



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

SECOND SECTION

CASE OF BRAND v. THE NETHERLANDS

(Application no. 49902/99)

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 Brand 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. 49902/99) 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, F.C. Brand (“the applicant”), on 15 April 1999.

2. The applicant was initially represented by Mr M.A.M. Wolters, a lawyer practising in Groningen, and from 1 February 2002 by Mrs L.H. Poortman-de Boer, also 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 First Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

4. On 11 September 2001 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 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).

6. On 4 December 2001 the Government filed observations on the admissibility and merits of the complaint, to which the applicant’s representative responded on 18 February 2002.

7. 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.

8. 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

9. The applicant was born in 1956 and lives in Eindhoven.

10. On 23 June 1994 the 's-Hertogenbosch Regional Court (*arrondissementsrechtbank*) convicted the applicant of participation in robbery with violence resulting in grievous bodily harm and sentenced him to fifteen months' imprisonment, with deduction of the time spent in pre-trial detention. In addition, having found that the applicant was suffering from a mental disorder and was dangerous, the Regional Court further ordered the applicant's confinement in a custodial clinic (hereafter a "TBS order" - *terbeschikkingstelling met bevel tot verpleging van overheidswege*).

11. On 10 October 1994, when the applicant had served his prison sentence, the TBS order took effect. However, the applicant was not transferred to a custodial clinic as there were no places available. He therefore remained in pre-placement detention in the 's-Hertogenbosch ordinary remand centre.

12. In order to expedite his admission to a custodial clinic, the applicant instituted summary civil proceedings (*kort geding*) against the Netherlands

State. He withdrew these summary proceedings after his transfer to a custodial clinic in Nijmegen on 28 December 1995.

13. On 8 February 1996 the applicant took civil proceedings against the Netherlands State before the Hague Regional Court, claiming compensation in tort (*onrechtmatige daad*) in an amount of 29,200 Netherlands guilders (NLG), i.e. NLG 50 for each day during the first ten months of his pre-placement detention after 10 October 1994 pending transfer to a custodial clinic and NLG 100 for each subsequent day until 28 December 1995.

14. In its judgment of 24 July 1996 the Regional Court held that a delay of six months was acceptable for a transfer to a custodial clinic and that the Netherlands State had only acted unlawfully in so far as this delay had exceeded six months. It awarded the applicant compensation in the amount of NLG 50 for each day spent in pre-placement detention between 6 and 10 months after 10 October 1994 and NLG 100 for each subsequent day until 28 December 1995, i.e. a total amount of NLG 20,100. It rejected the applicant's claim for the remainder.

15. The Netherlands State filed an appeal with the Hague Court of Appeal (*Gerechtshof*). The applicant filed a cross-appeal (*incidenteel beroep*) in which he reduced his claim for damages to NLG 24,900 in that he no longer sought compensation for the first three months of his pre-placement detention, i.e. the period between 10 October 1994 and 28 December 1995.

16. In its judgment of 20 March 1997 the Court of Appeal rejected the principal appeal filed by the Netherlands State. It did, however, quash the judgment of 24 July 1996 on the basis of the cross-appeal filed by the applicant in so far as the applicant's claims in excess of NLG 20,100 had been dismissed in this judgment. It ordered the Netherlands State to pay a further amount of NLG 4,800 to the applicant. The Netherlands State filed an appeal in cassation with the Supreme Court (*Hoge Raad*).

17. On 5 June 1998 the Supreme Court quashed the judgment of 20 March 1997 and referred the case back to the Amsterdam Court of Appeal. It held, *inter alia*:

“3.3 Article 9 § 1 (b) of the [1951] Prisons Act (*Beginselenwet Gevangeniswezen*) reads:

‘Remand centres are intended: (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 suitable place for their accommodation or for as long as admission to another suitable place is not possible.’

The point of departure for the examination ... must therefore be that the [applicant's] continued stay in the remand centre ‘for as long as admission to another suitable place is not possible’ is in principle lawful as being based on the law. Moreover, the parties and the Court of Appeal have taken this approach.

However, where it can no longer reasonably be held that the failure to admit a person to a custodial clinic is justified by the circumstances, the continuation of detention in the remand centre must be regarded as unlawful (Supreme Court, 28 June 1963, *Nederlandse Jurisprudentie* 1963, 480). Also, the parties and the Court of Appeal have taken this as their point of departure. Part 1 [of the cassation complaint] thus lacks a factual basis.

3.4.1 The Court of Appeal, faced with the question from what moment the situation referred to in the last paragraph of 3.3 arises, has held that ‘apart from exceptional circumstances, the stay of a [person awaiting admission to a custodial clinic] should not exceed three months’ and, further, that, in the absence of exceptional circumstances, the [applicant’s] stay in the ’s-Hertogenbosch remand centre was unlawful after a period of three months had elapsed. Parts 2-9 [of the cassation complaint] are directed against these findings and the reasons given by the Court of Appeal.

3.4.2 In the examination of these parts, it must be stated in the first place that the impugned findings of the Court of Appeal concern a situation prior to the entry into force of Article 12 of the Act on confinement to a custodial clinic of persons subject to a TBS order (*Beginsele wet verpleging ter beschikking gestelden*). ... this provision entered into force on 11 July 1997. The Supreme Court’s considerations hereafter will thus address the legal situation until 11 July 1997.

3.4.3 In 1963 the Minister of Justice gave an undertaking to the Upper House of Parliament that the admission to a custodial clinic of persons in respect of whom a TBS order had been given and in respect of whom a custodial clinic had been selected would be carried out within eight weeks after the TBS order had taken effect. ...

In a letter to the Lower House of Parliament of 3 June 1986, the State Secretary of Justice ... stated that she was unable to maintain this undertaking, given the growth in waiting lists.

Article 12 of the Act on confinement to a custodial clinic of persons subject to a TBS order reads:

‘1. The admission [to a custodial clinic] of a person in respect of whom a TBS order has been issued takes place within a period of six months after the date on which the TBS order has become effective.

2. When Our Minister, taking account of the requirements mentioned in Article 11 § 2 [of this Act], considers that admission is not possible within the period set out in the first paragraph, he may extend this period by three months each time.

3. A decision to extend within the meaning of the second paragraph shall be equated to a refusal to decide within the period mentioned in the first paragraph.’

In the Explanatory Memorandum to this Article it is stated, *inter alia*:

‘... in the proposed first paragraph of Article 12 a time-limit of six months is set out within which the admission must in general be carried out. This time-limit has been chosen on the basis of the fact that, in addition to the previously accepted guideline for a maximum duration for a TBS admission of twelve weeks, the time needed for the selection examination, the consultation with the

envisaged institution of admission and the decision-making at the Ministry must also be taken into consideration.

In 1986 my predecessor abandoned the above-mentioned time-limit of twelve weeks since, as a result of the lack of capacity of the custodial clinics including the [forensic psychiatric observation] Dr F.S. Meijers Institute, this time-limit could no longer be observed.

It cannot be expected for a foreseeable time that all persons in respect of whom a TBS order has been issued can be admitted to the custodial clinic selected for them within the stated time-limit. The proposed second paragraph of Article 12 therefore opens the possibility of an extension of the six-month period by three months each time.'

3.4.4 The following must be derived from the statements of the Minister and the State Secretary of Justice. **After 1963** the Government apparently assumed that the undertaking made **in 1963** concerned the time needed for selection **and** admission of persons awaiting admission to a custodial clinic and that this period would not exceed a maximum of twelve weeks. The State Secretary 'abandoned' this undertaking in 1986 on grounds of 'the lack of capacity of the custodial clinics, including the Dr F.S. Meijers Institute'. It follows from this that, where the above-mentioned lack of capacity is not taken into consideration, the point of departure is that the **procedure** of selection and admission of persons subject to a TBS order does not, in principle, need to take more than three months. The consequences of this lack of capacity and other circumstances that might influence the delay in admission will be addressed in considerations nos. 3.4.5 – 3.4.10.

In the light of the presupposed standard in 3.3 it cannot be said, however, that the mere exceeding of the three-month time-limit in itself renders a lawful detention in a remand centre unlawful under Article 9 § 1 (b) of the [1951] Prisons Act. This situation only arises where it can no longer reasonably be held that the failure to admit a person to a custodial clinic remains to be justified by the circumstances. Only then can it be said that, although there is a legal basis for the continued detention in a remand centre of a person subject to a TBS order, the further duration of that detention is contrary to what is fitting conduct in society according to unwritten (customary) law (*in strijd is met hetgeen volgens ongeschreven recht in het maatschappelijk verkeer betaamt*).

3.4.5 For cases like the present one, this unwritten law is as follows.

It must be stated first that the TBS order in cases like the present one starts to run from the date of early release and that the Minister of Justice, pursuant to Article 4 of the TBS Execution Rules (*Reglement tenuitvoerlegging TBS*) (as in force until 2 October 1997), had to decide 'as soon as possible on the admission to a custodial clinic intended to execute the confinement order'. This did not, however, mean that the Minister of Justice was obliged to ensure that the required capacity for persons subject to a TBS order was available at any given point in time. A certain friction between available and required capacity is indeed acceptable from the point of view of efficient expenditure of financial resources. It has already become clear in 3.4.3 that the Minister of Justice, when he allowed a delay of twelve weeks in 1963, took into account beforehand the fact that this delay would not be sufficient in all cases.

It further needs to be noted that Article 12 of the Act on confinement to a custodial clinic of persons subject to a TBS order entered into force on 11 July 1997. In this provision, identical wording to which was already included in the Bill submitted on 12 October 1993, the point of departure is an admission delay, continuously subject to extension, of six months. The views of the Government and Parliament during the history of the adoption of the aforementioned Act are relevant to the examination of the question as to the period of delay in a remand centre awaiting admission to a custodial clinic intended for the person concerned which can be considered, in general, justified by the circumstances and thus acceptable in society.

Noting the above, and with due regard for the considerations set out in 3.4.4, the Supreme Court is of the opinion that, after the end of the prison sentence, the pre-placement detention in a remand centre for a period of six months of a person subject to a TBS order awaiting admission to a custodial clinic intended for him cannot be regarded as unlawful. A period longer than six months would be unlawful, unless there were special circumstances, as referred to in 3.4.7 below.

3.4.6

3.4.7 In part 6 [of the grounds of appeal in cassation] the complaint is made that the Court of Appeal has not accepted that it is incompatible with the standard given in the Supreme Court's judgment of 28 June 1963 (NJ 1963, 480) that a distinction be made between general circumstances, which could be relevant for a waiting period for admission to a custodial clinic of three months, and special circumstances which could be relevant for the period after three months. ...

The complaint fails. Only on grounds of special circumstances to be submitted by the State and in the event of a proven dispute relating to the person concerned and/or the State – such as, for instance, incidental and serious friction between available and required capacity for persons subject to a TBS order – can the exceeding of the maximum duration of an admission delay be justified.

3.4.8

3.4.9

3.4.10 Since the State has not adduced any of the special circumstances referred to in 3.4.7, it follows from the foregoing that the detention of [the applicant] in the 's-Hertogenbosch remand centre must be considered unlawful from the moment when a period of six months had passed following the beginning of his stay there awaiting admission [to a custodial clinic].

3.4.11

3.4.12 The complaint set out in part 10 [of the grounds of appeal in cassation] about the reasons [given by the Court of Appeal for rejecting the State's argument in relation to the determination by the Regional Court of the amount of compensation of respectively NLG 50 and NLG 100 per day] is well-founded. The State has disputed ... on grounds that cannot immediately be refuted that the end date of the TBS would change when the starting date had been postponed. By ignoring this, the Court of Appeal has not given sufficient reasons for its impugned finding.

3.4.13 Part 10 further contains a complaint that the Court of Appeal has used an incorrect standard in the determination of compensation by assuming that the stay of [the applicant] in the remand centre can at best be compared to the case of a suspect who has spent more time in pre-trial detention than was justified. This complaint is also well-founded. The unlawfulness of detention in a remand centre after six months does not arise from the continued deprivation of liberty but from the failure to start treatment in a timely manner in a custodial clinic intended for this purpose. The comparison used by the Court of Appeal does not fit the nature of this form of unlawfulness and the non-pecuniary damage resulting therefrom. It is more appropriate to determine the scope of the damage according to equity and with due regard to all the circumstances of the case, including the duration of the continued stay of a person awaiting admission to a custodial clinic in a remand centre and the possible influence this may have on the (possibilities of) treatment.”

18. On 10 January 1999 the TBS order against the applicant expired. The public prosecutor had not sought a prolongation of the order.

19. In a judgment of 25 February 1999 the Amsterdam Court of Appeal quashed the judgment of the Hague Regional Court of 24 July 1996 in so far as it had awarded compensation to the applicant in an amount of NLG 20,100. It awarded the applicant compensation in an amount of NLG 11,250, rejected the rest of his claim and upheld the remainder of the judgment of 24 July 1996.

20. The Amsterdam Court of Appeal found it established that the delay in the admission of the applicant to a custodial clinic constituted an unlawful act in so far as this delay had exceeded a period of six months. It held that the applicant had been unable to demonstrate that there were special circumstances in his case for holding that a delay of more than three months constituted of itself an unlawful act. It agreed with both parties to the proceedings that it could not be determined what had been, in concrete terms, the effect of the applicant’s lengthy stay in the remand centre on his treatment. Relying on a report of 5 December 1996 by the National Ombudsman, the Court of Appeal further held that no general conclusive findings could be made on that issue. It did not find it established that, in the applicant’s case, the delay in admission had had a major and serious impact on treatment possibilities.

21. As to the determination of the compensation to be awarded to the applicant, the Court held that this was to be determined on an equitable basis and with due regard to all the circumstances of the case. The Court of Appeal held that an amount of NLG 1,000 for each month in excess of six months constituted adequate compensation for the applicant’s feelings of uncertainty and frustration. Having found it established that the applicant’s feelings of unrest had become more intense with the passage of time pending admission to a custodial clinic, it further held that he had sustained increasing non-pecuniary damage with the passage of time. As to this aspect, it considered that a three-monthly increase of the basic amount by NLG 250 per month on each occasion was, in the present case, in

accordance with the requirements of equitable compensation. It consequently fixed the total amount of compensation at NLG 11,250.

22. It rejected the applicant's argument that the compensation should be calculated on a daily basis. The Court of Appeal agreed with the State that the use of a daily compensation amount in cases like the present one, where the unlawfulness did not arise from the deprivation of liberty as such, suggested a degree of precision for which there was no basis in reality.

II. RELEVANT DOMESTIC LAW AND PRACTICE

23. 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, shall 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 shall 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."

24. 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. In practice, it is imposed in cases concerning murder, manslaughter, rape and other serious violent crimes or sexual offences. TBS

orders are 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).

25. 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).

26. According to the TBS Execution Rules (*Reglement tenuitvoerlegging terbeschikkingstelling*; "RTTBS") as in force at the relevant time, the prosecution department must inform the Minister of Justice as soon as possible of any judicial decision imposing a TBS order with confinement to a custodial clinic (Article 3 RTTBS). Under Article 4 RTTBS, the Minister must decide as soon as possible in which specific custodial clinic the person concerned is to be placed, taking into account the available information on the psychological examination and observation of the person concerned, advice on mental treatment, the case file on the criminal proceedings, the available possibilities for treatment, security requirements and the personal wishes of the person concerned.

27. The custodial clinics, of which there were seven at the relevant 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 purpose of treatment provided in these clinics is to reduce this danger and to prevent recidivism. The treatment is geared to individual disorders and personalities and 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.

28. The decision on the selection of the most appropriate custodial clinic – given the differences between the various institutions as regards security levels, patient population (gender, psychiatric diagnosis of the patients and their ability to function in a group setting etc.), methods of treatment and

average stay of patients – is in most cases preceded by a seven-week period of psychiatric observation in the Dr F.S. Meijers Institute, a forensic psychiatric observation institution specialised in this field.

29. The legal basis for pre-placement detention is provided for in Article 9 of the 1951 Prisons Act (*Beginselenwet gevangeniswezen*). This provision, as in force at the relevant time, reads:

“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. In a judgment given on 28 June 1963 the Supreme Court held that Article 9 § 1 (b) of the 1951 Prisons Act also covered situations in which persons subject to a TBS order entailing confinement to a custodial clinic were detained in a remand centre pending a decision as to the specific custodial clinic in which they were to be placed, and that such a detention in a remand centre was in principle lawful as being based on the law. It did, however, add that it did not follow from this interpretation that such – in principle – lawful detention would remain lawful where it could no longer reasonably be held that the failure to admit the person to a custodial clinic remained justified by the circumstances (*Nederlandse Jurisprudentie* (Netherlands Law Reports) 1963, 480).

31. In the National Ombudsman’s report no. 96/575 of 5 December 1996, 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.

32. 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 (*Beginselenwet verpleging ter beschikking gestelden*) entered into force. Article 12 of this Act had already entered into force on 11 July 1997.

33. Article 12 of this Act provides that a person subject to a TBS order must be admitted within six months to a custodial clinic 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.

III. RELEVANT INTERNATIONAL MATERIAL

34. 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.”

35. 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.”

36. 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.”

37. 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.

38. 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

39. 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.

40. The Government submitted, referring to the findings in the Supreme Court’s judgment of 5 June 1998 and the follow-up judgment of 25 February 1999 of the Amsterdam Court of Appeal, that the national authorities had established that the applicant’s pre-placement detention had become unlawful after six months and awarded him financial compensation for the period he had spent in pre-placement detention between 10 April 1995 and 28 December 1995. 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 10 April 1995, be regarded as a victim.

41. The applicant contested that argument. He submitted that a person did not cease to be a victim of an alleged violation of the Convention simply because pecuniary compensation had been granted at domestic level. Moreover, no compensation had been granted for the absence of treatment during his pre-placement detention.

42. 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).

43. The Court notes that the Amsterdam Court of Appeal, in its judgment of 25 February 1999 and in accordance with the previous findings of the Supreme Court, held that the applicant’s pre-placement detention in excess of six months was unlawful and, on that basis, awarded the applicant compensation of NLG 11,250 (5,105.03 euros – “EUR”).

44. The Court accepts that the applicant, in so far as his pre-placement detention exceeded six months, can no longer claim to be a victim within the meaning of Article 34 of the Convention in that the domestic courts acknowledged 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 become unlawful once it exceeded six months. Moreover, the Amsterdam Court of Appeal, on the basis of this finding, afforded redress in the form of financial compensation which, in the circumstances of the case, may be regarded as adequate and sufficient.

45. However, as the domestic courts did not find the first six months of the applicant’s pre-placement detention to be unlawful, 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

46. The applicant complained that his pre-placement detention, either from 10 October 1994, when the TBS order took effect or, in the alternative, from 10 January 1995, when he had spent three months in 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

47. 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

48. 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 Brand’s detention resulted from a conviction and was therefore governed by Article 5 § 1 (a).

49. According to the Government, in view of the judgment of 23 June 1994 of the ‘s-Hertogenbosch Regional Court, sub-paragraphs (a) and (e) of Article 5 § 1 of the Convention both afforded a basis for the applicant’s detention. In this judgment, which formed the ground for the applicant’s deprivation of liberty, the Regional Court had found the applicant responsible under criminal law for the offences of which he had been found guilty and had imposed a prison sentence. 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 Regional Court 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 of the 1951 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.

50. The Government emphasised that TBS orders served two distinct purposes. On the one hand, a TBS order – by depriving the person concerned of his liberty – was aimed at protecting society from the danger

he posed. This meant that, once a TBS order had been imposed, the lawfulness of extending the order did not only relate to the provision of treatment. It might be entirely lawful to deprive a person of his liberty by means of a TBS order purely for safety reasons (i.e. in order to prevent recidivism), even if no treatment was actually provided. On the other hand, the severity of a TBS order was justified precisely by the fact that it was not limited to detention, but included the provision of care and treatment.

51. According to the Government, the very nature of a TBS order made it necessary to strike a balance between conflicting interests in cases where the person concerned could not be admitted to a custodial clinic immediately after having served his 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.

52. The Government further submitted that, as accepted by the Supreme Court, 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 and as the possibility of pre-placement detention in a remand centre was provided for in Article 9 of the 1951 Prisons Act, a period of detention in which no treatment was provided was not inherently unlawful. On the other hand, as the other objective of a TBS order was the treatment of the person concerned for his mental disorder, it was important to begin treatment as soon as possible.

53. The Government were of the opinion that, since the purpose of the TBS order imposed in the present case was not only to provide care and treatment to the applicant but also to protect the public, there was a sufficiently strong connection between the ground for detaining the applicant and the place and circumstances of his detention in the period when the TBS order had taken effect but the applicant had not yet been admitted to a custodial clinic. Referring to the Court's findings in the case of *Bizzotto v. Greece* (judgment of 15 November 1996, *Reports* 1996-V, pp. 1738-1739, §§ 31-35) the Government concluded that the applicant's pre-placement detention could not be regarded as contrary to Article 5 § 1 of the Convention.

54. The applicant submitted that his detention until 10 October 1994 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 10 October 1994 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).

55. 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 sub-paragraph (e) of paragraph 1 if effected in a hospital, clinic or other appropriate institution (pp. 1961-62, § 46), the applicant argued that, from 10 October 1994 onwards, his detention had become unlawful.

56. According to the applicant, it had been the intention of the 's-Hertogenbosch Regional Court 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.

57. 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*

58. 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).

59. The Court observes that in the instant case the applicant's deprivation of liberty was based on the judgment of the 's-Hertogenbosch Regional Court of 23 June 1994 whereby the applicant was convicted of robbery resulting in 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 10 October 1994. Although the applicant had served his prison sentence on that date, the subsequent period of his deprivation of liberty remained covered by the judgment of 23 June 1994. Accordingly, the applicant's detention between 10 October 1994 and 10 October 1996 falls within the scope of both sub-paragraphs (a) and (e) of Article 5 § 1 of the Convention.

60. It must therefore be established whether the applicant's pre-placement detention between 10 October 1994 and 10 April 1995 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 Supreme Court’s judgment of 5 June 1998 and the judgment of the Amsterdam Court of Appeal of 25 February 1999, that the applicant’s pre-placement detention during the period under consideration was lawful under domestic law.

61. 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).

62. 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 10 October 1994 rendered his detention after that date automatically unlawful under Article 5 § 1 of the Convention.

63. 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 26 and 27 above) only after the TBS order has taken effect.

64. 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 agrees with the domestic courts 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.

65. 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.

66. 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 even a delay of six 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.

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

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

68. 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

69. 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.

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

71. 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 1,500.

B. Costs and expenses

72. 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

73. 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 1,500 (one thousand five hundred 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 10 October 1994 and 10 April 1995, but I do not share the opinion of the majority that pre-placement detention 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 detention 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 23 June 1994 was fifteen months’ imprisonment followed by confinement in a custodial clinic. Therefore, after completing his term of imprisonment on 10 October 1994 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 28 December 1995 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 needed 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 six months.

DISSENTING OPINION OF JUDGE THOMASSEN JOINED BY JUDGE JUNGWIERT

The applicant was convicted of participation in robbery with violence resulting in 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 *Morsink v. the Netherlands* (no. 48865/99), in which the Court has also delivered judgment today. In that case new legislation had come into force, which set a time-limit of six months for selecting the most appropriate setting and for waiting in a remand centre pending admission to a suitable clinic, and which provided for the possibility of extending that time-limit under certain conditions by further periods of three months.

In the present case the Supreme Court ruled that the applicant's detention during this six-month period was lawful under national law, applying the principle laid down in its case-law since 1963 to the effect that detention in a remand centre under a confinement order is not, in principle, unlawful.

Although the Court does accept the Supreme Court's finding that detention in a remand centre under a confinement order is not in principle unlawful, it does not accept the Supreme Court's conclusion that this applies to a period of six months without, however, indicating what period would be acceptable. 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 (§ 62). 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 for a period of, initially, two years. 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 period of two years. It followed from the Supreme Court's case-law dating from 1963 that the applicant could not expect to have been placed immediately in a custodial clinic. 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). Therefore I find that the Supreme Court's assessment that detention in a remand centre for a period of six months is covered by the confinement order cannot be considered arbitrary. In my view the applicant's detention was justified under sub-paragraph (a) of Article 5 § 1.

I recognise that, even if this six-month 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.