



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

FOURTH SECTION

CASE OF DENIS AND IRVINE v. BELGIUM

(Applications nos. 62819/17 and 63921/17)

JUDGMENT

STRASBOURG

8 October 2019

**THIS CASE WAS REFERRED TO THE GRAND CHAMBER
WHICH DELIVERED JUDGMENT IN THE CASE ON
01/06/2021**

This judgment may be subject to editorial revision.

In the case of Denis and Irvine v. Belgium,

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

Jon Fridrik Kjølbro, *President*,

Faris Vehabović,

Paul Lemmens,

Iulia Antoanella Motoc,

Carlo Ranzoni,

Stéphanie Mourou-Vikström,

Péter Paczolay, *judges*,

and Andrea Tamietti, *Deputy Section Registrar*,

Having deliberated in private on 3 September 2019,

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

PROCEDURE

1. The case originated in two applications (nos. 62819/17 and 63921/17) against the Kingdom of Belgium lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Belgian national, Mr Jimmy Denis (“the first applicant”), and a British national, Mr Derek Irvine (“the second applicant”), on 21 August 2017.

2. The applicants were represented by Mr P. Verpoorten, a lawyer practising in Herentals. The Belgian Government (“the Government”) were represented by their Agent, Ms I. Niedlispacher, of the Federal Justice Department.

3. The applicants alleged that their deprivation of liberty was contrary to Article 5 § 1 of the Convention and that they had no effective remedy available to them within the meaning of Articles 5 § 4 and 13 of the Convention.

4. On 12 February 2018 the Government were given notice of the complaints under Article 5 §§ 1 and 4 and Article 13 of the Convention, and the remainder of the applications were declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

5. The British Government did not avail themselves of their right to intervene in the proceedings (Article 36 § 1 of the Convention).

THE FACTS**I. THE CIRCUMSTANCES OF THE CASE**

6. The applicants were born in 1984 and 1964 respectively. At the time they lodged their applications, they were detained in the Bethaniënhuis

Psychiatric Hospital in Zoersel and the Antwerp forensic psychiatry centre respectively.

A. Application no. 62819/17

7. By a judgment of the Turnhout Criminal Court of 18 June 2007 the first applicant was placed in compulsory confinement for theft, pursuant to section 7 of the Law of 9 April 1930 on Social Protection in respect of Mental Defectives, Habitual Offenders and Perpetrators of certain Sexual Offences (the “Social Protection Act”), applicable at the material time.

8. In a report of 22 January 2007 psychiatrist A. had described the first applicant as having a psychotic personality and being dependent on alcohol and drugs. In the psychiatrist’s opinion, the applicant was suffering from a severe mental disturbance making him incapable of controlling his actions; he posed a danger to society and to himself, given his ongoing use of drugs and his psychotic disorders.

9. The first applicant was granted conditional discharge on several occasions, but his release licence was revoked each time on the grounds that he had failed to comply with the relevant conditions. His compulsory confinement in the social protection unit of Merksplas Prison was extended at regular intervals by the social protection bodies.

10. On 1 October 2016 new legislation, namely the Compulsory Confinement Act of 5 May 2014 (hereafter “the Compulsory Confinement Act”; see paragraph 33 below), entered into force. This Act replaced the Social Protection Act of 9 April 1930 in respect of Mental Defectives, Habitual Offenders and Perpetrators of certain Sexual Offences (see paragraph 7 above).

11. On an unspecified date the first applicant made a request for final discharge. In his pleadings, he argued that his compulsory confinement was no longer lawful, given that the offences for which he had been placed in confinement could no longer give rise to a confinement measure under the Compulsory Confinement Act. He submitted that under Article 5 § 1 (e) of the Convention his detention was accordingly neither “lawful” nor taken “in accordance with a procedure prescribed by law”. In addition, in the applicant’s submission, the fact that the Compulsory Confinement Act no longer provided for the possibility of confinement for the offences that he had committed implied that his mental disorder was no longer sufficiently serious to justify an extension of the compulsory confinement measure.

12. On 27 October 2016 the psychosocial department in Merksplas Prison issued a report, drawn up on the basis of interviews with the first applicant, his case file, observations from the department’s staff, a social-welfare investigation conducted by the prison and an opinion from the psychiatrist. The report noted that the applicant no longer took drugs but that his psychotic problems were also triggered by stress. When his

psychotic problems were in abeyance, his anti-social characteristics came to the fore. However, he seemed to be functioning in a more stable manner. After examining the applicant's criminal record, his progress since the initial placement in confinement, the proposed reclassification and the absence of contra-indications, the psychosocial department issued a favourable opinion on his conditional discharge and reclassification as an in-patient in a psychiatric hospital.

13. On 15 November 2016 the Social Protection Division at the Antwerp Post-Sentencing Court (the "CPS") granted the applicant a conditional discharge, with reclassification as an in-patient.

14. On 27 December 2016 the first applicant was again arrested and returned to the social protection unit of Merksplas Prison for failure to comply with the conditions imposed on him.

15. On 25 January 2017 the CPS set aside the first applicant's conditional discharge, dismissed his request for final discharge, ordered his immediate placement in the social protection unit of Merksplas Prison, refused the applications for day release and decided that the prison governor was to issue a new opinion by 18 July 2017 at the latest. The CPS pointed out that it had jurisdiction to order final discharge under the Compulsory Confinement Act, which laid down a number of conditions: in particular, the [individual's] mental health had to become sufficiently stable and he or she had to have successfully completed a minimum three-year period of conditional discharge. The CPS could do no more than apply the law, which provided for no other legal basis for definitive release. As a subsidiary consideration, the CPS noted that the legislature had not in any event wished to give retrospective effect to the "more lenient" law in relation to compulsory confinement decisions imposed on the basis of the previous Social Protection Act (1930). This was clear from the parliamentary drafting history. The Minister of Justice had merely suggested that those CPS which had jurisdiction in such cases were to review decisions on maintaining individuals in compulsory confinement with the necessary clemency. Thus, the Antwerp CPS considered that, irrespective of whether the punishable offences which had justified the applicant's placement in compulsory confinement in 2007 could still be considered as a ground for compulsory confinement under the new Act, the applicant could not be released definitively, having regard to his current mental condition and the fact that he had not completed the period of conditional discharge provided for by law.

16. The first applicant lodged an appeal on points of law. Alleging a violation of Article 5 § 1 and Article 7 of the Convention, he argued, firstly, that the extension of his detention had not been "prescribed by law" or "lawful", given that under the wording of the Compulsory Confinement Act the offences for which he had been placed in compulsory confinement could no longer give rise to a placement in confinement. Secondly, he submitted

that there had been a breach of Article 5 § 4 and Article 13 of the Convention, arguing that those provisions required that any person whose detention was no longer lawful was entitled to have access to a court which could order his or her immediate release. By requiring an individual to carry out a three-year probationary period before becoming eligible for final discharge, the Act was in breach of the above-mentioned Articles.

17. By a judgment of 21 February 2017 (no. P.17.0125.N), the Court of Cassation dismissed the first applicant's appeal on points of law. With regard to the argument alleging a violation of Articles 5 § 1 and 7 of the Convention, the Court of Cassation considered that Article 7 of the Convention was applicable only to penalties, and not to preventive measures such as compulsory confinement. For the remainder, Article 5 § 1 of the Convention did not prevent a compulsory confinement order, imposed by a decision which had acquired legal force, from becoming final in its turn and subsequently giving rise to an execution phase, which was not governed by the same rules as those in force when imposing the order. It followed that Article 5 § 1 did not mean that a confinement measure, imposed in proceedings which had become final, was no longer lawfully or legally imposed because the legislation had changed during the execution phase, and thus meant only that this particular measure could no longer be imposed in the future for the offence for which the applicant had already been placed in confinement. Assessment of a detainee's mental condition and the resulting danger to society was not made solely on the basis of the offence for which he or she had been placed in confinement, but also in the light of a range of risk factors which were submitted to the CPS for consideration. In so far as this argument was based on another legal premise, it was lacking in legal merit. As to the allegation of violations of Article 5 § 4 and Article 13 of the Convention, the Court of Cassation noted that, under section 66 of the Compulsory Confinement Act, final discharge was in principle subject to completion of a probationary period. This condition did not imply that an individual placed in compulsory confinement did not have access to a court or to an effective remedy as required by the Convention. This argument, derived from another legal premise, lacked legal merit.

18. On 18 July 2017 the CPS again ordered the first applicant's conditional discharge, subject to the condition that he was accepted as an in-patient by a psychiatric hospital in Zoersel. On 24 July 2017 the first applicant was taken to this hospital.

B. Application no. 63921/17

19. On 14 November 2002 the committals division at the Turnhout Criminal Court ordered that the second applicant be placed in compulsory confinement for offences classified as attempted aggravated burglary, pursuant to section 7 of the Social Protection Act.

20. In a report of 18 October 2002 psychiatrist D. had described the second applicant as suffering from a serious personality disorder and a psychotic disorder which made him incapable of controlling his actions.

21. On 27 June 2003 the applicant was granted conditional discharge. He was placed in a psychiatric hospital in Scotland.

22. After escaping from that institution, he was found wandering in Belgium on 1 December 2010 and arrested. On 11 January 2011 the Antwerp Social Protection Committee (the “CDS”) ordered that he be returned to the psychiatric wing in Turnhout Prison.

23. As it proved impossible to have the second applicant placed in a Scottish institution, on 23 June 2016 the CDS ordered his placement, as a matter of priority, in a forensic psychiatry centre in Ghent or Antwerp. While waiting for a bed to become available, he was placed in the social protection unit of Turnhout Prison.

24. On 6 December 2016 the second applicant asked the CDS to rule on a number of practical arrangements for his compulsory confinement, given that he was still detained in Turnhout Prison. In his conclusions, he also requested his final discharge, raising the same arguments under Articles 5 and 7 of the Convention as those previously relied on by the first applicant (see paragraph 11 above).

25. On 21 December 2016 the psychosocial department at Turnhout Prison issued a report, drawn up on the basis of an interview with the second applicant, observations from the department’s staff, the case file and previous reports. The report found that it was necessary to place the applicant in a forensic psychiatry centre or a long-stay institution, since it did not appear possible to place him in a psychiatric hospital in Scotland, despite the efforts made to that effect. The report was accompanied by an opinion from the psychiatrist attached to the psychosocial department, dated 22 December 2016, which described ongoing schizophrenic symptoms that were being treated by anti-psychotic intramuscular injections. The psychiatrist considered that the confinement measure should be maintained, and the applicant placed in a forensic psychiatry centre.

26. In a judgment of 25 January 2017, the CPS noted that it was impossible to implement the CDS’s decision of 23 June 2016 (see paragraph 23 above). It therefore set aside this latter decision and decided that the second applicant’s compulsory confinement would continue in the social protection unit of Turnhout Prison, pending availability in a forensic psychiatric centre in Ghent or Antwerp. The CPS dismissed the arguments under Articles 5 and 7 of the Convention and the second applicant’s request for final discharge, on the same grounds as those used in respect of the first applicant (see paragraph 15 above).

27. The second applicant appealed on points of law, expanding on the same arguments as the first applicant (see paragraph 16 above).

28. By a judgment of 21 February 2017 (no. P.17.0124.N), the Court of Cassation dismissed the appeal on points of law on the same grounds as those used with regard to the first applicant (see paragraph 17 above).

29. On 22 February 2018 the CPS ordered that the second applicant be placed in the Antwerp forensic psychiatry centre. That decision was executed on an unspecified date.

II. RELEVANT DOMESTIC LAW AND PRACTICE

30. The domestic law and practice in respect of compulsory confinement were set out in the *Rooman v. Belgium* judgment ([GC], no. 18052/11, §§ 75-104, 31 January 2019). Particular attention is drawn to certain relevant provisions.

A. Criteria justifying a compulsory confinement measure

31. Section 7 of the Law of 9 April 1930 on Social Protection in respect of Mental Defectives, Habitual Offenders and Persons Convicted of certain Sexual Offences, as in force at the time of the original confinement orders in respect of the applicants, was worded as follows:

“Except in cases of serious crimes committed for political motives or through the medium of the press, the investigating judicial authorities and the trial courts may order the detention of an accused who has committed a serious crime and is suffering from one of the conditions set out in section 1. ...”

32. Section 1 of the Act refers to persons who are suffering “either from a mental disorder or from a severe mental disturbance or defect making [them] incapable of controlling [their] actions”.

33. Section 9 of the Law of 5 May 2014 on compulsory confinement (“the Compulsory Confinement Act”), which entered into force on 1 October 2016, reads as follows:

“§ 1. Except in cases of crimes or serious offences committed for political motives or through the medium of the press, with the exception of press offences motivated by racism or xenophobia, the investigating judicial authorities and the trial courts may order the compulsory confinement of an individual:

i. who has committed a crime or serious offence that has harmed or could have harmed the physical or mental integrity of another person, and

ii. who, at the time of the order, is suffering from a mental disorder which destroys or seriously reduces his or her capacity for discernment or ability to control his or her actions, and

iii. in respect of whom there is a danger that he or she will commit fresh offences as referred to in i. above on account of his or her mental disorder, possibly combined with other risk factors.

...”

34. According to the report on the first reading of the draft law by the Justice Committee of the House of Representatives (Doc. 54-1590/006), the introduction of a “threshold” in order to impose compulsory confinement was intended to focus the confinement measure on the target group which needed it, and to avoid a situation where compulsory confinement without limit of time could be imposed for relatively minor offences (page 4). In reply to a question posed by members of the Committee, the Minister of Justice indicated that, legally speaking, the provisions amending the scope of the Compulsory Confinement Act could not be considered as criminal-law provisions. In consequence, the principle of the retrospective application of the more lenient criminal law was not applied and the Compulsory Confinement Act did not, in principle, affect decisions in respect of persons suffering from mental disorders who had committed offences capable of giving rise to compulsory confinement under the Social Protection Act of 1930, but for whom compulsory confinement would no longer be possible under the new legislation (page 46).

B. Provisions concerning the discharge of persons in compulsory confinement

35. In so far as relevant, section 18 of the Law of 9 April 1930, as in force at the time of the initial decisions to place the applicants in compulsory confinement, provided:

“The Social Protection Board may, of its own motion or at the request of the public prosecutor, the detainee or the latter’s lawyer, order the detainee’s release, without conditions or on a trial basis, where his mental condition has improved sufficiently and the appropriate conditions for his social rehabilitation have been established. If an application from the detainee or his lawyer is rejected, it may not be resubmitted within six months of the date of the rejection becoming final...”

36. The Compulsory Confinement Act (Law of 5 May 2014), provides that conditional discharge is one means of executing the compulsory confinement order, whereby the detainee is subject to the preventive measure imposed on him or her in the context of an in-patient or out-patient care path, subject to compliance with the conditions imposed during the probationary period (section 25). It may be granted at any point during compulsory confinement to the individual concerned, if there are no obstacles to discharge that cannot be addressed by imposing specific conditions and if the individual in question agrees to these conditions (section 26).

37. A detainee may be granted final discharge on expiry of a three-year probationary period, provided that the mental disorder in question has stabilised sufficiently for there no longer to be reasonable grounds to fear that, irrespective of his or her mental disorder, possibly combined with other risk factors, the individual concerned will again commit offences that harm

or threaten to harm the physical or mental integrity of another person (section 66).

38. By two judgments, of 9 April 2019 (no. P.19.0273.N) and 11 June 2019 (no. P.19.0245.N) respectively, the Court of Cassation held that an individual in compulsory confinement who is no longer mentally ill and who is no longer dangerous must be granted final discharge, even if the three-year trial period has not yet expired. The Court of Cassation held that to interpret section 66 of the Compulsory Confinement Act otherwise would be contrary to Article 5 §§ 1 and 4 of the Convention.

THE LAW

I. JOINDER OF THE APPLICATIONS

39. In view of the similarity between the applications, the Court considers it appropriate to order that they be joined (Rule 42 § 1 of the Rules of Court).

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

40. The applicants alleged that the fact of maintaining the compulsory confinement measure following the entry into force of the Compulsory Confinement Act was no longer compatible with Article 5 § 1 of the Convention, the relevant part of which provides:

“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:

...

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

...”

A. Admissibility

41. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention and is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. *The parties' submissions*

a) The applicants

42. The applicants noted that the offences committed by them which had initially justified their placement in compulsory confinement could no longer give rise to a confinement measure, following the entry into force of the Compulsory Confinement Act. In consequence, they alleged that their deprivation of liberty no longer had a legal basis, which amounted to a breach of Article 5 § 1 of the Convention. They argued that the Compulsory Confinement Act provided that the offences they had committed did not justify the imposition of a confinement measure and that the Minister of Justice had indicated that the new legislation was intended to avoid “improper use” of compulsory confinement. In addition, before the new legislation entered into force, the Ghent Social Protection Board had reportedly granted final discharge to all persons in compulsory confinement who had committed offences that would no longer be considered grounds for confinement under Compulsory Confinement Act. The applicants in the present case were in an identical situation to those persons. It was thus clear that the continued imposition of compulsory confinement measures against them was not lawful.

b) The Government

43. In the Government's submission, it was indisputable that the criteria set out in the *Winterwerp v. the Netherlands* judgment (24 October 1979, § 39, Series A no. 33) had been met in the present case. Both applicants had been placed in compulsory confinement in compliance with the legal procedure in force at the material time and therefore “in accordance with a procedure prescribed by law” within the meaning of Article 5 § 1. With regard to the lawfulness of extending the compulsory confinement measures in spite of the fact that, under the Compulsory Confinement Act, the applicants were no longer liable for confinement on the basis of the offences they had committed, the Government drew attention to the Court's case-law on Article 7 of the Convention, to the effect that the courts are obliged to apply the law whose provisions are most favourable to the defendant only where he or she has been the subject of a final decision that has not acquired the force of *res judicata* (they referred to *Scoppola v. Italy (no. 2)* [GC], no. 10249/03, § 109, 17 September 2009). In the present case, however, the orders imposing compulsory confinement in respect of the applicants had been taken many years previously, had acquired the force of *res judicata* and had become final. With regard to the persistence of the mental disorders, the Government considered that the social protection bodies had duly verified if this was indeed the case on the basis of recent psychiatric

and psychological reports, and had concluded that the applicants' mental health did not allow their release.

2. *The Court's assessment*

a) **General applicable principles**

44. The Court refers to the general principles as reiterated in the judgments in *Ilseher v. Germany* ([GC], nos. 10211/12 and 27505/14, §§ 126-141, 4 December 2018) and *Rooman v. Belgium* ([GC], no. 18052/11, §§ 190-193, 31 January 2019). In particular, it reiterates, concerning the "lawfulness" of detention, including the question whether "a procedure prescribed by law" has been followed, that the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules thereof (see *Ilseher*, cited above, § 135). A period of detention is, in principle, "lawful" if it is based on a court order (see *Jėčius v. Lithuania*, no. 34578/97, § 68, ECHR 2000-IX, and *Nevmerjitski v. Ukraine*, no. 54825/00, § 116, ECHR 2005-II (extracts)).

45. While it is normally in the first place for the national authorities, notably the courts, to interpret and apply domestic law, the position is different in relation to cases where failure to comply with such law entails a breach of the Convention. This applies, in particular, to cases in which Article 5 § 1 of the Convention is at stake and the Court must then exercise a certain power to review whether national law has been observed (see *Creangă v. Romania* [GC], no. 29226/03, § 101, 23 February 2012). In particular, it is essential, in matters of deprivation of liberty, that the domestic law define clearly the conditions for detention and that the law be foreseeable in its application (see *Zervudacki v. France*, no. 73947/01, § 43, 27 July 2006).

46. As regards the deprivation of liberty of persons suffering from mental disorders, an individual cannot be considered to be of "unsound mind" and deprived of his liberty unless the following three minimum conditions are satisfied: firstly, he must reliably be shown to be of unsound mind; secondly, the mental disorder must be of a kind or degree warranting compulsory confinement; thirdly, the validity of continued confinement depends upon the persistence of such a disorder (see *Winterwerp*, cited above, § 39, and *Rooman*, cited above, § 192).

b) **Application in the present case**

47. The Court observes at the outset that it is not in dispute between the parties that, in the absence of a "conviction", the applicants' detention falls within sub-paragraph (e) of Article 5 § 1 of the Convention in so far as it relates to the detention of persons of unsound mind. Nor has it been contested by the parties that the initial decisions to place the applicants in

compulsory confinement pursuant to section 7 of the Social Protection Act were taken “in accordance with a procedure prescribed by law” and that their detention was lawful within the meaning of Article 5 § 1.

48. The issue which arises in the present case is whether, since the entry into force of the Compulsory Confinement Act on 1 October 2016 (see paragraphs 10 and 33 above), the continued compulsory confinement can still be regarded as legal, in so far as this new legislation does not provide for the possibility of placing an individual in confinement for the offences committed by the applicants and which formed the basis for their confinement.

49. The Court notes that, under the national law as applicable at the time of the initial decisions to place the applicants in confinement, compulsory confinement could be ordered under the Social Protection Act where an individual had committed an act classified as a criminal offence if he or she was suffering from a mental disorder or from a severe mental disturbance or defect making him or her incapable of controlling his or her actions (see paragraphs 31 and 32 above). Since the entry into force of the Compulsory Confinement Act, section 9 of that Act now provides that compulsory confinement can only be imposed where a crime or serious offence has been committed which harms or threatens to harm the physical or psychological integrity of another person (see paragraph 33 above). Thus, the Court notes, and this is not disputed by the Government, that the offences of robbery and attempted burglary committed by the applicants in the present case could no longer, as things stand, constitute a ground for an individual’s compulsory confinement, irrespective of his or her mental health, under the Compulsory Confinement Act.

50. That being said, the Court notes that the Compulsory Confinement Act sets out no transitional measures with regard to those individuals whose compulsory confinement was imposed under the Social Protection Act of 1930 and who had committed offences which do not correspond to the criteria in the new legislation.

51. Thus, in the present case, the Court of Cassation held that the applicants’ compulsory confinement could be extended on the basis of decisions taken under the 1930 Social Protection Act which had become final. It considered that Article 5 § 1 of the Convention did not mean that a compulsory confinement measure which had become final was no longer lawfully or legally imposed because the legislation had changed in the course of the execution stage (see paragraphs 17 and 28 above). This interpretation by the Court of Cassation in the applicants’ case seems to be compatible with the parliamentary proceedings, which indicate that the Compulsory Confinement Act was not in principle intended to affect decisions in respect of persons suffering from mental disorders who had committed offences capable of giving rise to confinement under the 1930 Social Protection Act, but for which confinement would no longer be

possible under the new legislation (see paragraph 34 above). The applicants' detention thus continued to be based on the judicial decisions taken on 18 June 2007 and 14 November 2002 respectively (see paragraphs 7 and 19 above).

52. The Court considers that the national authorities' interpretation of the Compulsory Confinement Act in the present case was not arbitrary or manifestly unreasonable.

53. With regard to the broader question of the "lawfulness" of the confinement under the Convention, the Court notes that the applicants did not dispute that they meet the three conditions set out in the *Winterwerp* judgment (cited above, § 39; see also paragraph 46 above). In consequence, it does not consider it necessary to examine compliance with these conditions.

54. In the light of the foregoing, the Court considers that the fact of maintaining the confinement measures in respect of the applicants after the entry into force of the Compulsory Confinement Act was compatible with Article 5 § 1 of the Convention.

55. There has accordingly been no violation of that provision.

III. ALLEGED VIOLATION OF ARTICLE 5 § 4 OF THE CONVENTION

56. The applicants also alleged a breach of Articles 5 § 4 and 13 of the Convention. Article 5 § 4 provides a *lex specialis* in relation to the more general requirements of Article 13 (see *A. and Others v. the United Kingdom* [GC], no. 3455/05, § 202, ECHR 2009). Being the master of the characterisation to be given in law to the facts of a case (see *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, §§ 114 and 126, 20 March 2018), the Court will therefore analyse this complaint under Article 5 § 4 alone. This provision reads as follows:

"4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

A. Admissibility

57. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. *The parties' submissions*

a) The arguments

58. The applicants alleged that they had not had available a remedy which satisfied the requirements of Article 5 § 4 of the Convention. They submitted that, once their detention ceased to be lawful for the purposes of Article 5 § 1, they ought to have been able to secure their release promptly. However, this had not been possible, since section 66 of the Compulsory Confinement Act provided for a possibility of final discharge only after a minimum three-year probationary period. The Act made the immediate discharge of individuals who no longer fulfilled the criteria developed by the Court in the *Winterwerp* judgment (cited above, § 39) impossible, a situation which, in their submission, was contrary to Article 5 § 4. In addition, the new law stated that the review of whether it was appropriate to maintain the compulsory confinement measure would take place only one year later, and the domestic case-law showed that an application for an urgent measure, provided for in section 54 of the Compulsory Confinement Act, was also not an effective remedy.

b) The Government

59. The Government considered that the applicants' detention was not unlawful. The argument that they ought to be released since otherwise there would be a breach of Article 5 § 4 of the Convention was thus lacking in legal merit. For the remainder, the Government argued that the Compulsory Confinement Act clearly laid down a system for reviewing the lawfulness of the detention foreseen by it. This review had been validated by the Court of Cassation under Article 5 § 4 of the Convention. The Government pointed out that the applicants had been able to apply to the CPS, then to the Court of Cassation, and that both of those courts had heard, analysed and discussed the arguments raised by the applicants. They had thus had an effective remedy available to them.

2. *The Court's assessment*

60. The general principles concerning Article 5 § 4 in so far as it applies to the compulsory confinement of persons suffering from mental disorders were reiterated in the case of *Stanev v. Bulgaria* ([GC], no. 36760/06, §§ 168-171, ECHR 2012; see also *Dufoort v. Belgium*, no. 43653/09, §§ 97-101, 10 January 2013). In particular, this provision guarantees, where "a person of unsound mind" is detained for an indefinite or lengthy period, he or she is in principle entitled, at any rate where there is no automatic periodic review of a judicial character, to take proceedings "at reasonable intervals" before a court to put in issue the "lawfulness" – within the

meaning of the Convention – of his or her detention (see *Staney*, cited above, § 171).

61. The Court reiterates that it found no violation of Article 5 § 1 of the Convention (see paragraph 55 above). However, the mere fact that the Court has found no breach of the requirements of paragraph 1 of Article 5 does not mean that it is dispensed from carrying out a review of compliance with paragraph 4; the two paragraphs are separate provisions and observance of the former does not necessarily entail observance of the latter (see *Douiye v. the Netherlands* [GC], no. 31464/96, § 57, 4 August 1999, and *Mooren v. Germany* [GC], no. 11364/03, § 88, 9 July 2009).

62. In the present case, the applicants submit that, in view of the alleged unlawfulness of their confinement, they ought to have been able to secure their immediate and unconditional release, which has not been possible since the entry into force of the Compulsory Confinement Act.

63. The Court notes that, under section 66 of the Compulsory Confinement Act, release without a probationary period – the applicants' principal request in the present case – can only be granted on completion of a three-year period of conditional discharge, provided that the mental disorder has stabilised sufficiently for there no longer to be reasonable grounds to fear that, irrespective of his mental disorder, possibly combined with other risk factors, the individual concerned will again commit offences that harm or threaten to harm the physical or mental integrity of other persons (see paragraph 37 above).

64. However, the Court reiterates that in cases arising from individual applications its task is not to review the relevant legislation or practice in the abstract; it must as far as possible confine itself, without overlooking the general context, to examining the issues raised by the case before it (see *Paradiso and Campanelli v. Italy* [GC], no. 25358/12, § 180, 24 January 2017). Its role is not therefore to decide in the abstract whether the remedies set out in the Compulsory Confinement Act are compatible with the Convention. It must limit itself to verifying whether the way the Act was applied in the present case complied with the Convention.

65. Turning to the circumstances of the present case, the Court notes that the applicants were able to challenge the extension of their compulsory confinement by submitting their complaints to the CPS and then to the Court of Cassation, and that were able to submit their arguments to a judge ruling promptly on the lawfulness of their detention and on their applications for release. Thus, the Court notes that in the applicants' case, the condition of having served a three-year probationary period was only a supplementary ground among the various reasons given by the social protection bodies for refusing their immediate and final discharge. Indeed, the social protection bodies also considered, on the basis of recent psychiatric and psychological reports, that the applicants' mental health did not allow for their release (see paragraphs 15 and 26 above). Furthermore,

the applicants did not argue, before the Court of Cassation or before the Court, that the psychiatric disorders which had justified their compulsory confinement were no longer present, or that their mental-health conditions had improved to a sufficient level. Thus, they did not meet the other conditions provided for in section 66 of the Compulsory Confinement Act in order for final discharge to be ordered. It follows that in their cases the contested legal condition had no effect on the national courts' power of appreciation.

66. Furthermore, the Court notes that in the meantime the Court of Cassation has interpreted this provision in the light of Article 5 §§ 1 and 4 of the Convention and held that an individual in compulsory confinement who is no longer mentally ill and who is no longer dangerous must be granted final discharge, even if the three-year "probationary period" has not yet expired (see paragraph 38 above).

67. Having regard to the foregoing, the Court finds that there has been no violation of Article 5 § 4 of the Convention.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Decides* to join the applications;
2. *Declares* the application admissible;
3. *Holds* that there has been no violation of Article 5 § 1 of the Convention;
4. *Holds* that there has been no violation of Article 5 § 4 of the Convention.

Done in French, and notified in writing on 8 October 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Andrea Tamietti
Deputy Registrar

Jon Fridrik Kjølbro
President