council of 2 November 1995. P.L.M. gave the following reply:

“It is a general perception that mental trauma caused by incidents earlier in life and later giving rise to undesirable behaviour can be treated with some kind of counselling therapy, such as psychotherapy, to remove the adverse reactions to the injury. However, this is not the correct medical approach as experience from counselling therapy shows, whether it is experience from therapy in general or with sex offenders, that the feasible outcome of such therapy is mainly an understanding of what happened by processing the experiences from the conflict with the therapist. However, that does not make the undesirable behaviour disappear. Only if therapy makes the patient acknowledge and accept his disorder and face the consequences, which might be chemical castration in extreme cases, will it be possible to cause a behavioural change that has the nature of palliative care, and if that is the case, the risk of relapse will be reduced, as will also the patient’s dangerousness.”

B. The period between 1997 and 2013

13. The applicant has been placed in Herstedvester Institution since 31 January 1997.

14. During his incarceration, for the purpose of clinical conference discussions, numerous assessments have been made of the applicant by psychiatrists, psychologists and social workers at Herstedvester Institution.

15. It appears that at least seven different psychiatrists and eight different psychologists at Herstedvester Institution have attended to the applicant. Six of the medical professionals have provided long-term counselling therapy and two medical professionals have attempted such therapy. From May 2001 to May 2003, the applicant was given counselling therapy by psychologist T.L. (also an employee at Herstedvester Institution).

16. During his detention, several times in vain the applicant has requested release, or in the alternative that his sentence be altered to a more lenient one. Each time, by virtue of article 72 of the Penal Code, the Public Prosecution brought the issue before the domestic courts, which found against the applicant with reference to medical reports from medical experts at Herstedvester Institution, stating that there was a substantial risk of relapse into similar crime unless the applicant agreed to undergo chemical castration, which he refused due to somatic concerns.

17. In 2006, the applicant seemed prepared to undergo chemical castration. The Herstedvester Institution therefore asked the Medico-Legal Council for an opinion about whether such treatment could be recommended. In its opinion of 3 January 2007, the Medico-Legal Council stated as follows:

“Attempts were made during his previous terms of incarceration to motivate him to take libido-suppressing drugs, but he refused.

He had been granted leave, but without any prospects as he did not want to take leave because he refused to submit to urine testing.

During his current term in Herstedvester Institution, [the applicant] initially devalued himself and refused counselling therapy with the psychologists or psychiatrists at the Institution, but otherwise his everyday life has not given rise to any problems, and periodically he has been a steady worker within his own profession (painter and decorator).

In 2001, [the applicant] was granted counselling therapy with a psychologist of his own choice [T.L.]. The therapy continued until 2003. Due to a suspicion of unrealistic (psychotic) perceptions, a psychological assessment was made on 18 January 2002. However, no signs of a mental disorder were detected, even though it was found that he occasionally used peculiar language and that he was a guarded, self-absorbed person with limited insight into other people’s emotions and an inclination to act on impulse.

For the subsequent two-year period, [the applicant] underwent counselling therapy provided by one of the regular psychologists of the Institution. However, after he had threatened the physician at the Institution, that psychologist was replaced by another psychologist as from 2006, and during that period [the applicant] also had counselling appointments with the prison chaplain of Herstedvester Institution. Recently, he has become motivated to try libido-suppressing medication.

On this basis, the Medico-Legal Council recommends the initiation of chemical therapy to suppress his libido, combined with the usual blood-testing regime as advised by Herstedvester Institution.”

18. On 31 October 2011 consultant psychiatrist E.P., at Herstedvester Institution, issued a medical report on the applicant, stating as follows:

“[The applicant] has only infrequent contact with a psychologist/psychiatrist, and it has, unfortunately, not been possible to motivate him to accept anti-libidinal treatment, which is a condition for granting him additional liberties such as unaccompanied leave, relocation to a boarding house or the like.

[The applicant] feels bitterness and anger towards the prison (the entire system) that is so extreme that conversations about this topic end in a downward spiral, where [the applicant] sometimes becomes verbally threatening. Contact about more neutral topics of conversation may also easily end up in angry outbursts on the part of [the applicant]. He does often apologise afterwards, but nothing will have changed for the better the next time.

Treatment with anti-libidinal drugs is a serious and invasive medical treatment, which is indeed taken seriously at Herstedvester Institution, where an external specialist monitors the somatic aspect ...

Prior to starting treatment, in addition to a thorough, cross-disciplinary clinical discussion and an inquiry to the Danish Medico-Legal Council, the inmate will undergo a comprehensive somatic examination programme. Blood tests are performed to determine the haemoglobin percentage, white blood cell count, liver function, kidney function, metabolic rate, cholesterol and vitamin D level. A hepatitis test is performed, and the hormone level is measured. A bone scan is performed at Hvidovre Hospital, where the levels of calcium and phosphate in the blood are measured.

Two types of drugs are used, the first of which (Procren) is administered every twelve weeks and suppresses testosterone. The other drug (Androcur) is administered every fourteen days (blocks the effects of testosterone). When the drugs are administered, the inmate will see a nurse dedicated to this treatment. The inmate's weight and general condition will be monitored. In addition, the inmate has regular appointments with a psychiatrist/psychologist.

Inmates must consent to the treatment in writing, just as they must be informed about the treatment.

This form of treatment is considered carefully and monitored closely. Assessment is made on a continuing basis of whether treatment with one of the drugs is sufficient, but this depends on the existence of a relationship of trust between the treatment provider and the inmate, and on the inmate being well-adjusted in society in a safe environment. The treatment is only 'offered' in cases of very serious (repeated) sexual offences, and where other measures are not deemed to be sufficient to prevent the risk of relapse.

It is assessed that the risk of relapse into offences similar to the one of which [the applicant] is convicted is significant, unless he is under anti-libidinal treatment, for which reason altering the measure in any way is currently not recommended."

19. On 26 April 2012, the District Court of Glostrup (henceforth "the District Court") refused the applicant's request for the safe custody measure to be terminated or, alternatively, to be replaced by a more lenient sentence. The order was upheld by the High Court on 24 January 2013.

20. In the period from 2000 to 2009, it appears that on a few occasions the applicant was granted escorted leave, lasting between six and eight hours, in order to visit his family (who also visited him approximately once a week). Between 2009 and 2011, he was granted escorted leave every two months. In 2012 escorted leave was revoked due to a suspicion of an escape bid and it became necessary to ask additional prison officers to fetch him. In 2013, following reinstatement of his escorted leave scheme, a urine sample for cannabis tested positive upon his return from escorted leave.

C. The decision of 28 January 2015 to uphold the sentence of safe custody (the 2015 review proceedings)

21. On 2 April 2014, by virtue of article 72 of the Penal Code, the Public Prosecution brought before the courts a new request by the applicant for release or a more lenient sentence than safe custody.

22. In the meantime, for the purpose of the court proceedings, a medical report of 3 February 2014 had been issued by Consultant Psychiatrist E.P. stating the following:

"The undersigned psychiatrist has made repeated attempts to approach the issue of libido-suppression therapy, which is a condition for any unescorted leave and resettlement, but [the applicant] is totally dismissive of the idea. [The applicant] expresses mainly somatic concerns, but it should be emphasised that such treatment is closely monitored by an external psychiatric specialist, and specialists will also be

consulted if somatic problems emerge before or during the treatment. The Medico-Legal Council is consulted before any treatment is commenced.

[The applicant] is offered counselling therapy regardless of his approach to the issue of libido-suppressing medication, but it should be emphasised that the assessment remains that [the applicant] is at substantial risk of relapse into crime similar to the offences of which he has previously been convicted unless he is given libido-suppressing medication (the treatment is described in detail in the medical report of 31 October 2011).

Since [the applicant] is not willing to take any libido-suppressing medication and he is therefore deemed at high risk of relapse, it is recommended not to make any kind of change to the sanction.”

23. Before the District Court the applicant, represented by counsel, was heard. He stated, among other things:

“... He had seen [T.L.], the Chief Psychologist of the Q Department. They had discussed his crime and his future. He had had an appointment with [T.L.] every week, who had finally prepared a mental status examination report. He did not know the specific contents of the report written by [T.L.] about him, but subsequently the Institution had, on its own initiative, written a letter to him saying that he was to undergo chemical castration. [T.L.] had suggested the continuation of his therapy, including counselling therapy, but the [Herstedvester Institution] had objected. [T.L.] had said that persons in need of libido-suppressing medication should take such drugs, but it was his belief that [the applicant] did not need that kind of drug. He did not want to take libido-suppressing medication because he did not need that kind of drug since he was not a sexual offender and since the drugs only treated symptoms. He acknowledged that he had committed the offences of which he had been convicted, but he would not commit similar offences in future. He did not see [E. P.], except for a couple of times a year, most recently a couple of months ago on the occasion of the case at hand. He wanted no contact with psychologists and psychiatrists, and he would not accept any appointments with them because it did not do him any good. ...”

24. In addition a letter of 8 September 2014, written by the applicant, was read out by his counsel. It stated that the applicant had been examined in hospital to assess his cardiovascular condition. He suffered from different problems, including heart valve problems. If his heart were to become even slightly affected by the libido-suppressing medication, he would die from it. Ever since his youth, it had been a known fact that he suffered from a heart condition but Herstedvester Institution had ignored this fact. His heart condition was one of the reasons why he could not tolerate the libido-suppressing drugs. Androcur (cyproterone acetate), the libido-suppressing medication that they wanted to prescribe for him, would also lead to a deterioration in his general health, including his osteoporosis, and would affect his weight. Moreover, it would ruin his potency, for which reason he would never be able to have sexual intercourse with a woman of his own age, if he were to meet one. They had never investigated why he had committed the crime in question. He had never intended to rape anybody; it had just come to look like that. He was aware that he would have made much more progress if he had agreed to take libido-suppressing

medication. They had promised that he would be a free man within one year if he agreed to take libido-suppressing medication. [T.L.] had been giving him psychotherapy treatment. However, when he had refused the medication, the therapy had been discontinued. He wanted to continue the counselling therapy with [T.L.]. It was his impression that [T.L.] was also ready to resume counselling therapy. He had undergone mental status examinations in 2001 and 2002. Since then, no examinations had been carried out. He felt ready to commence long-term counselling therapy. Last time, the counselling therapy had only been interrupted because he had refused chemical castration.

25. Before the District Court the applicant's guardian *ad litem*, (*bistandsværge*) and sister were also heard. The medical report of 31 October 2011 was submitted as well.

26. On 13 October 2014 the District Court refused the applicant's request to lift or change the measure of safe custody. The reasoning read as follows:

"On 26 November [1996] the Supreme Court delivered a judgment sentencing [the applicant] for a very serious sexual offence against a girl who was a minor. He had previously been sentenced twice for similar serious crimes. Prior to the Supreme Court judgment, he had most recently been released from prison on 14 September 1994. He was remanded in custody again on 7 August 1995 and has been in custody ever since.

In its order of 26 April 2012, the District Court refused the request from [the applicant] that the sanction measure be terminated or, alternatively, be replaced by a more lenient sentence. The order was upheld by the High Court on 24 January 2013.

In these proceedings, [the applicant] has stated that he does not want to take libido-suppressing medication. It would be dangerous for him and harm his general health. He is ready to attend counselling therapy.

[E.P.], Consultant Psychiatrist, said in her medical opinion of 3 February 2014, including through references to her previous medical opinion of 31 October 2011, that in her assessment there was still a risk of relapse into similar crime if [the applicant] did not take libido-suppressing medication.

Considering the circumstances of the case, including in particular the medical opinion from [E.P.], Consultant Psychiatrist, and since it is a matter of a very serious sexual offence, the District Court finds that it is necessary to uphold the sanction measure in order to prevent an imminent risk of relapse. Due to the circumstance that [the applicant] is not willing to accept the requisite therapy, the duration of the safe custody arrangement cannot be varied."

27. The applicant appealed against the order to the High Court. He submitted, among other things, that he had been deprived of his liberty for more than 19 years and that the situation had ended in deadlock because he refused chemical castration. Relying on Article 5 of the Convention, including the judgments *H.W. v. Germany* (no. 17167/11, 19 September 2013) and *Ruiz Rivera v. Switzerland* (no. 8300/06, 18 February 2014), he emphasised the need for an external expert

assessment. He maintained that his most recent external examination had taken place more than twelve years before (it appears that he was referring to a mental status examination carried out in 2002 by T.L., although the latter was in fact employed by Herstedvester Institution).

28. By decision of 28 January 2015 the High Court upheld the safe custody sanction and stated as follows:

“Based on the information before it, including in particular the medical reports, most recently the report of 3 February 2014 made by [E.P.], psychiatric specialist and Consultant Psychiatrist, it is still assumed that [the applicant] is at a substantial risk of relapse into similar crime if he is not given libido-suppressing medication. According to the information provided, such medication is administered only after prior consultation with the Medico-Legal Council, and the therapy is closely monitored by an external psychiatric specialist. However, [the applicant] is still opposed to libido-suppression therapy, and he still refuses contact with psychologists and psychiatrists at Herstedvester Institution.

Against this background, the High Court finds that it is necessary to uphold the sanction measure of safe custody imposed in 1996 in order to prevent an imminent risk of relapse into very serious sexual crime. In the present circumstances, the duration of the safe custody arrangement so far cannot lead to a different finding.

Accordingly, and since the submissions made by the assigned counsel concerning Article 5 of the Convention cannot lead to a different finding, see in this respect the ruling handed down by the Supreme Court (*Højesteret*) on 4 September 2014 and reproduced on p. 3511 of the Weekly Law Reports for 2014 (U 2014.3511 H), [the applicant’s] appeal is dismissed”.

29. On 6 July 2015, the Appeals Permission Board (*Procesbevillingsnævnet*) refused the applicant’s request for leave to appeal to the Supreme Court.

D. The decision of 16 December 2016 to uphold the sentence of safe custody (the 2016 review proceedings)

30. On 11 August 2015 Consultant Psychiatrist E.P. issued a new medical report on the applicant.

31. On 14 October 2015, the applicant requested his release, or in the alternative, that his sentence be altered to a more lenient one. He also maintained that the High Court’s decision of 28 January 2015 had been in breach of Article 5 § 1 of the Convention since the only medical report regarding his dangerousness and need for therapy was issued by a medical expert affiliated to Herstedvester Institution, and not by an external expert as requested by him.

32. On 13 January 2016, the District Court upheld the sanction in its present form, particularly with reference to the medical report of 11 August 2015.

33. The applicant appealed against the decision to the High Court. For the purpose of those proceedings, a medical report of 27 July 2016 was obtained from consultant psychiatrist E. P, which stated as follows:

“[The applicant] has limited contact with a psychiatrist on an *ad hoc* basis, and at the beginning of 2016 he was offered regular appointments with an in-house psychologist. [...] He does not reject contact with professionals and has not done so previously, and he is basically friendly and accommodating. Previous inter-contact intervals seem mainly to have been caused by the aggressive and threatening conduct of [the applicant] as well as difficulties in talking with him about the medicinal therapy that is still considered to be an indispensable condition for unescorted leave, resettlement, etc. There is still no doubt about his unambiguously negative approach to libido-suppressing medication. [The applicant] continues to appear aggressive, almost threatening, whenever any reference is made to the therapy that he believes he has been given at Herstedvester Institution over the years. His voice is, however, quite subdued when other subjects are discussed. [The applicant] is occasionally also able to reflect on the reason for the sentence imposed, including his periodic feeling of being under severe pressure and strain. He has said several times that he does not avoid responsibility; rather, the crime committed was attributed to and caused by certain factors.

In the light of the extremely serious relapse into similar crime and difficulties in achieving sufficient therapeutic compliance, the entire current team of therapists still agree that Herstedvester Institution does not recommend any change in sanction for as long as [the applicant] is not ready to undergo strict, effective libido-suppression therapy. Accordingly, there is currently no alternative therapeutic option available that can replace libido-suppressing medication in reducing a high risk of relapse into similar crime.”

34. An opinion of 22 August 2016 was obtained from the Medico-Legal Council setting out:

“[The applicant] has undergone three mental status examinations on which occasions he was found to suffer from a character disorder involving lack of empathy for other people, avoidance of responsibility and contact weakness. These personality traits were also described in the most recent medical opinions. [The applicant] continues to perceive the sentence imposed as an erroneous judgment, as he has never committed the acts of which he has been found guilty, and he also displays anger and bitterness towards the professionals at Herstedvester Institution. Despite years of strenuous efforts through psychotherapy and counselling therapy, [the applicant’s] perception remains unchanged. Over the years, this has been a decisive factor when the psychiatric specialists in charge of his therapy have found it inadvisable to recommend any freedom in addition to the leave already granted, as there is still deemed to be a high risk of relapse into crime similar to the offences of which he has previously been convicted. It is deemed crucial to ensure the suppression of [the applicant’s] libido as a condition for an extended leave scheme and, in particular, for the relaxation of the measure imposed. This is deemed achievable with sufficient certainty only through medication, which [the applicant] refuses to take.

Against this background, the Medico-Legal Council finds that the risk of relapse into crime similar to the offences of which he has previously been convicted must still be considered a significant risk. On the basis of an overall assessment, the Council therefore finds that [the applicant] must be deemed still to pose such imminent danger

to the life, body, health or liberty of others that it is recommended to uphold the sanction measure imposed.

For the same reason, the Medico-Legal Council also finds it inadvisable to discharge [the applicant] if there is no certainty that his libido is being suppressed, which will most likely require therapy in accordance with the usual guidelines for the prescription of libido-suppressing medication.”

35. Following the submission of questions from the applicant’s counsel, the Medico-Legal Council added in an opinion of 21 September 2016:

“Question 1:

The Medico-Legal Council is asked to say whether there are sufficient medical reasons for assuming that the offender is currently too dangerous to be discharged on probation.

Yes.

Question 2:

According to section 7(1)(iii) of the Rules of Procedure of the Medico-Legal Council (Executive Order No. 1068 of 17 December 2001), the Council may ask one or more of its members or other experts to examine an offender. I ask the Medico-Legal Council to say whether the members of the Council find that it would be expedient to examine the offender themselves.

The Medico-Legal Council finds that the mental condition of [the applicant], including the assessment of the imminent danger to the life, body, health or liberty of others, has been sufficiently examined and assessed by virtue of the medical documents available. The Medico-Legal Council finds no need for subjecting [the applicant] to further examination by a member of the Council.

[...]”

Question 3:

The Medico-Legal Council is asked to say whether [the applicant’s] advanced age is relevant to the assessment of whether [he] ought to be discharged on probation, including whether his age is relevant to the question of whether [the applicant] still constitutes a danger to others.

The Medico-Legal Council issues opinions on the basis of an overall assessment of the case documents received. The Medico-Legal Council finds that importance should not be attached independently to [the applicant’s current age (51 years)] in the assessment of the risk of relapse into serious sexual offences similar to those of which he has previously been convicted, nor to the Council’s assessment of whether he is currently deemed to pose an imminent danger to the life, body, health or liberty of others.”

36. On 16 December 2016, the High Court upheld the sanction. It referred to the medical report of 27 July 2016 prepared by consultant psychiatrist E. P., and the opinions by the Medico-Legal Council of 22 August and 21 September 2016, and found that Article 5 of the Convention could not lead to a different outcome.

37. The applicant did not request leave to appeal against that decision to the Supreme Court.

38. The applicant's right to escorted leave was revoked on 9 March 2017 after he had absconded from escorted leave on the same day. He has not been granted any escorted leave since, due to the risk of abuse.

E. Pending proceedings

39. By letter of 20 November 2017, the applicant once more requested that the issue of variation or removal of the sanction measure be brought before the Danish courts. The Court has no information about the outcome of those proceedings.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Penal Code

40. At the time of the offences, the relevant articles of the Penal Code applicable read as follows:

Section 68

"If an accused is exempt from punishment pursuant to article 16, the court may decide on the use of other measures considered expedient to prevent further offences. If less radical measures such as supervision, decisions on place of residence or work, rehabilitation treatment, psychiatric treatment, etc., are considered insufficient, it may be decided that the relevant person must be committed to a hospital for the mentally ill or to an institution for the mentally retarded, or placed in care under the auspices of the Department for the Mentally Retarded or in a suitable home or institution offering special attention or care. A person can be committed to safe custody on the conditions referred to in article 70.

Article 69

Where the offender was in a condition characterised by mental or behavioural retardation, impairment or disorder, although not of the nature referred to in article 16, when the criminal act was committed, the court may decide on measures such as those referred to in the second sentence of article 68 instead of imposing a penalty, if considered expedient.

Article 70

(1) A person may be sentenced to safe custody if –

(i) he is found guilty of homicide, robbery, rape or other aggravated sexual assault, deprivation of liberty, aggravated violence, threats of the kind referred to in article 266 or arson, or an attempt at any of the offences listed above; and

(ii) it is assumed due to the nature of the act committed and from the information available on his character, including especially information on his criminal record, that he poses an imminent danger to the life, body, health or liberty of others; and

(iii) the use of safe custody rather than imprisonment is considered necessary to avert such danger.

[...]"

41. In 2015, the relevant articles of the Penal Code read as follows:

Article 68

"If an accused is exempt from punishment pursuant to article 16, the court may decide on the use of other measures considered expedient to prevent further offences. If less radical measures such as supervision, decisions on place of residence or work, rehabilitation treatment, psychiatric treatment, etc., are considered insufficient, it may be decided that the relevant person must be committed to a hospital for the mentally ill or to an institution for the severely mentally impaired, or placed under supervision with a possibility of administrative placement or in a suitable home or institution offering special attention or care. A person can be committed to safe custody on the conditions referred to in article 70.

[...]

Article 70

(1) A person may be sentenced to safe custody if –

(i) he is found guilty of homicide, robbery, deprivation of liberty, aggravated violence, threats of the kind referred to in article 266 or arson, or an attempt at any of the offences listed above; and

(ii) it is assumed due to the nature of the act committed and from the information available on his character, including especially information on his criminal record, that he poses an imminent danger to the life, body, health or liberty of others; and

(iii) the use of safe custody rather than imprisonment is considered necessary to avert such danger.

(2) Furthermore, a person may be sentenced to safe custody if –

(i) he is found guilty of rape or any other aggravated sexual assault, or an attempt at such act; and

(ii) it is assumed due to the nature of the act committed and from the information available on his character, including information on his criminal record, that he poses a significant danger to the life, body, health or liberty of others; and

(iii) the use of safe custody rather than imprisonment is considered necessary to avert such danger.

[...]

Article 72

(1) The Public Prosecution shall ensure that measures under articles 68, 69 or 70 are not upheld for longer and to a greater extent than necessary.

(2) A decision to vary or finally remove a measure under articles 68, 69 or 70 must be made by court order at the request of the convicted person, his guardian *ad litem*, the Public Prosecution, the management of the institution or the Prison and Probation Service. Any request from the convicted person, his guardian *ad litem*, the management of the institution or the Prison and Probation Service must be made to

the Public Prosecution, which must bring the issue before the court as soon as possible. Where a request from a convicted person or his guardian *ad litem* is not allowed, a new request cannot be made for the first six months following the date of the order. [...]"

42. Article 72 was proposed in 1999 (Bill no. 144 of 8 December 1999). The following appears from the preparatory notes:

"[...]"

Also the issue of variation or final removal of a sanction measure imposed must be decided under article 68 of the Criminal Code, that is, on the basis of the measure deemed the most expedient measure in the relevant situation to prevent further offences. If the circumstances of the offender have changed during the term of the measure, the consequence being that the sanction measure is no longer deemed expedient to prevent further offences, and if no other measures are deemed expedient, the relevant measure must be removed, see article 72, cf. the first sentence of article 68.

[...]"

The Regional Public Prosecutor's control of the duration of indefinite sanctions under article 68 of the Criminal Code implies in practice that a medical report must be requested once a year from the relevant institution about the need to uphold the measure. If a request is made for a variation of a measure by the offender, the institution or the guardian *ad litem*, the matter is brought before a court, possibly following the submission of the matter to the Medico-Legal Council, and in court the public prosecutor either accepts or objects to the request following a specific assessment. If no request is made for a variation of the measure, the Regional Public Prosecutor must assess, based on the medical report from the institution and possibly following the submission of the matter to the Medico-Legal Council, whether the matter ought to be brought before a court by the Public Prosecution for the purpose of a variation of the measure. This assessment includes a proportionality test. If there is deemed to be no need for a variation, the matter will be reassessed after yet another year.

An assessment made by the Public Prosecution of the issue of a potential variation of the measure takes into account the determinate prison sentence that would have been imposed for the relevant offence. However, the assessment must also take into account the nature and seriousness of the offence in combination with a medical evaluation of the risk of relapse, see article 68 of the Criminal Code.

The proposed wording of article 72(1) of the Criminal Code makes it a statutory rule that the Public Prosecution is obliged to ensure that measures under article 68, 69 or 70 are not upheld for longer and to a greater extent than necessary.

"[...]"

43. A letter of 20 January 2000 from the Minister of Justice to the Committee of Legal Affairs (*Retsudvalget*) was also part of the preparatory notes. The letter concerned criticism raised by a guardian *ad litem*, T.R., against statements by the Medico-Legal Council in cases concerning the removal or change of a preventive measure. The Committee of Legal Affairs asked the Minister of Justice for a comment in this respect. The latter answered, *inter alia*, as follows:

“... Based on his experience as a guardian *ad litem* for mentally ill people sentenced to psychiatric treatment, T. R. accounts for his views on these sentences in the mentioned letter. T. R. mentions, among other things, the medical statements etc. obtained when requests for rescission of judgments imposing measures are made. He also states that the downside of a sentence to psychiatric treatment is that it is not limited in time, and that it is very difficult to rescind.

With particular regard to statements from the Danish Medico-Council, these are made based on the case documents and medical statements etc. that are presented to the Council. The Danish Medico-Legal Council’s function as a medical expert in respect of psychiatric reports in criminal proceedings is described as follows in Report no. 1196/1990 on the Danish Medico-Legal Council, pp. 67-68:

‘The decisive point in the opinion of the majority of the committee is what the Danish Medico-Legal Council’s function is in relation to psychiatric reports in criminal proceedings, namely to provide an expert assessment of information that is already available. The intention was never that the Council members should perform the actual psychiatric examination, which usually requires long-term observation of the person concerned. In addition, considering the need to finalise the criminal proceedings within a reasonable time and resource constraints, there would be no point in the Council members repeating examinations that have already been performed. Also, it is unrealistic to imagine that a Council member would be able to perform a thorough review of observations made during a prolonged psychiatric examination based on a brief conversation or examination of the person concerned.

In the majority opinion, it should instead be acknowledged that the Danish Medico-Legal Council ... only has a limited control function in these cases, as certain aspects of the psychiatric examination are in reality excluded from the Council’s review. The Council should essentially only check (1) that the doctor has obtained the information and performed the individual examinations that are considered necessary for a psychiatric examination; (2) that the depth of the examination is in all respects as indicated by the information available in the specific case; and (3) that the doctor has drawn the right conclusions from the material contained in the statement and criminal acts.’ ”

B. The Act on the Medico-Legal Council

44. The relevant provisions of the Act on the Medico-Legal Council (*Retslægerådsloven*) read as follows:

Section 1

“The task of the Medico-Legal Council is to make medico-forensic and pharmaceutical assessments for public authorities for the purpose of cases concerning the legal circumstances of individuals. The Minister of Justice may lay down detailed rules determining the authorities that can request the Council to make an assessment and the cases in which such assessments can be requested.

Section 2

The Council comprises up to 12 physicians. The Council has two divisions, one of which focuses on forensic psychiatric issues and the other on all other medico-forensic issues.

[...]”

C. The Executive Order on Rules of Procedure for the Medico-Legal Council

45. The relevant provisions of the Executive Order on Rules of Procedure for the Medico-Legal Council read as follows:

Section 6

“Cases are usually decided on the basis of written submissions and written evidence. However, cases may be heard at an oral hearing if so requested by the Chairman of the Medico-Legal Council, the relevant Deputy Chairman or a member or an expert appointed for the consideration of the case.

Section 7

1. If the written submissions and written evidence presented to the Council are deemed not to provide a sufficient basis for an assessment of the matter, the Council must notify the requesting authority of the additional information deemed to be of significance. At the same time, the Council must indicate whether it considers it expedient that such information can be obtained –

[...]

(iii) by asking one or more of the members or other experts of the Council to examine the person involved in the case.”

46. A Supreme Court judgment of 4 September 2014, reproduced on p. 3511 of the Weekly Law Reports for 2014 (U 2014.3511 H), concerned a person, D, who was sentenced to forensic psychiatric care at a psychiatric hospital, and dealt with the question of whether or not the person concerned, as a general rule, had a right to an external examination by a doctor not affiliated to the hospital where he was being treated. The Supreme Court stated as follows:

“No information has been provided that gives rise to any doubt about the absolute impartiality of the consultant psychiatrist or the institution in this case, nor has any other exceptional basis for a deviation from the usual procedure been identified in the case at hand.

D has submitted that it is incompatible with Article 5 of the European Convention on Human Rights to uphold a measure of an indefinite period of deprivation of liberty only on the basis of an opinion from an expert affiliated to the institution in which the relevant person is placed.

D was sentenced to forensic psychiatric care on the basis of, *inter alia*, medical reports and the submission of the matter to the Medico-Legal Council. As already mentioned, the decision on a potential variation or removal of a sanction measure imposed is made by the court. When deciding the matter, the court is not bound by the recommendation of the institution, but decides the matter on the basis of the medical report from the institution, taking into account circumstances such as the current results of the treatment, whether the offender placed in psychiatric care has made any improvements in the severity of his mental disorder, whether he is aware of his disease, and whether he has behaved in a dangerous manner towards fellow patients or

others. If deemed necessary by the court, the matter can be submitted to the Medico-Legal Council.

The Supreme Court finds that this arrangement is a safeguard against arbitrariness in decisions on continued deprivation of liberty in accordance with the requirements of Article 5 of the European Convention on Human Rights.”

III. COUNCIL OF EUROPE MATERIALS

47. In its report to the Danish Government on its visit to Denmark from 11 to 20 February 2008 (CPT/Inf (2008) 26, 25 September 2008) the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (“CPT”) stated, among other things:

“The Herstedvester Institution

74. The focused follow-up visit to the Herstedvester Institution concentrated on two issues which had provoked the CPT’s concern in the past: the treatment of sexual offenders undergoing anti-hormone therapy, and the situation of prisoners from Greenland. In its reports on the visits in 1990 and 1996, the Committee considered these issues in detail and made a number of comments and recommendations in respect of them.

a. treatment of sexual offenders undergoing anti-hormone therapy

75. In the 1996 visit report, the CPT stressed that ensuring that patients’ consent to medical treatment is genuinely free and informed was a particularly acute issue in establishments such as the Herstedvester Institution in which patients constituted a “captive” group. The consent given by patients of that category may be influenced by their penal situation, especially if they were facing a long - or even indeterminate - period of imprisonment. The Committee recommended that steps be taken to ensure that the signed consent of patients was obtained prior to the commencement of treatment with libido-suppressing drugs, and that such persons be given a detailed explanation (including in writing) of all recognised adverse effects of the drugs concerned. Further, the CPT stressed that additional safeguards (e.g. the support of a system of lay/legal “advocates”) should exist to ensure that the consent given by such prisoners to medical treatment can be as free and informed as possible in the circumstances.

76. During the 2008 visit to the Herstedvester Institution, the delegation interviewed four sex offenders undergoing treatment with libido-suppressing drugs (including one who had been released on parole and who was attending the institution as an outpatient), as well as two others waiting to start treatment and six who had refused treatment. As regards the first group, the signed consent of persons concerned had been obtained prior to the commencement of treatment. However, it appeared that they had accepted the treatment as a “ticket to freedom” (i.e. release on parole or transfer to an open prison) rather than as a treatment for something which was wrong with them, not to speak of an illness. They indicated that they met a psychologist at varying intervals (from once every two weeks to once every two months), but that they did not take part in group therapy. Consultations with a psychiatrist were reportedly rare. All of them had been informed of the possible adverse side-effects of the treatment (i.e. bone decalcification, dose-dependent liver damage, weight gain, breast enlargement and hot flushes), but some felt that the information was not complete and feared that the treatment was dangerous for them. Some of them

were experiencing side-effects for which they were receiving medication. From the group of prisoners waiting to start treatment, one prisoner stated that he had not received any information in writing about the treatment, but after a number of meetings with his case worker and a psychologist, he had decided to follow it because of having been told that he can be transferred to an open prison. Some of the prisoners who had refused the treatment because they could not come to terms with its adverse side-effects indicated that they had felt pressured to accept it.

77. At the end of the visit, the CPT's delegation stressed that awareness of the possible health benefits and risks of anti-hormone therapy is essential for consent to treatment to be truly informed. In response to the delegation's preliminary observations, the Danish authorities indicated that the conditions for offering libido-suppressing treatment to prisoners are very restrictive and only two to four inmates a year commence this treatment.¹ Medical libido-suppressing treatment is only offered when all other options have been exhausted or are deemed insufficient to counter the risk of relapse into sexual offences. Combined with psychotherapy, the libido-suppressing treatment is intended to prevent the sexual offender from having compulsive and violent sexual fantasies while suppressing the sexual libidinal pressure, so as to avoid new sexual offences. According to the authorities, treatment is only commenced when the inmate has given his written informed consent. During a consultation with an external endocrinologist, the inmate is briefed on the effects and side-effects of the medicine orally and in writing, whereupon the inmate is invited to sign a statement confirming that he has received such a briefing and that he is willing to receive the treatment. In Denmark, the person's consent is a condition for the treatment of persons of unsound mind. This also applies to persons who undergo libido-suppressing treatment. Typically, however, the inmate is motivated by the fact that he cannot obtain permission for leave, release on parole or conditional discharge without commencing libido-suppressing treatment. Since 1997, all cases concerning libido-suppressing treatment as a condition for release are submitted to the Medico-Legal Council for approval. The Medico-Legal Council, which is an independent body, considers whether psychotherapeutic treatment is sufficient to reduce the risk of relapse into similar dangerous crime. Medical libido-suppressing treatment can start only if the Council agrees that it is necessary. In the opinion of the Herstedvester Institution, most of the inmates undergoing libido-suppressing treatment benefit from the psychotherapeutic element of the treatment. The therapeutic element of the treatment has several purposes, including assessing whether the inmate's mental condition changes in connection with the medical element of the treatment. Libido-suppressing treatment is typically given over a long period, and some inmates may therefore feel that a long time passes before liberty privileges are granted. This may be perceived as highly frustrating by the inmate, who might get the impression of not benefiting from the treatment.

78. The CPT has taken note of the explanations provided by the Danish authorities. They would indicate that the medical libido-suppressing treatment of sex offenders is at present surrounded by appropriate safeguards. Nevertheless, in the light of the information obtained by the delegation during the visit to the Herstedvester Institution, the Committee considers that more attention should be paid to ensuring that these safeguards are being fully respected in practice. In particular, special care should be taken to make sure that prisoners' consent to medical libido-suppressing

¹* The criteria for offering libido-suppressing treatment to sexual offenders are that they: i) have committed repeated or very serious sexual offences; ii) are deemed to be at risk of relapsing into the same type of offences; and iii) are assessed as persons for whom psychotherapy and other forms of treatment, for example against drug or alcohol abuse, cannot reduce the risk of relapse into sexual offences.

treatment is genuinely free and informed. In this connection, the provision of full information (oral and written) on the known adverse effects – as well as the possible benefits – of the treatment, should be improved. Further, no prisoner should be put under undue pressure to accept medical libido-suppressing treatment. Moreover, in addition to drug treatment, efforts should be made to step up psychotherapy and counselling with a view to reducing the risk of re-offending.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

48. The applicant complained that the High Court’s decision of 28 January 2015 to maintain his sentence of safe custody, without having heard an external medical expert, constituted a breach of 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;”

A. Admissibility

49. The Government argued that the applicant could no longer claim to be a victim of a violation of Article 5 since, in the ensuing review proceedings of the applicant’s sentence, leading to the High Court decision of 16 December 2016, the Medico-Legal Council, qualifying as an external medical expert, had issued opinions on 22 August and 21 September 2016. The Government pointed out that the Medico-Legal Council is independent. Its task is to make medico-forensic and pharmaceutical assessments for public authorities for the purpose of cases concerning legal circumstances of individuals. It comprises up to 12 physicians, who usually decide cases on the basis of written submissions and evidence. However, cases may also be heard at an oral hearing if so requested by the Chairman, Deputy Chairman or a member or an expert appointed for the consideration of a case.

50. The applicant contended that the shortcomings in the 2015 review proceedings had not been remedied in the 2016 review proceedings, in which the High Court had obtained an external expert opinion from the Medico-Legal Council, because the High Court had never acknowledged a violation of Article 5, nor provided him redress.

51. The Court considers that this objection is so closely linked to the substance of the applicant’s complaint that it is appropriate to join it to the merits.

52. It notes that the complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention, nor is it inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. Submissions of the parties

53. The applicant submitted that since his arrest in 1995 and transfer to Herstedvester Institution in 1997, he has been offered psychiatric therapy with the sole purpose of motivating him to undergo chemical castration, which he has refused due to somatic problems, including symptoms of osteoporosis and heart problems. His concern in this respect was constantly dismissed by the health personnel at Herstedvester Institution.

54. Chemical castration was also recommended by the Medico-Legal Council in its opinion of 3 January 2007, but the Council based its opinion strictly on the written material and conclusions presented by the prison authorities, which did not include information about the applicant's physical health.

55. The authorities upheld their position that the applicant should agree to chemical castration, and the applicant continued to refuse to do so. Accordingly, when the 2015 review proceedings commenced in 2014, the situation had ended in deadlock. "In such a situation it is particularly important to consult an external expert also in order to obtain fresh propositions for initiating the necessary therapeutic treatment" and "... at least attempt - to obtain fresh advice from an external medical expert on the necessity of the applicant's continuing preventive detention ..." (see, *inter alia*, *H.W. v. Germany*, no. 17167/11, §§ 112 and 113, 19 September 2013, and *Ruiz Rivera v. Switzerland*, no. 8300/06, § 64, 18 February 2014).

56. Nevertheless, in the review proceedings leading to the High Court decision of 18 January 2015, the applicant's request for an external medical opinion was refused. His case was not submitted for an opinion by the Medico-Legal Council or a psychiatrist not affiliated to Herstedvester Institution. Moreover, his claim that Article 5 had in this respect been breached was dismissed with reference to a Supreme Court judgment of 4 September 2014 (U 2014.3511 H, see paragraph 46 above), although that case did not concern preventive detention or a deadlock situation like the case at hand.

57. Finally, the applicant maintained that since a deadlock situation persisted, due to the limited and intended purpose of the Medico-Legal Council an opinion by it could not in any event have served as an external examination. He pointed out in this connection that the Medico-Legal Council decides on the basis of written submissions and evidence already available. The intention was never that the Council members should

perform the actual psychiatric examination (see paragraph 43 above). Likewise, in the 2016 review proceedings, the applicant had in vain asked the Medico-Legal Council whether it would be expedient to examine the applicant themselves (see paragraph 35 above). In other words, in the applicant's view, it would not serve any purpose to ask the Medico-Legal Council about his dangerousness since the Council would be presented only with the views of Herstedvester Institution.

58. The Government pointed out that under Article 72 of the Penal Code it is a precondition for the judicial assessment of review of a sentence that a medical report has been obtained from the institution in which the offender is placed. The courts are not bound by such reports, and they may decide to ask the Medico-Legal Council as well. The national authorities have a certain margin of appreciation regarding the merits of clinical diagnoses, since it is in the first place for them to assess the evidence in a particular case. The Court's task is to review under the Convention the decisions of those authorities (see, for example, *Ruiz Rivera*, cited above, § 62, and *Graf v. Germany* (dec.), 53783/09, 18 October 2011).

59. The Government considered that the present case had to be distinguished from *Ruiz Rivera* (cited above) in which the Court set out (ibid., § 64) that in a deadlock situation, the national authorities should at least seek the opinion of an external expert. Firstly, since Mr Ruiz Rivera could be considered of unsound mind, the assessment of his dangerousness involved an assessment of whether therapy had improved his mental condition. The applicant in the present case was not suffering from a mental disorder and he had a normal intellectual capacity (see the opinion by the Medico-Legal Council of 2 November 1995, paragraph 11 above). Moreover, the mental status examination report of 14 September 1995 (see paragraph 10 above) concluded that "the applicant was not suited for psychotherapy, the reason being that due to his distinctive personality characteristics, and despite his awareness of the consequences, he exhibits strong mental resistance to psychotherapy attempts by adopting his mental defence mechanisms ...". He was not motivated for chemical castration either. The latter conclusion was confirmed by the Medico-Legal Council's opinion of 22 August 2016 (see paragraph 34 above). Thus, the assessment of whether he was dangerous did not involve an assessment of whether his mental condition had improved, rather it concentrated on whether he was willing to take libido-suppressing drugs, which had been deemed essential by a number of different psychiatric consultants since 1995.

60. In these circumstances, the Government found that the Danish courts had acted within the applicable margin of appreciation when finding that the internal opinions on the applicant's dangerousness and need for therapy were suited and sufficient to form the basis for the decision to uphold the sanction.

2. *The Court's assessment*

(a) General principles

61. The general principles under Article 5 of the Convention were recently set out in, for instance, *S., V. and A. v. Denmark* ([GC] nos. 35553/12 and 2 others, §§ 73-76, 22 October 2018).

62. For the purposes of sub-paragraph (a) of Article 5 § 1, the word “conviction”, having regard to the French text (*condamnation*), has to be understood as signifying both a finding of guilt after it has been established in accordance with the law that there has been an offence, and the imposition of a penalty or other measure involving deprivation of liberty (see, for example, *M. v. Germany*, no. 19359/04, § 87, ECHR 2009). Furthermore, the word “after” in sub-paragraph (a) does not simply mean that the “detention” must follow the “conviction” in point of time. There must be a sufficient causal connection between the conviction and the deprivation of liberty at issue. The causal link required by sub-paragraph (a) might possibly be broken if a position were reached in which a decision not to release or to re-detain was based on grounds that were inconsistent with the objectives of the initial decision (by a sentencing court) or on an assessment that was unreasonable in terms of those objectives (see, among others, *H.W. v. Germany*, cited above, § 102, with further references).

63. When a considerable time has elapsed since the domestic courts assessed the offender's dangerousness with the help of a medical expert, a sufficient establishment of the relevant facts concerning a person's current dangerousness, will, as a rule, necessitate obtaining recent expert advice. Moreover, when the offender has been detained in the same prison for a considerable time and there appears to be a “deadlock situation” it is particularly important to consult an external expert also in order to obtain fresh propositions for initiating the necessary therapeutic treatment (see *H.W. v. Germany*, cited above, § 112). The Court has noted in this respect that a decision not to release a detainee because he still posed a threat to the public may become inconsistent with the objectives of the sentencing court's order for preventive detention if the person concerned is placed and remanded in detention because there was a risk that he would reoffend but is, at the same time, deprived of the necessary means, such as suitable therapy, to demonstrate that he was no longer dangerous. The Court has held that in such circumstances, detention which complied with Article 5 § 1 (a) at the outset would be transformed into deprivation of liberty that was arbitrary and, hence, incompatible with that provision” (*ibid.*, § 112; compare also, among other authorities, *C.W. v. Switzerland*, no. 67725/10, §§ 47-48, 23 September 2014 and *Ilmseher v. Germany* [GC], nos. 10211/12 and 27505/14, § 130, 4 December 2018).

64. Also in the context of a review under Article 5 § 4 of the Convention of the psychiatric detention of a person considered to be of unsound mind

within the meaning of Article 5 § 1 (e), the Court has confirmed that when some time has elapsed since the last medical assessment, and the situation has ended in deadlock, due to a breakdown in the relationship of trust with the staff of the institution in which the person concerned was placed, the national authorities “should at least have sought the opinion of an external medical expert” (see, *Ruiz Rivera*, cited above, § 64, and contrast with *M.T. v. Estonia*, no. 75378/13, § 68, 23 October 2018).

(b) Application of those principles to the instant case

65. The main issue in the present case concerns the question whether there was a sufficient causal connection, for the purposes of sub-paragraph (a) of Article 5 § 1 of the Convention, between the applicant’s criminal conviction by the sentencing High Court on 1 May 1996 and his continued deprivation of liberty ordered by that court on 28 January 2015. The Court reiterates in this respect that “conviction” under sub-paragraph (a) of Article 5 § 1 signifies a finding of guilt of an offence and the imposition of a penalty or other measure involving deprivation of liberty (see paragraph 62 above). It is not in dispute that the applicant’s continued detention in safe custody could not be justified under any of the other sub-paragraphs (b) to (f) of Article 5 § 1.

66. Furthermore, it is uncontested that since his conviction in 1996, by virtue of article 72 of the Penal Code, the applicant’s safe custody sentence was regularly reviewed, and that each time a fresh assessment was obtained by medical experts at Herstedvester Institution.

67. When the applicant appealed to the High Court against the District Court’s decision of 13 October 2014 to uphold his sentence of safe custody he referred to Article 5 of the Convention and submitted that an external expert assessment was needed. He pointed out, *inter alia*, that he had been deprived of his liberty for more than 19 years and that the situation had ended in deadlock because he refused chemical castration.

68. The High Court disagreed and referred to a Supreme Court ruling of 4 September 2014 in another case (see paragraphs 28 and 46 above). The Court notes, however, that the said case concerned a person, who had been sentenced to forensic psychiatric care at a psychiatric hospital, and who claimed that it was incompatible with Article 5 of the Convention to uphold a measure of an indefinite period of deprivation of liberty on the sole basis of an opinion from an expert affiliated to the institution in which he was placed. The Supreme Court found against the person concerned. It noted that the courts are not bound by the recommendation of the institution, and found that the arrangement by which a case can be submitted to the Medico-Legal Council by the courts, if deemed necessary, was a safeguard against arbitrariness in decisions on continued deprivation of liberty in accordance with the requirements of Article 5. The High Court did not, however, as far as the Court can see, explain why it did not, at the relevant time, find it

necessary to submit the case to the Medico-Legal Council or another external expert.

69. The Court is aware, though, that the High Court, in its decision of 28 January 2015 to uphold the applicant's sentence, and its implied decision to refuse the applicant's request for an external expert, had before it a number of elements for concluding that safe custody had to be maintained in order to prevent an imminent risk of relapse into the very serious sexual crimes of which the applicant had been convicted three times in the period between 1989 and May 1996.

70. The High Court had regard particularly to the medical reports in the applicant's case, including the most recent report of 3 February 2014 made by Consultant Psychiatrist [E.P.], at Herstedvester institution. This expert stated (see paragraph 22 above) that she had made repeated attempts to approach the issue of libido-suppression therapy, which was a condition for any unescorted leave and resettlement, but that the applicant was totally dismissive of the idea, mainly due to somatic concerns. The applicant was also offered counselling therapy, but she emphasised that the assessment remained that the applicant was at substantial risk of relapse into crime similar to the offences of which he had previously been convicted unless he were given libido-suppressing medication.

71. Before it, the High Court also had the applicant's statement before the District Court, confirming that due to somatic concerns he was opposed to libido-suppression therapy. Moreover, he did not want any contact with psychologists and psychiatrists "because it did not do him any good" (see paragraph 23 above). It also had the letter of 8 September 2014 from the applicant (see paragraph 24 above) stating, *inter alia*, that he was ready to resume counselling therapy with T.L., and that he felt ready to commence long-term counselling.

72. The Court is therefore satisfied that the High Court had regard to recent expert advice, and the applicant's view thereon, when concluding that it could still be assumed that the applicant was at a substantial risk of relapse into similar crime if he were not given libido-suppressing medication, that he was still opposed to such libido-suppression therapy, and that he still refused contact with psychologists and psychiatrists at Herstedvester Institution.

73. The Court notes in addition, as pointed out by the Government, that the mental status examination report of 14 September 1995 (see paragraph 10 above) had concluded that "the applicant was not suited for psychotherapy, the reason being that due to his distinctive personality characteristics, and despite his awareness of the consequences, he exhibits strong mental resistance to psychotherapy attempts by adopting his mental defence mechanisms ...".

74. The Court also observes that when the High Court passed its decision of 28 January 2015, the Medico-Legal Council had been heard

twice in the applicant's case, namely in November 1995 and January 2007. On the latter date, the Medico-Legal Council recommended that the applicant take libido-suppressing drugs, which apparently he was motivated for at the relevant time. It also noted that although initially the applicant had refused counselling therapy with the psychologists or psychiatrists at Herstedvester Institution, he had lately availed himself of such, for example, in the years between 2001 to 2003 with psychologist T.L., and for a subsequent two-year period with one of the regular psychologists of the Institution.

75. Moreover, the Court has regard to the information that the Medico-Legal Council is an independent body which provides medico-forensic and pharmaceutical assessments for public authorities for the purpose of cases concerning the legal circumstances of individuals. It comprises up to 12 physicians. The applicant has not alleged that any of its members were affiliated to Herstedvester Institution, nor has he, in the Court's view, submitted any convincing arguments which could lead it to conclude that, in general, the Medico-Legal Council cannot be qualified as an external expert.

76. In the present case, however, the High Court dismissed the applicant's specific request for an external expert opinion, be it by the Medico-Legal Council or another expert appointed for the consideration of the case, although at that point in time the applicant had been detained in safe custody for almost 19 years, namely since the judgment of 1 May 1996. Furthermore, the most recent external expert opinion was from January 2007, when the Medico-Legal Council gave its opinion.

77. The High Court noted that the applicant still refused contact with psychologists and psychiatrists at Herstedvester Institution. It had before it the report of 31 October 2011 by consultant psychiatrist E.P. which set out, *inter alia*, that "the applicant feels a bitterness and anger towards the prison (the entire system) that is so extreme that conversations about this topic end in a downward spiral, where the applicant sometimes becomes verbally threatening". In his letter of 8 September 2014, however, the applicant had stated that he was ready to resume counselling therapy with psychologist T.L., whom he apparently considered unaffiliated with Herstedvester Institution. The Court notes, in addition, that since the applicant was placed at Herstedvester Institution in 1997, the medical staff there had continually recommended and encouraged the applicant to undergo libido-suppression therapy and that he, except for a short period around 2006, had continually refused to undergo such treatment. Accordingly, in the Court's view, since there seemed to be no means for cooperation between the applicant and the medical staff at Herstedvester Institution, in order to work towards reducing significantly the applicant's dangerousness, the situation had indeed ended in deadlock.

78. It will be recalled that in such a situation it is particularly important to consult an external expert also in order to obtain fresh propositions for

initiating the necessary therapeutic treatment (see paragraphs 63 and 64 above). In these circumstances, the Court considers that as a result of the failure at least to attempt to obtain fresh advice from an external medical expert on the necessity of the applicant's continuing safe custody, the High Court, in the 2015 review proceedings, did not sufficiently establish the relevant facts in this respect.

79. The matter remains of whether the applicant can still claim to be a victim in this respect since the High Court, in the ensuing review proceedings leading to its decision of 16 December 2016 to uphold the sanction, had previously obtained an external expert opinion from the Medico-Legal Council of 22 August and 21 September 2016, in addition to the medical reports of 11 August 2015 and 27 July 2016 prepared by consultant psychiatrist E.P. from Herstedvester Institution.

80. The Court reiterates that to deprive an applicant of victim status the authorities must fulfil two conditions: acknowledge, at least in essence, a violation of the Convention, and provide the applicant with "sufficient redress" (see *Amuur v. France*, 25 June 1996, § 36, *Reports of Judgments and Decisions* 1996-III; see also, as more recent authorities, *Móry and Benc v. Slovakia*, nos. 3912/15 and 7675/15, § 25, 22 January 2019 and *Rooman v. Belgium* [GC], no. 18052/11, § 129, 31 January 2019).

81. The applicant relied on Article 5 of the Convention both in the 2015 and the 2016 review proceedings. During the latter proceedings, the High Court did not take a specific stand on the applicant's complaint and there is no indication that it found that there had been any shortcomings in the former proceedings. Admittedly, it did not anew dismiss his request for an external expert opinion with reference to the Supreme Court judgment of 4 September 2014. Instead it granted his request and obtained two opinions from the Medico-Legal Council. Nevertheless, even if the granting of an external expert opinion in the 2016 review proceedings could have remedied the decision by the High Court in the 2015 review proceedings not to obtain an external expert opinion, the Court is not convinced that the High Court thereby acknowledged, in essence, that a violation of Article 5 of the Convention had occurred.

82. The Court therefore rejects the Government's objection which it has previously joined to the merits (see paragraph 51 above).

83. In view of the foregoing, the Court reiterates that the High Court, in its decision of 28 January 2015, by failing at least to attempt to obtain fresh advice from an external medical expert on the necessity of the applicant's continuing safe custody, did not sufficiently establish the relevant facts in this respect. Their decision not to release the applicant, or to apply a more lenient sentence than safe custody, was therefore not based on an assessment that was reasonable in terms of the objectives pursued by the sentencing High Court on 1 May 1996.

84. There has accordingly been a violation of Article 5 § 1 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

85. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

86. The applicant claimed 50,000 Euros (EUR) in compensation for non-pecuniary damage relating to the alleged violation of Article 5 of the Convention.

87. The Government submitted that the claim was excessive and that the finding of a violation in itself would constitute adequate just satisfaction.

88. The Court considers that the finding of a violation in the present judgment (see paragraph 84 above) constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant.

B. Costs and expenses

89. The applicant claimed costs and expenses incurred in the Convention proceedings in the amount of DKK 104,600 corresponding to legal fees for a total of 49 hours of work, carried out by his representative and legal assistants, and for translation expenses.

90. The Government found the amount excessive and noted that the applicant had applied for legal aid under the Danish Legal Aid Act (*Lov 1999-12-20 nr. 940 om retshjælp til indgivelse og førelse af klagesager for internationale klageorganer i henhold til menneskerettighedskonventioner*) and that on 17 August 2018, the Department of Civil Affairs had notified the applicant of a provisional grant of legal aid up to DKK 40,000.

91. In the present case, the applicant has been granted provisionally DKK 40,000 under the Danish Legal Aid Act. However, it is uncertain whether the applicant will subsequently be granted additional legal aid by the Ministry of Justice and how a dispute between the parties about the applicant's outstanding claim for legal aid is to be decided. Therefore, the Court finds it necessary to assess and decide the applicant's claim for costs and expenses.

92. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable

as to quantum. In the present case, regard being had to the documents in its possession, the above criteria, awards made in comparable cases against Denmark (see, among others, *Osman v. Denmark*, no. 38058/09, § 88, 14 June 2011), and the fact that applicant has already been granted DKK 40,000 under the Danish Legal Aid Act, the Court considers it reasonable to award the sum of EUR 2,000 covering costs for the proceedings before the Court.

C. Default interest

93. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Decides* to join to the merits the Government's objection concerning the applicant's victim status and *rejects* it;
2. *Declares* the application admissible;
3. *Holds* that there has been a violation of Article 5 § 1 of the Convention;
4. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction in respect of any non-pecuniary damage that may have been sustained by the applicant;
5. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 2,000 (two thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
6. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 9 July 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Marialena Tsirli
Registrar

Faris Vehabović
President