



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

COURT (PLENARY)

CASE OF VAN DROOGENBROECK v. BELGIUM

(Application no. 7906/77)

JUDGMENT

STRASBOURG

24 June 1982

In the Van Droogenbroeck case,

The European Court of Human Rights, taking its decision in plenary session in application of Rule 48 of the Rules of Court and composed of the following judges:

Mr. G. WIARDA, *President*,
Mr. M. ZEKIA,
Mr. J. CREMONA,
Mr. W. GANSHOF VAN DER MEERSCH,
Mrs. D. BINDSCHIEDLER-ROBERT,
Mr. D. EVRIGENIS,
Mr. G. LAGERGREN,
Mr. L. LIESCH,
Mr. F. GÖLCÜKLÜ,
Mr. F. MATSCHER,
Mr. J. PINHEIRO FARINHA,
Mr. E. GARCIA DE ENTERRIA,
Mr. L.-E. PETTITI,
Mr. B. WALSH,
Sir Vincent EVANS,
Mr. C. RUSSO,
Mr. R. BERNHARDT,
Mr. J. GERSING,

and also Mr. M.-A. EISSEN, *Registrar*, and Mr. H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 26 and 27 February and on 24, 25 and 27 May 1982,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The Van Droogenbroeck case was referred to the Court by the European Commission of Human Rights ("the Commission") and the Government of the Kingdom of Belgium ("the Government"). The case originated in an application (no. 7906/77) against the aforementioned State lodged with the Commission on 16 April 1977 under Article 25 (art. 25) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Belgian national, Mr. Valery Van Droogenbroeck.

2. Both the Commission's request and the Government's application were lodged with the registry of the Court within the period of three months

laid down by Articles 32 par. 1 and 47 (art. 32-1, art. 47), the former on 18 December 1980 and the latter on 5 January 1981. The request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the Kingdom of Belgium recognised the compulsory jurisdiction of the Court (Article 46) (art. 46); the application referred to Article 48 (art. 48). The purpose of the request and the application is to obtain a decision as to whether or not the facts of the case disclose a breach by the respondent State of its obligations under Articles 4 and 5 (art. 4, art. 5); in particular, the Court is asked to clarify the scope of the right, guaranteed by paragraph 4 of Article 5 (art. 5-4), to take proceedings seeking a review of lawfulness.

3. The Chamber of seven judges to be constituted included, as ex officio members, Mr. W. Ganshof van der Meersch, the elected judge of Belgium nationality (Article 43 of the Convention) (art. 43), and Mr. G. Wiarda, the President of the Court (Rule 21 par. 3 (b) of the Rules of Court). On 31 January 1981, the President drew by lot, in the presence of the Registrar, the names of the five other members, namely Mr. J. Cremona, Mrs. D. Bindschedler-Robert, Mr. F. Gölcüklü, Mr. L.-E. Pettiti and Mr. B. Walsh (Article 43 in fine of the Convention and Rule 21 par. 4) (art. 43). Mr. Pettiti was subsequently prevented from taking part in the consideration of the case and was replaced by Mr. D. Evrigenis, the first substitute judge (Rules 22 par. 1 and 24 par. 1).

4. Having assumed the office of President of the Chamber (Rule 21 par. 5), Mr. Wiarda ascertained, through the Registrar, the views of the Agent of the Government and of the Commission's Delegate regarding the procedure to be followed. On 3 February, he decided that the Agent should have until 15 April 1981 to file a memorial and that the Delegate should be entitled to file a memorial in reply within two months from the date of the transmission of the Government's memorial to him by the Registrar.

The Government's memorial was received at the registry on 21 April. On 20 July, the Secretary to the Commission informed the Registrar that the Delegate would present his observations at the hearings.

5. After consulting, through the Deputy Registrar, the Agent of the Government and the Commission's Delegate, the President directed on 23 July that the oral proceedings should open on 20 October 1981.

6. The oral proceedings were held in public at the Human Rights Building, Strasbourg, on 20 October. Immediately before their opening, the Court had held a preparatory meeting.

There appeared before the Court:

- for the Government

Mr. J. NISSET, Legal Adviser

at the Ministry of Justice,

Mr. E. JAKHIAN, avocat,

Mrs. N. LAUWERS, Deputy Legal Adviser

at the General Directorate of Prisons,

Agent,

Counsel,

Adviser;

- for the Commission

Mr. S. TRECHSEL,

Delegate,

Mr. S. BEUSELINCK and Mr. J. VAN DAMME, *avocats,*

assisting the Delegate (Rule 29 par. 1, second sentence, of the Rules of Court).

The Court heard addresses by Mr. Trechsel, Mr. Beuselinck and Mr. Van Damme for the Commission and by Mr. Jakhian for the Government, and also their replies to questions put by it and two of its members.

7. Following deliberations held on 21 and 22 October and on 23 November 1981, the Chamber decided under Rule 48 of the Rules of Court to relinquish jurisdiction forthwith in favour of the plenary Court.

By letter of 8 December, the Agent of the Government indicated that he would not request a further hearing and the same position was taken by the Commission's Delegate on 15 December. On the following day, the President of the Court authorised the Agent, who had expressed a wish to that effect in the aforesaid letter, to file a supplementary memorial by 18 January 1982 and the Delegate to reply in writing within three weeks from the transmission of that memorial to him by the Registrar. On 28 January, the President extended the first of these time-limits to 10 February. The Government's supplementary memorial and the Delegate's reply, the latter being accompanied by the applicant's observations, were received at the registry on 10 and 25 February, respectively.

Having taken note of the agreement of the Agent of the Government and the concurring opinion of the Commission's Delegate, the Court decided on 27 February that the proceedings would continue without resumption of the hearings (Rule 26 of the Rules of Court).

8. On various dates between 14 October and 18 March 1982, the Registrar received from the Commission and the Government numerous documents and items of information; they supplied some of these on their own initiative and others in response to requests made by the Registrar on the instructions of either the President, the Chamber or the plenary Court.

AS TO THE FACTS

I. THE PARTICULAR CIRCUMSTANCES OF THE CASE

9. The applicant is a Belgian national, born in 1940. He has no fixed occupation.

On 29 July 1970, the Bruges criminal court (*tribunal correctionnel*) sentenced him to two years' imprisonment for theft, and attempted theft, committed with the aid of skeleton keys. The court also ordered that he be

"placed at the Government's disposal" for ten years, pursuant to section 23 of the "Social Protection" Act of 1 July 1964 (see paragraph 19 below): it noted that Mr. Van Droogenbroeck was a recidivist (Article 56 of the Criminal Code) who had been sentenced by the Brussels criminal court on 9 April 1968 to two years' imprisonment for aggravated theft and who manifested a persistent tendency to crime.

The applicant and the ministère public (public prosecutor's department) appealed to the Ghent Court of Appeal, which confirmed the first instance decision on 20 October 1970. It found that the placing at the Government's disposal was justified by the danger to which society and Mr. Van Droogenbroeck himself would be exposed were he to be released on completion of his sentence (door het gevaar dat, na afloop van de straf die tegen hem uitgesproken wordt, de invrijheidstelling van de veroordeelde voor de maatschappij en voor hem zelf zou doen lopen). An appeal by the applicant on a point of law was dismissed by the Court of Cassation on 19 January 1971.

10. On the completion (on 18 June 1972) of his principal sentence, which he served at St. Giles prison, Brussels, and then at Malines, Mr. Van Droogenbroeck did not remain in detention. It was true, according to the medical officer specialised in psychology (médecin-anthropologue) at Malines prison, that he was incapable of self-criticism and had no sense of responsibility (noch auto-kritiek, noch verantwoordelijkzin). Nevertheless, the Minister of Justice, acting on the advice of the prison governor and following a "policy of securing as far as possible the rehabilitation of released prisoners", agreed to attempt to reintegrate him into society by placing him, as from 1 August 1972, in semi-custodial care; this involved his working as an apprentice in a central-heating installation firm in Brussels and attending intensive vocational training courses in a specialised institution on Fridays and Saturdays.

11. The applicant disappeared, however, on 8 August 1972. Three days later, on the instructions of the procureur général (public prosecutor) attached to the Ghent Court of Appeal, he was placed on the wanted list and, on 3 October 1972, he was arrested, pursuant to a warrant issued by an investigating judge in connection with an attempt to commit aggravated theft, and detained at Forest prison, Brussels. On 17 November, he was found not guilty by the Brussels criminal court, but on 27 November the Minister of Justice decided to send him to Merksplas prison, in the block reserved for recidivists placed at the Government's disposal (te doen overbrengen naar de afdeling voor TBR - geïnterneerde recidivisten te Merksplas); this was because the Ministry's individual Cases Department had expressed the opinion, on 27 November, that the applicant had abused the opportunity offered to him, that he was totally untrustworthy and that a further period of detention was indicated (dat (hij) werkelijk misbruik heeft

gemaakt van de hem geboden kans, dat hij helemaal niet is te betrouwen en dat een nieuwe interneringsperiode gewettigd is).

On the strength of a favourable opinion from the Recidivists Board (see paragraph 22 below), before which Mr. Van Droogenbroeck had appeared on 13 June 1973, the Minister of Justice decided on 22 June to release him conditionally on 25 July, since the firm mentioned above was prepared to re-engage him as a trainee heating technician.

12. The applicant disappeared again at the beginning of September 1973. He was arrested on 6 November and brought before the Antwerp criminal court on a charge of aggravated theft, where he was sentenced on 16 January 1974 to three months' imprisonment. On 4 February, on the expiration of this sentence, he was released as the Minister had agreed to make a further attempt at his reintegration into society, but at the end of March the agency responsible for monitoring his rehabilitation lost trace of him. He was arrested on 21 May 1974 and, until 16 January 1975, served a sentence of eight months' imprisonment for aggravated theft, imposed by the Brussels criminal court on 9 August 1974; thereafter he returned to Merksplas prison pursuant to a detention decision (te interneren) taken by the Minister of Justice on 11 January. He left prison on 11 July 1975: two days previously and on the recommendation of the Recidivists Board, the Minister had agreed to his conditional release (te ontslaan), in the form of one month's renewable leave, with a view to rehabilitation in France.

13. Mr. Van Droogenbroeck accordingly went to France, accompanied by a member of the Prisoners' Aid committee, but the rehabilitation plan proved impracticable and he therefore returned to Belgium. After different setbacks in hostels, he was obliged to live alone in Brussels, without work and completely without resources. On 10 September 1975, the Individual Cases Department, citing the risk of recidivism, proposed that "steps be taken to detain" the applicant at Merksplas; the Minister of Justice gave his consent on the following day. Thereupon, Mr. Van Droogenbroeck disappeared for the third time; the authorities placed him on the wanted list, on account of his conduct. After hiding for some months in the Netherlands and finding himself in dire financial straits, he gave himself up on 21 January 1976 to the police attached to the parquet du procureur du Roi (public prosecutor's office) in Brussels. He was detained at once in Forest prison before being sent back to Merksplas. On 2 February, as he was unwilling to do the work offered to him, he was placed in the cell block rather than in the recidivists block.

On 3 March 1976, the applicant appeared at his request before the Recidivists Board, which decided to re-examine his case in September. At its meeting on 8 September, the Board found that he had saved nothing during his detention and that he had no prospects of finding work outside prison. It therefore declined to recommend his release unless and until he had saved 12,000 BF through his prison work.

On 23 September, the applicant was transferred from Merksplas to Louvain prison.

14. On 12 May 1976, Mr. Van Droogenbroeck, relying on section 26 of the Act of 1 July 1964 (see paragraph 23 below), had filed with the procureur général attached to the Ghent Court of Appeal an application for release from the effects of the decision placing him at the Government's disposal. The Court of Appeal refused the application on 13 December: after rejecting the arguments which he had based on Articles 4 par. 1, 4 par. 2, 5 par. 1 and 5 par. 4 of the Convention (art. 4-1, art. 4-2, art. 5-1, art. 5-4), the Court found that each time the applicant had been released, he had yielded to impulse and committed further offences; it concluded from this that he remained asocial (zodat hij asociaal blijft). On 15 February 1977, his appeal on a point of law was held by the Court of Cassation to be inadmissible on the ground that he was no longer entitled to contest before that Court - as he had attempted to do by pleading the Convention - the validity of the decision complained of, that decision having been final since 19 January 1971.

15. On 13 March 1977, the applicant lodged with the Louvain procureur du Roi a complaint of arbitrary detention and, in the alternative, of abuse of authority (abus de pouvoir). He pointed out that since 28 February the balance on his account had been more than 12,000 BF; in addition, he alleged that the Recidivists Board, not being mentioned in the Act of 1 July 1964, was "unlawful" and he accused the Minister of transforming his sentence into one of "forced labour". On 19 August 1977, the complaint was set aside as requiring no further action.

16. On 4 May 1977, Mr. Van Droogenbroeck appeared again before the above-mentioned Board. Noting that he had by then saved 12,868 BF and had been detained for long enough (lang genoeg), the Board recommended, "without much enthusiasm" (zonder veel enthousiasme), that he be released (te ontslaan). Accordingly, on 1 June 1977, the Minister of Justice granted him one month's renewable leave, to be preceded by a two month period of semi-custodial care during which he was to be accommodated at night in St. Giles prison (Brussels) but was to work outside the prison during the daytime. However, he disappeared on the day after his first day out and was at once placed on the wanted list for return to the recidivists block at Merksplas.

17. On 22 September 1977, Mr. Van Droogenbroeck was caught in the act of stealing in Bruges and arrested. On 9 December, he was sentenced to three month's imprisonment by the Bruges criminal court and, on completing that sentence on 21 December, was sent back to Merksplas. The Ministry of Justice had found, on 19 December, that the applicant's return to detention did not require a fresh Ministerial decision since he had evaded detention on 8 June 1977 (aangezien betrokkene zich op 8. 6. 77 heeft

onttrokken aan zijn internering, is geen ministeriële beslissing nodig om hem opnieuw te interneren).

The case was re-examined by the Recidivists Board on 3 May 1978, but the matter was adjourned until September. On 13 September, the Board pointed out that, on account of his systematic refusal to work, Mr. Van Droogenbroeck had saved only 2,437 BF and it therefore proposed that he not be granted renewable leave until he had saved 12,000 BF. On 3 October, the Minister gave instructions to that effect; he also stipulated that the applicant's release should be subject to a series of conditions similar to those previously laid down by the Minister, namely submitting to the "guidance" of the Brussels Social Rehabilitation Office, working regularly, not changing employer or address without that Office's consent, refraining from excessive consumption of alcohol and not associating with former criminals. It proved impossible to implement this decision, since Mr. Van Droogenbroeck failed to satisfy any of the conditions attached thereto. On 14 March 1979, he appeared once more before the Recidivists Board, which confirmed the advice it had tendered on 13 September 1978.

18. On 16 September 1979, the applicant lodged with the procureur général attached to the Ghent Court of Appeal a second application based on section 26 of the Act of 1 July 1964 (see paragraph 23 below). This application was granted on 18 March 1980: after considering the submissions to the contrary on the part of the ministère public and although the Court rejected, as in 1976, the arguments based on the Convention, it held that there were by then reasons for releasing Mr. Van Droogenbroeck from the effects of the decision placing him at the Government's disposal. He was set free on the same day, but shortly afterwards was again deprived of his liberty, the Brussels criminal court and the Ghent Court of Appeal having sentenced him on 10 September 1980 and 3 June 1981 to one month's and to one year's imprisonment for aggravated theft, though without applying to him the Social Protection Act.

II. THE LEGISLATION IN ISSUE

A. The placing of recidivists and habitual offenders at the Government's disposal

19. The placing of recidivists and habitual offenders at the Government's disposal was substituted for the placing under special police supervision that had been provided for in the Criminal Code of 8 June 1867; it was introduced by section 24 to 28 of the "Social Protection" Act of 9 April 1930 and is today the subject of sections 22 to 26 (Chapter VII) of the Social Protection in respect of Mental Defectives and Habitual Offenders Act of 1 July 1964 ("the 1964 Act").

According to Belgian case-law, being placed at the Government's disposal is to be classified as a penalty and not as a security measure; this has various consequences in law (Court of Cassation, 4 April 1978, *Pasicrisie* 1978, I, pp. 858-862; 17 June 1975, *ibid.* 1975, I, pp. 998-999; 11 December 1933, *ibid.* 1934, I, p. 96). Under sections 22 and 23 of the 1964 Act, the placing at the Government's disposal is added on to a principal penalty involving deprivation of liberty imposed at the same time, becomes operative on the expiration of that penalty and applies for a period fixed by the Act, namely twenty years, ten years, or from five to ten years, according to the nature of the case.

A person who has committed one indictable offence (crime) after another must be placed at the Government's disposal (section 22), whereas in other cases - such as the applicant's - it is a matter for the court's discretion (section 23): the latter rule applies where a non-indictable offence (*délit*) has followed an indictable or a non-indictable offence (Articles 56 and 57 of the Criminal Code), where an indictable offence has followed a non-indictable offence and to the case of "anyone who, having committed in the previous fifteen years at least three offences each involving a penalty of imprisonment for a non-indictable offence (*emprisonnement correctionnel*) of at least six months, is shown to manifest a persistent tendency to crime". In the latter cases, "particulars of the proceedings in respect of the offences which cause the individual concerned to be classified as a recidivist have to be included in the current prosecution file" and the court concerned must give "specific and precise" reasons for ordering the penalty in question (section 24 and Court of Cassation, 3 January 1962, *Pasicrisie* 1962, I, pp. 525-526).

20. If a recidivist is sentenced to a further principal penalty of imprisonment, the effects of any prior order placing him at the Government's disposal are suspended until that sentence has been served. Such was the result, in the present case, of the judgments of 16 January 1974, 9 August 1974 and 9 December 1977 (see paragraphs 12 and 17 above). The new sentence of imprisonment may itself be accompanied by a further order placing the individual concerned at the Government's disposal, the latter penalty to be served after the expiry of the first order, but as regards Mr. Van Droogenbroeck this course was not followed by the Antwerp, Brussels and Bruges criminal courts or the Ghent Court of Appeal in 1974, 1977, 1980 and 1981 (see paragraphs 12, 17 and 18 above).

21. According to the Court of Cassation, the penalty of being placed at the Government's disposal - which can be the subject of a full appeal or of an appeal to the Court of Cassation on a point of law - and the principal penalty form an "inseparable whole" and the former penalty, like the latter, constitutes a deprivation of liberty (4 April 1978, *Pasicrisie* 1978, I, pp. 858-862; 17 June 1975, *ibid.* 1975, I, pp. 998-999; 3 January 1962, *ibid.* 1962, I, pp. 525-526; 22 July 1955, *ibid.* 1955, I, pp. 1270-1271, 19

September 1939, *ibid.* 1939, I, p. 384; 11 December 1933, *ibid.* 1934, I, p. 96). Under section 25 of the 1964 Act, "recidivists and habitual offenders who are at the Government's disposal shall, if necessary, be detained in an establishment specified by Royal Decree" - in the instant case the establishment being Merksplas, which had been designated for males not suffering from any mental illness (Royal Decree of 8 February 1952).

As is indicated by the phrase "if necessary", the Act confers on the Government - here, the Minister of Justice - a wide measure of discretion in deciding how the penalty shall be implemented, the choice lying between detention, semi-custodial care, and remaining at liberty under supervision or on probation. The Minister may conditionally release the person concerned either at the end of the principal sentence - failing which he will be detained - or during the course of detention; he may also revoke conditional release at a later date.

The Minister of Justice takes various decisions in accordance with a procedure which is laid down, in part, by Ministerial Decrees. Conditional release usually occurs:

- whilst the principal penalty is being served, on a report from the "medical officer specialised in psychology" and the governor of the establishment where the convicted person is held (see paragraph 10 above);
- during detention, on a recommendation by the Recidivists Board (see paragraph 11, 12 and 16 above and paragraph 22 below).

A decision to revoke conditional release (see paragraph 11, 12, 13 and 17 above) is generally taken by the Minister in the light of a report from the officer responsible for the "guidance" of the person concerned, or of an recommendation by the procureur général attached to the Court of Appeal within whose district the placing at the Government's disposal was ordered. These reports and recommendations will cover the manner in which the person in question is observing the prescribed conditions, his means of subsistence, his work, his conduct and the risk of recidivism on his part. If, however, he is in the process of serving a further sentence of imprisonment, revocation is normally based on reports from the "medical officer specialised in psychology" and the governor of the establishment; these reports will contain information on the nature of the offences for which the sentence was imposed, the offender's criminal record, his personality, his moral character, his family and occupational situation and his future prospects.

22. The Board for Recidivists who have been placed at the Government's Disposal and are in Detention ("the Recidivists Board") was established by a Ministerial Decree of 12 March 1946 which was modified and supplemented on 20 May 1949 and 11 March 1968. The Board is composed of a judge or retired judge, who acts as chairman, the medical director or retired medical director of the Prison Psychological Service (Service d'anthropologie) and a senior official of the Prison Social Service. A

representative of the Ministry of Justice attends meeting of the Board and the Prisoners' Aid Committees or the Social Rehabilitation Offices may be invited to send a representative - who is entitled to speak and vote (Decree of 20 May 1949) - to those meetings at which the Board is to discuss the position of detainees who have been or are to be placed under their supervision.

The Board is convened by its chairman at least once every two months. It is required to supply the Minister of Justice with an opinion - which is not binding - "on the advisability of releasing recidivists and habitual offenders who are in detention ... and on the conditions" which should be attached to their release.

Offenders may apply to appear before the Board either at the meeting before the expiry of the first six months of their detention, if it began as soon as they have finished serving their principal sentence, or at the first meeting held after their return to detention, in cases where the Minister has revoked a decision granting conditional release (see paragraph 13 above). They will be heard again at the meeting before the expiry of the first six months of their detention, if it six months, fixed by the Recidivists Board (see paragraph 11, 12, 13, 16 and 17 above).

Although the texts are silent on the point, a detainee will be heard without the assistance of a lawyer and without being able to inspect the prison file which contains, *inter alia*, the results of the social enquiry. The Board's Secretary will communicate to him at once the opinion adopted by the Board at the end of its discussions. If the opinion is favourable, the matter will be referred to the Minister for decision. The Minister may also give directions for release at any time, without consulting the Board in advance.

The governors of the establishments involved inform the persons concerned of Ministerial decisions that they be released. Such decisions will be subject to conditions which will be recorded in a booklet and will always include an obligation to submit to supervision arranged by the Social Rehabilitation Offices or the Prison Social Service.

23. Under section 26 of the 1964 Act, individuals placed at the Government's disposal pursuant to sections 22 and 23 may apply to the procureur général attached to the Court of Appeal within whose district the decision was rendered to be released "from the effects of the decision". If, as in the present case, the offender has been placed at the Government's disposal for not more than ten years, such an application "can be made three years after completion of the [principal] sentence" (see paragraph 14 above) and, thereafter, "every three years" (see paragraph 18 above); these periods are increased to five years "in the other cases". The procureur général "shall make such enquiries as he sees fit, add the results to the case-file and lay it, with his submissions, before a criminal chamber of the Court of Appeal; the

Chamber shall give a reasoned judgment after hearing the person concerned, who shall have the assistance of a lawyer".

24. The practice followed in implementing the Acts of 1930 and 1964 has developed considerably over the years. Initially, offenders were not released until after a period of detention which varied according to the categories in which they were placed. Today, on the other hand, where it is the first time that the measure has been ordered and the individual is not very dangerous, the authorities' general rule is to release him on trial once the principal sentence has been served, subject to detaining him if he commits another offence or fails to observe one of the prescribed conditions and is out of work and without means of subsistence. Moreover, detention for a long period is now exceptional: according to the Government, the offender will in practice be conditionally released - unless there is a serious danger to society - as soon as there is a real possibility of rehabilitation.

25. According to Articles 62 and 63 of the General Prison Rules (Royal Decree of 21 May 1965), read in conjunction with Article 95, persons sentenced to a penalty for a non-indictable offence (*peine correctionnelle*) and then detained pursuant to section 25 of the 1964 Act, as was Mr. Van Droogenbroeck, may be required to do prison work.

B. Existence of remedies in respect of allegedly unlawful deprivation of liberty

26. The Government maintained that several remedies were available to the applicant:

(i) instituting or causing to be instituted a prosecution for arbitrary detention;

(ii) referring to the Ghent Court of Appeal any dispute between himself and the *ministère public* regarding the execution of the judgment of 20 October 1970;

(iii) applying to that Court of Appeal for release from the effects of the measure imposed on him;

(iv) applying to the President of the court of first instance in his capacity of *juge des référés* (judge hearing urgent applications);

(v) bringing an action based directly on Article 5 par. 4 (art. 5-4) of the Convention.

On the third point, the Court refers to paragraphs 14, 18 and 23 above, and, on the fifth, to paragraph 55 below.

27. As regards the first point, anyone who maintains that he has been unlawfully deprived of his liberty, either by a private individual or by a public official, is entitled under Belgian law either to file a complaint, with or without the joinder of a claim for damages (*constitution de partie civile*), or to bring the matter before a criminal court by means of a direct summons

(Articles 147 and 434 to 436 of the Criminal Code; Articles 63, 182 and 609 of the Code of Criminal Procedure; see paragraph 15 above).

28. As regards the second point, the Ghent Court of Appeal held, in 1897 and 1914 that disputes between the *ministère public* and a convicted person regarding the execution of a sentence could be referred to the court which passed it, but these are isolated decisions which have not been confirmed by other judgments.

29. As regards the fourth remedy mentioned above, the Court confines itself for the moment to noting that under Articles 584 and 1039 of the 1967 Judicial Code it falls to the President of the court of first instance to give a ruling, in the capacity of *juge des référés* - that is to say, on a "provisional" basis, if the matter is urgent, and without prejudice to the "merits" -, if so requested by anyone claiming to be the victim of, for example, an administrative act constituting a "*voie de fait*" (manifest illegality). This remedy is available "in all matters, except those which are excluded by law from the competence of the courts". The case-law cited by the Government in this connection is analysed at paragraph 54 below.

PROCEEDINGS BEFORE THE COMMISSION

30. On 2 January 1974, Mr. Van Droogenbroeck had lodged a first application (no. 6989/75) which the Commission declared inadmissible on 5 March 1976 on account of failure to exhaust domestic remedies. In his second application, dated 16 April 1977 (no. 7906/77), he maintained that he was held in servitude and forced to work, contrary to paragraphs 1 and 2 of Article 4 of the Convention (art. 4-1, art. 4-2). He further alleged that his deprivation of liberty, which in his view had been ordered by the Minister of Justice and not by a court, contravened paragraph 1 of Article 5 (art. 5-1) and that he had not been able to seek a judicial review of the lawfulness of his various periods of detention, as was required by paragraph 4 of the same Article (art. 5-4). Finally, he complained of an interference with his freedom of expression, guaranteed by Article 10 (art. 10), contending that he was on two occasions subjected to disciplinary sanctions for having protested against the Recidivists Board's recommendations.

31. On 5 July 1979, the Commission rejected the last complaint as being manifestly ill-founded (Article 27 par. 2) (art. 27-2) and declared the remainder of the application admissible.

In its report of 9 July 1980 (Article 31 of the Convention) (art. 31), the Commission expressed the opinion that there had been a violation of paragraph 4 of Article 5 (art. 5-4) (unanimously), but not of paragraph 1 (art. 5-1) (ten votes to two) or of Article 4 (art. 4) (unanimously).

The report contains one dissenting opinion.

SUBMISSIONS MADE BY THE GOVERNMENT TO THE COURT

32. In their memorial of April 1981 and in their supplementary memorial of February 1982, the Government submitted:

"that it may please the Court to hold that in the applicant's case there has been no violation of any provision of the European Convention for the Protection of Human Rights and Fundamental Freedoms."

AS TO THE LAW

I. THE ALLEGED VIOLATION OF ARTICLE 5 PAR. 1 (art. 5-1)

33. In so far as it is applicable in the present case, Article 5 par. 1 (art. 5-1) of the Convention reads:

"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;

..."

Sub-paragraphs (b) to (f) are clearly not relevant; besides, none of them was relied on by the Government.

34. As regards paragraph 1 (a) (art. 5-1-a), there is no dispute as to the "competence" of the "court" which ordered the measure complained of, namely the Ghent Court of Appeal by its judgment of 20 October 1970 (see paragraph 9 above).

The same is true of the question whether any deprivation of liberty occurred. In this connection, it should be recalled that according to Belgian case-law the placing of recidivists and habitual offenders at the Government's disposal is to be classified as a penalty involving deprivation of liberty; this is so irrespective of the form which implementation of the order may take in a given case or at a given time, be it detention, semi-custodial care, or remaining at liberty under supervision or on probation (see paragraphs 19 and 21 above - Court of Cassation, 4 April 1978, Pasicrisie 1978, I, p. 861). However, the Court will take into account solely the first of such forms, this being the only one of which Mr. Van Droogenbroeck complained. In view of the particulars supplied by the Commission's Delegate at the hearings of 20 October 1981, the Court will confine its examination to the periods of detention which were the subject of Mr. Van

Droogenbroeck's application no. 7906/77 (see paragraph 30 above), namely those running from 21 January 1976 to 1 June 1977 and from 21 December 1977 to 18 March 1980 (see paragraphs 13-18 above).

35. The Court has to determine whether those periods of detention occurred "after conviction" by the Ghent Court of Appeal.

Having regard to the French text, the word "conviction", for the purposes of Article 5 par. 1 (a) (art. 5-1-a), 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" (see the *Guzzardi* judgment of 6 November 1980, Series A no. 39, p. 37, par. 100), and the imposition of a penalty or other measure involving deprivation of liberty. These conditions are satisfied in the instant case.

The word "after" does not simply mean that the "detention" must follow the "conviction" in point of time: in addition, the "detention" must result from, "follow and depend upon" or occur "by virtue of" the "conviction" (see the *X v. the United Kingdom* judgment of 5 November 1981, Series A no. 46, p. 17, par. 39; the *Engel and others* judgment of 8 June 1976, Series A no. 22, p. 27, par. 68).

36. According to the applicant, the deprivations of liberty complained of stemmed not from a sentence imposed by a "competent court" but from decisions taken by the Minister of Justice.

The respondent State, on the other hand, maintained that detention occurred "by operation of law" following the judicial decision placing a recidivist at the Government's disposal and represented "the principal method of implementing" such a decision: it was only release that required "a Ministerial decision". The "task entrusted to the Minister ... by the Act of 1 July 1964" was said to be confined "to determining the modalities for the execution of a sentence involving deprivation of liberty", for example "by suspending", on such conditions as he determined, "the detention entailed by such a penalty ... or by revoking a decision to grant conditional release taken by him". Accordingly, so it was argued, "by not deciding to release, the Minister does not decide to detain".

37. This is a controversial point in Belgian law. The Government based themselves to a large extent on a passage in the drafting history of the predecessor of the 1964 Act, the Act of 9 April 1930 ("placing at the Government's disposal is detention in an establishment designated by Royal Decree", *Pasinomie* 1930, p. 88, column 2), but there are other passages to a different effect ("placing at the Government's disposal is independent of the detention which it may entail": *Chambre des représentants*, 1927-1928 session, document no. 11). The Commission's Delegate pointed out that the argument was inconsistent with the letter of section 25 of the 1964 Act (see paragraph 21 above: "if necessary") and, above all, with the recent administrative practice of the Ministry of Justice, since approximately two-thirds of the recidivists and habitual offenders who are placed at the

Government's disposal remain at liberty (see paragraph 24 above, paragraph 16 of the Commission's report and the verbatim record of the hearings on the morning of 20 October 1981).

Even when an offender is not set free after serving his initial sentence - something which did not occur in the instant case and is nowadays exception -, this is apparently the result of Ministerial instructions to the effect that he should be detained. At any rate, that such is the position emerges from paragraph 6 of a circular of 20 December 1930, which was supplied by the Government ("Convicted persons who have been placed at the Government's disposal after expiration of their sentence must be the subject of a notification to the Minister of Justice so that the question of their detention may be considered"), and from the summary of the facts appearing in one of the Commission's decisions (1 October 1975, application no. 6697t/74, *R. V. v. Belgium*, which was subsequently joined to Mr. Van Droogenbroeck's first application, no. 6989/75). Besides, it is understandable that express instructions of this kind are needed whenever the transfer of an individual who has to leave another prison for Merksplas is to be effected.

In any event, the Ministerial decisions of 11 January and 11 September 1975 revoking the conditional release granted to Mr. Van Droogenbroeck did order that he be "detained" (see paragraphs 12-13 above).

38. Be that as it may, one must look beyond the appearances and the language used and concentrate on the realities of the situation (see notably, *mutatis mutandis*, the Deweer judgment of 27 February 1980, Series A no. 35, p. 23, par. 44).

This is a matter in which the Government enjoy a wide measure of discretion. Case-law and practice certainly confirm the meaning suggested by the text of section 25 of the 1964 Act ("if necessary") and the actual phrase "placing at disposal". In a judgment of 4 April 1978, the Belgian Court of Cassation observed that "execution of the penalty" in question "is to a large extent a matter for the discretion" of the Minister of Justice (Pasicrisie 1978, I, p. 861). One finds that far less fetters are imposed on Ministerial decisions by a court's decision to apply the Social Protection Act than in the analogous area of the system of placing vagrants "at the Government's disposal" (Act of 27 November 1891; see the De Wilde, Ooms and Versyp judgment of 18 June 1971, Series A no. 12, pp. 24-25, par. 37, and pp. 33-34, par. 61). In short, to adopt the language used by the Commission's Delegate, "the court decision does not order the detention" of recidivists and habitual offenders: it "authorises" it.

39. In these circumstances, the Court has to consider whether there was a sufficient connection, for the purposes of Article 5 (art. 5), between the last-mentioned decision and the deprivation of liberty at issue.

This question must receive an affirmative reply since the Minister's discretion is exercised within a framework set both by the Act and by the

sentence pronounced by the "competent court". In this respect, the Court notes that, according to Belgian case-law, a judgment which sentences the person concerned to imprisonment and, by way of a supplementary or accessory penalty, places him at the Government's disposal pursuant to section 22 or section 23 of the 1964 Act constitutes "an inseparable whole" (see paragraph 21 above; Court of Cassation, 17 June 1975, *Pasicrisie* 1975, I, p. 999). There are two components to the judgment: the first is a penalty involving deprivation of liberty which the offender must undergo for a period specified in the court decision, and the second is the placing of the offender at the Government's disposal, the execution of which may take different forms ranging from remaining at liberty under supervision to detention.

The choice between these forms of execution is a matter for the discretion of the Minister of Justice. Nevertheless he does not enjoy an unlimited power in making his decision: within the bounds laid down by the Act, he must assess the degree of danger presented by the individual concerned and the short- or medium-term prospects of reintegrating him into society.

40. In fact, sight must not be lost of what the title and general structure of the 1964 Act, the drafting history and Belgian case-law show to be the objectives of this statute, that is to say not only "to protect society against the danger presented by recidivists and habitual offenders" but also "to provide [the Government] with the possibility of endeavouring to reform [them]" (Court of Cassation, 11 December 1933, *Pasicrisie* 1934, I, p. 99). Attempting to achieve these objectives requires that account be taken of circumstances that, by their nature, differ from case to case and are susceptible of modification. At the time of its decision, the court can, in the nature of things, do no more than estimate how the individual will develop in the future. The Minister of Justice, for his part, is able, through and with the assistance of his officials, to monitor that development more closely and at frequent intervals but this very fact means that with the passage of time the link between his decisions not to release or to re-detain and the initial judgment gradually becomes less strong. The link might eventually be broken if a position were reached in which those decisions were based on grounds that had no connection with the objectives of the legislature and the court or on an assessment that was unreasonable in terms of those objectives. In those circumstances, a detention that was lawful at the outset would be transformed into a deprivation of liberty that was arbitrary and, hence, incompatible with Article 5 (art. 5) (see, notably, the above-mentioned *X v. the United Kingdom* judgment, Series A no. 46, p. 19, par. 43).

Such a situation did not obtain in the present case. The Belgian authorities showed patience and trust towards Mr. Van Droogenbroeck: notwithstanding his conduct, they gave him several opportunities to mend

his ways (see paragraphs 10, 11, 12 and 16 above). The manner in which they exercised their discretion respected the requirements of the Convention, which allows a measure of indeterminacy in sentencing and does not oblige the Contracting States to entrust to the courts the general supervision of the execution of sentences.

41. Before the Commission (see paragraphs 27 in fine and 57 of the report), the applicant also contended that his detention was neither "lawful" nor effected "in accordance with a procedure prescribed by law", within the meaning of Article 5 par. 1 (art. 5-1), arguing that the Minister of Justice had appropriated to himself a power which section 25 of the 1964 Act conferred on the Government as a whole.

On this point the Court, like the Commission, confines itself to observing that in Belgium - as in other Contracting States - it is traditional for the execution of sentences and other measures pronounced by criminal courts to fall within the province of the Minister of Justice. The Court sees no reason to doubt that that Minister was, by virtue of the general principles of Belgian public law concerning the attribution and the allocation of powers, an appropriate authority to act in Mr. van Droogenbroeck's case.

42. There has accordingly been no violation of Article 5 par. 1 (art. 5-1).

II. THE ALLEGED VIOLATION OF ARTICLE 5 PAR. 4 (art. 5-4)

43. The applicant also complained that when he was detained he was unable to take any proceedings satisfying the requirements of paragraph 4 of Article 5 (art. 5-4), which reads:

"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."

The Court has to examine this complaint although there was no breach of paragraph 1 (art. 5-1); on this point, it refers to its case-law, and in particular to its *De Wilde, Ooms and Versyp* judgment of 18 June 1971 (Series A no. 12, pp. 39-40, par. 73).

A. The Government's principal plea

44. The Government argued in the first place that the proceedings conducted in 1970 and 1971 before the Bruges criminal court, the Ghent Court of Appeal and the Court of Cassation (see paragraph 9 above) met the requirements of Article 5 par. 4 (art. 5-4). They relied, *inter alia*, on the following passage in the above-mentioned judgment of 18 June 1971 (*ibid.*, p. 40, par. 76):

"At first sight, the wording of Article 5 par. 4 (art. 5-4) might make one think that it guarantees the right of the detainee always to have supervised by a court the

lawfulness of a previous decision which has deprived him of his liberty. ... Where [that] decision ... is one taken by an administrative body, there is no doubt that Article 5 par. 4 (art. 5-4) obliges the Contracting States to make available to the person detained a right of recourse to a court; but there is nothing to indicate that the same applies when the decision is made by a court at the close of judicial proceedings. In the latter case the supervision required by Article 5 par. 4 (art. 5-4) is incorporated in the decision; this is so, for example, where a sentence of imprisonment is pronounced after "conviction by a competent court" (Article 5 par. 1 (a) of the Convention) (art. 5-1-a)." (see also the above-mentioned Engel and others judgment, Series A no. 22, p. 32, par. 77).

45. However, as the Court has recently pointed out, this passage "speaks only of 'the decision depriving a person of his liberty'; it does not purport to deal with an ensuing period of detention in which new issues affecting the lawfulness of the detention might subsequently arise" (see the above-mentioned X v. the United Kingdom judgment, Series A no. 46, p. 22, par. 51). Besides, the De Wilde, Ooms and Versyp judgment had taken into account, under Article 5 par. 4 (art. 5-4), not only the initial decisions to detain the three applicants for vagrancy (Series A no. 12, pp. 40-43, par. 74-80) but also the procedure for the examination of their requests for release to the extent that they raised questions concerning the lawfulness of the continuation of their detention (*ibid.*, pp. 43-44, par. 81-84).

The "detention" of vagrants falls within sub-paragraph (e) of Article 5 par. 1 (art. 5-1-e) and the same applies to the "detention" of persons of unsound mind. However, "the reasons initially warranting confinement of this kind may cease to exist", a fact from which the Court drew a consequence of some importance:

"... it would be contrary to the object and purpose of Article 5 (art. 5) ... to interpret paragraph 4 ... as making this category of confinement immune from subsequent review of lawfulness merely provided that the initial decision issued from a court. The very nature of the deprivation of liberty under consideration would appear to require a review of lawfulness to be available at reasonable intervals." (see the Winterwerp judgment of 24 October 1979 and the above-mentioned judgment in the case of X v. the United Kingdom, Series A no. 33, p. 23, par. 55, and no. 46, pp. 22-23, par. 52)

46. The argument of the respondent State ran as follows. The placing of recidivists and habitual offenders at the Government's disposal presented none of the features that called for the application of these precedents. It amounted to a deprivation of liberty ordered by a court of law for a prescribed period. It would not be valid unless objective conditions, which were exhaustively listed in sections 22 and 23 of the 1964 Act and were, in principle, not susceptible of modification with the course of time, were met on the day when the penalty was imposed; its validity could not be brought into question by any subsequent event. The measure thus authorised by the legislature, utilised by the courts and implemented by the Minister of Justice in pursuance of his role of "individualising this penalty" was certainly based on the need to protect society against the activities of recidivists and habitual offenders, but neither Belgian law nor the Convention stipulated

that detention could continue only if a danger to society would persist in the event of the individual's release. The Commission's opinion to the contrary confuses lawfulness with appropriateness, two radically different concepts, and would mean that every convicted criminal ought to be entitled to contest at some point of time the appropriateness of his detention, a position that did not obtain in any country.

47. The Court recalls that the scope of the obligation undertaken by the Contracting States under paragraph 4 of Article 5 (art. 5-4) "will not necessarily be the same in alle circumstances and as regards every category of deprivation of liberty" (see the above-mentioned *X v. the United Kingdom* judgment, Series A no. 46, p. 22, par. 52). It has not overlooked the fact that in the present case the detention at issue was covered only by sub-paragraph (a) of paragraph 1 (art. 5-1-a) and not by sub-paragraph (e) (art. 5-1-e), as in the *Winterwerp* and the *De Wilde, Ooms and Versyp* cases, or by both of those sub-paragraphs taken together, as in the case of *X v. the United Kingdom* (*ibid.*, pp. 17-18, par. 39).

Nevertheless, in this context the nature and purpose of a given type of "detention" are of more importance than is the place which it occupies in the structure of the Convention. The system of placing recidivists and habitual offenders at the Government's disposal was established with specific objectives in mind. The position taken by the Court of Cassation is that the measure in question, although assimilated to a penalty, is designed not only to protect society but also to provide the executive with an opportunity of endeavouring to reform the individuals concerned (see paragraph 40 above). Except in the case of the commission of one indictable offence after another (section 22 of the Act), the court ordering the penalty must give reasons for its decision (section 24) and must, in particular, indicate "in specific and precise terms" why it considers that the accused, who in the eyes of the law is classified as a recidivist, manifests "a persistent tendency to crime", within the meaning of section 23 of the Act (Court of Cassation, 3 January 1962, *Pasicrisie* 1962, I, p. 526; see paragraph 9 above). In practice, the court's decision provides the Minister of Justice "with initial authority for detention for a period ... whose actual duration" - "from nothing to ten years" - is striking for its relatively indeterminate character and will vary, in principle, according to the treatment required by the offender and the demands of the protection of society (paragraph 64 of the Commission's report and final decision of 5 July 1979 on the admissibility of the application). The detention which may be entailed by a placing at the Government's disposal occurs only "if necessary" (section 25 of the Act), words which the Court of Cassation has taken as synonymous with the phrase "if the protection of society so requires" (4 April 1978, *Pasicrisie* 1978, I, p. 861).

As the Commission pointed out in paragraph 66 of its report, this system is fundamentally different from that - on which the Court does not have to

express an opinion on this occasion - of the conditional release of prisoners sentenced by a court to a period of imprisonment imposed by the court as being appropriate to the case.

The discretion enjoyed by the Minister of Justice under the 1964 Act implies that he should, throughout the period of application of the measure, direct his mind to the need to deprive or continue to deprive the person concerned of his liberty or to the absence or disappearance of such a need. "Persistent tendency to crime" and "danger to society" are essentially relative concepts and they involve monitoring the development of the offender's personality and behaviour in order to adapt his situation to favourable or unfavourable changes in his circumstances. To a certain extent this was recognised both by the Belgian legislature when it made it possible for the Court of Appeal to grant release from the effects of the initial judgment (section 26 of the Act; see paragraph 23 above) and by the Government when they set up the Recidivists Board and associated "medical officers specialised in psychology" with the decisions taken by the Minister (see paragraphs 21 and 22 above).

It must therefore be asked whether the very logic of the Belgian system does not require subsequent judicial review, at reasonable intervals, of the justification for the deprivation of liberty. If one were to consider such justification to have been established once and for all at the moment of conviction, this would amount, in a way, to a presumption that the detention would produce no useful result.

48. Admittedly, the Belgian Court of Cassation, in a judgment of 4 April 1978, rejected this argument in favour of the theory of "incorporated supervision" (Pasicrisie 1978, I, p. 862; and see paragraph 44 above). However, for the purposes of Article 5 par. 4 (art. 5-4), the "lawfulness" of an "arrest or detention" has to be determined in the light not only of domestic law but also of the text of the Convention, the general principles embodied therein and the aim of the restrictions permitted by Article 5 par. 1 (art. 5-1) (see, *mutatis mutandis*, the above-mentioned *X v. the United Kingdom*, judgment, Series A no. 46, p. 25, par. 57, to be read in conjunction with the above-mentioned *Winterwerp* judgment, Series A no. 33, p. 17, par. 39, and pp. 19-20, par. 45).

Quite apart from conformity with domestic law, "no detention that is arbitrary can ever be regarded as 'lawful'" for the purposes of paragraph 1 (art. 5-1) (see, amongst others, the above-mentioned *X v. the United Kingdom* judgment, Series A no. 46, p. 19, par. 43). This is the limit which the Minister of Justice must not exceed in the exercise of the wide discretion he enjoys in executing, or implementing, the initial court decision. This requirement is rendered all the more compelling by the seriousness of what is at stake, namely the possibility that the individual may be deprived of his liberty for up to ten years (section 23 of the Act) or even longer (section 22). This type of detention would no longer be in conformity with the

Convention if it ceased to be based on reasons that are plausible and consistent with the objectives of the Social Protection Act; for the purposes of Article 5 (art. 5), it would become "unlawful". It follows that the individual concerned must be entitled to apply to a "court" having jurisdiction to determine whether or not there has been a violation of that kind; this possibility must be open to him during the course of his detention - once a certain period has elapsed since the detention began and thereafter at reasonable intervals (see, *mutatis mutandis*, the above-mentioned *X v. the United Kingdom* judgment, Series A no. 46, pp. 22-23, par. 52) - and also at the moment of any return to detention after being at liberty.

49. It is true that Article 5 par. 4 (art. 5-4) does not guarantee a right to judicial control of such scope as to empower the court, on all aspects of the case, including questions of pure expediency, to substitute its own discretion for that of the decision-making authority. The review should, however, be wide enough to bear on those conditions which, under the Convention, are essential for the "lawful" detention of a person pursuant to Chapter VII of the 1964 Act; this is all the more so because, with the exception of the status of recidivist or habitual offender itself, the conditions initially justifying that detention may change to such an extent that they cease to exist (see, *mutatis mutandis*, the above-mentioned *X v. the United Kingdom* judgment, Series A nr. 46, p. 25, par. 57-58).

In the instant case, the Convention required an appropriate procedure allowing a court to determine "speedily", on application by Mr. Van Droogenbroeck, whether the Minister of Justice was entitled to hold that detention was still consistent with the object and purpose of the 1964 Act (*ibid.*). For the purposes of Article 5 par. 4 (art. 5-4), this was not simply a question of expediency but one that bore on the very "lawfulness" of the deprivation of liberty at issue.

B. The Government's alternative plea

50. The Government pleaded in the alternative that several remedies satisfying the requirements of Article 5 par. 4 (art. 5-4) would have been available to the applicant, namely:

- (i) instituting or causing to be instituted a prosecution for arbitrary detention;
- (ii) referring to the Ghent Court of Appeal any dispute between himself and the *ministère public* regarding the execution of the judgment of 20 October 1970;
- (iii) applying to that Court of Appeal for release from the effects of the measure imposed on him;
- (iv) applying to the President of the court of first instance in his capacity of *juge des référés* (judge hearing urgent applications);
- (v) bringing an action based directly on Article 5 par. 4 (art. 5-4).

At the hearings of 20 October 1981 and in their supplementary memorial of February 1982 (paragraphs 44-45), the Government withdrew their claim that Mr. Van Droogenbroeck could, in addition, have lodged with the Conseil d'État a plea that the decision to detain him was a nullity.

Neither does the Recidivists Board (see paragraphs 22 above) fall to be considered in connection with Article 5 par. 4 (art. 5-4). The Board is not a "court" within the meaning of the Convention, does not afford to detainees who appear before it the guarantees of judicial procedure determine the "lawfulness" of the "detention" of the individuals concerned or, a fortiori, to "order" the release of such of them whose deprivation of liberty it may consider "unlawful" (see, notably, the above-mentioned *X v. the United Kingdom* judgment, Series A no. 46, p. 23, par. 53, and p. 26, par. 61, and the *Ireland v. the United Kingdom* judgment of 18 January 1978, Series A no. 25, p. 76, par. 200).

51. The object of the first remedy mentioned by the Government (see paragraphs 26 and 50 above) is a finding not only that the detention is unlawful but also that an offence has been committed, *ex hypothesi* in the case of detention of a recidivist or habitual offender, by a civil servant, a public official or the governor of a prison establishment (Article 147 of the Criminal Code and Article 609 of the Code of Criminal Procedure), in other words a finding of personal guilt. In addition, the "court" (if any) hearing the case - assuming that the proceedings were terminated "speedily" - could at most convict the offender; it could not itself "order" the victim's release. Finally, the action might remain without effect if the accused sheltered behind the defence of "orders from the competent authority" (Article 70 of the Criminal Code), that is to say the Minister of Justice.

52. As regards the second alleged remedy, the Ghent Court of Appeal did in fact hold, in 1897 and 1914, that disputes between the *ministère public* and a detainee concerning the execution of a penal sentence could be referred to the court which passed it (see paragraph 28 above; paragraphs 35, 39 and 71 in fine of the Commission's report; paragraph 53 of the Government's memorial). However, as the Government admitted in reply to a question from the Court, those old judgments have remained isolated decisions and have not been confirmed by later jurisprudence. In any event, they did not concern the system of social protection. They cannot therefore be relied on as establishing the existence of a remedy as required by Article 5 par. 4 (art. 5-4).

53. The third remedy invoked, the application for release from the effects of the measure in question, provided for by section 26 of the 1964 Act (see paragraph 23 above), undoubtedly involves proceedings before a "court" and is accompanied by the guarantees of judicial procedure; however, when the person concerned is at liberty, what he will be seeking by means of such an application will be the complete cancellation of the sentence placing him at the Government's disposal. It is therefore the measure in its entirety

which will be reviewed and not just the question of detention, and the issue will be not so much the "lawfulness" of the detention as "the expediency of early termination of the penalty" imposed by a judgment which is no longer open to appeal (paragraph 33 of the Government's supplementary memorial, and Court of Cassation, 15 February 1977 - paragraph 14 above). As the Commission (paragraph 74 in fine of the report) and the applicant (written observations of February 1982) pointed out, the Court of Appeal would not be in a position to "make a distinction between the deprivation of liberty and such measures of guidance, assistance or supervision" as might still be necessary, "even if the current behaviour of the individual concerned were no longer in any way such as to justify in law continuation of the detention". Moreover, the intervals of three, or even five, years that must elapse between two applications to the court appear too long to be regarded as "reasonable" for the purposes of Article 5 par. 4 (art. 5-4) (see paragraph 48 above). The Court notes incidentally that the examination of Mr. Van Droogenbroeck's applications took seven months on the first occasion (12 May - 13 December 1976, see paragraph 14 above) and six months on the second (16 September 1979 - 18 March 1980, see paragraph 18 above), a fact that sits ill with the notion of "speedily".

54. According to the Government, the *juge des référés* (see paragraph 29 above) represents "the last bastion, if one were needed, of individual freedoms" in the Belgian legal system. An application may be made to him when the matter is urgent and on the basis of the general jurisdiction conferred on him by Article 584 of the Judicial Code to give "a provisional ruling ... in all matters except those which are excluded by law from the competence of the courts".

The *juge des référés* clearly has the characteristics of a "court" for the purposes of Article 5 par. 4 (art. 5-4). It would also appear to be within the very nature of his function to give a ruling "speedily" and, although he gives only a "provisional" decision, it is one that is "immediately enforceable, notwithstanding any possible appeal" (paragraph 56 of the Government's memorial).

The extent of his jurisdiction is expressed in wide terms and the drafting history of, and the official statement of reasons accompanying, the Judicial Code indicate that it includes all cases, civil, administrative and penal, within the competence of the courts, save those for which a special procedure is laid down under substantive or procedural criminal law. According to the information before the Court, the exception mentioned at the end of Article 584 relates to matters which are the prerogative of the executive, but would not prevent his finding that given acts on the part of such authorities were unlawful.

The Court also recognises the particular importance to be attached to the case-law cited by the Government. It notes, in particular, that on 22 February, 20 May and 14 August 1980, the Brussels *juge des référés*

"enjoined" the defendant, the Belgian State, to "release forthwith" persons whose detention he considered to be "unlawful" (*Journal des Tribunaux*, 1980, pp. 578-580). However, the orders in question post-date both the return to detention (21 December 1977) and, with the exception of the earliest of them, the release of Mr. Van Droogenbroeck (18 March 1980). Furthermore, whilst these orders concerned measures that deprived persons of their liberty, they did not relate to the 1964 Act: the first and third were in respect of the placing of non-Belgian subjects at the Government's disposal under the legislation on the control of aliens; the second, against which the Belgian State has lodged an appeal, was in respect of the revocation of conditional release.

The same does not apply to a more recent order*: on 16 November 1981, the Brussels *juge des référés* held that he had jurisdiction to hear an application inviting him to direct the release of an individual detained, pursuant to section 14 of the 1964 Act, in the psychiatric wing of a prison; he decided, however, that the circumstances of the case were such that a provisional order should not be made.

On the other hand, on 10 July 1981 the President of the Nivelles court of first instance held that he did not have jurisdiction to order the restitution of a wireless transmitter and aerial which had been seized on 3 June 1981 following a complaint by the Telegraph and Telephone Office*. This decision was confirmed by the Brussels Court of Appeal on 18 January 1982; it referred to both Belgian and French case-law, pre-dating the Judicial Code, and held that "a civil court, and hence the *juge des référés*, has no jurisdiction over steps taken in the course of criminal investigations".

In the light of the foregoing considerations, recourse to the *juge des référés* does not, in the opinion of the Court, satisfy the requirements of Article 5 par. 4 (art. 5-4) of the Convention in the present case for the following reasons.

In the first place, this is a matter which at present turns on issues of Belgian domestic law that are unsettled (see, *mutatis mutandis*, the above-mentioned Deweer judgment, Series A no. 35, p. 28 in fine), with case-law of very recent date which is still being developed and is the subject of debate. The Government have challenged that case-law before the national courts; they did not rely on it before the Commission, either in connection with Article 26 (art. 26) of the Convention or in connection with the merits. The existence of a remedy must be sufficiently certain, failing which it will lack the accessibility and effectiveness which are required by Article 5 par.

* Note by the registry: These decisions appear to be unreported at the date of adoption of the present judgment.

4 (art. 5-4) (see, *mutatis mutandis*, the above-mentioned De Wilde, Ooms and Versyp judgment, Series A no. 12, p. 34, par. 62). At least at the time of the events in question, the possibility of applying to the *juge des référés* on a matter covered by the 1964 Act did not satisfy this condition.

In the second place, since the decision by the *juge des référés* can contain only a "provisional" ruling, it is given without prejudice to the merits of the case (see Article 1039 of the Judicial Code and, *mutatis mutandis*, the above-mentioned Deweer judgment, Series A no. 35, p. 28, (a), *in fine*) and therefore does not have the authority of *res judicata*. Furthermore, the state of the case-law is not yet such as to establish with adequate clarity whether the review undertaken by the *juge des référés* meets, from the point of view of its scope, the requirements of Article 5 par. 4 (art. 5-4) regarding a decision on "lawfulness" (see paragraph 49 above). It is thus necessary to know which court is empowered to dispose finally of the matter "on the merits". The Court raised this question at the hearings and the Government replied that it would be the court of first instance. However, they did not produce any evidence in support of this statement or as to how, at the present time, the requirement of a "speedy" decision would be satisfied.

55. Some of the preceding observations also apply to the fifth and last remedy mentioned by the Government.

In a judgment of 28 February 1979, the Mons Court of Appeal held that, in the absence of any special provision and by virtue of Article 568 of the Judicial Code, it was for the court of first instance to hear applications challenging the validity of a deprivation of liberty that are based directly on Article 5 par. 4 (art. 5-4) of the Convention (Journal des Tribunaux, 1979, pp. 358-361). The case in question concerned the detention of an individual who, "at the time when the facts occurred", was "in a serious state of mental derangement rendering him incapable of regulating his conduct", this being a matter governed by Chapters II to V (section 7 to 20) of the 1964 Act. The Court of Cassation quashed that judgment on 14 February 1980, but for reasons unconnected with the admissibility of the application, which indeed it appears to have accepted implicitly (Revue de droit pénal et de criminologie, 1980, pp. 765-790, with submissions to the same effect by the *ministère public*).

Again, in a judgment of 22 August 1974 (Military Court, Journal des Tribunaux, 1974, pp. 611-612) and a decision of 10 June 1976 (Chamber of field court-martial, *ibid.*, 1976, pp. 646-647), it has been recognised, on the basis of Article 5 par. 4 (art. 5-4), that there is nothing to prevent a serviceman placed in detention on remand by the "Commission judiciaire" from applying for release to the court-martial or the Military Court, as the case may be. Those precedents stated that the powers of those courts were not derived from "current domestic legislation" but were a "creation of case-law", the origin whereof lay "in an international treaty and in the principle that priority must be accorded to rules of international treaty law";

accordingly, the scope of those powers did not go beyond the requirements of Article 5 par. 4 (art. 5-4) (review of lawfulness, but not of expediency).

The Court has already had the occasion to draw attention to the importance and the consequences of incorporating the Convention into domestic law (see the above-mentioned *Ireland v. the United Kingdom* judgment, Series A no. 25, p. 91, par. 239) and of the direct applicability of the Convention (see the above-mentioned *De Wilde, Ooms and Versyp* judgment, Series A no. 12, p. 46, par. 95, and the *Van Oosterwijck* judgment of 6 November 1980, Series A no. 40, p. 16, par. 33). However, the respondent State "is not aware of any decision on an application based directly on Article 5 par. 4 (art. 5-4) of the Convention, lodged by a recidivist placed at the Government's disposal" (paragraph 39 of the supplementary memorial). Of those applications it mentions, the oldest (1974/1976) concern the detention of servicemen on remand. The judgment delivered by the Mons Court of Appeal on 28 February 1979 did, in fact, relate to a form of deprivation of liberty covered by Chapters II to V - and not, as in the present case, Chapter VII - of the Social Protection Act. However, this was an isolated decision which has not been expressly confirmed by the Court of Cassation on the point at issue and which anyway post-dates Mr. Van Droogenbroeck's return to detention. Here again, Belgian case-law appears to be in a process of evolution and the extent to which it will in the future affirm the existence of a judicial power of review is uncertain.

56. The Court by no means excludes the possibility that, once the significant developments described above have come to their conclusion, a result that meets the requirements of Article 5 par. 4 (art. 5-4) might be achieved by combining an application to the *juge des référés* with an action "on the merits" based on Article 5 par. 4 (art. 5-4), or by exercising these two remedies concurrently or successively (see, *mutatis mutandis*, the above-mentioned *X v. the United Kingdom* judgment, Series A no. 46, p. 26, par. 60). Nevertheless, it is obliged to find that such a result was not attained in the instant case; there has accordingly been a violation of Article 5 par. 4 (art. 5-4).

III. THE ALLEGED VIOLATION OF ARTICLE 4 (art. 4)

57. Mr. Van Droogenbroeck also relied on Article 4 (art. 4), which reads:

"1. No one shall be held in slavery or servitude.

2. No one shall be required to perform forced or compulsory labour.

3. For the purpose of this Article (art. 4) the term "forced or compulsory labour" shall not include:

(a) any work required to be done in the ordinary course of detention imposed according to the provisions of Article 5 (art. 5) of [the] Convention or during conditional release from such detention;

..."

58. The applicant's first allegation was that by being placed at the Government's disposal he was held in "servitude", contrary to paragraph 1, in that he was subjected "to the whims of the administration".

The situation complained of did not violate Article 5 par. 1 (art. 5-1) (see paragraph 42 above). Accordingly, it could have been regarded as servitude only if it involved a "particularly serious" form of "denial of freedom" (see paragraphs 79-80 of the Commission's report), which was not so in the present case.

59. Mr. Van Droogenbroeck further complained that, contrary to paragraph 2 of Article 4 (art. 4-2), he was "forced" to work in order to save 12,000 BF. According to the Government, he was simply "invited" to work.

The Court considers that it may leave this question of fact open. In practice, once release is conditional on the possession of savings from pay for work done in prison (see paragraphs 13, 16 and 17 above), one is not far away from an obligation in the strict sense of the term.

However, it does not follow that the complaint is well-founded, for failure to observe Article 5 par. 4 (art. 5-4) (see paragraph 56 above) does not automatically mean that there has been failure to observe Article 4 (art. 4): the latter Article authorises, in paragraph 3 (a) (art. 4-3-a), work required to be done in the ordinary course of detention which has been imposed, as was here the case, in a manner that does not infringe paragraph 1 of Article 5 (art. 5-1). Moreover, the work which Mr. Van Droogenbroeck was asked to do did not go beyond what is "ordinary" in this context since it was calculated to assist him in reintegrating himself into society and had as its legal basis provisions which find an equivalent in certain other member States of the Council of Europe (see paragraph 25 above and, *mutatis mutandis*, the above-mentioned De Wilde, Oms and Versyp judgment, Series A no. 12, pp. 44-45, par. 89-90).

60. Accordingly, the Belgian authorities did not fail to observe the requirements of Article 4 (art. 4).

IV. THE APPLICATION OF ARTICLE 50 (art. 50)

61. At the hearings, one of the applicant's lawyers requested the Court, should it find a violation of the Convention, to afford his client just satisfaction under Article 50 (art. 50). He declared that he would leave the item of "pecuniary and non-pecuniary damage" to the Court's discretion; as regards "fees and expenses", he listed these in a note which the Secretary to the Commission transmitted to the Registrar on 14 November 1981.

The Government did not indicate their position on this matter.

62. Accordingly, although it was raised under Rule 47 bis of the Rules of Court, this question is not ready for decision and must be reserved; in the circumstances of the case, the Court considers that the question should be referred back to the Chamber in accordance with Rule 50 par. 4 of the Rules of Court.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that there has not been a violation of Article 5 par. 1 (art. 5-1) of the Convention;
2. Holds that there has been a violation of Article 5 par. 4 (art. 5-4);
3. Holds that there has not been a violation of Article 4 (art. 4);
4. Holds that the question of the application of Article 50 (art. 50) is not ready for decision;
 - (a) accordingly reserves the whole of the said question;
 - (b) refers the said question back to the Chamber under Rule 50 par. 4 of the Rules of Court.

Done in English and in French, the French text being authentic, at the Human Rights Building, Strasbourg, this twenty-fourth day of June, one thousand nine hundred and eighty-two.

Gérard WIARDA
President

Marc-André EISSEN
Registrar