



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

CASE OF D.N. v. SWITZERLAND

(Application no. 27154/95)

JUDGMENT

STRASBOURG

29 March 2001

In the case of D.N. v. Switzerland,

The European Court of Human Rights, sitting as a Grand Chamber composed of the following judges:

Mrs E. PALM, *President*,
Mr L. WILDHABER,
Mr J.-P. COSTA,
Mr A. PASTOR RIDRUEJO,
Mr J. MAKARCZYK,
Mr P. KÜRIS,
Mr R. TÜRMESEN,
Mrs F. TULKENS,
Mrs V. STRÁŽNICKÁ,
Mr P. LORENZEN,
Mr M. FISCHBACH,
Mr V. BUTKEVYCH,
Mr J. CASADEVALL,
Mrs H.S. GREVE,
Mr A.B. BAKA,
Mr R. MARUSTE,
Mrs S. BOTOCHAROVA,

and also of Mr M. DE SALVIA, *Registrar*,

Having deliberated in private on 18 October 2000 and 14 February 2001,

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

PROCEDURE

1. The case was referred to the Court in accordance with the provisions applicable prior to the entry into force of Protocol No. 11 to the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by the European Commission of Human Rights (“the Commission”) and by the Swiss Government (“the Government”) on 28 October and 16 December 1999 respectively (Article 5 § 4 of Protocol No. 11 and former Articles 47 and 48 of the Convention).

2. The case originated in an application (no. 27154/95) against the Swiss Confederation lodged with the Commission under former Article 25 of the Convention by a Swiss national, Ms D.N. (“the applicant”), on 20 April 1995.

3. The applicant complained under Article 5 § 4 of the Convention of the lack of impartiality of a judge of the Administrative Appeals Commission of the Canton of St Gall, which had decided on her request for release from a psychiatric clinic.

4. On 10 September 1997 the Commission declared the applicant's complaint admissible. In its report of 9 September 1999 (former Article 31 of the Convention) [*Note by the Registry*. The report is obtainable from the Registry], it expressed the opinion that there had been a violation of Article 5 § 4 (twenty votes to six).

5. Before the Commission, the applicant, who had been granted legal aid, was represented until 28 April 1997 by Mr Ch. Bernhart, a lawyer practising in St Gall, Switzerland. As from 30 May 1997 she was represented before the Commission and later before the Court by Mr B. Eugster, a lawyer also practising in St Gall. The Government were represented by their Deputy Agent, Mr F. Schürmann, head of the Human Rights and Council of Europe Section of the Federal Office of Justice.

6. On 6 December 1999 a panel of the Grand Chamber determined that the case should be decided by the Grand Chamber (Rule 100 § 1 of the Rules of Court). The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and former Rule 24. The President of the Grand Chamber acceded to the applicant's request not to have her name disclosed (Rule 47 § 3).

7. The applicant and the Government each filed a memorial.

8. After consulting the Agent of the Government and the applicant's lawyer, the Grand Chamber decided that it was not necessary to hold a hearing (Rule 59 § 2 *in fine*).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant, born in 1964, had been placed in psychiatric detention on eleven occasions since 1989. In 1994 she was hospitalised in February, June and September.

10. On 14 November 1994 Dr E., a district medical officer (*Bezirksarzt*) in St Gall, decided in agreement with the applicant to send her to the Wil cantonal psychiatric clinic ("the psychiatric clinic") on account of chronic schizophrenia and of constituting a danger to herself.

11. On 1 December 1994 the applicant applied for release from the psychiatric clinic. Her request was refused on the same day by Dr O., the chief medical officer of the psychiatric clinic, who referred, *inter alia*, to a psychotic outbreak (*Schub*) of recurring schizophrenia and to her inability to accept her illness (*mangelnde Krankheitseinsicht*).

12. On 12 December 1994 the applicant, who was represented by counsel, filed an application with the Administrative Appeals Commission

(*Verwaltungsrekurskommission*) of the Canton of St Gall, requesting, with reference to Article 397e § 2 of the Swiss Civil Code (*Zivilgesetzbuch*), her release from the psychiatric clinic. She also requested that the expert who was to examine her should not act as specialised judge (*Fachrichter*).

13. The Administrative Appeals Commission appointed one of its members, R.W., a doctor specialising in psychiatry and psychotherapy, to act as judge rapporteur.

14. On 15 December 1994 R.W. interviewed the applicant at the psychiatric clinic from 2.25 p.m. to 3.15 p.m. A court registrar (*Gerichtsschreiberin*) was also present. According to the verbatim record prepared by the latter, R.W. concluded the interview as follows:

“W. explains the further procedure and that the hearing will take place on 28 December 1994.

W.: I shall propose to the court to dismiss the action.

N.: Pity.”

15. By letter of 19 December 1994 the Administrative Appeals Commission informed the applicant’s counsel that the hearing had been fixed for 28 December 1994 at the psychiatric clinic. The letter referred to R.W. as being one of the specialised judges on the bench and rapporteur. It was further stated that at the hearing counsel would have the opportunity to comment on the expert opinion and on the case file.

16. On 23 December 1994 R.W. submitted his expert opinion. He diagnosed a schizophrenic mental illness and found that the applicant could not be released in view of the required high doses of medication. The report concluded: “If the applicant’s situation does not clearly improve before the date of the hearing, I recommend dismissal of the action. The applicant may consult this report.”

17. The hearing took place on 28 December 1994 at the psychiatric clinic. The bench of the Administrative Appeals Commission consisted of the President, who was a professional judge, and four other judges, namely a youth attorney (*Jugendanwalt*) and lawyer; a district director and curator (*Amtsvormund*) of the social services; an administrator of Pro Infirmis, a charitable association assisting the ill; and R.W., the rapporteur. The Administrative Appeals Commission heard two doctors from the psychiatric clinic and the applicant. The applicant’s counsel, who was on holiday, remained absent, the Administrative Appeals Commission having refused to grant his request to postpone the hearing until January 1995.

18. On 28 December 1994 the Administrative Appeals Commission dismissed the applicant’s action.

19. In its decision, the Administrative Appeals Commission concluded with reference, *inter alia*, to R.W.’s expert opinion that the applicant

suffered from severe mental disturbances warranting her detention in a psychiatric institution.

20. In so far as the applicant had requested to be examined by an expert who was not a member of the Administrative Appeals Commission, it was found that she had not substantiated her request. Reference was made to the case-law of the Federal Court (*Bundesgericht*), in particular a decision published in 1993 (*Bundesgerichtsentscheide* (BGE), vol. 119 Ia, p. 260), where that court had not expressly ruled out the combination of expert and judicial functions.

21. The applicant lodged a public-law appeal (*staatsrechtliche Beschwerde*) with the Federal Court, complaining, *inter alia*, of the position of the expert R.W., who should not have dealt with the case as he had already previously dealt with it by acting as an expert (*Vorbefassung*).

22. On 3 April 1995 the Federal Court dismissed the public-law appeal. In respect of the position of the expert, the court found, with reference to its own case-law:

“In the letter ... of 19 December 1994 counsel for the applicant was informed of the identity of the expert, and also that he would act as specialised judge and rapporteur. Already in her application to the Administrative Appeals Commission the applicant had provisionally requested that the expert should not act as specialised judge. However, she does not discuss the contrary opinion of the Federal Court. In line with the Federal Council’s Message to Parliament concerning the part of the Civil Code dealing with committal to a psychiatric institution, ... it has not been called in question that experts within the meaning of Article 397e § 5 of the Civil Code will also act as members of the deciding body ..., to the extent that their position can at all be compared with that of a regular expert who is consulted in evidence proceedings ... It is true that the Federal Court has recently described the combination of expert and judicial functions as being ‘not entirely unobjectionable’ ... However, no change of case-law can be seen in that decision, and the applicant has not shown today in what respect such a change would be called for ...”

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Swiss Civil Code

23. Articles 397a et seq. of the Swiss Civil Code concern deprivation of liberty, *inter alia*, on account of mental illness. Articles 397a and 397b list the conditions for such deprivation. Articles 397d, 397e and 397f provide as follows, in the version applicable at the relevant time:

“Article 397d

D. Judicial review

1. The person concerned or another close person may lodge in writing with the judge a complaint against the decision within ten days of its receipt.

2. This right shall apply even if a request for release has been refused.

Article 397e

E. Proceedings in the cantons

I. In general

The proceedings shall be determined by the cantonal law with the following exceptions:

1. In each decision the person concerned shall be told the reasons of the decision and informed in writing of the possibility of lodging a complaint with a judge.

2. Every person who enters a clinic must immediately be informed in writing that a complaint can be lodged with a judge in case of detention or if a request for release is refused.

3. A request for judicial examination shall immediately be transferred to the competent judge.

4. The request for judicial examination can be granted suspensive effect by the authority ordering the hospitalisation or by the judge.

5. In the case of mentally ill persons a decision can only be taken after consultation of an expert; if in judicial proceedings this has already happened, higher courts need not do so.

Article 397f

II. Before the court

1. The judge shall decide in simple and speedy proceedings.

2. Where necessary he shall appoint a legal representative for the person.

3. The judge of first instance shall hear this person orally.”

24. Upon enactment of these provisions the Federal Council published in 1977 in the Official Gazette (*Bundesblatt* 1977, vol. III, p. 37) a message (*Botschaft*) to the Federal Parliament in which it was explained that cantons were free to appoint as experts for these release proceedings persons within or outside the judicial body deciding on the release.

B. Case-law of the Swiss Federal Court

25. The Federal Court has developed extensive case-law on Article 397e § 5 (see paragraph 23 above). In a judgment published in 1984 (BGE, vol. 110 II, p. 122) it dealt with the issue whether the expert referred to in Article 397e § 5 could act as a judge in the proceedings and stated:

“This provision is complied with if experts belong as members to the deciding body ... The purpose of the statutory provision is that in the case of mentally ill persons no decision should be taken without the advice and the specialised knowledge of psychiatrically trained doctors. This will be the case in an optimal manner if such doctors participate as members of the judicial body.”

26. In a judgment of 1992 (BGE, vol. 118 II, p. 253) the court stated:

“It is one of the essential procedural guarantees that the expert mentioned in Article 397e § 5 of the Civil Code, even if he is not a member of the deciding body, shall be both an established expert and impartial. This implies that the expert shall not already have expressed an opinion on the illness of the person concerned in the same procedure, i.e. in the administrative proceedings preceding the court procedure ... For it should not be overlooked that the judge who examines the grounds stated in Article 397a §§ 1 and 3 of the Civil Code will substantially depend on the opinion of the expert. The position granted by the federal legislator to the expert within the framework of detention on grounds of protective care is exceptional: his position cannot at all be compared with that of an expert who is consulted in proceedings in which evidence is taken. The expert must imperatively be heard before the contested decision whether or not to release a person from detention.”

27. In judgments published in 1993 (BGE, vol. 119 Ia, p 260, and vol. 119 II, p. 319) the Federal Court referred to the “not entirely unobjectionable combination of expert and judicial functions” (“*nicht ganz unbedenkliche Verquickung sachverständiger und richterlicher Funktionen*”) and, in respect of the expert

mentioned in Article 397e § 5 of the Civil Code, to “the particular requirement of critical objectivity towards clinical doctors and psychiatrists” (“*die hier besonders geforderte kritische Objektivität gegenüber den Klinikärzten und den Psychiatern*”).

C. The Administrative Appeals Commission of the Canton of St Gall

28. In the Canton of St Gall the Administrative Appeals Commission (*Verwaltungsrekurskommission*) is the competent body to decide on matters of deprivation of liberty if and when a person contests detention. The commission has one full-time judge and twenty-four to thirty specialised judges, including doctors (often psychiatrists) and social workers. The professional judges are appointed by the cantonal parliament; the non-professional judges and the specialised judges are appointed, upon proposal of the Administrative Tribunal of the Canton of St Gall, by the cantonal government. A judge’s term of office lasts six years.

29. The Administrative Appeals Commission sits with five judges, including regular judges and specialised judges.

30. The Administrative Appeals Commission has opted for the system whereby the expert required by Article 397e § 5 of the Civil Code is appointed from the bench of judges.

31. According to section 71c(2) of the Act on Administrative Court Procedure (*Gesetz über die Verwaltungsrechtspflege*) of the Canton of St Gall, in the version in force at the relevant time, after an action has been filed with the Administrative Appeals Commission the President will immediately order the questioning of the person concerned by a judge. The questioning is undertaken by the judge rapporteur who will then prepare an expert opinion (Rule 6 of the Rules of Procedure of the Administrative Appeals Commission – *Reglement über den Geschäftsgang der Verwaltungsrekurskommission*).

THE LAW

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

32. The applicant complained of the lack of impartiality of R.W., a judge of the Administrative Appeals Commission of the Canton of St Gall which decided on her request for release from a psychiatric clinic. She relied on Article 5 § 4 of the Convention, 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.”

33. The Commission expressed the opinion that there had been a breach of that provision; the Government contested that conclusion.

A. Arguments before the Court

1. The applicant

34. The applicant submitted that in view of the expert opinion which he had prepared earlier, R.W. had a preconceived opinion when deciding as a judge on her request for release from the psychiatric clinic. This preconceived opinion played an even bigger role as the other judges knew nothing about the matter and had to rely completely on R.W. as the only psychiatrist on the bench.

2. *The Government*

35. The Government submitted that the position of R.W. complied with the requirements of Article 5 § 4 of the Convention. This provision did not require a court of law of the classic kind which was integrated within the standard domestic judicial machinery. States were free to choose different methods of performing their obligations under Article 5 § 4 of the Convention (see *X v. the United Kingdom*, judgment of 5 November 1981, Series A no. 46, p. 23, § 53). In the present case, the requirements under this provision had been fully met, in that the specific procedures had been adapted to the particular form of detention at issue.

36. The Government recalled that Article 397f § 1 of the Swiss Civil Code required “simple” proceedings. Moreover, the Administrative Appeals Commission of the Canton of St Gall consisted of two lawyers, a medical expert, and two judges from other professions. The Canton of St Gall thus wished to avoid too much emphasis being placed on the medical aspect of the case, since the decision to deprive a person of his or her liberty necessitated a multidisciplinary examination. In the Government’s opinion, it was understandable, on the other hand, that the psychiatrist’s point of view should play an essential part in the Administrative Appeals Commission’s decision. A judge could obtain a specialised knowledge within the proceedings. This situation resembled the functions of the delegates of the Commission when taking evidence in application of former Article 28 (a) of the Convention, as pointed out in the dissenting opinion contained in the Commission’s report prepared under former Article 31 of the Convention.

37. In the Government’s opinion, it was incorrect to consider that R.W. had acted in different functions at different stages of the proceedings. Rather, as rapporteur he had been called upon to prepare, for the Administrative Appeals Commission, an expert judicial opinion within the framework of the judicial proceedings. Once R.W. had prepared his report, the Administrative Appeals Commission had conducted a hearing at which all judges were present and the applicant had had the possibility of calling in question his conclusions. The applicant’s lawyer, on the other hand, had not participated in the hearing as he was on holiday, and the Administrative Appeals Commission had rightly refused his request to adjourn the hearing. When all is said and done, while the lawyer had requested at the outset that the expert psychiatrist in these proceedings should not be a member of the Administrative Appeals Commission, neither he nor the applicant had called in question R.W.’s independence and impartiality as a judge.

3. *The Commission*

38. The Commission considered on the basis of the Court’s case-law that, in view of the position of R.W., the Administrative Appeals

Commission dealing with the applicant's request for release from the psychiatric clinic was not a "court" within the meaning of Article 5 § 4 of the Convention. A dissenting opinion saw no violation of Article 5 § 4 inasmuch as the particular procedures in the present case had been adapted to the relevant circumstances in an appropriate manner.

B. The Court's assessment

39. It is not in dispute between the parties that the Administrative Appeals Commission, deciding on the applicant's request for release from the psychiatric clinic, constituted in principle a "court" within the meaning of Article 5 § 4 of the Convention which had the competence to "decide" the "lawfulness" of the applicant's detention and to order release if the detention was unlawful (see *Weeks v. the United Kingdom*, judgment of 2 March 1987, Series A no. 114, p. 30, § 61). It is true that the Administrative Appeals Commission consisted in the present case, in addition to the two lawyers, of three specialised judges, including the psychiatrist R.W. who also acted as rapporteur in the applicant's case. However, under Article 5 § 4 of the Convention, States are granted a certain freedom to choose the most appropriate system for judicial review, and it is not within the province of the Court to inquire what would be the best or most appropriate system in such matters (see *X v. the United Kingdom*, cited above, p. 23, § 53).

40. In the present case, however, the applicant called in question the impartiality of R.W. who, as judge rapporteur, had been asked to prepare an expert opinion on her state of health. The Government maintained that the requirements under Article 5 § 4 of the Convention had been fully met in that the procedures before the Administrative Appeals Commission had been adapted to the particular form of detention at issue.

41. According to the Court's case-law, although it is not always necessary for proceedings under Article 5 § 4 to be attended by the same guarantees as those required under Article 6 § 1 for criminal or civil litigation, they must have a judicial character and provide guarantees appropriate to the kind of deprivation of liberty in question (see *Niedbala v. Poland*, no. 27915/95, § 66, 4 July 2000, unreported).

42. It is true that Article 5 § 4 of the Convention, which enshrines the right "to take proceedings [in] a court", does not stipulate the requirement of that court's independence and impartiality and thus differs from Article 6 § 1 which refers, *inter alia*, to an "independent and impartial tribunal". However, the Court has held that independence is one of the most important constitutive elements of the notion of a "court", as referred to in several Articles of the Convention (see *De Wilde, Ooms and Versyp v. Belgium*, judgment of 18 June 1971, Series A no. 12, pp. 41-42, § 78). In the Court's opinion, it would be inconceivable that Article 5 § 4 of the Convention,

relating, *inter alia*, to such a sensitive issue as the deprivation of liberty of “persons of unsound mind” within the meaning of Article 5 § 1 (e), should not equally envisage, as a fundamental requisite, the impartiality of that court.

43. In the present case, the applicant contended that R.W. had had a preconceived opinion when deciding as one of five members of the Administrative Appeals Commission on her request for release from psychiatric detention. The applicant pointed out in particular that R.W. had interviewed her and expressed himself before the hearing on her state of health and on his proposal to the commission about her release.

44. In examining the impartiality of R.W. in exercising his functions as judge rapporteur, the Court recalls that impartiality must be determined by a subjective test, that is on the basis of the personal conviction of a particular judge in a given case, and also by an objective test, that is ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect (see, among other authorities, *Castillo Algar v. Spain*, judgment of 28 October 1998, *Reports of Judgments and Decisions* 1998-VIII, p. 3116, §§ 43 et seq.).

45. The personal impartiality of a judge must be presumed until there is proof to the contrary, and in the present case no such proof has been put forward (see *Hauschildt v. Denmark*, judgment of 24 May 1989, Series A no. 154, p. 21, § 47).

46. Under the objective test, it must be determined whether, irrespective of the judge’s personal conduct, there are ascertainable facts which may raise doubts as to his impartiality. Account must be taken in particular of internal organisation, though the mere fact that civil servants sit on account of their experience cannot give rise to doubts as to the independence and impartiality of the court (see *Piersack v. Belgium*, judgment of 1 October 1982, Series A no. 53, p. 15, § 30 (d), and *Stallinger and Kuso v. Austria*, judgment of 23 April 1997, *Reports* 1997-II, p. 677, § 37). In this respect even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public, including the parties to the proceedings. Accordingly, any judge in respect of whom there is a legitimate reason to fear a lack of impartiality must withdraw. In deciding whether in a given case there is a legitimate reason to fear that a particular judge lacks impartiality, the standpoint of the parties concerned is important but not decisive. What is decisive is whether this fear can be held to be objectively justified (see, *mutatis mutandis*, *Hauschildt*, cited above, p. 21, § 48).

47. The Government pointed out that the applicant had failed in these proceedings to challenge R.W.’s independence and impartiality. However, the Court notes that the applicant had indeed requested in her application for release from detention of 1 December 1994 that the expert who would

examine her should not act as specialised judge of the Administrative Appeals Commission.

48. The Court has had regard to the extent and nature of R.W.'s activities. As it has been emphasised by the Government, R.W. exercised one and the same function throughout the proceedings. He was acting as judge rapporteur who was called upon fully to examine, to assess, and to comment upon the applicant's state of health and thereby to decide whether or not she should be released from psychiatric detention.

49. Both the Government and the dissenting opinion contained in the Commission's report pointed out, in addition, that R.W.'s activities constituted typical functions of a judge rapporteur who with his specialised knowledge was logically called upon to hear evidence. Moreover, his activities could be compared to those of delegates of the former Commission who would make a proposal after having taken evidence in application of former Article 28 (a) of the Convention.

50. The Court has distinguished the following activities of R.W. as judge rapporteur. First, on 15 December 1994 he conducted an interview with the applicant as a result of which he concluded that "[he would] propose to the commission to dismiss the action". Next, on 23 December 1994 he submitted his expert opinion on the applicant's state of health in which he stated that "if the applicant's situation [did] not clearly improve until the date of the hearing, [he would] recommend dismissal of the action". Five days later, on 28 December 1994, the Administrative Appeals Commission conducted a hearing at which the applicant and other persons were heard; all the judges were present, including R.W. Finally, still on 28 December, the Administrative Appeals Commission issued its decision which was prepared by all the judges, including R.W.

51. In view of these various activities, the present case differs, in the Court's opinion, from proceedings where a judge rapporteur is in a position, after the hearing and during the court's deliberations, to examine and comment upon specialised evidence, for instance expert opinions, submitted to the court by an external specialist. The situation also differs from that of the delegates of the former Commission who, when taking evidence, were not in a position to inform the parties as to any proposals they might later make before the Commission, since the Commission's proceedings were conducted in camera (see former Article 33 of the Convention).

52. Indeed, while it is to be expected that a court-appointed expert will duly transmit the expert opinion, with its conclusions, both to the court and to the parties to the proceedings, it is unusual for an expert judge, as in the present case, to have formed his or her opinion and disclosed it to the parties before the hearing.

53. It is true that, according to the Federal Court's case-law, the position of an expert within the framework of psychiatric detention differs substantially from that of an expert consulted in proceedings in which

evidence is taken (see paragraph 26 above). However, in the Court's opinion, in either proceedings experts are only called upon to assist a court with pertinent advice derived from their specialised knowledge without having adjudicative functions. It is up to the particular court and its judges to assess such expert advice together with all other relevant information and evidence. An issue will arise as to the impartiality of the court under the objective test if it is called upon to assess evidence which had previously been given by one of its judges in the form of expert advice. The Court must accordingly examine the apprehensions which arose for the applicant in the course of these proceedings.

54. When the applicant attended the hearing before the Administrative Appeals Commission on 28 December 1994, R.W. had already twice formulated his conclusion – orally during the interview on 15 December, and in writing in his report of 23 December – that, as a result of the psychiatric examination, he would propose to the Administrative Appeals Commission to dismiss her request for release from detention. In the Court's opinion, this situation raised legitimate fears in the applicant that, as a result of R.W.'s position in these proceedings, he had a preconceived opinion as to her request for release from detention and that he was not, therefore, approaching her case with due impartiality (see, *mutatis mutandis*, *De Haan v. the Netherlands*, judgment of 26 August 1997, *Reports* 1997-IV, pp. 1392-93, § 51).

55. The applicant's fears would have been reinforced by R.W.'s position on the bench of the Administrative Appeals Commission where he was the sole psychiatric expert among the judges as well as the only person who had interviewed her. The applicant could legitimately fear that R.W.'s opinion carried particular weight in taking the decision.

56. In the Court's view, these circumstances taken as a whole serve objectively to justify the applicant's apprehension that R.W., sitting as a judge in the Administrative Appeals Commission, lacked the necessary impartiality.

57. Consequently, there has been a violation of Article 5 § 4 of the Convention in the present case.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

58. Article 41 of the Convention provides:

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

A. Damage

59. The applicant claimed compensation for non-pecuniary damage in an amount to be determined by the Court. The Government asked the Court to rule that the finding of a violation constituted sufficient just satisfaction.

60. The Court, making an assessment on an equitable basis, awards the applicant 3,000 Swiss francs (CHF) under this head.

B. Costs and expenses

61. Under this head the applicant's present counsel claimed out-of-pocket expenses of CHF 1,182.90 as well as fees in respect of 34.23 hours' work. The applicant's former counsel claimed a total of CHF 2,800.

62. The Government contended that no costs had been imposed on the applicant in the domestic proceedings. In addition, the Federal Court had awarded the applicant legal aid to the amount of CHF 700.

The Government regarded the sum of CHF 2,000 as adequate for the lawyer's costs in the Strasbourg proceedings.

63. The Court, in accordance with its case-law, will consider whether the costs and expenses claimed were actually and necessarily incurred in order to prevent or obtain redress for the matter found to constitute a violation of the Convention and were reasonable as to quantum (see, for instance, *Nilsen and Johnsen v. Norway* [GC], no. 23118/93, § 62, ECHR 1999-VIII).

64. The Court finds the applicant's claims excessive. Making an assessment on an equitable basis, and having deducted the legal aid awarded to the applicant which amounted to 6,200 French francs, the Court awards her CHF 1,500 in respect of the costs and expenses of her former counsel, and CHF 2,000 in respect of the costs and expenses of her present counsel.

C. Default interest

65. According to the information available to the Court, the statutory rate of interest applicable in Switzerland at the date of adoption of the present judgment is 5% per annum.

FOR THESE REASONS, THE COURT

1. *Holds* by twelve votes to five that there has been a violation of Article 5 § 4 of the Convention;
2. *Holds* unanimously
 - (a) that the respondent State is to pay the applicant, within three months, CHF 3,000 (three thousand Swiss francs) in respect of non-pecuniary damage and CHF 3,500 (three thousand five hundred Swiss francs) in respect of legal costs;
 - (b) that simple interest at an annual rate of 5% shall be payable from the expiry of the above-mentioned three months until settlement;
3. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English and in French, and notified in writing on 29 March 2001, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Elisabeth PALM
President

Michele DE SALVIA
Registrar

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the dissenting opinion of Mr Wildhaber, Mr Türmen, Mr Butkevych, Mr Baka and Mrs Botoucharova is annexed to this judgment.

E.P.
M. de S.

DISSENTING OPINION OF JUDGES WILDHABER,
TÜRMEŒ, BUTKEVYCH, BAKA AND BOTOCHAROVA

To our regret, we cannot share the Court's conclusion that there has been a violation of Article 5 § 4 of the Convention.

The issue in the present case is whether R.W.'s impartiality was objectively questionable, given the fact that he had made known in advance the conclusions of his medical examination of the applicant, that is, before the Administrative Appeals Commission decided on the applicant's action and in particular before the hearing took place on 28 December 1994.

By way of background to the case, we note that, when R.W. interviewed and examined the applicant, she had already been examined by two other medical experts. That such a further medical examination took place in the context of the judicial proceedings was highly desirable and in fact the result of an amendment in 1978 of the Swiss Civil Code, in particular of Article 397e § 5, which aimed at complying with the requirements under the Convention.

Turning to the legal analysis of the facts, it is established case-law that, under Article 5 § 4 of the Convention, States are granted a certain freedom to choose the most appropriate system for judicial review, and it is not within the province of the Court to inquire what would be the best or most appropriate system in such matters (see *X v. the United Kingdom*, judgment of 5 November 1981, Series A no. 46, p. 23, § 53).

This freedom left to States under Article 5 § 4 of the Convention is decisive for the present case, which concerns psychiatric detention, a highly sensitive issue calling for fair, transparent and speedy proceedings. It is striking how Article 5 § 4 of the Convention differs from Article 6 § 1 of the Convention in that it does not expressly list the impartiality and independence of the "court" as a requirement. Clearly, Article 5 § 4 expects States to adapt the proceedings to the circumstances and necessities of the particular form of detention at issue.

In respect of the requirement of impartiality, the mere fact that a judge has previously taken part in the proceedings does not in itself raise an issue as to the judge's impartiality. What matters are the extent and nature of the functions (see, *mutatis mutandis*, *Hauschildt v. Denmark*, judgment of 24 May 1989, Series A no. 154, p. 22, § 50).

In the present case, R.W.'s medical expert opinion indubitably played an important part in the proceedings. However, it should not be overlooked that the Administrative Appeals Commission, in addition to its President and R.W., also comprised three other judges, namely a youth attorney, a curator and an administrator of Pro Infirmis, a charitable association assisting the ill. Together, they ensured that all aspects of the applicant's situation were duly considered when deciding on her psychiatric detention.

Above all, the present case does not concern R.W.'s personal view as to the applicant's continuing detention. He was appointed by the Administrative Appeals Commission as an expert to hear the applicant. We are then confronted with his conclusion, following the medical examination, as to the applicant's state of mental health. As one would expect from any medical report, and this has not been contested by the applicant, R.W. drew objective conclusions as to the particular illness befalling her. A confirmation for this strictly medical and objective character of the report can be found in R.W.'s statement of 23 December 1994 in which he specifically left open the possibility of an improvement, a circumstance which would have changed his view.

No issue arises, therefore, in the present case as to a preconceived opinion of R.W. All he did was present the objective medical conclusions of his examination of the applicant. Indeed, it would have been objectionable if R.W.'s report had *not* been made public. The procedure of the Canton of St Gall as it stands today enables complete transparency. It enabled in particular the applicant fully to contest, at the hearing, the medical conclusions reached by R.W.

On the whole, in our opinion the review procedures envisaged by the Canton of St Gall for such cases of detention therefore fell within the freedom left to States under Article 5 § 4 of the Convention.