



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

COURT (CHAMBER)

CASE OF E. v. NORWAY

(Application no. 11701/85)

JUDGMENT

STRASBOURG

29 August 1990

In the case of E. v. Norway*,

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 J. CREMONA, *President*,

Mr R. RYSSDAL,

Mr Thór VILHJÁLMSSON,

Mr F. MATSCHER,

Sir Vincent EVANS,

Mr C. RUSSO,

Mr A. SPIELMANN,

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

Having deliberated in private on 25 January and on 28 June 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") and the Government of the Kingdom of Norway ("the Government") on 12 April and 19 June 1989 respectively, within the three-month period laid down in Article 32 § 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 11701/85) against the Kingdom of Norway lodged with the Commission under Article 25 (art. 25) by Mr E. on 13 May 1985. The applicant, who is a Norwegian national, has requested the Court not to disclose his identity.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) of the Convention and to the declaration whereby Norway recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request and of the Government's application was to obtain a decision as to whether the facts of the case disclosed a breach by the respondent State of its obligations under Article 5 § 4 (art. 5-4).

* Note by the Registrar: This case is numbered 12/1989/172/228. 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 corresponding originating applications to the Commission.

** Note by the Registrar: The amendments to the Rules of Court which entered into force on 1 April 1989 are applicable to this case.

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

3. The Chamber to be constituted included ex officio Mr R. Ryssdal, the elected judge of Norwegian nationality (Article 43 of the Convention) (art. 43), and Mr J. Cremona, the Vice-President of the Court (Rule 21 § 3 (b)). On 29 April 1989, in the presence of the Registrar, Mr Cremona drew by lot the names of the other five members, namely Mr Thór Vilhjálmsson, Mr J. Pinheiro Farinha, Sir Vincent Evans, Mr C. Russo and Mr A. Spielmann (Article 43 in fine of the Convention and Rule 21 § 4) (art. 43). Subsequently, Mr F. Matscher, substitute judge, replaced Mr Pinheiro Farinha, who was unable to take part in the consideration of the case (Rules 22 § 1 and 24 § 1).

4. Mr Cremona assumed the office of President of the Chamber (Rule 21 § 5) and, through the Registrar, consulted the Agent of the Government, the Delegate of the Commission and the lawyer for the applicant on the need for a written procedure (Rule 37 § 1). In accordance with his order, the applicant's memorial and the Government's memorial were received by the registry on 14 September and 13 October 1989 respectively. On 3 November 1989 the Secretary to the Commission notified the Registrar that the Delegate would submit his observations at the hearing.

5. Having consulted, through the Registrar, those who would be appearing before the Court, the President directed on 4 December 1989 that the oral proceedings should commence on 22 January 1990 (Rule 38). Shortly before the hearing, both the Government and the applicant filed a number of additional documents, with the President's authorisation (Rule 37 § 1, second sub-paragraph).

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

There appeared before the Court:

- for the Government

Mr E. MØSE, Assistant Attorney-General

(stedfortredende regjeringsadvokat),

Acting Agent,

Mr R.W. KNUDSEN, Minister-Counsellor,

Ministry of Foreign Affairs,

Mr M. RUUD, Legal Adviser,

Ministry of Justice,

Counsel,

Mrs K. MELING, Head of Division,

Ministry of Justice,

Mrs M. WALAAS, Head of Division,

Ministry of Social Affairs,

Advisers;

- for the Commission

Mr H. DANELIUS,	<i>Delegate;</i>
- for the applicant	
Mr K. ROGNLIEN, advokat,	<i>Counsel.</i>
Mr Ø. SOLBERG, advokat,	
Mr P. GRAVER, advokatfullmektig,	<i>Advisers.</i>

The Court heard addresses by Mr Møse for the Government, by Mr Danelius for the Commission and by Mr Rognlien for the applicant as well as their replies to its questions. On 15 March 1990 the applicant filed an additional document, with the President's authorisation (Rule 37 § 1, second sub-paragraph).

AS TO THE FACTS

I. PARTICULAR CIRCUMSTANCES OF THE CASE

A. Background

7. The applicant is a Norwegian citizen, who was born in 1948. In 1965 he was involved in a traffic accident in which he suffered serious brain damage, and he subsequently showed a distinct tendency to become aggressive.

In 1967 he was convicted of offences under Articles 227, 228 and 292 of the Norwegian Penal Code (assault and inflicting bodily harm) and sentenced to preventive detention (sikring) for a maximum period of five years in accordance with Article 39 § 1 (e) of the Penal Code. In an expert psychiatric opinion obtained at that time, he was declared mentally ill (sinnssyk) and he spent the period from May 1967 to July 1972 in mental hospitals.

8. From 1973 to 1978 the applicant was detained for a period of approximately four years at either Telemark Central Hospital or Reitgjerdet Mental Hospital in accordance with the provisions of the Mental Health Act (lov om psykisk helsevern).

B. The 1978 conviction - authorisation to use security measures

9. In 1978 the applicant was placed under "judicial observation" (judisiell observasjon) after having assaulted his father. The expert psychiatric opinion obtained at that time concluded that he was not mentally ill but had an underdeveloped and permanently impaired mental capacity

(mangelfullt utviklede og varig svekkede sjelsevner) and that there was a clear risk of his committing further criminal offences.

By a judgment of 26 June 1978 the District Court (herredsrett) of Kragerø convicted the applicant of an offence under Article 228 of the Penal Code. It sentenced him to sixty days in prison and authorised the use of security measures under Article 39 § 1 (a) to (f) of the Penal Code for a maximum period of five years. The judgment pointed out that preventive detention in a prison under Article 39 § 1 (f) was likely to have an adverse influence on the applicant and should therefore only be imposed as an emergency measure. The court added that it expected that the competent authorities would take such measures as were necessary in order to avoid prolonged spells of imprisonment.

10. Following that judgment, the police sought to have the applicant admitted to Telemark Central Hospital, but this was refused by the hospital as it considered E. to be a brain-damaged psychopath for whom psychiatric treatment did not appear to hold out any prospects of improvement.

11. On 3 July 1978 the prosecuting authority decided to detain the applicant in accordance with Article 39 § 1 (e) in a security ward at Ila National Penal and Preventive Detention Institution ("Ila").

12. On 8 September 1978 the applicant requested to be released under protective supervision (sikring i frihet). The Director of Ila forwarded the application to the Ministry of Justice on 18 September, expressing the opinion that although it would not be easy to find an appropriate solution to the applicant's problems, it did not seem proper to detain him in prison. On 5 October 1978 the Ministry of Justice decided nevertheless that the applicant should remain at Ila until further notice.

13. On 10 January 1979 the applicant's lawyer, referring to the court judgment of 26 June 1978 (see paragraph 9 above), applied to the Ministry of Justice for the applicant's release and his placement under protective supervision in accordance with Article 39 § 1 (a) to (c). The application was supported by the Director of Ila and the applicant was released on 24 April 1979 and put under preventive supervision. However, after approximately one week he was back at Ila since he did not comply with the conditions imposed. A new leave-of-absence scheme was arranged. However, the applicant refused to return to Ila when the leave had come to an end, and he was brought back to Ila by the police on 16 August 1979.

14. In a letter of 17 December 1979 to the Ministry of Justice, the Director of Ila recommended that the applicant should be released under protective supervision in accordance with Article 39 § 1 (a) to (c). The Director pointed out that the applicant was obviously a psychiatric case and not suitable for detention in a prison and recommended that the Ministry of Justice should contact the health authorities in order to have the applicant placed in a suitable psychiatric institution.

15. On 21 January 1980 the Ministry of Justice decided, pursuant to Article 39 § 1 (a) to (c), to release the applicant on the condition, *inter alia*, that he resided at his parents' home. Owing to a number of violent incidents, the applicant was however rearrested, and by a judgment of 15 June 1980 the District Court of Kragerø sentenced him to ninety days' imprisonment, which sentence was deemed to have been served in detention on remand.

16. On 24 July 1980 the Ministry of Justice decided to place the applicant in preventive detention once more at Ila in accordance with Article 39 § 1 (e). On 2 June 1981 he was released to his parents' home under preventive supervision in accordance with Article 39 § 1 (a) to (c).

17. A number of unfortunate episodes led the Ministry of Justice to decide under Article 39 § 1 (e) to detain Mr E. again. The applicant returned to Ila on 17 July 1981.

18. During his placement in the security ward at Ila, Mr E. attacked prison staff on several occasions. The prison authorities sought to have him transferred to Reitgjerdet Mental Hospital. However, such a transfer was considered impossible as the applicant did not fulfil the conditions for admission under the Mental Health Act.

By letter of 16 September 1981 the Director of Ila requested assistance from the Ministry of Justice to have the applicant placed in psychiatric health care. It appears that the Ministry concluded that no transfer to the psychiatric health system could be effected unless the situation developed and the applicant became psychotic within the meaning of the Mental Health Act.

19. On 5 February 1982 the Ministry of Justice decided to apply Article 39 § 1 (f) of the Penal Code, and on 16 February the applicant was sent to Oslo District Prison. On 4 November 1982 he was transferred to Ullersmo National Prison ("Ullersmo").

C. The 1983 conviction - authorisation to use security measures other than detention in a security ward or in a prison

20. Whilst so detained, the applicant was convicted by the District Court of Asker and Baerum on 18 March 1983 and sentenced to six months' imprisonment for assaulting prison staff at Ila and Ullersmo on three occasions. The expert psychiatric opinion obtained for the trial concluded, as before, that Mr E. was not mentally ill but suffered from an underdeveloped and permanently impaired mental capacity.

With regard to the question of security measures, the court pointed out that the information available showed that detention in a prison or similar institution was inappropriate and had a destructive influence on the applicant. The court found that he clearly needed psychiatric care and concluded that everything should be done to give him adequate treatment. It accordingly authorised the prosecuting authority to impose security

measures under Article 39 § 1 except, however, detention in a security ward or in a prison under subsections (e) and (f).

D. The 1984 conviction - authorisation to use security measures including detention in a security ward or in a prison

21. Having served his sentence the applicant was released on 18 November 1983 and placed in a flat at Kragerø under the surveillance of the local police. However, on 19 December 1983 he was arrested and detained on remand, again charged with offences under Articles 227 and 228 of the Penal Code. A further expert psychiatric opinion was obtained but it reached the same conclusion as the two earlier ones (see paragraphs 9 and 20 above).

22. By a judgment of 20 September 1984 the District Court of Kragerø found the applicant guilty on most of the charges brought against him and sentenced him to 120 days' imprisonment. Furthermore, the court authorised the prosecuting authority to use any of the security measures mentioned in Article 39 § 1 of the Penal Code for a maximum period of five years. As to the conditions for having recourse to these measures, the court referred to the earlier decisions (see paragraphs 9 and 20 above). However, it found that, having regard to the applicant's almost total lack of self-control in certain situations and to his physical strength, it could not rule out the use by the competent authorities of preventive detention in a prison or in a security ward under Article 39 § 1 (e) and (f), should this prove necessary. Apparently there was such a need, since the applicant remained at Ila.

23. The applicant appealed to the Supreme Court (Høyesterett) against the decision as regards preventive detention. In a judgment of 12 January 1985 Justice Røstad stated on behalf of the unanimous court:

"...

I consider it beyond doubt that the scope of the security measures should be extended as set out in the judgment now appealed against. Like the District Court I find that the requirements for imposing preventive detention are fulfilled. [The applicant], who must be considered to have, as required by Article 39 [of the Penal Code], a deviant character, presents a serious danger regarding new offences, including threats - Article 227. I may add that it cannot be considered disproportionate to impose security measures on such a clearly dangerous offender. In my view, the protection of society requires that the authorities should be able to impose security measures considered necessary in order to prevent [the applicant] from committing further serious offences.

In view of the summing-up of counsel for the defence, I would point out that I find no basis for arguing that the decision of a Norwegian court concerning the authorisation to use security measures in a case like the present one would violate [Article 3] (art. 3) of the [...] Convention. It is for the implementing authorities to ensure that the security measure takes a form which in practice not only protects the

interests of society but also tries to promote those of [the applicant], including his need for psychiatric treatment.

...

In the present case several persons have pointed out that [the applicant] mainly needs treatment and most of all psychiatric medical care. I agree with these views and I will add that I expect the prosecuting authorities, the prison authorities and the health authorities after consultations to continue to try to find an arrangement whereby preventive detention in a prison can be avoided. A proposal for treatment that was drawn up after a meeting held on 13 November 1984 has been submitted to the Court. It was not possible to implement this proposal as [the applicant] was opposed to it. The proposal entailed his returning to Telemark, where a flat would be bought for [him] at Skien near a psychiatric hospital. The proposal also provided for treatment with drugs and for prompt transfer to preventive detention in the event of a breach of any important conditions, such as those attaching to his stays at Kragerø, or failure to undergo the medical treatment.

The time factor and the serious consequences which continued placement in institutions run by the prison authorities may have for [the applicant] make it necessary that a suitable solution should be found as soon as possible which will take into account the legitimate interests of both [the applicant] and society."

24. On 7 November 1985 Mr E. was transferred from Ila to Ullersmo pursuant to a decision of the Ministry of Justice under Article 39 § 1 (f) of the Penal Code.

After this transfer, the applicant declared that he was prepared to accept the conditions laid down in the scheme mentioned in the above Supreme Court judgment (see paragraph 23). The authorities approached the hospital which they had in mind for supervising the scheme. The hospital replied however that it could not take over responsibility for the applicant until a department for difficult patients had been set up.

The authorities also sought to have the applicant admitted to Reitgjerdet Mental Hospital. However, under the general regulations applicable to that institution, only patients who were "seriously mentally ill" could be admitted. As the applicant was not considered to meet this requirement, the hospital asked the Public Health Department of the Ministry of Social Affairs for a dispensation from these requirements. The Department replied however on 26 February 1986 that it was legally precluded from making such an exception. Nevertheless, the applicant spent twenty-three days at the hospital in April-May 1986. On 6 May his case was examined by the hospital's Supervisory Board (kontrollkommisjonen), which concluded that it had not been established that the applicant was psychotic or that the other requirements for his staying there were met, and he was accordingly sent back to Ullersmo.

On 29 October 1986 he was convicted by the District Court of Asker and Baerum for having attacked a prison officer and was given a suspended sentence of forty-five days' imprisonment. On 12 January 1987 he was

transferred from Ullersmo to Sunnås Rehabilitation Centre near Oslo in order to receive treatment from a psychologist for fourteen days. Certain examinations were carried out, but the applicant was sent back to Ullersmo after attacking one of the nurses.

25. On 24 February 1987 Mr E. was sent to Reitgjerdet Mental Hospital, where it was established that he was now psychotic. As he thus met the requirements for compulsory placement, he was kept there until 4 December 1987 on which date the hospital concluded that he was no longer psychotic.

26. The applicant nevertheless stayed at the hospital on a voluntary basis, but after some weeks he became aggressive towards other patients and staff. As he refused to be placed in the ward for difficult patients, he was sent back to Ullersmo, still under the authorisation of the Ministry of Justice in accordance with Article 39 § 1 (f) of the Penal Code.

27. With effect from 8 February 1988 the preventive measures were changed. Under Article 39 § 1 (a) to (c) the Ministry of Justice decided that the applicant should be released from Ullersmo, on condition that he lived in a house at Skien under the supervision of the Probation and After-care Service (kriminalomsorg i frihet).

28. On 19 April 1988 the applicant assaulted the social workers supervising him and the Ministry of Justice decided on the same day to replace preventive supervision under Article 39 § 1 (a) to (c) by detention in a secure institution, at least for a short time, in accordance with Article 39 § 1 (f). The applicant was transferred to Arendal District Prison.

E. Applicant's first challenge of a decision to keep him in preventive detention

29. On 27 April 1988 the applicant instituted proceedings against the Ministry of Justice in the Oslo City Court, claiming that the decision of 19 April 1988 was invalid. While the case was pending, the Ministry decided on 18 May 1988 that the applicant should again be placed under preventive supervision pursuant to Article 39 § 1 (a) to (c). He was consequently released on 19 May 1988 from Arendal District Prison and moved to the house at Skien. On 17 June 1988 he dropped the proceedings he had brought, as he was no longer detained.

F. Applicant's second challenge of a decision to keep him in preventive detention

30. Following several violent incidents the Ministry of Justice decided on 21 July 1988, in accordance with a recommendation from the Probation and After-care Service, that preventive supervision at Skien should cease and that the applicant was to be transferred to Ila under Article 39 § 1 (e).

Mr E., who at that time was detained on remand charged with several criminal offences, instituted proceedings against the Ministry of Justice in the Oslo City Court on 3 August 1988 - during the court vacation. In his application for judicial review he requested a speedy procedure. He alleged several violations of the Public Administration Act on the part of the Ministry: it had not specified the facts on which its decision to detain him again was based; it had refused him access to relevant documents in the case file; and it had never taken a formal decision, thereby preventing appeal. He also contended that detaining him again was an unreasonably harsh response to his behaviour, especially as the measure was not subject to any time-limit. Finally, he also submitted that the Ministry had circumvented the safeguards in Article 96 of the Constitution by using preventive measures instead of having recourse to ordinary criminal procedure.

The case was initially assigned to one judge but on 8 August was transferred to another. After this judge had returned from holiday on 15 August, he started to arrange for hearings but apparently encountered difficulties in contacting the applicant's lawyer, and he did not succeed in this until 24 August. On 25 August the summons was served on the Ministry, whose observations in reply were received almost immediately afterwards. The hearing was fixed for the first day acceptable to all concerned, 7 September. At the hearing the applicant and five witnesses gave evidence.

In its judgment of 27 September 1988, dismissing the application, the court stated, *inter alia*:

"The case concerns the validity of the Ministry of Justice's decision to change the security measures imposed on the applicant from preventive supervision to preventive detention in a security ward.

...

Article 96 of the Constitution

The court [observes] that security measures under Article 39 cannot be imposed except by order of a court. Where a judgment, as in [the applicant's] case, authorises security measures under Article 39 § 1 (a) to (f) for a maximum period of five years, this means that the court has decided that [the applicant] may be subjected to different security measures, including placement in a closed ward, for a period which cannot, however, exceed the time-limit fixed. The court's decision defines the scope of the security measures which can be imposed on the [person] according to the rules set out in Article 39.

The legal provision which empowers the Ministry to change the security measures is to be found in Article 39 § 4, sub-paragraph 2. See also Article 39 § 3, whereby 'these measures shall be discontinued when they are no longer regarded as necessary, but may be resumed if there is reason to do so'.

The Court does not find that these provisions contravene Article 96 of the Constitution, whereby 'no one may be punished except by judgment of a court'. The Ministry's decision under Article 39 § 3 concerning renewed placement in a security ward was based on the decision in the judgment which authorised the use of security measures.

Procedural errors

[The applicant] was clearly informed in advance that the Ministry was planning to consider and decide the question of a change of security measures when he was detained on remand in this connection. This appears from the Kragerø District Court transcripts of 27 June 1988. ...

The witness statements have confirmed that [the applicant] was informed of the change of security measures. The Court finds that the matter has been dealt with properly, having regard to Article 16 ... of the Public Administration Act [forvaltningsloven, Act of 10 February 1967; see paragraph 38 below]. Neither can it be established that the Ministry has failed to consider the provisions of Article 17 In any event, the Court finds that even if [the applicant] had felt a need of further information, Article 41 of the Public Administration Act applies. ...

Fairness of the decision

The decision includes no time-limit, but this does not mean that [the applicant] must expect a placement in the security ward to continue for the remainder of the security period. On the contrary, the Court has been told that a new preventive supervision programme is being considered and that it is intended that a decision should be made to change the security measures to such supervision before the end of October 1988.

Article 39 of the Penal Code does not require a special time-limit to be included in the decision to change the security measures. The law requires only a time-limit for the maximum period. The question of time in connection with a change will depend on how long it takes to organise a new preventive supervision programme. ... The Court does not find that the lack of any time-limit in the decision is a ground for considering it unfair. Nor is it correct to consider the decision unfair because the accusations made against [the applicant] might lead to charges being filed against him. A punishable offence may justify a change to a more severe security measure, but this decision is then based on the aims of the security measures and is not considered as a punishment. If the instant case is pursued and [the applicant] convicted, the question whether it is fair to use both placement for a time in a security ward and punishment will have to be considered when sentence is passed. In such circumstances it will be of importance that [the applicant] has had to undergo the change of security measures. This can be compared with the opposite situation referred to in Article 39 § 5 of the Penal Code."

Mr E. did not appeal against the judgment and remained in custody at Ila.

G. Subsequent developments

31. On 21 October 1988 the Ministry of Justice decided that the applicant should be released and placed under preventive supervision pursuant to Article 39 § 1 (a) to (c) of the Penal Code and he was brought

back to the house at Skien. However, as on several occasions he violated the restrictions imposed on him the Ministry decided, on 27 December 1988, to detain him at Ila again in accordance with Article 39 § 1 (e). The applicant does not appear to have challenged this decision.

32. On 11 January 1989 the applicant was convicted by the District Court of Kragerø of offences under Article 227 and Article 228 in conjunction with Article 230 of the Penal Code (threats and assault). He was sentenced to 120 days' imprisonment, which sentence was deemed to have been served in detention on remand, and he continued to be detained at Ila under Article 39 § 1 (e). On 3 February 1990 the prosecuting authorities in Vestfold and Telemark applied to Kragerø District Court for a three-year extension of the Supreme Court's authorisation to implement security measures from 12 January 1985 (see paragraph 23 above), as this was due to expire on 25 February 1990. On an application by the police, the District Court decided on 12 February that Mr E. should be detained until 26 March 1990, pursuant to Article 171 of the Code of Criminal Procedure. The applicant appealed against this decision to the Agder Court of Appeal (lagmannsret) claiming that this detention was unlawful, *inter alia*, because there was no legal basis for renewing the authorisation to impose security measures as he was not accused of having committed any new offences of the kind described in Article 39 of the Penal Code. As to this the Court of Appeal observed:

"There is no doubt that it has until now been accepted in Norwegian law that it is possible to prolong the period for which security measures can be imposed, even if the person concerned has not committed any new offence ... The provision of the law that the court shall set a time-limit on the duration of security measures is based, *inter alia*, on a concern for the convicted person, namely that after a certain time he should obtain a new judicial assessment of whether security measures are still necessary. If this possibility of having a further review by a court did not exist, the alternative would be to allow an authorisation period sufficiently long for the court to feel reasonably certain that there would be no further need to impose security measures after it expired. Under the present system the courts do not have to determine the period on the basis of such considerations and need only specify, initially, a period which in general will probably be shorter than would have been the case if there had been no possibility of having a further review."

33. A further appeal by Mr E. to the Supreme Court was rejected on 16 March 1990. On 14 April 1990, however, the prosecuting authorities withdrew their application, and on the following day the applicant was set free.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Security measures under Article 39 of the Penal Code

34. Article 39 of the Penal Code provides:

"1. If an otherwise punishable act is committed ... by someone with an underdeveloped or permanently impaired mental capacity and there is a danger that the offender, because of his condition, will repeat such an act, the court may authorise the prosecuting authority, as a security measure, to

- (a) assign or forbid him a particular place of residence;
- (b) place him under supervision by the police or a specially appointed probation officer and order him to report to the police or the probation officer at specified intervals;
- (c) forbid him to consume alcoholic beverages;
- (d) place him in secure private care;
- (e) place him, whenever this is possible, in a mental hospital, sanatorium, nursing home or security ward, in accordance with the general provisions promulgated by the King;
- (f) keep him in detention in prison.

...

3. These measures shall be discontinued when they are no longer regarded as necessary, but may be resumed if there is reason to do so. The security measures listed under (a) to (d) may be employed concurrently.

The court shall determine the maximum period for which security measures may be imposed without its further consent.

4. If the court has not decided otherwise, the prosecution may choose between the above-mentioned security measures.

The decision to discontinue, resume or change a security measure shall be made by the Ministry.

Before a decision about security measures or their discontinuance is made, the opinion of a medical specialist shall normally be obtained. The same procedure shall be followed at regular intervals during the period for which security measures are in force.

5. If the act has led to the imposition of a punishment, the Ministry may decide that the punishment shall be remitted, in whole or in part, if security measures are imposed under paragraph 1 above.

..."

35. A decision by a court to impose security measures is subject to the general provisions of the Code of Criminal Procedure (straffeprosessloven) and may be appealed against up to the Supreme Court.

36. Rules concerning changes of security measures are found in Article 11 of a Royal Decree of 1 September 1961, which reads as follows:

"Not later than one year after security measures have been initiated, and subsequently at intervals of not more than one year, the security measures in question shall be submitted to the Ministry of Justice with a statement as to whether their form should remain unchanged or whether they should be replaced by other measures, or whether they should be discontinued. If special reasons so dictate, the matter may be submitted before the specified time-limit has been reached.

The matter shall be submitted by the prosecuting authority or, where the person sentenced to security measures is serving a prison sentence or is subject to security measures in an institution in the prison system, by the director of the institution concerned.

The report of the prosecuting authority shall contain information on the situation of the person sentenced to security measures, and a statement from the probation officer, the Probation and After-care Service, the custodian, or from the hospital or any other institution in which the person sentenced to security measures has been placed.

The report shall be prepared by the chief of police who has been in charge of investigating the case, and sent by him to the public prosecutor (statsadvokaten), who will forward it to the Ministry of Justice."

37. The Ministry will also consider the question of discontinuing or changing the measures upon application by the person concerned. In practice, the appropriateness of preventive detention in a particular case is often reviewed several times a year.

38. The Ministry's (and also, where relevant, the prosecuting authority's) decisions are governed by the Public Administration Act; this means, inter alia, that the Ministry has to give the grounds for any change of security measures and that its decision may be appealed to the King in Council. However, the person concerned may also, both before and after exhausting administrative remedies, bring the decision directly before the ordinary courts of justice, which will review its lawfulness exercising the jurisdiction they derive from the unwritten constitutional principle of judicial supremacy, which was established in the middle of the last century.

39. Chapter 33 of the Code of Civil Procedure (tvistemålsloven, Law no. 6 of 13 August 1915) contains special, detailed provisions on judicial review of administrative decisions concerning deprivation of liberty and other coercive measures. However, they only apply when the relevant statutes expressly so provide, for example in the case of detention under the Mental Health Act. They do not apply when the person concerned is placed,

as Mr E. mostly was, elsewhere than in psychiatric hospitals, for instance in a security ward or a prison under Article 39 § 1 (e) or (f) of the Penal Code.

B. Judicial review

40. Proceedings for judicial review under the Constitution follow the provisions of Chapter 30 of the Code of Civil Procedure. In such proceedings the validity both of general regulations and of decisions in individual cases may be challenged.

41. The courts ensure that the administrative authorities have acted within the legal framework by which they are bound.

They ascertain whether the impugned decision or regulation was made by the competent authority and in accordance with procedural requirements, including those contained in the Public Administration Act.

They always have unlimited power to review the facts on which the decision is based. Thus, in cases where the mental capacity of the person concerned is relevant, psychiatric experts may assist the courts as expert witnesses under Chapter 18 of the Code of Civil Procedure.

Nor are there any restrictions on the courts' competence to review the authorities' application of the relevant legal provisions (*rettsanvendelsesskønn*), even where these provisions seem to leave some discretion to the authorities, for instance by referring to such standards as "unreasonable", "unacceptable" or "good business practice". However, as regards purely discretionary administrative decisions, namely decisions or steps in a specific decision-making process which are left unregulated by the relevant law (*fritt skønn* or *hensiktsmessighetsskønn*), the courts will usually limit their examination to determining whether or not there has been a misuse of power or whether the decision is manifestly unreasonable.

42. When exercising their control over the public authorities, the Norwegian courts will also as far as possible interpret domestic law in such a way as to conform with treaties binding on Norway, such as the Convention, even if these have not been formally incorporated into the Norwegian legal system ("the principle of presumption").

The Norwegian Supreme Court has thus on a number of occasions examined the conformity of its interpretation of domestic law with Norway's obligations under international human-rights instruments and in particular under the Convention as interpreted by the Court and the Commission: judgment of 16 December 1961, *Norsk Retstidende* ("NRt") 1961, p. 1350; judgment of 28 March 1966, NRt 1966, p. 476, containing a reference to the Commission's decision declaring application no. 1468/62, *Iversen v. Norway*, inadmissible; judgment of 8 October 1974, NRt 1974, p. 935; judgment of 26 February 1982, NRt 1982, p. 35; judgment of 23 October 1984, NRt 1984, p. 1175, containing references to the European Court's judgments in the *Winterwerp* case (24 October 1979, Series A no.

33) and in the case of X v. the United Kingdom (5 November 1981, Series A no. 76); judgment of 15 May 1987, NRt 1987, p. 612, with reference to the Court's judgment in the case of Klass and Others (6 September 1978, Series A no. 28); the judgment of 16 March 1990 previously cited (see paragraph 33 above); judgment of 16 March 1990 (in case L.nr. 470/1990), with reference to the Court's judgment in the Hauschildt case (24 May 1989, Series A no. 154).

However, there has been no case in which the Supreme Court has been confronted with a clear conflict between the Convention and domestic legislation.

The Convention's status as a relevant source of law was endorsed by the plenary court in the above-mentioned judgment of 26 February 1982, which concerned, *inter alia*, the consequences of water-regulation works on the Alta river. Justice Christiansen stated on behalf of the unanimous court:

"What I said about the limits of judicial review needs to be qualified. In the present case it has been argued that the Sami people are protected against such interferences with their interests as follow from the regulation of the Alta river by virtue of rules of international law which are binding upon Norway. The rules concerning the courts' power to review the validity of administrative acts do not prevent the Court from fully and comprehensively considering whether the expansion works violate rules of international law [the Convention and the International Covenant on Civil and Political Rights]."

The "principle of presumption" was given particularly clear expression in the above-mentioned judgment of 23 October 1984, which dealt with the question of what judicial review should be available where a person already sentenced to security measures is committed to a mental hospital pursuant to Article 39 § 1 (e). The court first observed that neither the wording of the relevant Act nor its drafting history gave any direct indication as to how the problem before the court should be resolved. The judgment went on:

"The decision to be taken must accordingly take into account all relevant circumstances, in particular the consideration that domestic law must be interpreted, as far as possible, in accordance with those treaties under international law which Norway has ratified, in this instance the [Convention]."

After a comprehensive survey of the relevant case-law of the European Court, the Supreme Court concluded that its interpretation of Norwegian law on the point at issue conformed with the requirements of Article 5 § 4 (art. 5-4).

The relevance of the principle when examining the scope of judicial review required in respect of detention decisions under Article 39 of the Penal Code was also recently mentioned in a concurring opinion in the Supreme Court (judgment of 11 December 1989, NRt 1989, p. 1327). One of its members, Justice Smith, found it necessary to disapprove a statement made in a dissenting opinion in the Court of Appeal to the effect that no

judicial review would have been possible of the prosecuting authorities' decisions regarding security measures under Article 39 of the Penal Code:

"In reply (...) it should be pointed out that the Supreme Court has decided [in the above-mentioned case of 23 October 1984], amongst other things on the basis of Article 5 § 4 (art. 5-4) of the [Convention], as interpreted by the Court and the Commission, that a person subject to security measures and also detained in a mental hospital has the right to obtain a decision at reasonable intervals as to whether continued detention is lawful. I maintain that this right to judicial review which is enshrined in Article 5 § 4 (art. 5-4) and which the Supreme Court has established for one category of persons subject to security measures, must be applied by the courts also in relation to other persons subject to such measures who are deprived of their liberty in other institutions."

43. Where the impugned administrative decision has been concerned only with the application of clear legal provisions, the courts may order the authorities to act in the manner prescribed by the law. In cases concerned with purely discretionary decisions, however, the courts will consider themselves to have this power only if special circumstances obtain; otherwise they will decide only whether the decision is valid or not.

44. According to Chapter 15 of the Law relating to the enforcement of civil claims (tvangsfullbyrdelsesloven, Law no. 7 of 13 August 1915), the court carrying out judicial review, whether at first instance or on appeal, may order interim measures (midlertidig forføyning), such as a stay of execution of a decision.

Furthermore, Article 148 of the Code of Civil Procedure empowers the court to decide, on application, that its judgment shall be enforced before it becomes final "if special circumstances so require".

45. Applications for judicial review of administrative decisions are frequent. In 1985, 225 such applications were made to the courts. For 1986 and 1987, the figures were 218 and 201, respectively. They account for more than a third of all the civil cases heard by the Supreme Court. However, there have been no cases in which Norwegian courts have overruled administrative decisions taken under section 39 of the Penal Code.

PROCEEDINGS BEFORE THE COMMISSION

46. Mr E.'s application (no. 11701/85) was lodged with the Commission on 13 May 1985. He alleged a breach of Article 3 (art. 3) of the Convention as a result of the conditions of his detention and treatment, in particular his lengthy periods of solitary confinement in the Ila security ward and in prison between 1978 and 1988, and also a breach of Article 5 § 4 (art. 5-4) in that, while in detention, he had not had access to a court satisfying the requirements of this Article (art. 5-4).

47. The Commission declared the application inadmissible as regards Article 3 (art. 3) (partial decision of 7 March 1988) but admissible as regards Article 5 § 4 (art. 5-4) (decision of 12 May 1988).

In its report of 16 March 1989 (made under Article 31) (art. 31) the Commission expressed the unanimous opinion that there had been a breach of Article 5 § 4 (art. 5-4). The full text of the Commission's opinion is reproduced as an annex to this judgment*.

AS TO THE LAW

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

48. The applicant complained of several violations of Article 5 § 4 (art. 5-4), which provides:

"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."

He alleged that the review available under Norwegian law of the lawfulness of his repeated periods of detention in the Ila security ward and in prison under Article 39 § 1 (e) or (f) of the Penal Code did not meet the requirements of the Convention in three respects: the scope of review was too limited, or at least too unclear in the absence of any case-law; the courts lacked the power to order release; and the Oslo City Court did not deliver its decision in 1988 speedily (see paragraph 30 above).

The Commission agreed with the applicant's allegations, whereas the Government contested them.

A. The scope of judicial review

1. The requirements of Article 5 § 4 (art. 5-4)

49. According to the Court's established case-law, the notion of "lawfulness" under paragraph 4 of Article 5 (art. 5-4) has the same meaning as in paragraph 1 (art. 5-1), so that the arrested or detained person is entitled to a review of the "lawfulness" of his detention in the light not only of the requirements of domestic law but also of the text of the Convention, the general principles embodied therein and the aim of the restrictions permitted

* Note by the Registrar: For practical reasons this annex will appear only with the printed version of the judgment (volume 181 of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

by paragraph 1 (art. 5-1) (see, inter alia, the Brogan and Others judgment of 29 November 1988, Series A no. 145-B, p. 34, § 65).

50. Article 5 § 4 (art. 5-4) does not guarantee a right to judicial review of such a 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 are essential for the "lawful" detention of a person according to Article 5 § 1 (art. 5-1). This applies equally whether the detention at issue is covered by sub-paragraph (a) of paragraph 1 (art. 5-1-a) - "the lawful detention of a person after conviction by a competent court" (see the Van Droogenbroeck judgment of 24 June 1982, Series A no. 50, pp. 26-27, § 49, and the Weeks judgment of 2 March 1987, Series A no. 114, p. 29, § 59), or by sub-paragraph (e) (art. 5-1-e) - "the lawful detention ... of persons of unsound mind" (see the X v. the United Kingdom judgment of 5 November 1981, Series A no. 46, pp. 18 and 25, §§ 40 and 58, and the Ashingdane judgment of 28 May 1985, Series A no. 93, pp. 18 and 23, §§ 37 and 52).

2. The Norwegian system

51. If punishable acts are committed "by someone with an underdeveloped or permanently impaired mental capacity and there is a danger that the offender, because of his condition, will repeat such an act", the sentencing court, in addition to imposing a fixed term of imprisonment, may, pursuant to Article 39 § 1 of the Penal Code (see paragraph 34 above), authorise the prosecuting authority - and subsequently the Ministry of Justice - to impose security measures, including deprivation of liberty in a security ward (Article 39 § 1 (e)) or preventive detention in prison (Article 39 § 1 (f)), for a specified maximum period.

The principal objective of Article 39 § 1 is to protect society against further offences by the person concerned, whose interests must nevertheless not be disregarded. The imposition of specific measures is therefore to be terminated when they are no longer regarded as necessary, but may be resumed if there is reason to do so (Article 39 § 3).

52. Under Article 39 of the Penal Code the Ministry of Justice has a wide discretion in deciding which security measure is to be imposed and for how long. In fact, this system shares a number of features with the Belgian system in regard to recidivists and habitual offenders which was at issue in the Van Droogenbroeck case. Under such systems the courts cannot at the time of their decisions do more than assess how the person concerned will develop in the future. The authorities, on the other hand, through and with the assistance of their officers, can monitor that development more closely and at frequent intervals. However:

"... with the passage of time the link between [the Ministry's] 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) ..." (Van Droogenbroeck judgment previously cited, Series A no. 50, pp. 21-22, § 40)

3. The availability of adequate review in Mr E. 's case

53. In the instant case Mr E. claimed that his periods of detention in the Ila security ward and in prison came under sub-paragraph (a) of Article 5 § 1 (art. 5-1-a) of the Convention - "the lawful detention of a person after conviction by a competent court". The Government agreed, but maintained that sub-paragraph (e) (art. 5-1-e) - "the lawful detention ... of persons of unsound mind" - was also applicable.

The basic prerequisites for authorising security measures, including deprivation of liberty under Article 39 § 1 (e) and (f) of the Penal Code, were that a punishable act had been committed "by someone with an underdeveloped or permanently impaired mental capacity" and that "there [was] a danger that the offender, because of his condition, [would] repeat such an act". The relevant conditions for "lawful" detention under the Convention were thus, as in the case of *X v. the United Kingdom* previously cited (Series A no. 46, p. 17, § 39), those contained in sub-paragraph (a) (art. 5-1-a) and sub-paragraph (e) of Article 5 § 1 (art. 5-1-e). In any event, the Convention required an appropriate procedure allowing a court to determine, on an application by Mr E., whether the Ministry of Justice was entitled to hold that detention remained consistent with the object and purpose of Article 39 § 1 of the Penal Code. For the purposes of Article 5 § 4 (art. 5-4) of the Convention this was not simply a question of expediency but one that was essential for the lawfulness of the deprivation of liberty at issue.

54. The Government accepted that such an appropriate procedure should be available to Mr E. on any return to custody and also at reasonable intervals during his detention.

55. It should be recalled that decisions to use measures not including deprivation of liberty were taken on several occasions but that attempts to establish a system of supervision outside institutions failed, with the result that the Ministry of Justice more than once decided to detain the applicant in accordance with Article 39 § 1 (e) or (f) of the Penal Code (see paragraphs 11, 13, 16, 17, 22, 26, 28, 30 and 31 above).

56. The participants in the proceedings before the Court agreed on the general description of the relevant system of judicial review in respect of administrative decisions (see paragraphs 40-45 above).

However, there was disagreement as to the adequacy of the general power of review for deciding the "lawfulness" of a detention ordered as a security measure pursuant to Article 39 § 1 (e) or (f) of the Penal Code.

57. The applicant considered the available proceedings for judicial review inadequate for this purpose. He stressed that there were no substantive rules concerning the discontinuance or resumption of security measures. In Article 39 § 3 it was provided that security measures should be discontinued when no longer regarded as necessary, but could be resumed if there was reason to do so. The terms of Article 39 § 3 were said to be so vague that the courts could not review the Ministry's exercise of its discretion as to the necessity of maintaining or resuming detention in a security ward or in prison. The applicant conceded that there might be some judicial control as to the basic requirements laid down in Article 39 § 1, namely that the person concerned has an "underdeveloped or permanently impaired mental capacity" and that there be a danger that "because of his condition" he will repeat a punishable act. However, he maintained that this remedy did not have the availability and effectiveness required by the Court in, *inter alia*, its above-mentioned Van Droogenbroeck judgment (Series A no. 50, pp. 29-31, § 54). The courts might well limit their examination to considering whether the Ministry's decision was unreasonable or irrational, a review which, according to the applicant, did not meet the requirements of Article 5 § 4 (art. 5-4) of the Convention.

58. The Commission agreed with the applicant's observations and emphasised that there existed no case-law to show that an administrative decision taken under Article 39 of the Penal Code had been overruled by the courts. It thus could not be stated with certainty that the courts would really be prepared to carry out a new, full assessment as to whether the two substantive conditions for the imposition of security measures were still fulfilled or that in regard to the choice between detention as a preventive measure and another measure not involving detention, effective court review was available under the Norwegian system. Consequently, the Commission found that the state of the case-law was not yet such as to establish with adequate clarity whether, from the point of view of its scope, the judicial review met the requirements of Article 5 § 4 (art. 5-4) of the Convention.

59. The Government claimed that the scope of review satisfied these requirements.

Judicial control of all kinds of administrative decisions was a fundamental rule of Norwegian constitutional and administrative law, which was applied in a large number of cases and had been the subject of extensive comment in legal writing. The accessibility of this remedy was also confirmed in the present case: the applicant applied to the courts on two occasions for review of the lawfulness of the Ministry's decisions to detain him under Article 39 § 1 (e) or (f) of the Penal Code. His second application gave rise to a judgment on the merits, and there was every indication that

the first application would also have done so had he not withdrawn his complaint (see paragraphs 29-30 above). As to the two main conditions for imposing security measures under Article 39 § 1 - the convicted person's mental state and the ensuing danger that he will commit new offences -, the courts had full competence to review both the evidence and the Ministry's exercise of its discretion in applying the law. The courts did so when they authorised the use of such measures - as was evident from the reasons in the Supreme Court's judgment of 12 January 1985 (see paragraph 23 above) - and, in any subsequent proceedings concerning the validity of the Ministry's decision to impose such measures, were also entitled to examine questions both of fact and of law.

If the court was satisfied that the above-mentioned main conditions for the use of security measures were still met, further review of the need to maintain or resume such measures would be more limited. The court could not simply substitute its own discretion for that of the Ministry. The court had, however, full competence to examine the facts on which the Ministry's decision was based and to review the proceedings for procedural errors. The court would in addition invalidate a decision which it considered to be manifestly unreasonable. In so doing, the court could take into account information which was not available to the Ministry at the time of its decision.

The Government further emphasised that there was general agreement that the Norwegian courts would follow the "principle of presumption", that is to say, that domestic provisions have to be interpreted to the extent possible in such a way as to be in conformity with treaties binding on Norway. The validity of this principle in relation to the Convention had indeed been confirmed by the Supreme Court on several occasions, for example in its 1984 judgment cited above (see paragraph 42 above). Neither the wording of Article 39 of the Penal Code nor any other legislative enactment would seem to prevent a review consistent with the requirements of Article 5 § 4 (art. 5-4) of the Convention, as interpreted by the European Court of Human Rights.

60. The Court first observes that Mr E. had the possibility of challenging in the ordinary courts each of the Ministry's decisions that he should remain in detention or return to custody under Article 39 § 1 (e) or (f) of the Penal Code. Such proceedings could be instituted in accordance with Chapter 30 of the Code of Civil Procedure. This was confirmed when on 3 August 1988 Mr E. started proceedings in the Oslo City Court to challenge the Ministry's decision of 21 July 1988. The court held a hearing on 7 September when the applicant and five witnesses were heard (see paragraph 30 above). It has not been contested that the Norwegian courts fulfil the requirements as to independence and impartiality and that the procedure to be used is satisfactory.

In such proceedings the ordinary courts have competence to review all the facts on which the Ministry's decision was based. Moreover, the courts have competence to determine whether the two main conditions for imposing security measures are still satisfied, that is whether the individual concerned has "an underdeveloped or permanently impaired mental capacity" and whether "there is a danger that the offender, because of his condition, will repeat such [a punishable] act" (see paragraph 34 above).

In the proceedings before the Oslo City Court the applicant claimed that the Ministry's decision of 21 July 1988 to detain him in the security ward under Article 39 § 1 (e) was invalid and that the court should accordingly order his release. He alleged that the provisions in Article 39 of the Penal Code were unconstitutional, that there were procedural errors, and that the Ministry's decision was unfair for certain reasons. The applicant did not, however, contest that the two main conditions for imposing security measures were still satisfied, and in its judgment the Oslo City Court therefore did not have to consider this question.

The existence of a remedy under Article 5 § 4 (art. 5-4) of the Convention must be sufficiently certain to give the individual concerned adequate protection against arbitrary deprivation of liberty (see the above-mentioned Van Droogenbroeck judgment, Series A no. 50, p. 30, § 54). However, under the Norwegian system the courts have the competence not only to determine whether the two main conditions for imposing security measures are still satisfied but also, in the light of a full examination of the facts, to determine whether the administrative authorities' decision to impose the impugned measure of detention was or was not arbitrary.

It is true that there have not so far been any decisions by the Norwegian Supreme Court to the effect that an administrative decision taken under Article 39 of the Penal Code can be overruled in judicial proceedings. Nevertheless, on the basis of the foregoing examination of the Norwegian system, the Court is satisfied that the available judicial review was wide enough to bear on those conditions which, under the Convention, were essential for the lawful detention of the applicant pursuant to Article 39 § 1 of the Penal Code.

The Court concludes that there has been no violation of the Convention on this point.

B. The courts' power to order release

61. The applicant claimed that the Norwegian courts did not have the power to order his release, should they find his detention "unlawful": the courts could only order the administrative authorities to act in a certain way if the law contained explicit provisions as to the decision to be taken and nothing was left to the discretion of the authorities concerned; however, such was not the case with regard to the authorities' obligations under

Article 39 of the Penal Code. The Commission agreed with this conclusion, albeit mainly on the basis of what it perceived to be uncertainty regarding the legal position in Norway.

The Government, for their part, maintained that there was no violation of this requirement of Article 5 § 4 (art. 5-4) of the Convention: the Norwegian courts would have the power to order release in cases where one of the two substantive conditions (see paragraph 57 above) for a deprivation of liberty under Article 39 of the Penal Code was not fulfilled, and in other cases their judgments would at least have the effect of a release order.

62. If a Norwegian court considers that a disputed administrative decision cannot be upheld, the conclusion in the judgment will normally be only to declare the decision invalid (see paragraph 43 above). However, the Court is satisfied that where an administrative decision to detain a person was considered to be invalid, the Norwegian court would - in accordance with the general principles of judicial review - have the power to order his release. An order for immediate release could be based on Article 148 of the Code of Civil Procedure, under which a court may, on petition, decide that a judgment can be enforced before it becomes final if "special circumstances so require" (see paragraph 44 above). The Norwegian courts would certainly consider this provision to be applicable if a person was deprived of his liberty without the conditions under Article 39 § 1 of the Penal Code being fulfilled, a fact that would also be in breach of Article 5 (art. 5) of the Convention, which is a relevant source of law (see paragraph 42 above).

In the proceedings instituted in the Oslo City Court on 3 August 1988 the applicant contended that the Ministry's decision of 21 July 1988 was invalid, and he claimed that the court should order his release. There is, in the light of the foregoing, no reason to believe that the court would have declined to do so if it had accepted his contention.

Accordingly, no violation of Article 5 § 4 (art. 5-4) has been established in this respect.

C. The speediness of the proceedings

63. In the view of the applicant and the Commission, the period of approximately two months from the institution of proceedings in the Oslo City Court on 3 August 1988 to the delivery of the judgment on 27 September 1988 did not correspond to the notion of "speedily". They pointed to the lack of rules providing for the speedy conclusion of proceedings as well as to delays in arranging for hearings and subsequently in giving judgment (see paragraph 30 above).

The Government, relying on the Court's case-law in, *inter alia*, the Bouamar case (judgment of 29 February 1988, Series A no. 129, p. 24, § 60), objected that the scope of the obligations flowing from Article 5 § 4 (art. 5-4) was not identical in all circumstances or for every kind of

deprivation of liberty. Considering that in this case the need to impose security measures had been confirmed by the courts on a number of occasions, that the applicant's mental state had been fairly stable over a long period and had also been such as to necessitate deprivation of liberty at short intervals, and lastly that the applicant contributed to some extent to the delay in the Oslo City Court, the Government maintained that the proceedings had been conducted speedily for the purposes of Article 5 § 4 (art. 5-4). In addition, they claimed that there was every reason to believe that the City Court would have delivered judgment immediately if it had found his detention to be unlawful.

64. The Court observes that the issues submitted to a court in the context of such challenges of the "lawfulness" of a deprivation of liberty as are the subject of this case (see paragraph 51 above), are often of a more complex nature than those which have to be decided when a person detained in accordance with Article 5 § 1 (c) (art. 5-1-c) is brought before a judge or other judicial officer as required by paragraph 3 (art. 5-3) of the Article. Indeed, the notion of "promptly" (aussitôt) in the latter provision indicates greater urgency than that of "speedily" (à bref délai) in Article 5 § 4 (art. 5-4) (see the above-mentioned *Brogan and Others* judgment, Series A no. 145-B, p. 32, § 59). Even so, a period of approximately eight weeks from the filing of summons to judgment does appear, *prima facie*, difficult to reconcile with the notion of "speedily". However, in order to reach a firm conclusion, the special circumstances of the case have to be taken into account (see, *inter alia*, the *Sanchez-Reisse* judgment of 21 October 1986, Series A no. 107, p. 20, § 55).

65. Five weeks elapsed between the filing of the application for judicial review and the date of the hearing. To begin with, there was a delay of some twelve days pending the return from vacation of the judge responsible, and thereafter some nine days seem attributable to difficulties in reaching the applicant's lawyer. A further period of somewhat less than two weeks was allegedly needed to "put the case on the right track". However, once contact was established with the applicant's lawyer, the applicant did not complain of any undue delay in fixing the date of the hearing. Following the hearing, a further period of three weeks elapsed before the court's judgment was pronounced.

66. Admittedly, the judge to whom the case was assigned required a certain amount of time to carry out the necessary inquiries. However, it is evident that the initial delays were caused by administrative problems due to the lodging of the application for judicial review during the vacation period. The Convention requires, however, the Contracting States to organise their legal systems so as to enable the courts to comply with its various requirements (see the *Bezicheri* judgment of 25 October 1989, Series A no. 164, p. 12, § 25). It is incumbent on the judicial authorities to make the necessary administrative arrangements, even during a vacation period, to

ensure that urgent matters are dealt with speedily and this is particularly necessary when the individual's personal liberty is at stake. Appropriate provisions for this purpose do not appear to have been made in the circumstances of the present case.

As regards the period of three weeks required to write the judgment, it may well be, as the Government contended, that this period would have been much shorter had the Oslo City Court reached another conclusion after the hearing. Nevertheless, Mr E. was entitled to a speedy decision, whether affirmative or negative, on the lawfulness of his custody (see the above-mentioned Sanchez-Reisse judgment, p. 21, § 57).

67. In all the circumstances the review proceedings were not conducted "speedily", and there was therefore a violation of Article 5 § 4 (art. 5-4) in this respect.

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

68. 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."

The applicant, who received free legal aid in Norway for his representation before the Convention organs, sought only compensation for pecuniary and non-pecuniary damage.

69. As to pecuniary damage, the applicant maintained that if the Norwegian courts had had the authority to look more deeply into the Ministry's exercise of its discretion and to order his release, he would most probably have been treated appropriately and set free many years ago. In that event, he would have had the possibility of earning an ordinary salary by working in a factory for handicapped persons. He calculated his resulting loss of income from 1978 until the day of the hearing to have been at least 1,000,000 Norwegian crowns.

As to non-pecuniary damage, he claimed 500,000 crowns for his suffering and feelings of uncertainty while in solitary confinement (see paragraph 46 above).

70. Neither the Government nor the Commission expressed any opinion as to the application of Article 50 (art. 50) in respect of the failure to comply with the requirement of a speedy procedure found in this case. The Court observes that the claims submitted by the applicant are based on circumstances unrelated to this violation of Article 5 § 4 (art. 5-4). If Mr E. did suffer any non-pecuniary damage as a result of the undue length of the proceedings before the Oslo City Court, the present judgment provides him

with sufficient just satisfaction (see, *mutatis mutandis*, the above-mentioned Bezicheri judgment, Series A no. 164, p. 13, § 29).

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that there has been no violation of Article 5 § 4 (art. 5-4) as regards the scope of the Norwegian courts' power to review the lawfulness of the applicant's detention;
2. Holds that there has been no violation of Article 5 § 4 (art. 5-4) as regards their powers to order his release;
3. Holds that there has been a violation of Article 5 § 4 (art. 5-4) on account of the failure, in the review proceedings instituted on 3 August 1988, to take a decision "speedily";
4. Rejects the claim for just satisfaction.

Done in English and French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 29 August 1990.

John CREMONA
President of the Chamber

Marc-André EISSEN
Registrar