



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

FIRST SECTION

CASE OF RUTTEN v. THE NETHERLANDS

(Application no. 32605/96)

JUDGMENT

STRASBOURG

24 July 2001

FINAL

24/10/2001

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Rutten v. the Netherlands,

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

Mrs E. PALM, *President*,
Mrs W. THOMASSEN,
Mr GAUKUR JÖRUNDSSON,
Mr R. TÜRMEŒ,
Mr C. BİRSAN,
Mr J. CASADEVALL,
Mr R. MARUSTE, *judges*,

and Mr M. O'BOYLE, *Section Registrar*,

Having deliberated in private on 22 May 2001 and on 3 July 2001,

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

PROCEDURE

1. The case originated in an application (no. 32605/96) against the Kingdom of the Netherlands lodged with the European Commission of Human Rights ("the Commission") under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Dutch national, Mr Ronald G.J. Rutten ("the applicant"), on 28 May 1996.

2. The applicant, who had been granted legal aid, was represented before the Court by Ms J. Kuijper and Mr J. Rammelt, both lawyers practising in Amsterdam. The Dutch Government ("the Government") were represented by their Agents, Mr R. Böcker and Mrs J. Schukking, of the Netherlands Ministry of Foreign Affairs.

3. The applicant alleged that the decision to prolong his TBS order was contrary to his rights under Article 5 §§ 1 and 4 of the Convention.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the First Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1 of the Rules of Court.

6. By a decision of 28 March 2000 the Chamber declared the application admissible.

7. The Government, but not the applicant, filed observations on the merits (Rule 59 § 1).

8. A hearing took place in public in the Human Rights Building, Strasbourg, on 22 May 2001 (Rule 59 § 2).

There appeared before the Court:

(a) *for the Government*

Mr J. BÖCKER, Ministry of Foreign Affairs,	<i>Agent,</i>
Mr J. STRUYKER BOUDIER, Ministry of Justice,	
Ms R. VAN DER ZON, Ministry of Justice,	<i>Advisers.</i>

(b) *for the applicant*

Mr J. RAMMELT,	<i>Counsel,</i>
Ms A. RICCI ASCOLI,	<i>Adviser.</i>

The Court heard addresses by Mr Rammelt and Mr Böcker.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. On 13 August 1992, following proceedings on appeal, the Arnhem Court of Appeal (*Gerechtshof*) convicted the applicant of attempted homicide and sentenced him to eight months' imprisonment with deduction of the time spent in pre-trial detention. In addition, the Court of Appeal imposed a TBS order (*terbeschikkingstelling*) with confinement to a secure institution (*met bevel tot verpleging van overheidswege*). The TBS order took effect on 4 September 1992 and expired two years later, on 4 September 1994.

10. By decision of 9 September 1994, the Arnhem Regional Court (*Arrondissementsrechtbank*) of Arnhem prolonged the TBS order by one year. It was consequently due to expire on 4 September 1995.

11. On 18 July 1995 the public prosecutor filed a request for a further prolongation with the Arnhem Regional Court, where it was registered on 19 July 1995. This prolongation request was based on an advice of 6 July 1995 by the secure institution where the applicant was being treated. In this advice, a prolongation of the TBS order was recommended because the applicant was still considered capable of being seriously aggressive towards other people.

12. The Regional Court examined the request in the course of a hearing held on 22 September 1995. The applicant submitted that the public prosecutor's request for a prolongation should be declared inadmissible

since the Regional Court was no longer competent to prolong his TBS order as it had expired on 4 September 1995. The applicant further submitted that the Regional Court had failed to comply with Article 509t of the Code of Criminal Procedure (*Wetboek van Strafvordering*; hereinafter referred to as “CCP”) which provides that a decision on a request for prolongation has to be taken within two months after the submission of the request for prolongation.

13. In its decision of 6 October 1995, the Regional Court rejected the applicant’s arguments and prolonged his TBS order with confinement to a secure institution by one more year, taking into account the advice issued by the secure institution where the applicant was being treated and the testimony of an expert witness, recommending that the TBS order should be extended because the applicant was still considered capable of being seriously aggressive towards others. The Regional Court admitted that the examination of the request had not taken place within the time-limit contained in Article 509t CCP and that the reason therefor was the fact that during the holiday months it had not been able to hold sufficient hearings with judges having the specialised knowledge needed. However, it held that a failure to observe the time-limit in Article 509t CCP did not imply that the public prosecutor’s request should be declared inadmissible. It noted that the date of the hearing in the instant case had been fixed on 20 July 1995, i.e. within a period of two months after the submission of the prolongation request. It further noted that, by summons of 28 July 1995, the applicant had been invited to appear at the hearing of 22 September 1995 and that a copy of the summons had been sent to his representative. The Regional Court considered that, if the latter had objected to the fixing of that date, the hearing could have been rescheduled for an earlier date during the recess. The Regional Court concluded that in all these circumstances the general security of persons required a prolongation of the TBS order.

14. The applicant filed an appeal with the Arnhem Court of Appeal on 11 October 1995. In the course of a hearing held on 15 January 1996, the Court of Appeal heard the applicant and a psychologist working in the secure institution where the applicant was under treatment.

15. In its decision of 29 January 1996, the Court of Appeal noted that the decision of 6 October 1995 had been taken seventeen days after the expiry of the time-limit provided for in Article 509t CCP. It held that the Regional Court could and should have scheduled a hearing date before the expiry of the time-limit. Moreover, Article 509t CCP made the Regional Court responsible and not the applicant or his lawyer to see to it that the time-limit was observed. It further held that failure to observe the time-limit entailed neither the inadmissibility of the prosecution’s request, nor the incompetence of the Regional Court to examine this request, nor yet the expiry of the TBS order. On the basis of the failure to respect the time-limit referred to in Article 509t CCP and the unsatisfactory reasons therefor

stated by the Regional Court, the Court of Appeal decided to quash the decision of 6 October 1995 and, on appeal, to determine itself the prolongation request.

16. After having noted the advice of the secure institution where the applicant was receiving treatment and an expert opinion concerning the applicant's medical condition, the Court of Appeal decided to extend the TBS order with confinement to a secure institution by one year.

17. The applicant's post-sentence confinement, the order was finally terminated on 9 December 2000.

II. RELEVANT DOMESTIC LAW AND PRACTICE

18. Article 37a of the Netherlands Criminal Code (*Wetboek van Strafrecht*) enables courts, when dealing with certain serious crimes, to impose a TBS order on a defendant whose mental faculties were inadequately developed or pathologically disturbed at the time of the commission of the offence. If the safety of others or the general safety of persons or goods so requires, the court may further direct that such a person be confined to a secure institution in accordance with Article 37b of the Criminal Code. A TBS order with confinement to a secure institution can also be imposed in conjunction with a custodial sanction if the convicted person's responsibility was merely diminished at the time of the commission of the offence. In such a situation, the TBS order will take effect after the convicted person has served the prison sentence imposed. A TBS order with confinement to a secure institution is not intended to have a punitive effect, but to protect society from any risk posed by the person concerned. A confinement order is subject to statutory time-limits, but there is in principle no restriction on the number of extensions that can be granted.

19. The provisions relating to the extension of a confinement order are set out in Articles 509o – 509x of the Code of Criminal Procedure (*Wetboek van Strafvordering*; "CCP").

20. Article 509o § 1 CCP provides that the public prosecutor's office (*openbaar ministerie*) may submit a request (*vordering*) for the prolongation of a confinement order no sooner than two months and no later than one month before the time at which the TBS order is due to expire. The request must be accompanied by a recent recommendation prepared by the institution in which the patient is being treated (Article 509o § 2 CCP). In accordance with the provisions of Article 509o § 6 CCP, the person concerned must be given a copy of the request as soon as possible.

21. The court competent to decide on such a request is the Regional Court that tried the person concerned at first instance for the crime that gave rise to the TBS order (Article 509p).

22. Article 509q CCP, in so far as relevant, reads:

“1. The TBS order shall remain in force as long as no final decision on the request <for its prolongation> has been taken (“*zolang op de vordering niet onherroepelijk is beslist ...*”). Where the request is granted after the day on which the TBS order, by passage of time, would have expired had no prolongation request been filed, the new period shall nevertheless start to run on that day. ...”

23. The Regional Court must immediately (*onverwijld*) set a date for the examination of the case, and the person concerned must be timely informed of this date (Article 509s § 1). The decision of the Regional Court must be rendered as soon as possible, but no later than two months from the date on which the request was lodged (Article 509t § 1). The Regional Court may, however, exceed this time-limit if it wishes to consider refusing the request – thus terminating the TBS order – and if it needs more information as to the way in which the person concerned might be released back into society. In such a case, the court has an additional three months to render its decision (Article 509t § 2).

24. Under Article 509t § 3 CCP, the time-limit referred to in Article 509t § 1 CCP does not apply where a circumstance has arisen on grounds of which the court cannot comply with its obligation pursuant to Article 509s CCP to hear the person concerned before deciding the request. In such a situation, the Regional Court must decide the prolongation request within a period of two months after the obstacle for hearing the person concerned has ceased to exist.

25. The Regional Court’s decision shall be reasoned. If it decides to prolong the TBS order, the decision must be pronounced publicly (Article 509t § 4). An appeal against a decision on a prolongation request lies with the Arnhem Court of Appeal, which must determine the appeal as soon as possible (Article 509x § 1 CCP). However, no appeal lies against a first decision to prolong the TBS order for one year (Article 509v).

26. There is no express provision requiring the release of the person concerned if the time-limits laid down by Articles 509o § 1 and 509t §§ 1 and 2 are not complied with, nor does the CCP impose any sanctions on exceeding these time-limits.

27. According to Netherlands case-law, summary civil proceedings (*kort geding*) may be instituted in cases where a person subject to a confinement order wishes to obtain a court judgment on the lawfulness of his detention.

28. In a judgment of the Supreme Court (*Hoge Raad*) of 14 June 1974 (*Nederlandse Jurisprudentie* (NJ) 1974, no. 436), it was held that a confinement order remains lawful even if the decision to prolong it has been taken after the expiry of the two months’ time-limit now provided for in Article 509t § 1 CCP, as this time-limit is merely of an exhortatory nature.

29. According to a judgment of the Supreme Court of 29 September 1989 (NJ 1990, no. 2), a failure to comply with the statutory two months’ time-limit does not in itself give rise to an obligation to terminate a

confinement order and to release the person concerned. Only in certain circumstances would the State be obliged to terminate a confinement order after its statutory period had expired and no decision as to its prolongation had been taken. In order to determine whether such an obligation exists, the court should have regard to the extent to which the statutory time-limit had been exceeded, the reasons for which the time-limit had not been complied with and the personal and societal interests involved.

30. In decisions taken on 17 April 1989 and 21 December 1992, the Arnhem Court of Appeal held that a failure to respect the time-limit set out in Article 509t § 1 CCP does not affect the validity of the running confinement order since, in accordance with Article 509q CCP, it remains in force until a final decision has been taken on request for prolongation thereof.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 §§ 1 AND 4 OF THE CONVENTION

31. The applicant complains under Article 5 § 1 of the Convention that the decision to prolong his TBS order was not given in a procedure prescribed by law in that during the period from 4 September to 6 October 1995 there was no judicial decision authorising his detention. The applicant further complains that the decision to prolong the TBS order was not taken speedily as required by Article 5 § 4 of the Convention.

32. Article 5 of the Convention, in so far as relevant, reads:

“1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

...

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

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

1. Article 5 § 1 of the Convention

33. The Government submit that the applicant's detention between 4 September and 6 October 1995 was lawful. The two months' time-limit referred to in Article 509t CCP imposes an obligation on the courts and, although this obligation serves the interests of the person concerned, it does not confer a right, as such, on that person. Both the relevant statutory provisions and the case-law of the Dutch courts clearly indicate that exceeding the time-limit contained in Article 509t § 1 CCP does not necessarily imply that the confinement to a secure institution should be terminated or that the TBS order has become unlawful once the statutory period has expired.

34. The Government explain that, under the system of time-limits provided for by Articles 509o and 509t CCP, the Regional Court's decision on prolongation can be taken after the expiry of a TBS order, since under Article 509q CCP such an order remains in force until a final decision on the request for prolongation has been handed down.

35. The Government argue that to determine whether a deprivation of liberty is arbitrary for the purposes of Article 5 of the Convention requires more than simply establishing that a time-limit under domestic law has been exceeded, in particular where it concerns confinement orders in which there is always a general public interest at stake given the reasons on which such orders are based. Having regard to the statutory required recommendations submitted in the domestic proceedings at issue, according to which the applicant still presented a danger of re-offending, the Government are of the opinion that the applicant's detention cannot be regarded as arbitrary.

36. The applicant submits that from the fact that the legislator has provided for a distinct statutory regulation of the situation of an extended deprivation of liberty in theory lacking any basis in law, i.e. detention after the expiry of the confinement order, and has thus legalised this situation, it must be deduced that any other deprivation of liberty without a statutory basis is unlawful. In view of the period referred to in Article 509t CCP in conjunction with Article 509q CCP, it must be assumed, also on the basis of the systematics of law, that the latter provision does not apply to situations in which the two months' time-limit for the determination of a prolongation request has been disrespected.

37. The applicant further submits that the Regional Court's decision, as sanctioned by the Court of Appeal, was arbitrary since the judicial authorities were themselves to blame for the fact that the legal time-limits had not been complied with. Apart from that, the reasons given by the Regional Court for its failure to comply with the statutory time-limit were insufficient to justify the continued deprivation of liberty. Furthermore, although it had been clear to the Regional Court when it set a date for the

hearing that the statutory time-limit would not be met, the actual decision was made even later, which made the violation more serious still.

38. The applicant finally argues that, if Article 509q CCP is to be interpreted as allowing an unrestricted detention from the moment of the filing of a request for prolongation of a confinement order until the court's determination of this request, the duration of the resulting detention must be regarded as arbitrary.

39. The Court notes that the applicant was committed to a secure institution for compulsory treatment on the basis of a second TBS order valid until 4 September 1995. On 18 July 1995, the public prosecutor filed a request to prolong this order. Unlike the situation examined by the Court in the case of *Erkalo v. the Netherlands* (judgment of 2 September 1998, *Reports* 1998-VI, p 2464), this prolongation request was filed within the statutory defined time-limit. However, it was not before 22 September 1995 that the Regional Court examined this request, which it granted on 6 October 1995.

40. The Court further notes that, according to Article 509t CCP, the Regional Court must determine a request for prolongation of a TBS order within a period of two months from the date of the request. Since, pursuant to Article 509o CCP, the public prosecutor may submit a request for prolongation at the latest one month before the expiry of the previous period of post-sentence confinement, it is implicit that the Regional Court's decision may be taken after the expiry of that period.

41. This situation is foreseen in Article 509q CCP according to which an expired TBS order remains in force until a request for prolongation has been finally determined. As Article 509q CCP explicitly refers to a final decision ("*zolang op de vordering niet onherroepelijk is beslist*"), this provision must be considered as also referring to a situation where an appeal has been lodged against a decision on a prolongation of a TBS order taken in first instance proceedings.

42. Recalling that it is in the first place for the national authorities, notably the courts, to interpret and apply domestic law (cf. *Erkalo v. the Netherlands*, *loc. cit.*, p. 2478, § 55), the Court accepts that the applicant's detention after the expiry of his TBS order remained lawful under domestic law (see §§ 29–31 above).

43. However, for the purposes of Article 5 of the Convention, the lawfulness under domestic law of the applicant's detention after the expiry of his TBS order is not in itself decisive. It must also be established that his detention during the period under consideration was in conformity with the purpose of Article 5 § 1 of the Convention which is to prevent persons from being deprived of their liberty in an arbitrary fashion (cf. *Witold Litwa v. Poland*, no. 26629/95, 4.4.2000, §§ 72-73, to be reported in ECHR 2000–III).

44. The Court notes that the applicant's TBS order with confinement to a secure institution was given by judgment of 13 August 1992 of the Arnhem Court of Appeal and was prolonged by one year on 9 September 1994 by the Arnhem Regional Court. The Court further notes that the prolongation request of the public prosecutor was based on the advice of 6 July 1995 of the secure institution to prolong the applicant's TBS order because the applicant was still considered capable of being seriously aggressive towards other people.

45. The Court further notes that the request was filed within the statutory time-limit and that the applicant was informed on 28 July 1995 that the Arnhem Regional Court would consider the request for a prolongation of the order at a hearing to be held on 22 September 1995 whereas it was only at this hearing that the applicant expressed objections against the delay in the examination of the prolongation request.

46. In these circumstances, the Court is of the opinion that the applicant's detention between the expiry of his TBS order and the determination by the Regional Court of the request for the prolongation thereof cannot be regarded as involving an arbitrary deprivation of liberty.

47. It follows that there has been no violation of Article 5 § 1 of the Convention.

2. Article 5 § 4 of the Convention

48. The Government submit that, for the purposes of Article 5 § 4, account should be taken only of the period between 19 July 1995, when the public prosecutor filed the request for prolongation of the applicant's post-sentence confinement, and 6 October 1995, when the Regional Court gave its decision. It thus amounted to two months and seventeen days. In the Government's opinion, this was sufficiently brief to satisfy the requirement of speediness under Article 5 § 4.

49. The applicant submits that the failure to meet the two months' time-limit made the decision "arbitrary" and, already for that reason, Article 5 § 4 had been violated. He further submits that the length of the appeal proceedings should also be taken into account. In his opinion, the duration of the appeal proceedings, i.e. from 11 October 1995, when he filed his appeal, to 29 January 1996 when the Court of Appeal handed down its decision, was excessive and therefore contrary to Article 5 § 4 of the Convention.

50. By virtue of Article 5 § 4 of the Convention, a person of unsound mind who is compulsorily confined to an institution for an indefinite or lengthy period is entitled, at any rate where there is no automatic periodic review of a judicial character, to take proceedings at reasonable intervals before a court to put in issue the "lawfulness" – within the meaning of the Convention – of his or her detention, inasmuch as the reasons initially warranting confinement may cease to exist (cf. *X. v. the United Kingdom*

judgment of 5 November 1981, Series A no. 46, p. 22, § 52; and *Musiał v. Poland* [GC], no. 24557/94, 25.3.1999, § 43, to be reported in ECHR-1999 II).

51. In the present case, the Court considers that the proceedings complained of amounted to an “automatic periodic review of a judicial character” (cf. *Koendjiharie v. the Netherlands* judgment of 25 October 1990, Series A no. 185-B, p. 40, § 27).

52. Article 5 § 4, in guaranteeing to persons arrested or detained a right to take proceedings to challenge the lawfulness of their detention, also proclaims their right, following the institution of such proceedings, to a speedy judicial decision concerning the lawfulness of detention and ordering its termination if it proves unlawful. The Court considers that the same applies to proceedings constituting an automatic periodic review of a TBS order once such an order has expired.

53. Although Article 5 § 4 of the Convention does not guarantee a right to appeal against decisions on the lawfulness of detention, it follows from the aim and purpose of this provision that its requirements must be respected by appeal courts if an appeal lies against a decision on the lawfulness of detention (cf. *Navarra v. France* judgment of 27 October 1993, Series A no. 273-B, p. 28, § 28).

54. The Court notes that in the present case the request for prolongation of the applicant’s TBS order was determined by the Regional Court more than two months and seventeen days after the date on which the prolongation request was filed, whereas according to national law the court should decide as soon as possible but at the latest two months after this date. Furthermore, the decision of the Regional Court was taken more than one month after this order had expired, after which it took the Arnhem Court of Appeal more than three months to determine the applicant’s subsequent appeal against the decision of the Regional Court.

55. In these circumstances and on the basis of the proceedings taken as a whole, the Court cannot find that the lawfulness of the applicant’s detention was decided speedily as required by Article 5 § 4 of the Convention. Accordingly, there has been a violation of this provision.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

56. 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

57. The applicant claimed 250 Netherlands Guilders (NLG) by way of non-pecuniary compensation for each day he was unlawfully deprived of his liberty. He submitted that he suffered insecurity and was distressed from not having the prolongation request determined in time. Since his rights were violated for a period of at least seventeen days, he requested the Court to award him a total amount of NLG. 4,250.

58. The Government submitted that, if the Court were to find that there had been a breach of the Convention, that decision would in itself constitute sufficient just satisfaction.

59. The Court, recalling that it has found no violation of Article 5 § 1 of the Convention, is of the opinion that the length of the proceedings at issue may have engendered in the applicant a certain feeling of frustration, but not to the extent of justifying the award of compensation. The finding of a violation of Article 5 § 4 of the Convention constitutes in itself sufficient just satisfaction in this respect.

B. Costs and expenses

60. The applicant further claimed an amount of NLG. 42,134.62 for legal costs incurred in the proceedings before the Court.

61. The Government considered this claim to be excessive.

62. The Court recalls that, according to the criteria laid down in its case-law, it must ascertain whether the sum claimed was actually and necessarily incurred and was reasonable as to quantum (cf. *Brumărescu v. Romania* (just satisfaction) [GC], no. 28342/95, 23.1.2001, § 30). Applying the said criteria to the instant case, recalling that no violation of Article 5 § 1 of the Convention has been found and making its assessment on an equitable basis, the Court finds it reasonable to award the applicant an amount of NLG 7,000 for his costs and expenses together with any value-added tax that may be chargeable, less the amount of 1,354.23 Euros already paid under the Court's legal aid scheme.

C. Default interest

63. According to the information available to the Court, the statutory rate of interest applicable in the Netherlands at the date of adoption of the present judgment is 8% per annum.

FOR THESE REASONS, THE COURT

1. *Holds* by six votes to one that there has been no violation of Article 5 § 1 of the Convention;
2. *Holds* unanimously that there has been a violation of Article 5 § 4 of the Convention;
3. *Holds* unanimously that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant;
4. *Holds* unanimously
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, for costs and expenses, 7,000 (seven thousand) Netherlands Guilders, together with any value-added tax that may be chargeable less 1,354.23 (one thousand three hundred and fifty four) Euros and 23 (twenty three) cents;
 - (b) that simple interest at an annual rate of 8 % shall be payable from the expiry of the above-mentioned three months until settlement;
5. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 24 July 2001, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Michael O'BOYLE
Registrar

Elisabeth PALM
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following partly dissenting opinion of Mr Maruste is annexed to this judgment.

E.P.
M.O'B.

PARTLY DISSENTING OPINION OF JUDGE MARUSTE

To my regret I disagree with my colleagues in the finding of no violation of Article 5 § 1 of the Convention.

My understanding is that the basic requirements for a deprivation of liberty and for a release from detention must be symmetrical. This means that when someone is taken into custody, there must first exist a law prescribing detention and secondly an independent judicial procedure and decision – verifying the correct application of that law and the justifiability of detention in the given circumstances – on the basis of which a deprivation of liberty should either be permitted or refused. A deprivation of liberty cannot be considered legal if it is effected without a judicial procedure and decision. I am also of the opinion that exactly the same applies in respect of the question whether to release a person or whether to prolong his detention when the period of time for which the detention was permitted has expired (in this case, this means the period during which the TBS order was valid).

I am of the opinion that in the present case there was a law, and in this I am in agreement with my colleagues. I cannot find, however, that there was a “procedure prescribed by law”. Or, more precisely, the procedure exists, but it was not followed. And it was not followed for reasons which were wholly insufficient. It is this serious procedural failure (the lack of a timely decision) that constitutes a violation of Article 5 § 1. It is clear from the facts of the case, and this was both recognised by the domestic courts and not disputed between the parties, that there was a period of at least seventeen days during which the further detention was not based on a judicial decision.

In the case of *Witold Litwa v. Poland* (no. 26629/95, § 72, to be reported in ECHR 2000-III) it was stressed by the Court, “*that under Article 5 of the Convention any deprivation of liberty must be “lawful”, which includes a requirement that it must be effected “in accordance with a procedure prescribed by law”. On this point, the Convention essentially refers to national law and lays down an obligation to comply with its substantive and procedural provisions*”.

I should also like to point out that to my mind the relevant Netherlands law (article 509q CCP) is a blanket (penal) provision which in principle provides for detention without a judicial decision for an unlimited period without any consequences for those responsible. Such a regulation can hardly be regarded as being in conformity with the requirements of the

Convention. I also do not share the emphasis on the general dangerousness and possibly “serious aggressiveness towards others” (see §§ 11 and 13) as a justified reason for further detention, since a detention on that basis is similar to detention of a preventative nature, which has been criticised by the Court on several occasions.