



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

SECOND SECTION

CASE OF H.M. v. SWITZERLAND

(Application no. 39187/98)

JUDGMENT

STRASBOURG

26 February 2002

FINAL

26/05/2002

In the case of H.M. v. Switzerland,

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

Mr J.-P. COSTA, *President*,
Mr A.B. BAKA,
Mr L. WILDHABER,
Mr GAUKUR JÖRUNÐSSON,
Mr L. LOUCAIDES,
Mr C. BÎRSAN,
Mr M. UGREKHELIDZE, *judges*,

and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 15 and 29 January 2002,

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

PROCEDURE

1. The case originated in an application (no. 39187/98) against the Swiss Confederation 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 Swiss national, H.M. (“the applicant”), on 16 December 1997.

2. The applicant was represented before the Court by Mr W. Krähenmann, a lawyer practising in Berne. The Swiss Government (“the Government”) were represented by their Agent, Mr P. Boillat, Head of the International Affairs Division of the Federal Office of Justice. The President of the Chamber acceded to the applicant's request not to have her name disclosed (Rule 47 § 3 of the Rules of Court).

3. The applicant, who was placed in a nursing home on account of neglect, complained of an unlawful deprivation of liberty in that Article 5 § 1 (e) of the Convention only cites “vagrancy”, and not neglect, as a ground for detention.

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 Second Section of the Court (Rule 52 § 1). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

6. By a decision of 7 December 2000, the Chamber declared the application partly admissible [*Note by the Registry*. The Court's decision is obtainable from the Registry].

7. The applicant and the Government each filed observations on the merits (Rule 59 § 1). After consulting the parties, the Chamber decided that no hearing on the merits was required (Rule 59 § 2 *in fine*).

8. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Second Section (Rule 52 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant, a Swiss citizen born in 1912, is a pensioner living in Worben (Switzerland).

A. The applicant's placement in a nursing home

10. Until 1994 the applicant, who draws an old-age pension, lived with her husband in a house belonging to He.M., one of her two sons, in Lyss in the Canton of Berne. As she was suffering from leg sores, she received help from the Lyss Association for Home Visits to the Sick and Housebound from 1987. In 1989 He.M. moved in.

11. In 1994, at their request, the applicant and her husband were placed under the guardianship (*Beistandschaft*) of their other son, A.M. However, He.M. objected to this. At the end of 1994 the applicant's husband moved into the S. Nursing Home at Worben in the Canton of Berne. It was agreed that the applicant would also move in within a week, but she did not do so.

12. On 29 March 1995 a new guardian, Mrs B.F., was appointed. At the applicant's request and in view of He.M.'s resistance to the new guardian, the guardianship order was discontinued in respect of the applicant on 28 June 1995, but the order in respect of her husband remained effective.

13. Early in 1996 the applicant's husband died.

14. On 9 February 1996 the Association for Home Visits to the Sick and Housebound wrote to the Lyss Guardianship Office (*Vormundschaftsbehörde*), stating, *inter alia*:

“For the following reasons [the applicant's] treatment and care is causing increasing difficulty; for days now it has become impossible. Our programme is being disrupted: virtually every day we must stand outside a closed door and wait until He.M, her son, perhaps deigns to open it, scantily dressed. Frequently, we must try again at another

time ... A collection of newspapers, cardboard boxes and full plastic bags makes it difficult for us to gain access to the equipment we need for our work ... If [the applicant] is bedridden, which she was from 28 January to 5 February 1996 because of the lack of heating in the rooms, we are unable to undertake even the minimum care of [her] on account of the chaos in the room [*im räumlichen Debakel*] ... We will be able to continue to provide care for [the applicant] until 29 February 1996. If [she] or her family wishes us to continue our services, this will be possible after 1 March 1996, but only on the following conditions:

1. We expect He.M. to open the door to us at the latest by 10 a.m., and to be properly dressed;
2. We expect heated rooms in winter in order to provide the necessary care;
3. We require space to be made available in [the applicant's] bedroom, and the spare bed, as well as the boxes and bags that are lying around, to be taken out, as they hinder our work; access to [the applicant's] bed must be free;
4. Once a month we wish to put fresh linen on [the applicant's] bed; He.M. shall wash the linen, or have it washed elsewhere;
5. If [the applicant] is bedridden, she should have a warm midday meal (to be provided by the home services of the old people's home)."

15. It appears that the applicant and He.M. did not respond to that proposal. On 29 February 1996 the Association for Home Visits to the Sick and Housebound stopped visiting them. Subsequently, following an eye operation, the applicant's eyesight deteriorated. From March 1996 the association's doctor ceased to visit the applicant, who continued to live with He.M.

16. On 13 December 1996 the Lyss Guardianship Commission (*Vormundschaftskommission*) requested the Aarberg District Government Office (*Regierungsstatthalteramt*) to place the applicant in an old people's nursing home.

17. On 16 December 1996 the Aarberg District Governor visited the applicant. The applicant explained that, as a rule, her son did the cooking and that she was given enough to eat. She could go to the toilet unassisted, and washed herself in the kitchen. Her leg sores were washed and treated by a woman who helped her. The applicant also stated that she did not wish to go to the S. Nursing Home.

18. On 17 December 1996 the Aarberg District Government Office ordered the applicant's placement for an unlimited period in the S. Nursing Home on account of serious neglect (*schwere Verwahrlosung*). The Office relied on Articles 397a et seq. of the Swiss Civil Code (*Zivilgesetzbuch*) and section 9 of the Deprivation of Liberty on Grounds of Welfare Assistance Act (*Gesetz über die fürsorgereische Freiheitsentziehung*) of the Canton of Berne. The order requested the municipal police, together with the health inspectors, to implement the order on 20 December. The order noted that the

applicant required permanent treatment in view of her leg sores and cataract, that she no longer received care from a doctor or an association, and that it was not certain that she had enough to eat. The order, referring to intolerable conditions of hygiene in the unheated flat, stated that this situation, which had already lasted for many years, would not change in the foreseeable future.

19. On 20 December 1996 the applicant was placed in the S. Nursing Home in Worben.

B. Proceedings before the Cantonal Appeals Commission

20. The applicant and He.M., her son, each filed an appeal (*Rekurs*) with the Deprivation of Liberty on Grounds of Welfare Assistance Cantonal Appeals Commission (*Rekurskommission*) of the Canton of Berne. The Appeals Commission consisted of three judges, its president being a lawyer. The other two persons were specialised judges, one of whom, the rapporteur, was a doctor.

21. On 16 January 1997 the Appeals Commission conducted a hearing at which the applicant, He.M., their lawyer, a member of the Guardianship Commission and a representative of the S. Nursing Home were present. According to the record of the hearing, the applicant explained that she had no reason to be unhappy with the nursing home, that, as she could no longer walk, it would be better for her to stay there, and that she did not see how matters could get better for her. However, she also said that she “wanted to get out of S.”.

22. The Appeals Commission dismissed the appeals the same day. As to the facts it found:

“The situation at [the applicant's home] was apparently catastrophic, as even third parties found it necessary to file reports or make statements. It is noted in the file that lately [the applicant] had taken to staying in bed, her eyesight was very poor, and she could not walk or stand properly. According to her own submissions, she has to hold on to support wherever she goes. She needs a wheelchair, but does not have one at home. The flat was not heated, there was refuse everywhere, and no one was catering for meals. The nurse responsible for [the applicant's] care had already stated on a previous occasion that her leg sores had not healed because of her living conditions. The nurse now states that in the last weeks of care she had noticed a serious loss of body weight, which she attributed to the fact that [the applicant's son] was not taking sufficient care to ensure that his mother was eating properly. A certain Mr Hi., who had brought [the applicant] home after her stay in hospital, had been horrified by the state of the flat and said that it was not heated. The fruit vendor also reported that the situation was horrific. When Mrs B.F., the head of the social services, had been asked how [the applicant] responded to the nursing home, she had answered that she had been present when [the applicant] had arrived. At that time [the applicant] had not been able to walk, she was not properly dressed (she was wearing nylon tights and a torn woollen jacket) and smelled badly. Mrs B.F. was shocked and declared that she had never seen a person in such a state, although she had a long experience in guardianship matters.”

23. In its decision the Appeals Commission considered that two grounds had been made out under Article 397a of the Swiss Civil Code that justified withdrawing the applicant's liberty on grounds of welfare assistance. Firstly, the applicant had been neglected, as she was no longer able to tend to her most basic dietary and hygiene needs. She could not even dress herself. Without outside help she was confined to bed. Since the Association for Home Visits to the Sick and Housebound had stopped visiting, the problem was unresolved, particularly as the applicant refused to go into the S. Nursing Home voluntarily. In respect of the second ground, the Appeals Commission considered that “during the hearing it had come to the conclusion that the applicant had a mental disability (senile dementia)” (*Geistesschwäche (altersbedingte Demenz)*). In view of that disability, the Appeals Commission considered that the applicant's placement in a nursing home “would be justified even if it was considered that the degree of neglect was not sufficiently serious”. The decision continued:

“In this context, the appellants' argument is not helped by the fact that [the applicant] has accepted that she needs to go into a nursing home, as she explained during the appeal hearing. It is true that there would be no need for deprivation of liberty on grounds of welfare assistance if [the applicant] went to reside at the S. Nursing Home of her own free will. However, it transpires from the case file that although she has already frequently stated that she was now willing to enter S. voluntarily, finally this has not happened.”

24. In the Appeals Commission's view, if the applicant were released, she would return to her son, who was unable to provide sufficient care for her, as he was himself an invalid with poor eyesight. Yet, the S. Nursing Home, which could provide the necessary care, was ideal for the applicant as it was in an area she knew. Indeed, the applicant was hardly aware of the deprivation of liberty, which was minimal, and in fact it mainly affected her son, who did not want to leave his mother. The Appeals Commission further found that the deprivation of liberty on grounds of welfare assistance complied with Article 5 § 1 (e) of the Convention, since that provision also permitted a deprivation of liberty in cases of vagrancy, a term that was to be understood in a wide sense.

C. Proceedings before the Federal Court

25. The applicant and her son He.M. lodged a public-law appeal (*staatsrechtliche Beschwerde*) which the Federal Court (*Bundesgericht*) dismissed on 15 May 1997. The decision was served on 17 June 1997.

26. In so far as the applicant and her son complained that the Appeals Commission had not examined whether less stringent measures were possible, the court found:

“The Commission concludes on the facts that the first appellant [the applicant] is no longer capable of looking after and caring for herself, feeding herself or even dressing

herself; without outside help she would be confined to bed; the second appellant [the applicant's son] who is an invalid, and is in fact no longer able to see, is unable to look after her, and there is nobody else who is in a position to care for her; other attempts which have been made to resolve this problem have failed; in the end, placement in the S. Nursing Home at Worben has been considered to be the only means of preventing neglect. The Appeals Commission has therefore duly considered the proportionality of the deprivation of liberty ...

Whether in the case of the first appellant there exists, apart from serious neglect, some mental disability which would also justify a deprivation of liberty in itself – a point which is challenged by the appellants – and whether procedural rules have allegedly been breached in connection with this ground of detention, are matters which do not need to be examined, particularly as the appellants have been unsuccessful in their appeal against the [applicant's] detention for serious neglect.”

D. Subsequent developments

27. On 14 January 1998 the Aarberg District Government Office lifted the applicant's placement order as she had agreed to reside in the nursing home of her own free will.

II. RELEVANT DOMESTIC LAW

28. Articles 397a et seq. of the Swiss Civil Code concern the withdrawal of liberty on grounds of welfare assistance (*fürsorgerische Freiheitsentziehung*). Article 397a provides:

“An elderly or incapacitated person may be placed or retained in a suitable institution on account of mental illness, mental disability, alcoholism, other addictions or serious neglect, if the person cannot otherwise be afforded the necessary personal care.

In this context, account must be taken of the burden which the person places on his or her environment.

The person concerned must be released as soon as the situation permits.”

29. Article 397e, which lays down the procedure in such cases, provides that “in the case of mentally ill persons a decision can only be taken on the basis of an expert opinion”.

30. The Deprivation of Liberty on Grounds of Welfare Assistance Act of the Canton of Berne implements Articles 397a et seq. of the Civil Code. Sections 3 et seq. of the Act concern “measures without deprivation of liberty”. Section 3 provides that the Guardianship Office (*Vormundschaftsbehörde*) shall secure the necessary personal assistance for persons who put themselves or others in danger on account of mental illness, mental disability, alcoholism, other addictions or serious neglect. Under section 4, the Guardianship Office may order care measures if guardianship measures

do not suffice; such measures may be renewed after two years and standard social-work procedures are to be followed. Sections 8 et seq. concern the “deprivation of liberty on grounds of welfare assistance”. Section 8 mentions, *inter alia*, the institutions in which such persons may be placed, namely a psychiatric clinic, a therapeutic home or a nursing home. Section 9 mentions the competent decision-making bodies, in particular the District Government Office.

THE LAW

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

31. The applicant complained of the unlawfulness of her deprivation of liberty in that she had been placed in a nursing home on account of neglect. She submitted that neglect is not cited as a ground of detention in Article 5 § 1 (e) of the Convention, the relevant part of which provides as follows:

“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:

...

(e) the lawful detention of persons ... of unsound mind ... or vagrants;

...”

A. The parties' submissions

1. The applicant

32. The applicant submitted that she had been placed in a nursing home against her will. She said that she could wash and dress herself, her son could cook for her and she did not wish to leave him on his own. In the nursing home she was no longer free to make decisions about her place of residence or her daily life. She was unable to return home, as she would have been brought back again. It was irrelevant that she had later agreed to stay in the nursing home, since she disagreed with the original decision which had deprived her of her liberty.

33. The applicant contended that she did not fall into the vagrancy category, as defined in the “vagrancy cases” (see *De Wilde, Ooms and Versyp v. Belgium*, judgment of 18 June 1971, Series A no. 12, pp. 37-38,

§ 68). At the time of her placement in the nursing home, she had a home and a regular income. She could not understand why the Association for Home Visits to the Sick and Housebound had stopped providing her assistance at home, as she had been very happy with their services. When they stopped, her health had deteriorated, thus providing the authorities with an opportunity to place her in a nursing home. In so far as reference had been made to the Appeals Commission's decision that she also suffered from mental disability, the applicant pointed out that she had never had the right to reply to that accusation before the Appeals Commission, and that she had never been examined by a medical expert in that connection.

34. The applicant emphasised that Article 5 § 1 (e) of the Convention only listed “vagrancy” and not “neglect” as a ground of detention, and that the two notions were not comparable. On the one hand, neglect implied that the usual conventions in respect of cleanliness, diet and health care were not met. Vagrancy, on the other hand, implied lack of a home or financial means, with the person concerned becoming a burden to the public. The applicant claimed that she had had a fixed domicile with her son and, as an old-age pensioner, drew a regular pension. Thus, none of the justifiable grounds of detention under Article 5 § 1 were met in her case.

2. The Government

35. The Government submitted that the grounds listed in Articles 397a et seq. of the Civil Code amounted, in principle, to a deprivation of liberty within the meaning of Article 5 § 1 of the Convention. However, the applicant had not been deprived of her liberty within the meaning of that provision. All the circumstances of her case had to be considered, in particular the nature and duration of the alleged deprivation, its intensity, and the manner in which it was effected. In the present case, the S. Nursing Home was an open institution with complete freedom of movement, to the extent that the applicant was able to occupy herself. The applicant, who was never in the secure ward, was free to have personal contacts, write letters or make telephone calls. The only limitation on the applicant was that she had to respect the hours fixed for the necessary medical treatment. From the outset, the applicant herself did not regard the placement in the nursing home as a deprivation of liberty and, before the Appeals Commission, she even welcomed the assistance given to her. In the meantime, she had agreed to stay in the nursing home of her own free will. As a result, the applicant's freedom of movement was, in fact, enhanced thanks to the care provided in the home.

36. Assuming that there had been a deprivation of liberty, the Government considered that the notion of “neglect” did not entirely tally with that of “vagrancy” in Article 5 § 1 (e) of the Convention, since it involved insufficient care, food, medical assistance and clothing. The criteria established in the Court's judgment in the vagrancy cases (cited

above) related to a danger to public security. However, as the Court found in *Guzzardi v. Italy*, a person's own interests may also warrant a deprivation of liberty (judgment of 6 November 1980, Series A no. 39, p. 37, § 98). The Government also drew attention to *Witold Litwa v. Poland* (no. 26629/95, ECHR 2000-III) in which the Court considered, in relation to Article 5 § 1 (e) of the Convention, that the predominant reason for depriving persons of their liberty was not only the danger to public safety but also the persons' own interests, for instance in receiving medical care.

37. The Government pointed out that other means had been employed before the applicant was placed in the nursing home. Thus, she had been the subject of a guardianship order, although this was terminated on account of the applicant's son, He.M. Until 1996 the applicant was treated by a doctor who visited her at home. Until 1996 the Association for Home Visits to the Sick and Housebound also assisted the applicant at home. However, it eventually withdrew its help in view of the lack of cooperation by the applicant and her son.

38. In the Government's view, the notion of "vagrancy" could not be clearly circumscribed by reference to a precise catalogue of material conditions, such as whether the person concerned had a fixed domicile or independent financial means. Rather, account had to be taken of whether he or she could still lead a normal life, and the adverse effects his or her not being able to do so would have on that person or others. The question was not whether the person concerned was of fixed abode, but whether the accommodation prevented him or her from receiving proper care. Similarly, in addition to financial means, account had to be taken of the person's need to lead a dignified life, degree of integration into a social network and state of health. As a result, the applicant's placement in a nursing home complied with the requirements of Article 5 § 1 (e) of the Convention.

39. The Government also pointed out that the Appeals Commission had considered that the applicant was suffering from a mental disability, in particular senile dementia, a view that was confirmed, as required by law, by the medical expert who sat on that Appeals Commission. The Appeals Commission found that the applicant's placement in the nursing home was justified on those grounds alone, regardless of whether she was suffering from neglect. In the Government's view, a mental disability of that type was one of the grounds mentioned in Article 397a of the Swiss Civil Code and constituted a justified ground of detention under Article 5 § 1 (e) of the Convention.

B. The Court's assessment

40. The Court must first examine whether there was in the instant case a deprivation of liberty to which Article 5 § 1 applies. Under its established case-law, this provision is not concerned with mere restrictions on liberty of movement, which are governed by Article 2 of Protocol No. 4.

41. The applicant complained that she had been placed in the nursing home against her will, whereas the Government contested that the applicant had been deprived of her liberty within the meaning of Article 5 of the Convention.

42. In order to determine whether there has been a deprivation of liberty, the starting-point must be the specific situation of the individual concerned and account must be taken of a whole range of factors such as the type, duration, effects and manner of implementation of the measure in question. The distinction between a deprivation of and restriction upon liberty is merely one of degree or intensity, and not one of nature or substance (see *Ashingdane v. the United Kingdom*, judgment of 28 May 1985, Series A no. 93, p. 19, § 41).

43. The Court refers to *Nielsen v. Denmark*, which concerned the placement of a 12-year-old boy, at his mother's request, in the psychiatric ward of a State hospital for five and a half months. In that case, in which no deprivation of liberty within the meaning of Article 5 § 1 of the Convention was found, the Court considered that:

“The applicant was in need of medical treatment for his nervous condition and the treatment administered to him was curative, aiming at securing his recovery from his neurosis. ...

The restrictions on the applicant's freedom of movement and contacts with the outside world were not much different from restrictions which might be imposed on a child in an ordinary hospital: it is true that the door of the Ward, like all children's wards in the hospital, was locked, but this was to prevent the children exposing themselves to danger or running around and disturbing other patients; the applicant was allowed to leave the Ward, with permission, to go for instance to the library and he went with other children, accompanied by a member of the staff, to visit playgrounds and museums and for other recreational and educational purposes; he was also able to visit his mother and father regularly and his old school friends and, towards the end of his stay in hospital, he started going to school again; in general, conditions in the Ward were said to be 'as similar as possible to a real home' ...

The duration of the applicant's treatment was 5½ months. This may appear to be a rather long time for a boy of 12 years of age, but it did not exceed the average period of therapy at the Ward and, in addition, the restrictions imposed were relaxed as treatment progressed ...

...

Nor did the intervention of the police, which would have been appropriate for the return of any runaway child of that age even to parental custody, throw a different light on the situation.” (judgment of 28 November 1988, Series A no. 144, pp. 25 and 26, §§ 70 and 72).

44. Turning to the circumstances of the present case, the Court notes that the applicant had had the possibility of staying at home and being cared for by the Lyss Association for Home Visits to the Sick and Housebound, but she and her son had refused to cooperate with the association. Subsequently, the living conditions of the applicant at home deteriorated to such an extent that the competent authorities of the Canton of Berne decided to take action. On 16 December 1996 the Aarberg District Governor visited the applicant at home in order to assess the situation and, finding that she was suffering from serious neglect, decided on 17 December 1996 to place her in the S. Nursing Home. On 16 January 1997, after carefully reviewing the circumstances of the case, the Cantonal Appeals Commission of the Canton of Berne concluded that the living conditions and standards of hygiene and of medical care at the applicant's home were unsatisfactory, and that the nursing home concerned, which was in an area which the applicant knew, could provide her with the necessary care.

45. Furthermore, it transpires from the Government's submissions that the applicant was not placed in the secure ward of the nursing home (a fact which the applicant did not contest). Rather, she had freedom of movement and was able to maintain social contact with the outside world.

46. The Court notes, in addition, the decision of the Cantonal Appeals Commission of 16 January 1997, according to which the applicant was hardly aware of the effects of her stay in the nursing home, which were mainly felt by her son who did not wish to leave his mother. Moreover, the applicant herself was undecided as to which solution she in fact preferred. For example, at the hearing before the Appeals Commission, she stated that she had no reason to be unhappy with the nursing home.

47. Finally, the Court notes that, after moving to the nursing home, the applicant agreed to stay there. As a result, the Aarberg District Government Office had lifted the order for the applicant's placement on 14 January 1998.

48. Bearing these elements in mind, in particular the fact that the Cantonal Appeals Commission had ordered the applicant's placement in the nursing home in her own interests in order to provide her with the necessary medical care and satisfactory living conditions and standards of hygiene, and also taking into consideration the comparable circumstances in *Nielsen* (cited above), the Court concludes that in the circumstances of the present case the applicant's placement in the nursing home did not amount to a deprivation of liberty within the meaning of Article 5 § 1, but was a responsible measure taken by the competent authorities in the applicant's interests. Accordingly, Article 5 § 1 is not applicable in the present case.

Conclusion

49. Consequently, the Court finds that there has been no violation of Article 5 § 1 of the Convention.

FOR THESE REASONS, THE COURT

Holds by six votes to one that there has been no violation of Article 5 § 1 of the Convention.

Done in English, and notified in writing on 26 February 2002, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

S. DOLLÉ
Registrar

J.-P. COSTA
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

- (a) concurring opinion of Mr Gaukur Jörundsson;
- (b) dissenting opinion of Mr Loucaides.

J.-P.C.
S.D.

CONCURRING OPINION OF JUDGE GAUKUR JÖRUNDSSON

While I agree with the majority that there has been no violation of Article 5 of the Convention in the present case, I have reached this conclusion on different grounds.

1. Whether the applicant was deprived of her liberty

The first question to be examined is whether in the instant case there was a deprivation of liberty to which Article 5 § 1 applies.

I note that the relevant statutory provisions under Swiss law, namely Articles 397a et seq. of the Swiss Civil Code, expressly refer to the measure at issue as one of “deprivation of liberty”, and the same term was employed by all the authorities involved in the present proceedings. By comparison, other less far-reaching measures, such as external care arrangements, are described in section 3 of the Deprivation of Liberty on Grounds of Welfare Assistance Act of the Canton of Berne as “measures without deprivation of liberty”.

Furthermore, when ordering the placement on 16 January 1997, the Cantonal Appeals Commission considered that such a measure had become necessary as the applicant had not accepted placement in the nursing home of her own free will. Indeed, when she later agreed to the placement, the order was discontinued on 14 January 1998.

Finally, it is undisputed that the police were employed to implement the measure, which was of unlimited duration and served the purpose of ensuring that the applicant did not leave the nursing home.

It is true that the applicant was not “under lock and key” within the nursing home, and that she was able to have personal contacts, to write letters and to telephone the outside world. In my opinion, however, it is clear that she was not permitted to leave the institution and go home, and that, if she did, she would have been brought back to the nursing home. Thus, I find that the present circumstances differ from those in *Nielsen v. Denmark* which involved a minor who was temporarily placed in a locked psychiatric ward of a State hospital, at his mother's request, for therapeutic purposes (judgment of 28 November 1988, Series A no. 144, pp. 25-26, § 70). Thus, the present applicant had been placed under guardianship, though the latter measure was eventually lifted.

In these circumstances, I consider that the applicant's placement in the nursing home amounted to a deprivation of liberty within the meaning of Article 5 § 1 of the Convention.

2. Whether there was compliance with the conditions of Article 5 § 1 of the Convention

The next question is, therefore, whether the conditions of Article 5 § 1 were complied with in the present case.

Article 5 § 1 of the Convention contains an exhaustive list of permissible grounds for deprivation of liberty. Consequently, no deprivation of liberty will be lawful unless it falls within one of the grounds set out in sub-paragraphs (a) to (f) of Article 5. The Government have not relied on any other ground than sub-paragraph (e) to justify the applicant's detention. Accordingly, I shall limit my examination to that provision.

(a) “The lawful detention ... of persons of unsound mind”

In particular, I have first examined whether the applicant could be considered as a “person of unsound mind” within the meaning of sub-paragraph (e) of Article 5 § 1 of the Convention.

According to the Court's case-law, the meaning of the term “persons of unsound mind” is continually evolving as research in psychiatry progresses and increasing flexibility in treatment is developing. Nevertheless, sub-paragraph (e) of Article 5 § 1 cannot be taken as permitting the detention of a person simply because his or her views or behaviour deviate from the norms prevailing in society. To hold otherwise would not be reconcilable with the text of Article 5 § 1 which sets out an exhaustive list of exceptions calling for a narrow interpretation (see *Winterwerp v. the Netherlands*, judgment of 24 October 1979, Series A no. 33, p. 16, § 37).

An individual cannot be considered to be of “unsound mind” and deprived of his or her liberty unless the following three minimum requirements are satisfied: firstly, the person must reliably be shown to be of unsound mind; secondly the mental disorder must be of a kind or degree warranting compulsory confinement and, thirdly, the validity of any continued confinement depends on the persistence of such a disorder (see *Johnson v. the United Kingdom*, judgment of 24 October 1997, *Reports of Judgments and Decisions* 1997-VII, pp. 2409-10, § 60).

It remains to be seen whether these conditions were met in the present case.

As regards the first requirement, on 16 January 1997 the Cantonal Appeals Commission, whose composition included a doctor as a specialised judge, heard the applicant, her son, their lawyer, a member of the Guardianship Commission and a representative of the S. Nursing Home. In its decision dated the same day, the Appeals Commission carefully considered the applicant's situation. It stated that it had come to the conclusion that the applicant, who could no longer care for herself, had a mental disability, namely senile dementia, justifying her placement in a

nursing home. In my view, it has, therefore, reliably been established that the applicant was of unsound mind.

In respect of the second requirement, the Cantonal Appeals Commission was satisfied that the applicant's illness warranted her placement in a nursing home, since other less far-reaching measures, for example the appointment of a guardian between 1994 and 1995, or external care by a welfare association, had proved to be insufficient, particularly as the applicant and her son had refused to cooperate.

Finally, the applicant's situation had persisted and indeed had deteriorated over the years, as confirmed by the Aarberg District Government Office on 17 December 1996. Clearly, the applicant's situation presented a danger to herself. The third requirement was, therefore, also met in that the authorities could reasonably assume that the applicant's disorder would persist.

I am therefore satisfied that the applicant's detention fell within the ambit of Article 5 § 1 (e) as being the “lawful detention ... of [a person] of unsound mind” within the meaning of that provision.

It is, therefore, unnecessary to examine the other grounds mentioned in Article 5 § 1 (e).

(b) Whether the measure was “lawful” within the meaning of subparagraph (e) of Article 5 § 1 of the Convention

The authorities, when placing the applicant in the nursing home, relied on Article 397a of the Swiss Civil Code which mentions, *inter alia*, “mental illness [and] mental disability” as grounds for the withdrawal of liberty. In my view, therefore, the measure imposed on the applicant was “lawful” within the meaning of Article 5 § 1 of the Convention.

3. Conclusion

Considering the circumstances of the present case as a whole, I find that there has been no violation of Article 5 § 1 of the Convention.

DISSENTING OPINION OF JUDGE LOUCAIDES

I disagree with the majority that the applicant's placement in the nursing home did not amount to a deprivation of liberty within the meaning of Article 5 § 1. I also disagree with the concurring opinion of Judge Gaukur Jörundsson to the effect that the applicant's deprivation of liberty in this case through the compulsory placement in the nursing home fell within the ambit of Article 5 § 1 (e) as being the “lawful detention ... of [a person] of unsound mind” within the meaning of that provision.

I am of the opinion that the applicant's placement in the nursing home amounted to a deprivation of liberty within the meaning of Article 5 § 1 of the Convention and that such deprivation of liberty did not fall within the ambit of Article 5 § 1 (e) or any other sub-paragraph of that Article. Therefore, I find that there has been a violation of Article 5 § 1 of the Convention in this case.

As regards my finding that there has been a deprivation of the applicant's liberty, I adopt the reasoning of Judge Gaukur Jörundsson. But I would like to add on this subject the following: The applicant's placement in the nursing home was against her will. It was implemented by the police under an order explicitly defined by the national law itself and referred to by the national authorities as a measure of deprivation of liberty (see paragraph 28 of the judgment), and she was not permitted to leave the nursing home. In these circumstances, I cannot see how her situation could be regarded as anything else than a deprivation of liberty.

In *Ashingdane v. the United Kingdom*, also referred to by the majority (see paragraph 42 of the judgment), it was found that a person kept compulsorily in a mental hospital was protected by Article 5 even though he was in an “open” (that is to say, unlocked) ward and was permitted to leave the hospital unaccompanied during the day and over the weekend (see paragraph 43 of the judgment). Therefore, the fact referred to by the majority that “the applicant was not placed in the secure ward of the nursing home ... Rather, she had freedom of movement and was able to maintain social contact with the outside world” does not in any way change the reality and severity of the restrictive regime in which the applicant was placed, as described above (see paragraph 45 of the judgment).

Detainees in prisons and other places of detention, which amount to typical cases of deprivation of liberty for the purposes of Article 5 of the Convention, may be allowed to move freely within defined areas and have social contact with the outside world through telephone calls, correspondence and visits, for example; some may also be allowed day release. Yet, so long as they (like the applicant) are not permitted to leave the place where they are detained and go anywhere they like and at any time they want they are certainly “deprived of their liberty”.

In *De Wilde, Ooms and Versyp v. Belgium* (judgment of 18 June 1971, Series A no. 12, p. 36, § 65), the Court went as far as to hold that the fact that a person has submitted voluntarily to a particular regime of detention does not exclude the operation of Article 5 when it came to challenging its lawfulness or seeking release. The Court stated:

“... the right to liberty is too important in a 'democratic society' within the meaning of the Convention for a person to lose the benefit of the protection of the Convention for the single reason that he gives himself up to be taken into detention. Detention might violate Article 5 even although the person concerned might have agreed to it.”

In the same case the Court also stated:

“In so far as the wishes of the applicants were taken into account, they cannot in any event remove or disguise the mandatory, as opposed to contractual, character of the decisions complained of; this mandatory character comes out unambiguously in the legal texts ...” (ibid.)

Therefore, the view of the majority that “the applicant was hardly aware of the effects of her stay in the nursing home ... [T]he applicant herself was undecided as to which solution she in fact preferred. For example, at the hearing before the Appeals Commission, she stated that she had no reason to be unhappy with the nursing home” runs counter to the above approach in *De Wilde, Ooms and Versyp*.

I also find that the statement of the majority that “after moving to the nursing home, the applicant *agreed* to stay there. *As a result, the ... order for the applicant's placement [was lifted]*” (emphasis added) highlights rather than attenuates the mandatory restrictive nature of the applicant's placement in the nursing home.

The majority appear to have relied heavily on “the fact that the Cantonal Appeals Commission ordered the applicant's placement in the nursing home *in her own interests* in order to provide her with the necessary medical care and satisfactory living conditions and standards of hygiene” (emphasis added). Relying on that consideration and taking into account the “comparable circumstances in *Nielsen*”, the majority concluded that “the applicant's placement in the nursing home did not amount to a deprivation of liberty within the meaning of Article 5 § 1, *but was a responsible measure* taken by the competent authorities *in the applicant's interests*” (emphasis added).

It is my opinion that the question whether a measure amounts to a deprivation of liberty does not depend on whether it is intended to serve or actually serves the interests of the person concerned. This is illustrated by *De Wilde, Ooms and Versyp* (cited above) and the examples of minors and persons of unsound mind requiring educational supervision, whose detention is expressly justified under the provisions of Article 5 § 1 (d) and (e) on the premise that their case concerns “deprivation of liberty”, even though such detention may be exclusively in the detainees' interests.

I believe that physical freedom is of unique importance and that the exceptions to the prohibition of deprivation of liberty are exhaustively limited to those set out expressly in the sub-paragraphs of Article 5 § 1. If an individual's deprivation of liberty does not fall within any of these categories then it must be prohibited by Article 5. Indeed, if it were true that those responsible for the application or interpretation of the Convention were free to establish other categories of “deprivation of liberty” in respect of which the prohibition of Article 5 would be inapplicable, either because the compulsory restriction of a person's physical freedom is a “responsible measure” for his own good (as in the present case) or for any other “useful” purpose, this would render the prohibition in question meaningless and make a mockery of its objectives. Even worse, it would open the door to uncontrolled arbitrariness and real and unwarranted dangers to the freedom of the individual which the Convention aims to avert.

It is true that there are situations not specifically mentioned in Article 5 where deprivation of liberty may be necessary for good reasons. The present case may, possibly, be an example of this. However, these situations could comply with Article 5 in accordance with the safeguards provided thereunder if appropriate national legislation brought them within the exception of sub-paragraph 1 (b) of Article 5. In this way the safeguards of Article 5 § 1 (b) will serve to protect against, for example, the danger of elderly people being deprived of their liberty at the behest of scheming relatives seeking to make personal gain from their compulsory removal to institutions on the general, feeble grounds of “mental disability” or “senile dementia”.

On the other hand, the majority's reliance on the “comparable circumstances in *Nielsen*” does not, I think, provide a solid ground for their conclusion that Article 5 § 1 is not applicable in the present case. Like Judge Gaukur Jörundsson, I find that the circumstances of the present case differ from those in *Nielsen v. Denmark* (judgment of 28 November 1988, Series A no. 144). The factual basis of the latter case was the placement of a 12-year-old boy in the psychiatric ward of a hospital at the request of the mother, who had sole parental rights. Such a situation cannot be compared with the placement of an adult against her will in a nursing home, which was what happened in the present case. The Court considered that the facts in *Nielsen* amounted to an exercise of parental rights by the mother, not a restriction on freedom of movement by the State (*loc. cit.*, pp. 23 et seq., §§ 63 et seq.). In so far as the Court went on to state that the restriction involved in the child's placement in a secure psychiatric ward did not amount to a deprivation of liberty, this statement (which has been subject to certain extra-judicial criticism [See Harris, O'Boyle and Warbrick, *Law of the European Convention on Human Rights*, p. 101, and Karen Reid, “Article 25 of the Convention: Applications by Children”, in *The Birth of European Human Rights Law*]) is linked to the particular facts and

circumstances of that case and, specifically, the fact that the decision to hospitalise the child was taken by the mother in the exercise of her parental rights (ibid., pp. 26-27, §§ 72-73) [“It must be possible for a child like the applicant to be admitted to hospital at the request of the holder of parental rights, a case which clearly is not covered by paragraph 1 of Article 5” (*Nielsen*, p. 26, § 72)]; *Nielsen* is again clearly distinguishable from the present case.

I must also place on record the reasons for my disagreeing with Judge Gaukur Jörundsson's view that the applicant's detention fell within the ambit of Article 5 § 1 (e) as being the “lawful detention ... of [a person] of unsound mind” within the meaning of that provision. These are as follows:

(a) The list of exceptions to the prohibition on deprivation of liberty under Article 5 § 1 is exhaustive. Given the importance of the right to liberty, the exceptions must be narrowly interpreted. Therefore, the concept of “unsound mind” must likewise be narrowly interpreted. It is not sufficient that a person's views or behaviour deviate from the established norms (see *Winterwerp v. the Netherlands*, judgment of 24 October 1979, Series A no. 33, p. 16, § 37).

(b) As rightly stated by the Court in *Winterwerp* (pp. 17-18, § 39): “except in emergency cases, the individual concerned should not be deprived of his liberty unless he has been reliably shown to be of 'unsound mind'. The very nature of what has to be established before the competent national authority – that is, a true mental disorder – calls for objective medical expertise.”

(c) On the basis of the material before the Court, it appears that the applicant was never examined by a doctor qualified as a medical expert, that is to say, in this case, a psychiatrist. In fact, the applicant has never undergone a proper medical examination for the purpose of ascertaining her mental state, in particular, whether she was suffering from a mental illness and, if so, to what degree, in order to determine whether she was of “unsound mind”.

(d) It is true that the Appeals Commission which examined the appeals of the applicant and her son against the order for the placement of the applicant in the nursing home consisted of three judges, one of whom was a doctor, and that it held a hearing at which the applicant was to make representations in support of her appeal. In its decision, the Appeals Commission considered that “during the hearing it had come to the conclusion that the applicant had a mental disability (senile dementia)”. However, firstly, such a conclusion was not, as already pointed out above, the result of a diagnosis by a medical expert on completion of a proper medical examination of the applicant. Secondly, “mental disability” and “senile dementia” are general terms which may or may not coincide with a state of “unsound mind”, depending on the precise nature and gravity of their symptoms and effects. Moreover, no relevant information was given

by the Appeals Commission in their decision, presumably because no such information was obtained by them in the absence of a proper medical examination of the applicant. Incidentally, a finding to the effect that the applicant was of “unsound mind” sits ill with the fact set out in paragraph 27 of the judgment that “On 14 January 1998 the Aarberg District Government Office lifted the applicant's placement order as *she had agreed* to reside in the nursing home of *her own free will*” (emphasis added).

(e) Even more important, and in my view decisive, is the fact that the above finding of the Appeals Commission to the effect that the applicant “had a mental disability (senile dementia)” was disputed by the applicant, who argued that she had never had a right of reply to that accusation before the Appeals Commission, and had never been examined by a medical expert in that connection (see paragraph 33 of the judgment in this case). The applicant challenged this finding before the Federal Court which, however, declined to examine the issue on the ground that the applicant's detention was justified in any case on account of “serious neglect” (as defined by the Swiss Civil Code). The relevant passage of the judgment of the Federal Court reads as follows:

“Whether in the case of the first appellant there exists, apart from serious neglect, some mental disability which would also justify a deprivation of liberty in itself – a point which is challenged by the appellants – and whether procedural rules have allegedly been breached in connection with this ground of detention, are matters which do not need to be examined, particularly as the appellants have been unsuccessful in their appeal against the [applicant's] detention for serious neglect.”

Two significant points must be made here:

(i) The relevant finding of the Appeals Commission was not sustained throughout the judicial proceedings because it was not upheld by the Federal Court, which left the matter open. This is admitted by the Government in their reply to the following question of the Court: “Was the applicant declared to be of unsound mind in these proceedings?” The Government, after referring to the relevant finding of the Appeals Commission, state: “Il sied de relever que le Tribunal fédéral *a laissé ouverte la question de savoir si la requérante souffrait également de faiblesse d'esprit ...*” (emphasis added).

(ii) So long as the finding in question was disputed by the applicant before the competent higher court – the Federal Court – and considering that the Federal Court did not determine the question but left it open, I do not think that we can adopt such a finding as a basis for our judgment because, if we do so, we are in effect ourselves determining the dispute as a third-instance court in the place of the Federal Court.

For all the above reasons, I find that there has been a deprivation of the applicant's liberty in this case in breach of Article 5 of the Convention.