



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

SECOND SECTION

CASE OF MORSINK v. THE NETHERLANDS

(Application no. 48865/99)

JUDGMENT

STRASBOURG

11 May 2004

FINAL

10/11/2004

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 Morsink v. the Netherlands,

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

Mr J.-P. COSTA, *President*,

Mr L. LOUCAIDES,

Mr C. BÎRSAN,

Mr K. JUNGWIERT,

Mr V. BUTKEVYCH,

Mrs W. THOMASSEN,

Mrs A. MULARONI, *judges*,

and Mrs S. DOLLÉ, *Section Registrar*,

Having deliberated in private on 21 October 2003 and 6 April 2004,

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

PROCEDURE

1. The case originated in an application (no. 48865/99) against the Kingdom of the Netherlands lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Netherlands national, P.G.L. Morsink (“the applicant”), on 15 April 1999.

2. The applicant was represented by Mrs L.H. Poortman-de Boer, a lawyer practising in Groningen. The Netherlands Government (“the Government”) were represented by their Agent, Mr R.A.A. Böcker, of the Netherlands Ministry of Foreign Affairs.

3. The application was allocated to the Second 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.

4. On 3 June 2003 the Court declared the application partly inadmissible and decided to communicate to the Government the complaint under Article 5 § 1 of the Convention concerning the applicant's pre-placement detention in a remand centre pending his placement in a custodial clinic.

5. On 14 August 2003 the Government filed observations on the admissibility and merits of the complaint, to which the applicant's representative responded on 2 October 2003.

6. A hearing on admissibility and merits took place in public in the Human Rights Building, Strasbourg, on 21 October 2003 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Mr R. BÖCKER, Ministry of Foreign Affairs,	<i>Agent,</i>
Mrs M. DE GROOT, Ministry of Justice,	<i>Counsel,</i>
Ms M. KUIJER, Ministry of Justice,	
Mrs L. VAN DER ZON, Ministry of Justice,	
Mr J. DE JONG, Ministry of Justice	<i>Advisers;</i>

(b) *for the applicant*

Mrs L. POORTMAN-DE BOER,	<i>Counsel.</i>
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The Court heard addresses by Mr Böcker and Mrs de Groot, and by Mrs Poortman-de Boer, as well as their replies to its questions.

7. Under the provisions of Article 29 § 3 of the Convention, the Court decided to examine the merits of the application at the same time as its admissibility.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant was born in 1959 and is currently staying in a custodial clinic in the Netherlands.

9. Between 1975 and 1995, the applicant was convicted nineteen times of theft, criminal damage, assault and aggravated assault. On 21 January 1997 the Arnhem Regional Court (*arrondissementsrechtbank*) convicted the applicant of assault and assault occasioning grievous bodily harm committed in 1996. Having found that at the time of the commission of the offence the applicant was able to understand the unlawful nature of his acts but that his mental faculties were so poorly developed that he could only be held responsible for these offences to a limited degree, the Regional Court sentenced the applicant to fifteen months' imprisonment in combination with an order for his confinement in a custodial clinic (hereafter a "TBS order" - *terbeschikkingstelling met bevel tot verpleging van overheidswege*).

10. On 16 September 1997 the Arnhem Court of Appeal (*gerechtshof*) upheld the Regional Court's judgment of 21 January 1997.

11. Although the applicant had initially filed an appeal in cassation with the Supreme Court (*Hoge Raad*) against the judgment of 16 September 1997, he withdrew this appeal on 5 February 1998 when, after having served his prison sentence, the TBS order took effect. However, he was not transferred to a custodial clinic but was held in pre-placement detention in an ordinary remand centre (*huis van bewaring*).

12. On 7 August 1998, the applicant filed an appeal with the Appeals Board (*beroepscommissie*) of the TBS Section of the Central Council for the Administration of Criminal Justice (*Centrale Raad voor Strafrechtstoepassing*) against the apparently automatic prolongation by three months of the six-month period of pre-placement detention referred to in Article 12 of the Act on confinement to a custodial clinic of persons subject to a TBS order (*Beginsele wet verpleging ter beschikking gestelden*; hereinafter referred to as “the 1997 Act”). He submitted that this six-month period had expired, that he had not received written notification from the Minister of Justice that his pre-placement detention would be extended by three months and, apparently, that the procedure for selection and placement in a custodial clinic in his case had not yet started.

13. Between 11 September and 11 November 1998 the applicant stayed in the Dr. F.S. Meijers Institute for the purpose of selection and subsequent placement in a custodial clinic.

14. On 5 November 1998 the applicant filed a further appeal with the Appeals Board against the second apparently automatic prolongation of his pre-placement detention by three months. He requested the Appeals Board to suspend the second prolongation request.

15. On 10 November 1998 the Minister of Justice filed written submissions with the Appeals Board in response to those filed by the applicant.

16. On 11 November 1998 the President of the Appeals Board rejected the applicant's request to suspend the further execution of the Minister's decision of 2 November 1998 to prolong the applicant's pre-placement detention in the remand centre by three months. Taking into account the fact that the applicant, at the time of the decision, had spent eight months awaiting placement in a custodial clinic and that, according to the medical report of 15 October 1998, there was no apparent urgent medical need for his placement in a custodial clinic, the President found no pressing interest which required the suspension of the Minister's decision.

17. On 28 January 1999 the applicant filed an appeal against the third apparently automatic prolongation by three months of his pre-placement detention. On 15 February 1999 the Minister informed the applicant that he could not yet be admitted to a custodial clinic and that his pre-placement detention had been prolonged by a further period of three months, i.e. from 31 January to 30 April 1999.

18. On 10 March 1999, after a hearing held on 19 January 1999, the Appeals Board gave its decision on the applicant's appeals against the first and second automatic prolongations of his pre-placement detention. This decision, in so far as relevant, reads:

“1. The challenged decisions

1.1 The Minister had not extended by 4 August 1998 the period within which the appellant should have been placed in a custodial clinic for persons subject to a TBS order. Pursuant to Article 12 § 3 of the [1997] Act ... , this failure is to be considered a decision to prolong this period.

1.2 The Minister had not extended by 2 November 1998 the period within which the appellant should have been placed in a custodial clinic for persons subject to a TBS order. Pursuant to Article 12 § 3 of the [1997] Act ..., this failure is to be considered a decision to prolong this period. ...

3. The facts

... The appellant's TBS order took effect on 5 February 1998. Since then, he has spent a transitory period in the G. remand centre awaiting placement in a custodial clinic.

By letter of 2 September 1998 the Minister informed the appellant that he could not yet be placed in a custodial clinic and that the transitory period (*passantentermijn*) pending his placement in a custodial clinic had, for the time being, been *ipso jure* prolonged by three months from 4 August 1998 to 2 November 1998 ... On 16 October 1998 the appellant was heard by a penitentiary adviser.

By letter of 2 November 1998 the Minister informed the appellant that he still could not be placed in a custodial clinic and that his pre-placement detention pending his admission to a custodial clinic was to be prolonged further from 2 November 1998 to 31 January 1999.

The appellant was admitted for selection purposes between 11 September 1998 and 11 November 1998 to the Dr F.S. Meijers Institute in Utrecht. He was selected for the custodial clinic X in Y.

The Utrecht District Psychiatric Service has provided a medical statement dated 15 October 1998 on the appellant's mental condition, which has been supplemented by a report of 16 October 1998.

4. The parties' submissions

... The [applicant's] lawyer further considers, relying on the learned observation by a commentator on the [*Bizzotto v. Greece*] judgment of the European Court of Human Rights of 15 November 1996, Netherlands Law Reports (*Nederlandse Jurisprudentie*) 1998, no. 203, that there is already a violation of Article 5 of the Convention when the six-month delay is exceeded. ...

[The Minister], as to the [applicant's] reliance on Article 5 of the Convention, points out that the TBS order serves in the first place for the protection of society and, in the

second place, for the treatment of the person concerned. According to the Supreme Court's case-law, the execution of a TBS order in a remand centre is not an unlawful deprivation of liberty. Where a reproach can be made of the fact that the 'treatment aspect' is lacking, liability for damage arises. If an appeal is declared well-founded by the Appeals Board, the 'treatment aspect' is also lacking and imputable as from the relevant expiry date.

5. The assessment

... 5.2.1 The following must be first stated in assessing the appeal. On the basis of the history of the enactment of Article 12 of the [1997] Act ..., it must be assumed that it has been the intention of the legislature that a lack of capacity in the custodial clinics may in principle give the Minister reason to prolong by three months, as often as necessary, the period of six months set out in the first paragraph of this provision within which a person subject to a TBS order must be placed in a custodial clinic. A decision by the Minister to prolong this period on grounds of lack of capacity does not, therefore, constitute an automatic ground for declaring the appeal well-founded. ...

5.2.3 ... in examining appeals filed by persons subject to a TBS order against decisions of the Minister to prolong the transitory period, the Appeals Board must at least have at its disposal information to be supplied by or on behalf of the Minister in relation to:

- the available capacity or the lack of capacity in custodial clinics at the time of taking the decision to prolong the transitory period, as well as a prognosis on this for the three months' period following the decision;
- an indication of the average duration of transitory stays in remand centres of persons subject to a TBS order at the time when the decision to prolong the transitory period was taken;
- the *pro justitia* report in relation to the mental condition of the person concerned who is subject to a TBS order, and a statement by a doctor on the question whether the person concerned, in view of his mental condition, is able to stay any longer, on a transitory basis, in a remand centre.

5.2.4 The Minister is obliged, prior to the expiry of the transitory period referred to in Article 12 of the [1997] Act ..., to take a decision on the prolongation of this period and, in doing so, to comply with the procedural regulations set out in Article 53 § 2 (a) of the [1997] Act ... – the obligation to hear – and Article 54 § 2 of the [1997] Act ... – the obligation to inform. These regulations are of essential importance for the legal position of the person subject to a TBS order and the Minister is therefore obliged to comply with these regulations in the decision-making process concerning the prolongation of the transitory period. ...

5.3 The argument based on Article 5 of the Convention fails. The detention of a person subject to a TBS order in a remand centre is, after all, based on the judicial decision in which the TBS order has been imposed, whereas Article 9 § 1 (b) of the [1951] Prisons Act (*Beginselenwet Gevangeniswezen*) provides that 'remand centres are intended for the accommodation of all others lawfully deprived of their liberty by a judicial decision ... for as long as their admission to another suitable place is not possible'.

5.4.1 In so far as the appeal is directed against the prolongation of the transitory period for placement from 4 August 1998 until 2 November 1998, the Appeals Board considers as follows:

5.4.2 It has appeared from the examination of the present case that the Minister did not, prior to the expiry of the delay for placement, take a decision to prolong that delay. Nor has the appellant been heard on this subject in a timely manner. The Minister's reliance on the exception contained in Article 53 § 4 (a) of the [1997] Act ..., as regards refraining from hearing requests of an urgent nature, fails. This provision is not applicable as in the present case there was no sudden event requiring an immediate measure and thus no opportunity to hear the person concerned.

The Appeals Board is of the opinion that it follows ... that the appeal is well-founded and that the ... Minister's [implied] decision to prolong the transitory period must be quashed on formal grounds.

5.4.3 The Appeals Board considers that the appellant must be provided with some compensation for the uncertainty in which he was kept as a result of the Minister's conduct referred to in 5.4.2. The Appeals Board fixes this compensation, having heard the view of the Minister, at 100 Netherlands guilders (NLG).

5.4.4 As the Minister, regarding the prolongation at issue, has not sent separate written notification to the appellant, but did inform the appellant, by written notification of 2 November 1998, of the further prolongation of the transitory period after he had been heard on that matter, the Appeals Board will not order the Minister to take a new decision in respect of the period referred to in 1.1. but will examine whether there are also material grounds for quashing the ... decision. Further reference is made to the considerations set out in 5.6.

5.5.1 In so far as the appeal is directed against the prolongation of the transitory period for placement from 2 November 1998 until 30 January 1999, the Appeals Board considers as follows:

5.5.2 It has appeared from the examination of the present case that the Minister did not, prior to the expiry of the delay for placement, take a decision to prolong that delay. The Appeals Board is of the opinion that it follows ... that the appeal is well-founded and that the ... Minister's decision to prolong the transitory period must be quashed on this formal ground.

5.5.3 The Appeals Board considers that the appellant must be provided with some compensation for the uncertainty in which he was kept as a result of the Minister's conduct referred to in 5.5.2. The Appeals Board fixes this compensation, having heard the view of the Minister, at NLG 100.

5.6 It has been sufficiently established from the examination of the present case that, as a result of a lack of capacity, the appellant has still not been placed in a custodial clinic. It has also been sufficiently established that the Minister, in his decision on this matter, has not deviated from his policy to determine the order of placement in a custodial clinic chronologically according to the date on which the TBS orders in respect of the appellant and other [like] persons ... took effect.

5.7 The total duration of the appellant's stay in a remand centre [awaiting placement in a custodial clinic] ... has not yet been so long that these decisions to prolong the

transitory stay, balancing all relevant interests, must be regarded as unreasonable or inequitable.

5.8 It appears from the medical statement of the Utrecht District Psychiatric Service of 16 October 1998 that the appellant's mental condition at that moment was such that a further stay in the remand centre should be regarded as irresponsible. Although the Appeals Board considers it highly desirable that the Minister, as regards subsequent prolongation decisions, should submit on each occasion updated medical reports, it finds, in respect of the present appeals, that the medical report drawn up shortly before the second prolongation suffices. From the report on the selection examination in the period between 11 September 1998 and 11 November 1998 (falling partly within both of the prolongation periods challenged), it does not appear that the detention was unsuitable during the period of admission to the Dr F.S. Meijers Institute.

5.9 The Appeals Board is of the opinion, having regard to the above considerations, that the decisions challenged are not in violation of the substance of the [1997] Act ..., and that the period within which the appellant should be placed in a custodial clinic had to be prolonged from 4 August 1998 to 2 November 1998 and from 2 November 1998 to 31 January 1999.

5.10 As the decisions challenged must be quashed on formal grounds, the Appeals Board rules, pursuant to Article 66 § 3 (b) in conjunction with Article 69 § 5 of the [1997] Act ..., that its decision in respect of the prolongations of the transitory period should replace those which were challenged. ..."

19. No further appeal lay against this decision.

20. On 22 April 1999 the Minister of Justice decided to prolong the applicant's pre-placement detention by a further period of three months as from 1 May 1999. The applicant filed an appeal against this decision on 4 May 1999 with the Appeals Board.

21. The applicant was admitted to a custodial clinic on 17 May 1999.

22. On 15 June 1999, following a hearing held on 19 April 1999, the Appeals Tribunal quashed the Minister's decision to prolong the applicant's pre-placement detention from 31 January to 30 April 1999 on formal grounds, namely the Minister's failure to comply with the procedural regulations under Article 53 § 2 (a) and Article 54 § 2 of the 1997 Act. Finding also that the total duration of the applicant's pre-placement detention could not be regarded as having been so long that, balancing all relevant interests, it should be considered unreasonable or inequitable, and having found no indication that the applicant's mental condition required a priority placement in a custodial clinic, the Appeals Board did not find that the impugned decision should be quashed for being in material breach of the 1997 Act. It decided that the applicant's pre-placement detention should be prolonged until 30 April 1999. The Appeals Tribunal decided to replace the Minister's decision with its own decision to prolong the applicant's pre-placement from 31 January to 30 April 1999. It awarded the applicant compensation in an amount of NLG 100 in respect of the procedural shortcomings in the Minister's decision.

23. In so far as the applicant had claimed that his pre-placement detention was contrary to Article 5 of the Convention, the Appeals Board held:

“The argument based on Article 5 of the Convention fails. After all, the pre-placement detention in a remand centre of a person subject to a TBS order is based on the judicial decision in which the TBS order has been imposed whereas, according to Article 9 § 1 (b) of the 1951 Prisons Act, as in force until 1 January 1999, *casu quo* Article 9 § 2 (f) of the [new 1999] Prisons Act as in force as from that date, persons subject to a TBS order can be held in a remand centre for as long as their admission to a place suitable for them is not possible. Under Article 12 of the 1997 Act, the duration of such a stay in a remand centre can, after six months, be prolonged by periods of three months.”

24. On 11 November 1999, after a hearing held on 17 September 1999, the Appeals Board ruled on the applicant's appeal of 4 May 1999. Having found it established that, contrary to Article 53 § 2 of the 1997 Act, the applicant's view had not been heard prior to the taking of the decision, the Appeals Board considered that, on this procedural ground alone, the impugned decision had to be quashed. In addition, it found that, also on material grounds, the decision of 22 April 1999 had to be quashed as at the expiry of that prolongation decision the applicant would have spent more than fifteen months in pre-placement detention. A delay of more than fifteen months, balancing all relevant interests, should be regarded as unreasonable and inequitable. It awarded the applicant compensation of NLG 100 on account of the procedural shortcomings and NLG 1,250 for the sixteen days he had spent in pre-placement detention on the basis of the decision of 22 April 1999.

25. On 18 February 2000 the Arnhem Regional Court (*arrondissementsrechtbank*) extended the applicant's TBS order by two years. An appeal by the applicant against this decision was rejected by the Arnhem Court of Appeal on 13 November 2000. No further appeal lay against this decision.

II. RELEVANT DOMESTIC LAW AND PRACTICE

26. The relevant provisions of the Netherlands Criminal Code (*Wetboek van Strafrecht*), as in force at the relevant time, read as follows:

“Article 13

1. A person sentenced to imprisonment who, on grounds of the inadequate development or pathological disturbance of his mental faculties, is eligible for this, may be placed in a judicial institution (*justitiële inrichting*) for the treatment (*verpleging*) of persons subject to a TBS order; in that case Articles 37c, 37d and 37e shall apply by analogy. ...

Article 37

1. The judge may order that a person who, owing to the inadequate development or pathological disturbance of his mental faculties, cannot be held responsible for an offence, be committed to a psychiatric hospital (*plaatsing in een psychiatrisch ziekenhuis*) for a period of one year, but only if he represents a danger to himself, to others, or to the general safety of persons or property. ...

Article 37a

1. The judge may impose a TBS order (*terbeschikkingstelling*) on a suspect whose mental faculties were inadequately developed or pathologically disturbed at the time of the commission of the offence if:

1° the offence he has committed is one which, according to its statutory definition, renders offenders liable to a term of imprisonment of four years or more, or if the offence is defined in Articles 132, 285 § 1, 318, 326a or 395 of the Criminal Code, Article 175 § 2 of the 1994 Road Traffic Act (*Wegenverkeerswet*), Article 11 § 2 of the Opium Act (*Opiumwet*), or Article 432, under 3°, of the Criminal Code, and

2° the said measure is necessary in the interests of the safety of others or the general safety of persons or property.

2. In applying paragraph 1, the judge may refrain from imposing a penalty, even if he finds that the suspect may be held criminally responsible for the offence.

3. In making an order referred to in paragraph 1, the judge shall take account of the statements contained in the reports made concerning the suspect's personality, and shall take account of the seriousness of the offence committed and the number of previous convictions for indictable offences.

4. Paragraph 1 of this Article and Article 37 § 1 may be applied in conjunction with regard to the same offence.

Article 37b

1. The judge may order that a person who is subject to a TBS order be confined to a custodial clinic (*verpleging van overheidswege*) if this is necessary in the interests of the safety of others or the general safety of persons or property. ...

Article 37c

1. Treatment shall be provided in custodial clinics for persons subject to TBS orders in accordance with rules to be laid down by Order in Council (*algemene maatregel van bestuur*).

2. The Minister of Justice shall ensure that persons subject to TBS orders who are confined to a custodial clinic receive the necessary treatment. In respect of specific patients, the Minister may issue special instructions to the head of the custodial clinic in the interests of the safety of others or the general safety of persons or property.

3. The rules to be laid down pursuant to paragraph 1 shall make provision for persons subject to TBS orders to appeal against decisions which restrict their freedom of movement or correspondence, or their right to receive visitors.

Article 37d

1. Persons subject to TBS orders may be confined to the following institutions, on condition that the institutions have been designated for this purpose by the Minister of Justice:

- a. private institutions managed by legal persons established in the Netherlands;
- b. State institutions.

2. Treatment shall preferably take place in a private institution. ...

Article 37e

The costs of the confinement of persons subject to TBS orders shall be borne by the State in so far as no other provision is made for them by or pursuant to any Act of Parliament. Rules shall be laid down by Order in Council concerning payment for confinement elsewhere than in State institutions.”

27. A TBS order with confinement to a custodial clinic is not intended to have a punitive effect, but to protect society from any risk posed by the person concerned. It is initially imposed for a period of two years and may be prolonged by a judge for further periods of one or two years where the safety of others or the general safety of persons or property so require (Article 38d of the Criminal Code). The total duration of a TBS order may not exceed four years, unless it has been imposed on the ground of an offence directed against, or constituting a danger to, the physical integrity of one or more persons. In the latter case, there is in principle no restriction on the number of extensions that can be granted by a judge (Article 38e of the Criminal Code).

28. The provisions relating to the proceedings on the extension of a TBS order are set out in Articles 509o – 509x of the Code of Criminal Procedure (*Wetboek van Strafvordering*). Article 509o § 1 provides that the public prosecutor's office (*openbaar ministerie*) may submit a request (*vordering*) for the prolongation of a TBS order no sooner than two months and no later than one month before the date on which the order is due to expire. The request must be accompanied by a recent and reasoned recommendation prepared by the custodial clinic where the person concerned is receiving treatment (Article 509o § 2 CCP). 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).

29. Article 9 of the 1951 Prisons Act (*Beginnelsenwet gevangeniswezen*), as in force until 1 January 1999, provided:

“Remand centres are intended:

a. for the accommodation of those who must undergo punishment by imprisonment or military detention;

b. for the accommodation of all others lawfully deprived of their liberty by a judicial decision, court order or public authority, in so far as there is no other place suitable for their accommodation or for as long as their admission to another suitable place is not possible.”

30. On 1 January 1999, a new Prisons Act (*Penitenciaire Beginselenwet*) entered into force, replacing the 1951 Act. Article 9 § 2 of the 1999 Act, in so far as relevant, reads:

“The following may be held in remand centres: ...

f. persons subject to a TBS order with confinement to a custodial clinic within the meaning of Articles 37b or 38 c of the Criminal Code for as long as their admission to a suitable clinic is not possible.”

31. On 1 October 1997 Articles 1–11 and 13–80 of the Act on confinement to a custodial clinic of persons subject to a TBS order (“the 1997 Act”) entered into force. The custodial clinics, of which there were seven at the material time, are top-security institutions as the persons placed there have been found to pose a great danger to society as well as to themselves. The treatment provided in these clinics is aimed at reducing this danger and preventing recidivism.

32. The 1997 Act distinguishes between care (*verpleging*) and treatment (*behandeling*). The provision of care in a custodial clinic is aimed at the protection of society against the risks posed by persons subject to a TBS order by keeping them confined in a secure institution. The treatment provided in a custodial clinic is geared to individual disorders and personalities. It is aimed at helping persons subject to a TBS order to gain insight into and control over their disorders, to make them aware of their responsibilities and to adjust their behaviour accordingly so that they no longer pose a threat to society.

33. Pursuant to Article 12 of the 1997 Act, which provision had already entered into force on 11 July 1997, a person subject to a TBS order must be admitted to a custodial clinic within six months after the TBS order has taken effect. This period can be extended by the Minister of Justice by further periods of three months each time if placement proves impossible. A failure to give an explicit prolongation decision is considered to be a decision to prolong the pre-placement detention. In such a situation, the pre-placement detention is extended automatically. Consequently, a failure to give a prolongation decision can never result in the release of the person concerned, who may challenge such an implicit decision by taking appeal proceedings before the Appeals Board.

34. Article 11 of the 1997 Act provides that the Minister of Justice must decide in which specific custodial clinic the person concerned is to be placed, and that such a decision should – at least – take into account the

requirements of the protection of society against the dangerousness of the person subject to a TBS order, the safety of persons other than the detainee or the general safety of persons or property, and the requirements of the treatment of the person concerned in view of the nature of the established inadequate development or pathological disturbance of his or her mental faculties.

35. The decision on the selection of the most appropriate custodial clinic – given the differences between the various institutions as regards their security levels, patient population (gender, psychiatric diagnosis of the patients and their ability to function in a group setting, etc.), methods of treatment and the average stay of patients – is in most cases preceded by a seven-week period of psychiatric observation in the Dr F.S. Meijers Institute, an institution specialised in this field.

36. In the National Ombudsman's report no. 96/575 of 5 December 1996, which concerned the situation prior to the entry into force of the 1997 Act, it was stated that, in principle, taking into account the seven-week observation period and a margin of some weeks for the administrative processing of the selection application and the admission procedure, a delay of three months between the date on which a sentenced person became eligible for early release and the date of admission to a custodial clinic was acceptable. Acknowledging that incidental friction between the available and necessary capacity of custodial clinics could not be wholly excluded, the National Ombudsman further held that an additional delay of no longer than three months at the very most might still be acceptable. However, given the responsibility of the Minister of Justice for adequate capacity planning, the Ombudsman did emphasise that reliance on *force majeure* would only be acceptable if the Minister could demonstrate unforeseen circumstances that indeed rendered a longer period of pre-placement detention unavoidable.

37. Since September 1999 a simplified system has been used for the selection and placement of persons subject to a TBS order. This has resulted in a reduction of the delay in effecting admission to a custodial clinic. In 2002 this delay was, on average, 248 days.

III. RELEVANT INTERNATIONAL MATERIAL

38. In the report of 15 July 1993 of the European Committee for the Prevention of Torture and Inhuman Treatment (the “CPT”) on its visit to the Netherlands from 30 August to 8 September 1992 (CPT/Inf (93)15), it is stated:

“130. ... the delegation also met (for instance, in the De Schie Prison, the De Singel Prison and the FOBA) some male and female prisoners in respect of whom treatment measures (eg. a TBS placement) had been decided, in some cases a long time before, but who had not yet been transferred because of a lack of places.

The CPT would like to receive the Dutch authorities' comments on this subject.”

39. In their response to the CPT report (CPT/Inf (93)20), the Netherlands Government stated:

“The increase in the number of persons under a TBS order has placed the existing capacity under severe strain, causing a rise in the number of prisoners awaiting transfer to a TBS clinic. The Netherlands Government shares the CPT's view that such prisoners should be placed in an appropriate hospital facility within a reasonable length of time. The situation has changed, however, since the delegation's visit. A programme has been set up to increase the capacity through building projects and the creation of more places in existing establishments, and outpatient departments for part-time treatment have been added to some TBS clinics, widening the prospect for earlier probationary leave. These measures will reduce waiting times considerably.”

40. In the CPT report of 29 September 1998 on its second visit to the Netherlands from 17 to 27 November 1997 (CPT/Inf (98)15), it is stated:

“111. Since the beginning of the 1990s, the Dutch authorities have been confronted by a significant increase in TBS orders, a problem which has been exacerbated by the prolonged stays – for more than six years – of some 160 persons within the TBS system. As a result, the number of persons waiting in prisons for admission to TBS establishments rose from 26 in 1991 to over 200 at the time of the CPT's second periodic visit. In response to this situation, the Dutch authorities have decided to increase the number of TBS places, in order to reach a capacity of 1,000 in 1999. However, the CPT notes that, in a letter sent to the Lower House of Parliament on 2 April 1998, ... the Minister of Justice indicated that the shortage of TBS places in 2002 is estimated at 340.

Concern has been expressed in the Netherlands about the position of inmates waiting in prison for admission to a TBS institution. During this waiting period, currently averaging 9 months, the persons concerned do not receive the treatment they require, a situation which, it has been pointed out, is likely to provoke feelings of anxiety, self-doubt and anger in the persons concerned. Further, as they are considered dangerous, those inmates run a serious risk of being placed in restrictive regimes in the prison establishments where they are temporarily being held.”

41. In their response to the CPT report (CPT/Inf (99)5), the Netherlands Government informed the CPT of the measures taken by the Dutch authorities in order to overcome the difficulties flowing from the large number of prisoners awaiting admission to a custodial clinic and of the steps taken to ensure that such prisoners received at least minimally adequate treatment whilst awaiting admission. According to the Netherlands Government, efforts were being made to improve/accelerate the outflow of TBS patients to mainstream psychiatric facilities and the new statutory provision for the conditional lifting of TBS orders was expected both to increase the outflow of TBS patients as well as to reduce the number of patients entering custodial clinics.

42. The Government further informed the CPT that lengthy waiting lists for places in custodial clinics would continue to exist pending a resolution of the capacity problem, but that experiments had started in a few places

providing special psychiatric treatment for inmates awaiting admission to a custodial clinic in ordinary prisons. In these experiments, therapists attached to forensic outpatient departments offered a form of preparatory therapy designed to alleviate anxiety about the eventual TBS treatment and to reduce the growing hostility felt by these people towards the justice system. According to the Government, the initial results of these experiments were encouraging in that the persons involved – therapists, prison staff and inmates – had all responded positively, and there was a growing demand among prisoners awaiting admission to a TBS institution for this kind of support (pp. 40-41).

THE LAW

I. THE APPLICANT'S STATUS AS A VICTIM

43. Before turning to the substance of the complaint, the Court must ascertain whether, and to what degree, the applicant continues to be a victim of the alleged breach within the meaning of Article 34 of the Convention.

44. The Government submitted, referring to the decision of 11 November 1999 by the Appeals Board, that the national authorities had established that the applicant's pre-placement detention had become unlawful after fifteen months and awarded him financial compensation for the period he had spent in pre-placement detention between 1 and 17 May 1999. The Government were therefore of the opinion that the applicant could no longer, or in any event not in respect of the time spent in pre-placement detention after 1 May 1999, be regarded as a victim.

45. The applicant contested that argument. He submitted that the Appeals Board's decision to award him financial compensation on the basis of a finding that a period of pre-placement detention longer than fifteen months was unreasonable and unfair was insufficient to deprive him of his victim status under the Convention.

46. The Court reiterates that a decision or measure favourable to an applicant is not in principle sufficient to deprive him of his status as a "victim" unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention (see *Burdov v. Russia*, no. 59498/00, § 31, ECHR 2002-III).

47. The Court notes that the Appeals Board, in its decision of 11 November 1999, held that the decision to prolong the applicant's pre-placement detention after 1 May 1999 was in breach, on both procedural and material grounds, of the 1997 Act and, on that basis, awarded the applicant compensation of NLG 1,350 (612.60 euros – "EUR").

48. Although the Appeals Board rejected on 11 November 1999 the applicant's argument that his pre-placement detention was contrary to his rights under Article 5 of the Convention, the Court accepts that the applicant, in so far as his pre-placement detention exceeded fifteen months, can no longer claim to be a victim within the meaning of Article 34 of the Convention. The Appeals Board did acknowledge in substance that his right to liberty and security, as guaranteed by Article 5 of the Convention, had been infringed by holding that his pre-placement detention had given rise to a substantive breach of domestic law once it had exceeded fifteen months. On the basis of this finding, the Appeals Board then afforded redress in the form of financial compensation which, in the circumstances of the case, may be regarded as adequate and sufficient.

49. However, as the Appeals Board did not find the first fifteen months of the applicant's pre-placement detention to be unlawful under domestic law, the Court finds that the applicant may still claim to be a victim of a violation of Article 5 § 1 of the Convention in respect of that period.

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

50. The applicant complained that his pre-placement detention was in violation of his rights under Article 5 of the Convention. This provision, in so far as relevant, reads 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:

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

(e) the lawful detention ... of persons of unsound mind ...”

A. Admissibility

51. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The arguments of the parties

52. The Government submitted that the present case was to be distinguished from the case of *Aerts v. Belgium* (judgment of 30 July 1998,

Reports of Judgments and Decisions 1998-V) in which the applicant was found not to be criminally responsible on the basis of his mental disorder and his detention was solely based on Article 5 § 1 (e) of the Convention. However, Mr Morsink's detention resulted from a conviction and was therefore governed by Article 5 § 1 (a).

53. According to the Government, in view of the judgment of 21 January 1997 of the Regional Court, as upheld in the judgment of 16 September 1997 of the Court of Appeal, sub-paragraphs (a) and (e) of Article 5 § 1 of the Convention both afforded a basis for the applicant's detention. In these judgments, which formed the grounds for the applicant's deprivation of liberty, the applicant had been found responsible under criminal law for the offences of which he had been found guilty and a prison sentence had been imposed. In addition to this sentence, finding that he was suffering from a mental disorder as a result of which he posed a threat to the safety of others and/or the general safety of persons or property, the domestic courts had also imposed a TBS order, which was a non-punitive measure aimed at the protection of society against the danger posed by the mental disorder. The prison sentence, which was to be executed first, related to the part of the offence for which the applicant had been found criminally liable and the TBS order to the part for which he could not be held criminally liable. Article 9 § 1 (b) of the 1951 Prisons Act and, from 1 January 1999, Article 9 § 2 (f) of the 1999 Prisons Act provided the legal basis for the place where the applicant, after having served his prison sentence, was to be held pending his admission to a custodial clinic.

54. According to the Government, the very nature of a TBS order made it necessary to strike a balance between different interests if there was no place available in a custodial clinic immediately after the end of the prison sentence. On this point, the Government explained that a substantial unforeseen increase in the incidence of TBS orders, together with a disproportionately low number of discharges from custodial clinics, had led to an increase in the number of pre-placement detainees. As a result of policy initiatives taken to render the intake, throughput and outflow of persons subject to a TBS order more efficient and effective, the capacity of custodial clinics had been increased from 994 in 1998 to 1,264 in 2002.

55. The Government argued that a degree of friction between the capacity available in custodial clinics and the capacity required should be regarded as acceptable, having regard to the need to manage and balance public spending. Given the twofold purpose of a TBS order, namely to provide the person concerned with care and treatment for his mental disorder and to protect the public against the danger posed by this disorder, a period in which no treatment could be given could not be regarded as unlawful or incompatible with Article 5 of the Convention.

56. Referring to the Court's findings in the case of *Bizzotto v. Greece*, in which it had held that arrangements for implementing sentences could not,

in principle, have any bearing on the “lawfulness” of a deprivation of liberty under Article 5 § 1 of the Convention (judgment of 15 November 1996, *Reports* 1996-V, pp. 1739, § 34), the case of *Ashingdane v. the United Kingdom* in which the Court had held that Article 5 § 1 (e) of the Convention was not in principle concerned with suitable treatment or conditions (judgment of 28 May 1985, Series A no. 93, p. 21, § 44), and the case of *Wynne v. the United Kingdom* (no. 67385/01, decision of 22 May 2003) in which the Court had held that the applicant's continued detention beyond the expiry of his “tariff” on grounds of risk and dangerousness remained justified under Article 5 § 1 of the Convention as there was a clear causal connection between the original offences and his continued detention, the Government considered that, even during the applicant's pre-placement detention, the required connection had existed between the legal basis for his detention and the place and circumstances of that detention. The Government were therefore of the opinion that the applicant's pre-placement detention could not be regarded as contrary to Article 5 § 1 of the Convention.

57. The applicant submitted that his detention until 5 February 1998 had been a lawful detention after conviction by a competent court and thus in accordance with Article 5 § 1 (a) of the Convention. However, from 5 February 1998, when his TBS order – being of a non-punitive character and imposed on the basis of a finding that he was suffering from a mental disorder requiring treatment because it posed a threat to society – had taken effect, his detention had no longer fallen within the scope of Article 5 § 1 (a) but under Article 5 § 1 (e).

58. Relying on the Court's findings in the case of *Aerts v. Belgium* (cited above) in which it had held that there must be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention, and that, in principle, the “detention” of a person as a mental health patient would only be “lawful” for the purposes of subparagraph (e) of paragraph 1 if effected in a hospital, clinic or other appropriate institution (pp. 1961-62, § 46), the applicant argued that, from 5 February 1998 onwards, his detention had become unlawful.

59. According to the applicant, it had been the intention of the Arnhem Regional Court and the Arnhem Court of Appeal that, after having served his prison sentence, he should undergo treatment in a custodial clinic and not remain without treatment in a remand centre. As there was no relationship between his pre-placement detention in an ordinary wing of a remand centre without any care or treatment being provided and the objective of his deprivation of liberty, namely to treat him in a custodial clinic so that he would no longer pose a threat to society, his rights under Article 5 § 1 (e) had been infringed.

60. The applicant lastly submitted that the detention in a remand centre of persons who had been found to be mentally ill and in need of treatment

should be regarded as unacceptable, regardless of the duration of such detention.

2. *The Court's assessment*

61. The Court reiterates that Article 5 § 1 of the Convention contains a list of permissible grounds of deprivation of liberty that is exhaustive. However, the applicability of one ground does not necessarily preclude that of another; a detention may, depending on the circumstances, be justified under more than one sub-paragraph (see *Eriksen v. Norway*, judgment of 27 May 1997, *Reports* 1997-III, p. 861, § 76).

62. The Court observes that in the instant case the applicant's deprivation of liberty was based on the judgment of Arnhem Regional Court of 21 January 1997 – as upheld on 16 September 1997 by the Arnhem Court of Appeal – whereby the applicant was convicted of assault and assault occasioning grievous bodily harm, and was given a prison sentence as well as a TBS order. This order, being initially valid for two years and comprising confinement in a custodial clinic, took effect on 5 February 1998. Although the applicant had served his prison sentence on that date, the subsequent period of his deprivation of liberty remained covered by the judgments of 21 January and 16 September 1997. Accordingly, the applicant's detention between 5 February 1998 and 5 February 2000 falls within the scope of both sub-paragraphs (a) and (e) of Article 5 § 1 of the Convention.

63. It must therefore be established whether the applicant's pre-placement detention between 5 February 1998 and 1 May 1999 was “in accordance with a procedure prescribed by law” and “lawful” within the meaning of Article 5 § 1 of the Convention. The Convention here essentially refers back to national law and states the obligation to conform to the substantive and procedural rules thereof. Reiterating that it is in the first place for the national authorities, notably the courts, to interpret and apply domestic law (see *Bouamar v. Belgium*, judgment of 29 February 1988, Series A no. 129, p. 21, § 49), the Court accepts, in the light of the Appeals Board's decision of 11 November 1999, that the applicant's pre-placement detention during the period under consideration was lawful under domestic law.

64. However, for the purposes of Article 5 of the Convention, the lawfulness under domestic law of the applicant's pre-placement detention is not in itself decisive. It must also be established that his pre-placement detention during the relevant period 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 (see *Witold Litwa v. Poland*, no. 26629/95, §§ 72-73, ECHR 2000–III).

65. Although it is true that the Court has held in the past that there must be some relationship between the ground of permitted deprivation of liberty

relied on and the place and conditions of detention, and that, in principle, the “detention” of a person as a mental health patient will only be “lawful” for the purposes of sub-paragraph (e) of paragraph 1 if effected in a hospital, clinic or other appropriate institution (see *Hutchison Reid v. the United Kingdom*, no. 50272/99, § 48, ECHR 2003-IV, with further references), the Court, in the circumstances of the present case, cannot accept the applicant's argument that the failure to admit him to a custodial clinic on 5 February 1998 rendered his detention after that date automatically unlawful under Article 5 § 1 of the Convention.

66. In this connection, the Court considers in the first place that – given the difference between a prison sentence, which has a punitive character, and a TBS order, which is of a non-punitive nature – it cannot, as such, be regarded as contrary to Article 5 § 1 of the Convention to commence the procedure for selecting the most appropriate custodial clinic (see paragraphs 34 and 35 above) only after the TBS order has taken effect.

67. The Court further considers that, once this selection procedure has been completed, it would be unrealistic and too rigid an approach to expect the authorities to ensure that a place is immediately available in the selected custodial clinic. It accepts that, for reasons linked to the efficient management of public funds, a certain friction between available and required capacity in custodial clinics is inevitable and must be regarded as acceptable.

68. Consequently, a reasonable balance must be struck between the competing interests involved. On this point, reiterating the importance of Article 5 in the Convention system, the Court is of the opinion that in striking this balance particular weight should be given to the applicant's right to liberty. A significant delay in admission to a custodial clinic and thus the beginning of the treatment of the person concerned will obviously affect the prospects of the treatment's success within the statutory two-year time-frame for the initial validity of a TBS order. Moreover, the chances of having to prolong the validity of the TBS order will, correspondingly, be increased.

69. The Court cannot find that, in the circumstances of the present case, a reasonable balance was struck. Bearing in mind that the problem of a structural lack of capacity in custodial clinics had been identified by the Netherlands authorities as early as 1986, and having found no indication in the instant case that, at the material time, the authorities were faced with an exceptional and unforeseen situation, the Court is of the opinion that a delay of fifteen months in the admission of a person to a custodial clinic cannot be regarded as acceptable. To hold otherwise would entail a serious weakening of the fundamental right to liberty to the detriment of the person concerned and thus impair the very essence of the right protected by Article 5 of the Convention.

70. There has, accordingly, been a violation of Article 5 § 1 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

71. 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

72. The applicant requested the Court to make an award for non-pecuniary damage suffered as a result of his having had to wait for admission to a custodial clinic, which damage had only been compensated in part. He left it to the Court's discretion to determine the amount of such an award.

73. The Government did not avail themselves of the possibility of submitting comments on the applicant's claim for damage.

74. The Court accepts that the applicant must have suffered feelings of frustration, uncertainty and anxiety, which cannot be compensated solely by the finding of a violation. The Court considers, deciding on an equitable basis, that the applicant should be awarded the sum of EUR 6,000.

B. Costs and expenses

75. The applicant did not submit a claim for costs and expenses. Accordingly, the Court considers that there is no call to award him any sum on that account.

C. Default interest

76. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Declares* admissible unanimously the applicant's complaint that his pre-placement detention was in violation of his rights under Article 5 § 1 of the Convention;
2. *Holds* by five votes to two that there has been a violation of Article 5 § 1 of the Convention;
3. *Holds* by five votes to two
 - (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, EUR 6,000 (six thousand euros) in respect of non-pecuniary damage, plus any tax that may be chargeable;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points.

Done in English, and notified in writing on 11 May 2004, 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 opinions are annexed to this judgment:

- (a) Concurring opinion of Mr Loucaides;
- (b) Dissenting opinion of Mrs Thomassen joined by Mr Jungwiert.

J.-P.C.
S.D.

CONCURRING OPINION OF JUDGE LOUCAIDES

I agree that there has been a violation of Article 5 § 1 in this case in respect of the period between 5 February 1998 and 1 May 1999, but I do not share the opinion of the majority that pre-placement in an ordinary remand centre pending transfer to a custodial clinic may, under certain circumstances, escape censure under Article 5 § 1 of the Convention.

I consider that pre-placement cannot, under any circumstances, be considered as having a legal basis under Article 5 § 1 of the Convention. The provisions of this Article authorise “the lawful detention of a person after conviction by a competent court” and “the lawful detention of persons ... of unsound mind...” It is a well-established principle that the limitations on the rights provided in the Convention should be interpreted strictly and narrowly (see, among other authorities, *Klass and Others v. Germany*, judgment of 6 September 1978, Series A no. 28, p. 21, § 42, *Sunday Times v. the United Kingdom*, judgment of 26 April 1979, Series A no. 30, p. 40, § 65, *Winterwerp v. the Netherlands*, judgment of 24 October 1979, Series A no. 33, p. 16, § 37, and *Guzzardi v. Italy*, judgment of 6 November 1980, Series A no. 39, p. 36, § 98). This applies in particular to the list of permissible exceptions in paragraph of Article 5 of the Convention “...having regard to the fact that they constitute exceptions to a most basic guarantee of individual freedom” (see *Kurt v. Turkey*, judgment of 25 May 1998, *Reports* 1998-III, p. 1184, § 122; and see also *Ciulla v. Italy*, judgment of 22 February 1989, Series A no. 148, p.18, § 41; and *Labita v. Italy*, [GC], no. 26772/95, § 170, ECHR 2000-IV).

The lawful sentence imposed on the applicant by the Arnhem Regional Court in its judgment of 21 January 1997 was fifteen months' imprisonment followed by confinement in a custodial clinic. Therefore, after completing his term of imprisonment on 5 February 1998 he should have been transferred forthwith to a custodial clinic. The fact that the authorities were facing practical difficulties in finding accommodation for the applicant in such a clinic and had to keep him in a remand centre until 17 May 1999 cannot by itself justify a deviation from the terms of the judgment in question which, as already pointed out, was the only lawful basis for depriving the applicant of his liberty. The majority stated in this respect:

“The Court further considers that, once this selection procedure has been completed, it would be unrealistic and too rigid an approach to expect the authorities to ensure that a place is immediately available in the selected custodial clinic. It accepts that, for reasons linked to the efficient management of public funds, a certain friction between available and required capacity in custodial clinics is inevitable and must be regarded as acceptable”.

I find this reasoning, which is used to explain what in my opinion amounts to a deviation from the judgment in question, unpersuasive. Reasoning of this type opens the door to abuse, as it allows the authorities to

rely on practical problems as a sufficient legal excuse for failing to comply with the requirements of the Convention. It also creates a risk of arbitrariness. I would note that the Court has repeatedly held in respect of the “reasonable-time” requirement under Article 6 of the Convention that the authorities cannot rely on practical difficulties to justify unreasonable delays and that the High Contracting Parties are expected to organise their judicial system in such a way as to meet the requirements of Article 6 § 1 of the Convention (see, among other authorities, *Andrzej and Barbara Pilka v. Poland*, no. 39619/98, § 55, 6 May 2003; and *Duclos v. France*, judgment of 17 December 1996, *Reports* 1996-I, pp. 2180-81, § 55 *in fine*). I believe that this approach should be applied, *mutatis mutandis*, to the situation under consideration.

In the light of the above and of the demands of the rule of law, I cannot accept that the applicant's pre-placement detention in a remand centre, where no medical care was available of the kind he would have received had he been sent to the custodial clinic in accordance with the judgment authorising his detention, does not amount to a deprivation of liberty contrary to Article 5 § 1 of the Convention. This unlawful detention was aggravated by the fact that it continued for fifteen months.

DISSENTING OPINION OF JUDGE THOMASSEN JOINED BY JUDGE JUNGWIERT

The applicant was convicted of assault and assault occasioning grievous bodily harm, and was sentenced to fifteen months' imprisonment in combination with an order for his confinement in a custodial clinic (confinement order).

After the date on which he had become eligible for early release, the applicant remained in detention in a remand centre pending the procedure for the selection of the most suitable custodial clinic for him, and pending his admission to that clinic.

The issue before the Court is whether the applicant's detention in a remand centre was lawful under Article 5 § 1, since the aim of the order is to place the person concerned in a custodial clinic.

This issue is the same as in the case of *Brand v. the Netherlands* (no. 49902/99), in which the Court has also delivered judgment today. In that case the basis for the applicant's placement in a remand centre was the case-law of the Supreme Court, dating from 1963, to the effect that detention in a remand centre under a confinement order is not, in principle, unlawful.

In the present case new legislation was in force, which confirmed this case-law. A time-limit of six months was set for selecting the most appropriate setting and for waiting in a remand centre pending admission to a suitable clinic, and that time-limit could be prolonged under certain conditions by further periods of three months.

The Court does not accept this legislation as being in compliance with Article 5 § 1 of the Convention. It emphasises that there must be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention, and that, in principle, the detention of a person as a mental health patient will only be lawful for the purposes of sub-paragraph (e) of Article 5 § 1 if effected in a hospital, clinic or other appropriate institution (§ 65). It concludes that the applicant's detention was unlawful.

I cannot agree with the Court's conclusion. The Regional Court found the applicant to represent a threat to public safety and in order to protect society it imposed a confinement order on him. The confinement order implied that the applicant should not be released on the date on which he became eligible for early release but should remain in detention for a further period of, initially, two years. It followed from the legislation in force that the applicant would not have been placed immediately in a custodial clinic. A time-limit of six months was provided for under the law, with the possibility of further extensions of three months. The fact that the confinement order was aimed at having the applicant undergo treatment of his mental disorder did not affect in my view the main ground for his detention, namely the

protection of society after a conviction for serious crimes (see, *mutatis mutandis*, *Bizzotto v. Greece*, judgment of 15 November 1996, *Reports* 1996-V). The prolongation decisions taken in the present case were examined on appeal by the Appeals Board, which took into consideration the available capacity, an indication of the average duration of transitory stays in remand centres, a report in relation to the applicant's mental condition, and a statement by a doctor on the question whether the applicant, in view of his mental condition, was able to stay any longer, on a transitory basis, in a remand centre. I cannot follow the Court in finding both the law in general and the decisions of the Appeals Board arbitrary. In my view the applicant's detention in a remand centre was justified under sub-paragraph (a) of Article 5 § 1.

I recognise that, even if the period spent in detention in a remand centre by the applicant is lawful, it may give rise to issues under the Convention; in particular, combined with a lack of adequate medical care, detention in a remand centre could be rendered incompatible with Article 3. However, in the present case, such circumstances were not alleged, nor are they apparent from the case file.

It follows from the above that I cannot follow the majority in its finding that the applicant's detention was unlawful, nor can I find that the applicant's personal circumstances were neglected in an inhuman way.