

In the van der Leer case*,

* Note by the Registrar: The case is numbered 12/1988/156/210. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of the Rules of Court, as a Chamber composed of the following judges:

Mr R. Ryssdal, President,
Mr J. Cremona,
Mr A. Spielmann,
Mr J. De Meyer,
Mr J.A. Carrillo Salcedo,
Mr N. Valticos,
Mr S.K. Martens,

and also of Mr M.-A. Eissen, Registrar, and Mr H. Petzold, Deputy Registrar,

Having deliberated in private on 27 September 1989 and 22 January 1990,

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

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 13 September 1988, within the three-month period laid down by Article 32 § 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 11509/85) against the Kingdom of the Netherlands lodged with the Commission under Article 25 (art. 25) by a national of that State, Mrs Hendrika Wilhelmina van der Leer, in May 1984.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the Netherlands recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether or not the facts of the case disclosed a breach by the respondent State of its obligations under Article 5 §§ 1, 2 and 4 and Article 6 § 1 (art. 5-1, art. 5-2, art. 5-4, art. 6-1).

2. In response to the enquiry made in accordance with Rule 33 § 3 (d) of the Rules of Court, the applicant stated that she wished to take part in the proceedings and designated the lawyer who would represent her (Rule 30).

3. The Chamber to be constituted included ex officio Mr S.K. Martens, the elected judge of Netherlands nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 § 3 (b)). On 29 September 1988, in the presence of the Registrar, the President drew by lot the names of the other five members, namely Mr J. Cremona, Mr A. Spielmann, Mr J. De Meyer, Mr J. A. Carrillo Salcedo and Mr N. Valticos (Article 43 in fine of the Convention and Rule 21 § 4) (art. 43).

4. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 § 5) and, through the Registrar, consulted the Agent of the Netherlands Government ("the Government"), the Delegate of the Commission and the applicant's representative on the need for a written procedure (Rule 37 § 1). The proceedings were initially suspended while negotiations for a friendly settlement took place between the Government and the applicant, but on 30 January 1989 the Agent of the Government informed the Registrar of their failure.

Thereafter, in accordance with the orders and directions of the President, the registry received the Government's memorial on 26 April. The applicant's observations, which concerned only her claims under Article 50 (art. 50), were submitted on 20 September 1989. On 6 July the Secretary to the Commission had advised the Registrar that the Delegate would make his submissions at the hearing.

5. On different dates between 6 July and 24 October 1989, the Commission, the Government and the applicant each produced various documents which, on the Court's instructions, the Registrar had requested. On 24 October 1984 the Government, in addition, submitted their observations on the applicant's claims under Article 50 (art. 50).

6. After consulting, through the Registrar, those who would be appearing before the Court, the President directed on 7 July 1989 that the oral proceedings should open on 26 September (Rule 38).

7. The hearing took place in public in the Human Rights Building, Strasbourg, on the appointed day. The Court had held a preparatory meeting immediately beforehand.

There appeared before the Court:

(a) for the Government

Miss D.S. van Heukelom, Assistant Legal Adviser, Ministry of Foreign Affairs,	Agent,
Mr J.C. De Wijkerslooth de Weerdesteijn, Landsadvokaat,	Counsel,
Mrs R.E. van Galen-Herrmann, Ministry of Justice,	Adviser;

(b) for the Commission

Mr H. Danelius,	Delegate;
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(c) for the applicant

Mrs G.E.M. Later, advokate en procureur,	Counsel,
Mr W.J.J. Los,	
Mr J. Legemaate,	Advisers.

The Court heard addresses by Miss van Heukelom and Mr De Wijkerslooth de Weerdesteijn for the Government, by Mr Danelius for the Commission and by Mrs Later for the applicant.

AS TO THE FACTS

I. Particular circumstances of the case

8. Mrs Hendrika Wilhelmina van der Leer is a Netherlands national. She currently resides in The Hague.

9. On 28 September 1983 the Burgomaster of The Hague ordered Mrs van der Leer's confinement in a local psychiatric hospital. She had already been committed on a number of previous occasions. Following a decision of 3 October 1983 by the President of the

District Court (Arrondissementsrechtbank) refusing to extend her confinement, she nevertheless remained in the hospital on a voluntary basis.

On 18 November 1983, on her husband's application, the Cantonal Court judge (Kantonrechter) of The Hague authorised Mrs van der Leer's compulsory confinement in the same hospital for a period of six months. The application was supported by a medical declaration by a psychiatrist, who had examined her on 16 November 1983. In this declaration, the psychiatrist answered in the negative the question whether it would be devoid of purpose or medically inadvisable for Mrs van der Leer to be heard by a judge.

The Cantonal Court judge did not hold any hearings, with the result that no record was drawn up. His order stated that the medical declaration sufficiently indicated the necessity of committing the applicant to a psychiatric hospital. The pre-printed statement, on the standard-form order, that a hearing had been dispensed with because it would have been devoid of purpose or medically inadvisable had been deleted.

Mrs van der Leer was not informed of the confinement order, nor did she receive a copy of the written decision.

10. On 28 November 1983, after she had been placed in isolation, she became aware that her confinement was compulsory and immediately contacted her lawyer. On 6 December the lawyer requested the Board of the hospital to discharge her. The request was refused by the Board on 15 December, on the basis of the unfavourable opinion of the medical director of the hospital. The request was then forwarded on 20 December 1983, to the public prosecutor (Officier van Justitie) who, on 6 February 1984, referred it to the District Court of The Hague.

11. The District Court held hearings on 5 March, 16 April and 7 May 1984. On each occasion Mrs van der Leer was represented by her counsel. On 26 March 1984 the District Court stated that it wished to hear the doctor who was treating the applicant and ordered that he appear and that the hospital's medical reports be produced. This interlocutory decision was, however, not complied with, either at the hearing on 16 April or at that on 7 May 1984. On the latter occasion, in the absence of evidence that, as a result of her mental illness, Mrs van der Leer represented a danger, the court ordered her discharge.

12. However, Mrs van der Leer, with the help of her husband, had already left the hospital without authorisation on 31 January 1984.

She had been granted probationary leave by the hospital as from 7 February, but only learned of this indirectly during the course of March.

II. Relevant domestic law and practice

13. The confinement of persons of unsound mind in the Netherlands is governed by the Act of 27 April 1884 on State Supervision of Mentally Ill Persons, commonly known as the Mentally Ill Persons Act (Krankzinnigenwet).

A. Emergency committal procedure

14. If it is a matter of urgency, the burgomaster is empowered to order the compulsory admission of a "mentally ill" person to a psychiatric hospital. Under section 35 (c) of the Act, he must first seek the opinion of a psychiatrist, or, where this proves impossible, another medical practitioner. Once he has ordered a committal, he must inform the public prosecutor and transmit to him the medical

declaration on which he has relied. The public prosecutor has then to communicate it, not later than the following day, to the President of the District Court, requesting, where appropriate, the continuation of the confinement. The President must give his decision within three days. If he refuses to order the continuation of the confinement, it must cease forthwith.

B. Issue of an order authorising provisional confinement

15. Section 12 of the Act enables, amongst others, the spouse of a mentally ill person to apply in writing to the local cantonal court judge for an authorisation to have that person placed temporarily in a mental hospital in the interests of public safety or of the person concerned.

Section 16 of the Act requires that such an application be accompanied by a reasoned medical declaration by a qualified doctor who has specialised in mental and nervous disorders. This declaration must be to the effect that the patient is mentally ill and that treatment in a mental hospital is necessary or desirable. The statement should also indicate in so far as possible whether or not, in view of the patient's condition, it would be devoid of purpose or medically inadvisable for the judge to hear the patient.

16. The judge will issue the requested order authorising provisional detention if the medical declaration, either on its own or in conjunction with the facts related or the documents submitted, adequately establishes that treatment in a psychiatric hospital is "necessary or desirable" (section 17 § 1 of the Act). The Supreme Court (Hoge Raad) of the Netherlands has interpreted this expression as meaning that the patient must represent a danger to himself, to others or to the general public order, to such an extent that it is necessary or desirable that he be treated in a psychiatric clinic (judgment of 4 November 1983, *Nederlandse Jurisprudentie* (NJ) 1984, no. 162).

The judge is obliged to hear the person whose confinement is sought unless he concludes from the medical declaration that this would be devoid of purpose or medically inadvisable (section 17 § 3). The Supreme Court has held that a decision not to hear the patient must be supported by reasons (judgment of 27 November 1981, NJ 1983, no. 56).

The judge must, "so far as possible", seek information from, amongst others, the person who made the application for confinement and the spouse of the patient (section 17 § 4).

By virtue of article 72 of Regulation I (Reglement I) made in pursuance of the Judiciary (Organisation) Act (*wet op de rechterlijke organisatie*), a registrar must be present at "the hearings and examinations" conducted by the judge ("*terechtzingen en verhoren*").

The confinement order may not be appealed against and is not notified to the person concerned (section 17 §§ 1 and 8); its renewal must be sought within six months of the day on which it was made (section 22).

C. Discharge of the patient

17. By virtue of section 29 of the Act, the patient may petition the Board of the hospital for his release at any time. The Board must immediately consult the medical director of the institution. If the doctor's opinion is unfavourable, the Board has to transmit the request, together with the opinion, to the public prosecutor who, in general, will forward the request to the District Court for decision.

18. As regards the procedure, section 29 refers to section 23, according to which the District Court is empowered, but not bound, to hear the patient. In a judgment of 2 December 1983 (NJ 1984,

no. 164), however, the Supreme Court held that, in the light of Article 5 (art. 5) of the Convention, these provisions should be interpreted as conferring on the patient detained the right to be heard and to adduce any evidence which might help to secure his release. This entailed not only the right to be assisted by a lawyer, but also the right to demand the presence of an expert to counter the arguments of the hospital board.

PROCEEDINGS BEFORE THE COMMISSION

19. In her application (no. 11509/85) lodged with the Commission on 18 May 1984, Mrs van der Leer alleged that her compulsory confinement in a psychiatric hospital had been neither ordered "in accordance with a procedure prescribed by law" nor "lawful" within the meaning of Article 5 § 1 (art. 5-1) of the Convention. She further complained that paragraphs 2 and 4 of Article 5 (art. 5-2, art. 5-4) had been violated since she had not been informed of the order of 18 November 1983 or given the possibility of having the lawfulness of her deprivation of liberty reviewed "speedily" by a court. Finally, she claimed that, in breach of Article 6 § 1 (art. 6-1), she had been denied a fair hearing in the determination of her civil rights and obligations.

20. The Commission declared the application admissible on 16 July 1986.

In its report adopted on 14 July 1988 (Article 31) (art. 31), the Commission expressed the unanimous opinion that there had been a violation of Article 5 §§ 1, 2 and 4 (art. 5-1, art. 5-2, art. 5-4), but no violation of Article 6 § 1 (art. 6-1). The full text of its opinion and of the separate opinion accompanying it is reproduced as an annex to this judgment.*

* Note by the Registrar. For practical reasons this annex will appear only with the printed version of the judgment (volume 170 of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

AS TO THE LAW

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

21. The applicant claimed to be the victim of a violation of Article 5 § 1 (art. 5-1), which, in so far as is relevant to the present case, provides as follows:

"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 of unsound mind ...;

..."

She alleged that the order authorising her confinement in a psychiatric hospital had not been issued in accordance with a procedure prescribed by law, which had rendered her detention unlawful.

In the first place and above all, the Cantonal Court judge had not heard Mrs van der Leer prior to making the order, although under section 17 (3) of the Mentally Ill Persons Act he was bound to do so, since the psychiatrist had not raised any objection to such a hearing

(see paragraph 9 above).

In addition, she submitted that the order in question had not complied with the conditions to which, according to the Netherlands Supreme Court and the European Court of Human Rights, the validity of such a measure was subject. It did not appear that the judge had established that the person concerned was a danger to herself, to others or to the general public order. The applicant questioned whether the psychiatrist's attestation amounted to an expert report which was sufficiently objective to support the conclusion that she was of unsound mind within the meaning of Article 5 § 1 (e) (art. 5-1-e) of the Convention.

She considered further that the Cantonal Court judge ought also to have heard her husband (section 17 § 4 of the Mentally Ill Persons Act), or at least, should have stated why he had not done so.

Finally she alleged failure to comply with Article 72 of Regulation I made in pursuance of the Judiciary (Organisation) Act, which requires the presence of a registrar at the hearings and examinations conducted by the judge (see paragraph 16 above).

22. In the Court's view, the main issue to be determined in the present case is whether the disputed detention was "lawful", including whether it complied with "a procedure prescribed by law". The Convention here refers back essentially to national law and lays down the obligation to conform to the substantive and procedural rules thereof, but it requires in addition that any deprivation of liberty should be consistent with the purpose of Article 5 (art. 5), namely to protect individuals from arbitrariness (see, in particular, the Winterwerp judgment of 24 October 1979, Series A no. 33, pp. 17-18 and 19-20, §§ 39 and 45; the Bozano judgment of 18 December 1986, Series A no. 111, p. 23, § 54; and the Bouamar judgment of 29 February 1988, Series A no. 129, p. 20, § 47).

23. Notwithstanding the requirements of the Mentally Ill Persons Act, the Cantonal Court judge failed to hear Mrs van der Leer before authorising her confinement, although the legal conditions under which such a hearing might be dispensed with were not satisfied. At the very least he should have stated, in his decision, the reasons which led him to depart from the psychiatrist's opinion in this respect. The Government accepted this.

There has therefore been a violation of Article 5 § 1 (art. 5-1) in this regard.

24. Having found a failure to comply with an essential procedural requirement on this ground, the Court does not consider it necessary to examine the other complaints put forward by the applicant under Article 5 § 1 (art. 5-1).

II. ALLEGED VIOLATION OF ARTICLE 5 § 2 (art. 5-2)

25. The applicant complained of a violation of Article 5 § 2 (art. 5-2) which provides as follows:

"Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him."

In her submission, this provision entitled her to be informed immediately of the order authorising her confinement. In fact she found out about it only by accident, when she was placed in isolation.

26. The Government conceded that Mrs van der Leer should have been informed promptly, but they contended that this resulted from paragraph 4 (art. 5-4). They argued that paragraph 2 (art. 5-2), on

the other hand, did not apply to the case in question because the words "arrest" and "charge" showed that it was only relevant to cases arising under the criminal law. The presence of the conjunction "and" confirmed this.

27. The Court is not unmindful of the criminal-law connotation of the words used in Article 5 § 2 (art. 5-2). However, it agrees with the Commission that they should be interpreted "autonomously", in particular in accordance with the aim and purpose of Article 5 (art. 5), which are to protect everyone from arbitrary deprivations of liberty. Thus the "arrest" referred to in paragraph 2 of Article 5 (art. 5-2) extends beyond the realm of criminal-law measures. Similarly, in using the words "any charge" ("toute accusation") in this provision, the intention of the drafters was not to lay down a condition for its applicability, but to indicate an eventuality of which it takes account.

28. The close link between paragraphs 2 and 4 of Article 5 (art. 5-2, art. 5-4) supports this interpretation. Any person who is entitled to take proceedings to have the lawfulness of his detention decided speedily cannot make effective use of that right unless he is promptly and adequately informed of the reasons why he has been deprived of his liberty (see, *mutatis mutandis*, the *X v. the United Kingdom* judgment of 5 November 1981, Series A no. 46, p. 28, § 66).

Paragraph 4 (art. 5-4) does not make any distinction as between persons deprived of their liberty on the basis of whether they have been arrested or detained. There are therefore no grounds for excluding the latter from the scope of paragraph 2 (art. 5-2).

29. Having found that Article 5 § 2 (art. 5-2) is applicable, the Court must determine whether it has been complied with in this case.

30. The applicant was in hospital to receive treatment as a "voluntary" patient. It was not until 28 November 1983 that she learned, when she was placed in isolation, that she was no longer free to leave when she wished because of an order made ten days previously (see paragraphs 9 and 10 above). The Government did not contest this.

31. It therefore appears that neither the manner in which she was informed of the measures depriving her of her liberty, nor the time it took to communicate this information to her, corresponded to the requirements of Article 5 § 2 (art. 5-2). In fact it was all the more important to bring the measures in question to her attention since she was already in a psychiatric hospital prior to the Cantonal Court judge's decision, which did not change her situation in factual terms.

Accordingly, there has been a violation of Article 5 § 2 (art. 5-2).

III. ALLEGED VIOLATION OF ARTICLE 5 § 4 (art. 5-4)

32. The applicant complained of a double violation of Article 5 § 4 (art. 5-4) which provides as follows:

"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."

She claimed in the first place to be the victim of an infringement of her right to be informed promptly and adequately of the facts and the grounds on which her detention was based in order to be able to institute the proceedings referred to in this provision. Secondly, she argued that, inasmuch as the District Court did not deliver its decision on the lawfulness of the contested order until five months after the proceedings had been instituted, it had not decided the

question "speedily".

33. The Court would observe at the outset that the review of lawfulness required under Article 5 § 4 (art. 5-4) was not in this instance incorporated in the decision depriving the applicant of her liberty because, before authorising the detention, the judge had failed to comply with one of the fundamental procedural guarantees applying in the field of deprivation of liberty failed to comply (see paragraph 23 above and the De Wilde, Ooms and Versyp judgment of 18 June 1971, Series A no. 12, pp. 40-41, § 76). The applicant therefore had to be given the possibility of instituting proceedings.

34. The Court has already determined, in the context of Article 5 § 2 (art. 5-2), the question of the information which should have been communicated to Mrs van der Leer. It does not consider it necessary to re-examine it in the light of Article 5 § 4 (art. 5-4).

35. On the issue of the compliance, in this case, with the requirement of "speediness", it observes that there are certain divergences between the views of the participants in the proceedings as regards the method of determining the period to be taken into consideration. In guaranteeing to persons arrested or detained a right to institute proceedings, Article 5 § 4 (art. 5-4) also proclaims their right, following the institution of such proceedings, to a speedy judicial decision terminating their deprivation of liberty if it proves unlawful.

Neither the fact that the applicant absconded nor even the fact that she was granted probationary leave could render such a decision unnecessary. After she had left the hospital without authorisation, Mrs van der Leer could at any moment have been taken back there against her will. The leave made no difference from her point of view. As it was not possible to bring the hospital's decision to her notice, she must have remained in fear of being compelled to return to the establishment. Accordingly, the relevant period runs from when the application for release was lodged - which step must be regarded, in this instance, as equivalent to instituting proceedings against the confinement order - to the date of the judgment ordering her release, in other words from 6 December 1983 to 7 May 1984.

36. Consequently, the proceedings lasted five months. In the specific circumstances of the case, the Court considers this lapse of time excessive. As Mrs van der Leer stressed in her application for release, the judge had not heard her before authorising her detention. Moreover, the institution of proceedings may have been significantly retarded by the failure to comply with the obligation to inform the person concerned of the measure taken against her. There were therefore compelling reasons for avoiding any dilatoriness. On the Government's own admission, the public prosecutor, to whom the matter was referred on 20 December 1983, did not transmit the file to the District Court of The Hague until 6 February 1984 (see paragraph 10 above). In the absence of any grounds justifying this delay, the Court finds that there has been a violation of Article 5 § 4 (art. 5-4).

IV. ALLEGED VIOLATION OF ARTICLE 6 § 1 (art. 6-1)

37. Before the Commission the applicant also relied on Article 6 § 1 (art. 6-1), but at the hearing on 26 September 1989 she withdrew this complaint. The Court does not consider it necessary to examine this question of its own motion.

V. APPLICATION OF ARTICLE 50 (art. 50)

38. Under Article 50 (art. 50) of the Convention,

"If the Court finds that a decision or a measure taken by a legal

authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

39. Mrs van der Leer claimed in the first place 10,000 Dutch guilders in respect of pecuniary and non-pecuniary damage. In addition to the harm caused by her unlawful detention, she maintained that she had suffered not only from the fear of being returned to the hospital after she had absconded, but also as a result of the court proceedings and the memory of the distressing circumstances of her confinement.

40. She also sought the payment of 30,997.55 guilders in respect of the expenses and fees of the lawyer who represented her before the Commission and the Court.

The Government noted that she had received legal aid. In their view, she had not shown that she had had to pay her lawyer additional fees whose reimbursement she was entitled to request.

41. With a view to securing a friendly settlement, the Government had proposed to the applicant an overall sum of 15,000 guilders covering any damage suffered as well as the costs incurred through her being represented by a lawyer before the Strasbourg organs. This offer was repeated at the hearing.

42. In the Court's view, the applicant must have suffered some non-pecuniary damage. The fact that she was not heard by the Cantonal Court judge could have led to a feeling of frustration, to which was added the fear of being sent back to the hospital during the delay resulting from the failure to take the relevant decision "speedily".

Making an equitable assessment in accordance with Article 50 (art. 50), the Court awards the applicant, in respect of all the heads of claim, the overall amount of 15,000 guilders.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that there has been a violation of paragraphs 1, 2 and 4 of Article 5 (art. 5-1, art. 5-2, art. 5-4);

2. Holds that it is not necessary to consider in addition the case under Article 6 § 1 (art. 6-1);

3. Holds that the Netherlands is to pay to the applicant 15,000 (fifteen thousand) Dutch guilders;

4. Dismisses the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 21 February 1990.

Signed: Rolv RYSSDAL
President

Signed: Marc-André EISSEN
Registrar