

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

FIRST SECTION

CASE OF KUTTNER v. AUSTRIA

(Application no. 7997/08)

JUDGMENT

STRASBOURG

16 July 2015

FINAL

16/10/2015

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.



In the case of Kuttner v. Austria,

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

Isabelle Berro, *President,*
Elisabeth Steiner,
Khanlar Hajiyev,
Paulo Pinto de Albuquerque,
Erik Møse,
Ksenija Turković,
Dmitry Dedov, *judges,*

and Søren Nielsen, *Section Registrar,*

Having deliberated in private on 23 June 2015,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 7997/08) against the Republic of Austria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Austrian national, Mr Franz Kuttner ("the applicant"), on 8 February 2008.

2. The applicant, who had been granted legal aid, was initially represented by Mr H. Blum, a lawyer practising in Linz. After the application was communicated to the Government, Mr H. Graupner, a lawyer practising in Vienna, took over the applicant's legal representation. The Austrian Government ("the Government") were represented by their Agent, Mr H. Tichy, Head of the International Law Department at the Federal Ministry for Europe, Integration and Foreign Affairs.

3. The applicant complained under Articles 5 § 4 and 6 § 1 of the Convention of the length of the proceedings relating to his application for release from the institution for mentally ill offenders. He further relied on Article 13 of the Convention.

4. On 30 April 2010 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1950 and currently lives in Traun.

A. The applicant's conviction and sentence

6. On 21 January 2005 the Linz Regional Court convicted the applicant of having deliberately caused severe bodily harm and sentenced him to six years' imprisonment. The court found that the applicant had beaten his 80-year-old mother by kicking and punching her face, head and thorax, which resulted in a severe and lasting infirmity. The applicant had been convicted on seven previous occasions, four of which involved similar offences of violence. Relying on a report by a psychiatric expert, the court found that even though the applicant was responsible for his acts, he was suffering from a grave mental disorder, was dangerous to the public and was likely to re-offend. For these reasons, the court ordered the applicant's detention in an institution for mentally ill offenders in accordance with section 21 § 2 of the Criminal Code, in addition to the term of imprisonment. Given the time the applicant had served in detention on remand, the Court stated that the applicant's detention pursuant to the prison sentence was likely to end on 7 May 2010.

7. On 7 June 2005 the Linz Court of Appeal ("the Court of Appeal") dismissed the applicant's appeal against his sentence. On the same day the applicant was placed in Garsten detention centre, an institution for mentally ill offenders.

B. The first set of proceedings for release from the institution

8. On 31 March 2006, in a first set of proceedings in which the applicant requested his conditional release from the institution, the Steyr Regional Court ("the Regional Court") ordered that the applicant remain in the institution. The Court of Appeal dismissed the applicant's appeal against this decision on 9 May 2006.

C. The second set of proceedings for release from the institution

9. On 10 January 2007 the applicant applied for the lifting of the order to detain him at Garsten detention centre (under section 21 § 2 of the Criminal Code) in order to serve his sentence in an ordinary prison.

10. On 12 January 2007 the Regional Court asked the Garsten prison administration and its psychiatric and psychological service to transmit further information on the applicant, which it received on 9 March 2007. On 12 March 2007 it ordered a fresh psychiatric expert report and instructed the expert to submit the report before 11 June 2007.

11. On 23 June 2007 the applicant filed an application with the Court of Appeal for the setting of a time-limit (*Fristsetzungsantrag*) under section 91 of the Court Act (*Gerichtsorganisationsgesetz*) for the Regional Court to decide on his application, as the last determination of the continuing need to

detain him had taken place on 9 May 2006, and he had not yet received a decision concerning his application of 10 January 2007.

12. On an unspecified date, the applicant was transferred to a psychiatric institution in Vienna. It appears, however, that this transfer was only temporary, and on an unspecified date, the applicant was transferred back to Garsten detention centre.

13. After having been urged by the Regional Court to deliver her report, the expert replied on 3 July 2007 that she would submit it as soon as possible. She did so on 10 July 2007 and explained that the applicant had meanwhile been transferred to an institution in Vienna, for which reason she had not been able to examine him earlier. She found that the applicant, even though he had started to respond positively to his therapy, was still suffering from a serious mental disorder and that there was still the risk that the applicant would commit dangerous acts of violence.

14. On 30 July 2007 the Court of Appeal granted the applicant's application under section 91 of the Court Act and ordered the Regional Court to take a decision by 3 August 2007 at the latest. It held that in the light of the chronology of events in this case, the Regional Court had not fulfilled its duty to take a decision within a reasonable amount of time.

15. On 31 July 2007, after having held an oral hearing with the applicant present, the Regional Court ordered the continuation of his detention in an institution for mentally ill offenders. On the basis of the expert opinion obtained, the court found that the applicant was still dangerous and likely to re-offend. It dismissed the applicant's request for the hearing of two prison officers as witnesses, since these persons could not make a relevant assessment in this respect and that therefore the applicant's request lacked a relevant issue on which evidence should be taken (*relevantes Beweisthema*).

16. On 16 August 2007 the applicant appealed against this decision to the Court of Appeal maintaining his view that the placement in a psychiatric institution was no longer justified. He maintained, furthermore, that the length of the proceedings for the determination of this issue was in breach of Articles 5 and 6 of the Convention.

17. On 10 September 2007 the Court of Appeal dismissed the applicant's appeal. On the basis of the evidence obtained, the expert report of a psychiatrist, reports by the head of Garsten detention centre and its psychiatric and psychological service, it found that despite progress in the applicant's therapy he still suffered from a grave mental disorder and was likely to commit acts of violence in the future. The Court of Appeal also considered that the Regional Court had correctly dismissed the applicant's request for the taking of further evidence. As to the applicant's argument that the proceedings related to his request had lasted an unreasonably long time, the Court of Appeal found that, according to the relevant case-law, the condition under section 25 § 3 of the Penal Code for annual review of the further necessity of detention in an institution was complied with if such a

review had been started by the competent court within the one-year period, whereas it was not necessary that the decision following the review be taken within that time-limit.

D. The third set of proceedings for release from the institution

18. On 28 February 2008 the applicant again applied for the order for psychiatric detention to be lifted, and to be transferred to an ordinary prison. After a further application by the applicant under section 91 of the Court Act, the application was finally examined on 10 September 2009, when the Regional Court ordered the termination of the applicant's psychiatric detention, suspended the remaining seven months of his prison sentence and released him subject to a number of conditions.

II. RELEVANT DOMESTIC LAW AND PRACTICE

19. Section 21 of the Criminal Code (under the heading "preventive measures") as in force at the relevant time provided as follows:

> "(1) If a person commits an offence punishable with a term of imprisonment exceeding one year, and if the person cannot be punished for the sole reason that he committed the offence under the influence of a state of mind excluding responsibility (section 11) resulting from a serious mental or emotional abnormality, the court shall order him to be placed in an institution for mentally ill offenders, if in view of his person, his condition and the nature of the offence it is to be feared that he will otherwise, under the influence of his mental or emotional abnormality, commit a criminal offence with serious consequences.
>
> (2) If such a fear exists, an order for placement in an institution for mentally ill offenders shall also be made in respect of a person who, while not lacking responsibility, commits an offence punishable by a term of imprisonment exceeding one year under the influence of his severe mental or emotional abnormality. In such a case the placement is to be ordered at the same time as the sentence is passed."

20. Section 25 of the Criminal Code, as far as relevant, provides as follows:

> "(1) Preventive measures are to be ordered for an indefinite period. They are to be implemented for as long as is required by their purpose ...
>
> (2) The termination of preventive measures shall be decided by the court.
>
> (3) The court must of its own motion examine at least once yearly whether the placement in an institution for mentally ill offenders ... is still necessary."

According to the case-law of the Supreme Court, section 25 § 3 is complied with if the review of the necessity of further detention has started within one year of the last decision on that matter. The law guarantees an examination at regular intervals, but does not fix a time-limit for the actual decision. It is therefore not necessary that the decisions of first and/or

second instance be taken within a one-year time-limit (Supreme Court, judgment of 30 September 1980, 10 Os 79/80).

21. By virtue of section 46 of the Criminal Code, conditional release from prison is possible after half or two thirds of the sentence respectively have been served, subject to certain conditions.

22. Section 91 of the Court Act provides for interlocutory applications whereby a court is required to request a higher instance to impose an adequate time-limit for taking a procedural measure which the lower court has failed to take to date.

III. RELEVANT INTERNATIONAL INSTRUMENTS

23. In its 75th plenary meeting, the United Nations General Assembly on 17 December 1991 adopted the Principles for the Protection of Persons with Mental Illness and for the Improvement of Mental Health Care, (Resolution A/RES/46/119), which read in the relevant parts as follows:

"Application

The present Principles shall be applied without discrimination on any grounds, such as disability, race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, legal or social status, age, property or birth.

...

Principle 17

Review body

...

3. The review body shall periodically review the cases of involuntary patients at reasonable intervals as specified by domestic law.

4. An involuntary patient may apply to the review body for release or voluntary status, at reasonable intervals as specified by domestic law.

5. At each review, the review body shall consider whether the criteria for involuntary admission set out in paragraph 1 of principle 16 above are still satisfied, and, if not, the patient shall be discharged as an involuntary patient.

6. If at any time the mental health practitioner responsible for the case is satisfied that the conditions for the retention of a person as an involuntary patient are no longer satisfied, he or she shall order the discharge of that person as such a patient.

7. A patient or his personal representative or any interested person shall have the right to appeal to a higher court against a decision that the patient be admitted to, or be retained in, a mental health facility.

...

Principle 20

Criminal offenders

1. The present Principle applies to persons serving sentences of imprisonment for criminal offences, or who are otherwise detained in the course of criminal proceedings

or investigations against them, and who are determined to have a mental illness or who it is believed may have such an illness."

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

24. The applicant alleged that the length of the proceedings relating to his second application to be released from the psychiatric hospital was in violation of Article 5 § 4 of the Convention. Article 5 provides, so far as relevant, 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 for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

...

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

25. The Government contested that argument.

A. Admissibility

1. The parties' submissions

26. The Government noted that pursuant to section 46 § 1 of the Penal Code, the applicant, in case of his previous release from the psychiatric institution, could have been conditionally released from detention at the earliest after having served half of his prison term, meaning that his release was excluded by statute until 8 May 2007. In their view, a violation of Article 5 § 4 because of proceedings conducted prior to that date was impossible, which is why only the examination period between 8 May 2007 and 20 September 2007 should be taken into consideration. In that context, the Government emphasised the nature of the applicant's detention: section 21 § 2 of the Criminal Code enabled the sentencing court, in addition to imposing a sentence of imprisonment, to order detention in an institution for mentally ill offenders. Such detention was to be served before the prison sentence, but counted as part of the prison sentence. They pointed out that where a prison sentence was imposed by a convicting court, the

review of lawfulness required by Article 5 § 4 was incorporated in the initial conviction. Accordingly – because the applicant was not asking for his release, but merely for a transfer from one type of detention facility to another – that provision was not applicable in the present case.

27. The applicant maintained that the purpose of the proceedings was the question of his release from detention in the psychiatric institution, and that Article 5 § 4 was applicable to such release issues.

2. The Court's assessment

28. The Court reiterates that Article 5 § 1 of the Convention contains a list of permissible grounds for deprivation of liberty, a list which is exhaustive. Consequently, no deprivation of liberty will be lawful unless it falls within one of the grounds set out in sub-paragraphs (a) to (f) of Article 5 § 1. However, the applicability of one ground does not necessarily preclude that of another; deprivation of liberty may, depending on the circumstances, be justified under one or more sub-paragraphs (see, among other authorities, the *Erkalo v. the Netherlands* judgment of 2 September 1998, Reports of Judgments and Decisions 1998-VI, p. 2477, § 50).

29. The Court reiterates that Article 5 § 4 of the Convention guarantees a review of the lawfulness of detention. That review is incorporated in the decision depriving a person of his liberty when that decision is made by a court at the close of judicial proceedings; this is so, for example, where a sentence of imprisonment is pronounced after conviction by a competent court within the meaning of Article 5 § 1 (a) of the Convention. However, Article 5 § 4 may require the possibility of subsequent review of the lawfulness of detention by a court. This usually applies to the detention of persons of unsound mind within the meaning of Article 5 § 1 (e), where the reasons initially warranting psychiatric confinement may cease to exist. The same principle may apply to the detention "after conviction by a competent court" mentioned in Article 5 § 1 (a), but only in certain quite specific circumstances (see, with further references, *Iribarne Pérez v. France*, 24 October 1995, § 30, Series A no. 325-C).

30. In the present case the Linz Regional Court, in convicting the applicant on 21 January 2005, made two substantive orders. First, it imposed a term of imprisonment of six years on the applicant. Secondly, it ordered his detention in an institution for mentally ill offenders under section 21 § 2 of the Criminal Code. That order, confirmed on appeal on 7 June 2005 by the Linz Court of Appeal, constituted an initial decision that the applicant could be detained in such an institution. The second part of the order, which ran parallel to the prison sentence, required the applicant's placement in an institution for mentally ill offenders for as long as this measure was necessary.

31. In terms of Article 5 § 1, the applicant's detention in general was therefore initially covered both by sub-sections (a) and (e) of that provision.

His application of 10 January 2007 to the Regional Court for the order under section 21 § 2 of the Criminal Code to be lifted, however, was not an application for a review of the lawfulness of his detention in general. The applicant rather alleged that the reasons for his detention under Article 5 § 1 (e) of the Convention had ceased to exist. He was asking for the lifting of the measure of detention under section 21 § 2 of the Criminal Code, which ran parallel to his prison sentence but could be challenged independently by virtue of the domestic law, even if at the material time this could not have led to his release, but only to his transfer to an ordinary prison**.** In this context the Court considers that in cases concerning the placement in mental institutions where the reasons initially warranting confinement may cease to exist, it would be contrary to the object and purpose of Article 5 to interpret paragraph 4 thereof as making this category of confinement immune from subsequent review of lawfulness merely because the initial decision of detention was taken by a court under Article 5 § 1 (a) of the Convention. This must be the case even if the review under Article 5 § 4 would not lead to release but to a transfer to an ordinary prison. The reason for guaranteeing a review under Article 5 § 4 is equally important to persons detained in a mental institution regardless of whether or not these persons are serving sentences of imprisonment for criminal offenses. The Court also reiterates that in the Austrian legal system a separate challenge of such confinement is allowed.

32. Having regard to this, the Court finds that Article 5 § 4 of the Convention was applicable to the proceedings in question.

33. The Court does not find that the complaint is manifestly ill-founded within the meaning of Article 35 § 3 (a) or inadmissible on any other ground. It must therefore be declares admissible.

B. Merits

1. The parties' submissions

34. The Government considered that the proceedings in question did not last too long: the Austrian legislation provided for annual reviews of such detention, and the automatic review would have begun on 30 March 2007. The second instance decision on the review was given on 10 September 2007, that is eight months after the applicant's request of 10 January 2007, a little over five months after the time for the annual review of detention, and scarcely four months after the applicant was even eligible for release. In the circumstances, that period was not unduly long.

35. The applicant submitted that the proceedings in question lasted ten months, namely from 10 January to 10 September 2007. In particular, he alleged that the court took too long to appoint the expert, too long to ensure that the expert report was prepared, and too long to set down the case for a

hearing. The decision by the appellate court was taken more than sixteen months after the earlier appeal decision on preventive detention (9 May 2006 – 10 September 2007). If one considered the time that passed between the decisions in the first instance, that period also lasted sixteen months, namely from 31 March 2006 to 31 July 2007. He claimed that section 25 § 3 of the Criminal Code unambiguously stated that a review had to take place at least yearly, meaning that not less than once every 12 months a decision on further detention had to be taken. Therefore, the authorities had failed to fulfil the requirement of a "speedy" review of detention pursuant to Article 5 § 4 of the Convention.

2. The Court's assessment

(a) General principles

36. The Court reiterates that Article 5 § 4 of the Convention proclaims the right to a speedy judicial decision concerning the lawfulness of detention, and to an order for release it if proved unlawful (see *Baranowski v. Poland*, no. 28358/95, § 68, ECHR 2000-III, and *Kadirzhanov and Mamashev v. Russia*, nos. 42351/13 and 47823/13, § 119, 17 July 2014). Whereas the Court has held above, that Article 5 § 4 is applicable in this case, it reiterates that Article 5 § 4 does not compel the Contracting States to set up a second level of jurisdiction for the examination of the lawfulness of detention. However, where domestic law provides for an appeal, the appellate body must also comply with the requirements of Article 5 § 4, for instance as concerns the speediness of the review in appeal proceedings. Accordingly, in order to determine whether the requirement that a decision be given "speedily" has been complied with, it is necessary to effect an overall assessment where the proceedings have been conducted at more than one level of jurisdiction (see *Mooren v. Germany* [GC], no. 11364/03, § 106, 9 July 2009). At the same time, the standard of "speediness" is less stringent when it comes to proceedings before an appellate court (see *Lebedev v. Russia*, no. 4493/04, § 96, 25 October 2007).

37. The question of whether periods comply with the requirement of "speediness" under Article 5 § 4 must be determined in the light of the circumstances of each case (see *Sanchez-Reisse v. Switzerland*, 21 October 1986, § 55, Series A no. 107, *Oldham v. the United Kingdom*, no. 36273/97, § 31, ECHR 2000-X, and *Rehbock v. Slovenia*, no. 29462/95, § 84, ECHR 2000-XII). Although the amount of time taken by the relevant proceedings is obviously an important element, it is not necessarily in itself decisive for the question of whether a decision has been given with the requisite speed (see *Merie v. the Netherlands* (dec.), no. 664/05, 20 September 2007). What is taken into account is the diligence shown by the authorities, the delay attributable to the applicant, and any factors causing delay for which the State cannot be held responsible, such as the complexity of a case (see,

mutatis mutandis, *Jablonski v. Poland*, no. 33492/96, §§ 91-94, 21 December 2000). The Court must also examine whether any new relevant factors that have arisen in the interval between periodic reviews have been assessed, without unreasonable delay, by a court having jurisdiction to decide whether or not the detention has become "unlawful" in the light of these new factors (see *Abdulkhakov v. Russia*, no. 14743/11, § 215, 2 October 2012).

38. The Court observes that it is not its task to attempt to rule on the maximum period of time between reviews which should automatically apply to a certain category of detainees (see *Kadirzhanov and Mamashev v. Russia*, cited above, § 130). The requirements of Article 5 § 4 as to what may be considered a "reasonable" interval in the context of periodic judicial review varies from one domain to another, depending on the type of deprivation of liberty in question (see, for a summary of the Court's case-law in the context of detention for the purposes set out in sub-paragraphs (a), (c), (e) and (f) of Article 5 § 1, *Abdulkhakov v. Russia*, §§ 212-14, cited above). Long intervals in the context of automatic periodic review may give rise to a violation of Article 5 § 4 (see, among other authorities, *Herczegfalvy v. Austria*, 24 September 1992, § 77, Series A no. 244).

(b) Application of these principles to the present case

39. At the outset, the Court notes that section 25 § 3 of the Austrian Criminal Code requires that a court must "examine" at least once yearly whether the placement in an institution for mentally ill offenders is still necessary. This provision has been interpreted by the Supreme Court to stipulate that it has been complied with if the review was started within one year of the last decision being taken (see paragraph 20 above). The Court notes that this requirement under domestic law and jurisprudence appears to have been fulfilled in the proceedings in question.

40. However, according to the Court's case-law such a decision must also be taken speedily. The Court observes that the Court of Appeal in its decision of 30 July 2007 found that the Regional Court had not fulfilled its duty to take a decision within a reasonable amount of time (see paragraph 14 above).

41. The Court notes in particular that there is no indication that would suggest that the applicant had caused any delays in the examination of his request. On the contrary, he availed himself of the legal remedy he had at hand in order to accelerate the proceedings, namely an application for the setting of a time-limit under section 91 of the Court Act.

42. When it comes to the authorities' conduct, the Court considers, as pointed out by the Court of Appeal in its decision of 30 July 2007, that there were significant delays in the proceedings before the Regional Court. The Court further considers that the delay in the submission of the expert

opinion is attributable to the Regional Court. These delays which occurred before the first instance court cannot be offset by the fact that the Court of Appeal issued its appeal decision just four weeks after having received the applicant's appeal.

43. Taking into account the authorities' conduct, the Court finds that under the specific circumstances of the present case, the interval of sixteen months between the final decisions in the first and the second set of proceedings (9 May 2006 to 10 September 2007) on the applicant's further detention in a psychiatric institution did not fulfill the "speediness" requirement under Article 5 § 4 of the Convention. Accordingly, there has been a violation of that provision.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

44. The applicant further contended that the above proceedings had lasted an unduly long time, and for that reason were in breach of Article 6 § 1 of the Convention. Under Article 6 § 3 (d) of the Convention, he complained that the courts had failed to take evidence requested by him. That provision, so far as relevant, reads as follows:

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time ...
>
> 3. Everyone charged with a criminal offence has the following minimum rights:
>
> ...
>
> (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him."

45. The Government, referring to the relationship between Article 5 § 4 and Article 6 of the Convention and, in particular, to the case of *Reinprecht v. Austria* (no. 67175/01, ECHR 2005-XII), submitted that Article 6 of the Convention was not applicable to the present case. However, even if Article 6 of the Convention were applicable, the proceedings had not lasted too long.

46. The applicant argued that Article 6 was applicable at least in its civil limb, as preventive detention under the special preventive detention regime puts detainees under special restrictions which affect their civil rights and obligations. He maintained that the proceedings in question had lasted too long.

47. The Court considers that whereas the complaints are admissible, having regard to its findings under Article 5 § 4 of the Convention, it does not find it necessary to examine them further.

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

48. Lastly, the applicant complained under Article 13, read in conjunction with Articles 5 § 4 and 6 § 1 of the Convention, that it was not open to him to complain about the length of the proceedings to the Supreme Court. Furthermore, he complained that an application for the setting of a time-limit under section 91 of the Court Act was not an effective remedy against the length of the proceedings, as it took the Court of Appeal more than eleven weeks to decide on this request.

49. The Court has previously held that an application under section 91 of the Court Act is in principle an effective remedy against court delays (see *Tuma v. Austria*, no. 22833/07, § 21, 18 October 2011, with further references). In the instant case, the applicant's application under that provision led to the setting of a time-limit for a decision by the first instance court. The mere fact that he did not have the possibility to appeal to the Supreme Court does not render this remedy inefficient. Therefore, having regard to all the material in its possession and in so far as they fall within the Court's competence, it finds that these complaints do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that this part of the application must be rejected as manifestly ill-founded, pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

50. 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

51. The applicant claimed 10,000 euros (EUR) in respect of non-pecuniary damage.

52. The Government questioned whether the applicant had actually suffered non-pecuniary damage from being detained in an institution for mentally ill offenders instead of an ordinary prison, as he had failed to specify in what way this had caused him harm. It considered this claim in any event to be excessive.

53. The Court finds that the violation of the speed requirement under Article 5 § 4 caused the applicant non-pecuniary damage, such as stress and frustration, which cannot be compensated solely by the finding of a

violation. Making its assessment on an equitable basis, it awards the applicant EUR 3,000 under this head, plus any tax that may be chargeable.

B. Costs and expenses

54. The applicant also claimed EUR 3,592.08 less the amount of EUR 850 already paid to his current legal counsel under the Court's legal aid scheme for the costs and expenses incurred before the Court.

55. The Government pointed out that the applicant has not incurred any costs at all, since he was granted legal aid.

56. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, in particular the fact that the application to the Court was lodged by the applicant's former legal counsel, and that the services of the applicant's current legal counsel were only engaged for the purposes of submitting observations, the Court considers that the legal aid already received by the latter suffices to cover his costs and expenses incurred in the Convention proceedings and makes no additional award under this head.

C. Default interest

57. The Court considers it appropriate that the default interest rate 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* unanimously the complaints under Article 5 § 4 and Article 6 of the Convention admissible and the remainder of the application inadmissible;

2. *Holds* unanimously that there has been a violation of Article 5 § 4 of the Convention;

3. *Holds* by six votes to one that it is not necessary to examine further the complaints under Article 6 of the Convention;

4. *Holds* unanimously
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 3,000 (three thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
   (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;

5. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 16 July 2015, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen	Isabelle Berro
Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Pinto de Albuquerque is annexed to this judgment.

I.B.L.
S.N.

PARTLY CONCURRING AND PARTLY DISSENTING OPINION OF JUDGE PINTO DE ALBUQUERQUE

1. I agree with the Chamber that there has been a violation of Article 5 § 4 of the European Convention on Human Rights ("the Convention"), on the basis of the excessive length of the proceedings relating to the second application, namely the period of sixteen months between the final decisions in the first and the second set of proceedings (that is to say, between 9 May 2006 and 10 September 2007). But I disagree with its decision not to consider the applicant's other grievances regarding the entire proceedings, including the period of two years between the Court of Appeal's final decision in the second set of proceedings, issued on 10 September 2007, and the Regional Court's order terminating the applicant's psychiatric detention, suspending the remaining seven months of his prison sentence and releasing him subject to a number of conditions, issued on 10 September 2009. I cannot understand that the Chamber took issue with a delay of sixteen months in the second set of proceedings, but did not find it necessary to censure a delay of twenty-four months in the third set of proceedings and still less the overall duration of the proceedings for release.

I also regret the fact that the Chamber did not take the opportunity to clarify the nature of the procedural guarantees applicable to offenders made subject to preventive measures such as the one applied to the applicant. By so doing, the Chamber also left unsaid what it thinks about the applicant's complaint of a violation of Article 6 § 3 (d) of the Convention on account of the Linz Regional Court's alleged failure to take the evidence requested by him during the proceedings for the review of the preventive measure.

Finally, and above all, I am disappointed that the Chamber did not address the broader issue of the compatibility of the preventive measure under section 21 § 2 of the Austrian Criminal Code with the guarantees of lawfulness and proportionality under Article 5 of the Convention. In the light of the "serious human rights problems" (*ernstzunehmende menschenrechtliche Probleme*) involved in this issue and the need for measures against "the increasing duration of detention in the light of the principle of proportionality according to Article 5 of the ECHR" (*die zunehmende Anhaltedauer im Lichte des Verhältnismässigkeitsprinzips gemäss Art. 5 EMRK*), which the Government themselves acknowledge[1], I

[1] *Arbeitsgruppe Massnahmenvollzug – Bericht an den Bundesminister fur Justiz über die erzielten Ergebnisse* (led by Michael Schwanda), January 2015, pp. 8 and 14. Nowak/Krisper, "Der österreichische Massnahmenvollzug und das Recht auf persönliche Freiheit", in EuGRZ, 2013, p. 657, talk about an "alarming and grave human rights deficit" as does Krisper in "Der Massnahmenvollzug in Österreich und das Recht auf persönliche Freiheit", in NEOS, *Moderner Massnahmenvollzug, Beiträge zur Reformierung*, June 2015, p. 23.

thought it wise to further discuss the case at the point where the Chamber concluded its analysis.

The international standards on the treatment of offenders with mental health problems

2. Disability-based arrest, detention or imprisonment is in breach of Article 14 § 1 (b) of the Convention on the Rights of Persons with Disabilities ("the CRPD"). Detention based on the perceived danger of mentally ill persons to themselves or to others breaches Article 14, the approach taken in the 1991 Principles for the Protection of Persons with Mental Illness, which condoned deprivation of liberty in the field of mental health, having been rejected[2].

When persons with disabilities are subjected to arrest, detention or imprisonment, Article 14 § 2 of the CRPD guarantees non-discrimination, including by the provision of reasonable accommodation on an individualised basis, in other words, accommodation with the necessary and appropriate modification and adjustments to secure to each person with disabilities the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms. Deprivations of liberty based on the existence of a disability are intrinsically discriminatory. Detention

[2] Specifically with regard to Austria, the Committee on the Rights of Persons with Disabilities ("the Committee") concluded as follows: "The Committee is of the opinion that the legislation is in conflict with article 14 of the Convention because it allows a person to be deprived of their liberty on the basis of their actual or perceived disability. The Committee urges the State Party to take all necessary legislative, administrative and judicial measures to ensure that no one is detained against their will in any kind of mental health facility. It urges the State party to develop deinstitutionalization strategies based on the human rights model of disability." (CRPD/C/AUT/CO/1, 13 September 2013, paragraphs 29-30; see also CRPD/C/CZE/CO/1, 15 May 2015, paragraphs 26-28; CRPD/C/MNG/CO/1, 13 May 2015, paragraphs 24-25; CRPD/C/TKM/CO/1, 13 May 2015, paragraphs 25-26; CRPD/C/HRV/CO/1, 17 April 2015, paragraphs 19-22; CRPD/C/DOM/CO/1, 17 April 2015, paragraphs 26-29; CRPD/C/COK/CO/1, 17 April 2015, paragraphs 27-28; CRPD/C/DEU/CO/1, 17 April 2015, paragraphs 29-32; CRPD/C/NZL/CO/1, 31 October 2014, paragraph 34; CRPD/C/DNK/CO/1, 30 October 2014, paragraph 36; CRPD/C/BEL/CO/1, 28 October 2014, paragraph 29; CRPD/C/MEX/CO/1, 27 October 2014, paragraph 30; CRPD/C/SWE/CO/1, 12 May 2014, paragraphs 35-36; CRPD/C/CRI/CO/1, 12 May 2014, paragraph 28; CRPD/C/AZE/CO/1, 12 May 2014, paragraph 29; CRPD/C/SLV/CO/1, 8 October 2013, paragraphs 31-32; CRPD/C/PRY/CO/1, 15 May 2013, paragraph 32; CRPD/C/CHN/CO/1, 15 October 2012, paragraph 26; CRPD/C/HUN/CO/1, 22 October 2012, paragraph 28; CRPD/C/ARG/CO/1, 8 October 2012, paragraphs 23-26; CRPD/C/PER/CO/1, 20 April 2012, paragraph 29; CRPD/C/ESP/CO/1, 19 October 2011, paragraph 36; and CRPD/C/TUN/CO/1 13 May 2011, paragraph 25). This jurisprudence has been summarised in the Committee's Statement on article 14 of the Convention on the Rights of Persons with Disabilities of September 2014. (CRPD/C/12/2, annex IV).

regimes which by their own terms discriminate on the basis of disability constitute arbitrary detention. The involuntary detention of persons with disabilities based on presumptions of risk or dangerousness linked to disability labels is contrary to the right to liberty[3]. In the criminal-law context, the automatic and involuntary transfer to mental health facilities within or outside of an ordinary prison facility, or the automatic imposition of mental health treatment as a condition of probation, parole or a transfer to a softer or "normal" prison regime, cannot be considered a reasonable individualised accommodation for persons with a disability. Thus, States parties should ensure that each detained person with disabilities has access to voluntary, suitable, timely health care that is in keeping with his or her state of health as well as full access to rehabilitation therapy on a regular basis[4].

3. The United Nations Special Rapporteur on Torture has called for the replacement of Rules 82 and 83 of the Standard Minimum Rules on the Treatment of Prisoners, which mandate transfers of "insane and mentally abnormal prisoners" to mental health facilities and placement under medical supervision. The new provisions should not only articulate certain rights enshrined in the CRPD, but also state clearly that inmates with disabilities are entitled to be eligible for all programmes and services available to others, including voluntary engagement in activities and community release programmes, and to be housed in the general prison population on an equal basis with others without discrimination[5].

---

[3] The Committee expresses its concern that persons with disabilities who are deemed unfit to stand trial due to an intellectual or psychosocial disability can be detained indefinitely in prisons or psychiatric facilities without being convicted of a crime and for periods that can significantly exceed the maximum period of custodial sentence for the offence (CRPD/C/AUS/CO/1, 21 October 2013, paragraph 31). The Committee is also concerned that declaring persons with disabilities unfit to stand trial is a pretext for applying preventive measures involving their indefinite deprivation of liberty and that they are not entitled to the same guarantees as other persons in the criminal justice system (CRPD/C/ECU/CO/1, 27 October 2014, paragraph 28). *A fortiori*, the same concerns could be expressed in relation to persons declared criminally responsible who are detained indefinitely on the basis of their "abnormality".

[4] *Mr. X. v. Argentina*, CRDP Communication No. 8/2012 (CRPD/C/11/D/8/2012), 18 June 2014.

[5] Report of the Special Rapporteur on Torture, 9 August 2013, A/68/295, paragraph 72, following the 2008 report, A/63/175, paragraphs 38 and 53. This could also apply to Rule 100 of the European Prison Rules, which is similar to the UN model. Rule 12 of the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules) is different, in view of its individualised and voluntary approach to the problem of mental health of women prisoners. Rule 41 also provides that women with mental health care needs are housed in accommodation which is not restrictive, and at the lowest possible security level, and receive appropriate treatment, rather than being placed in higher security level facilities solely due to their mental health problems.

This call was followed by the Observations on the Standard Minimum Rules for the Treatment of Prisoners, adopted by the Committee on 20 November 2013. The Committee insisted that the denial of reasonable accommodation in custody facilities or any other detention institutions should be considered as a form of discrimination, and in some instances as a form of torture and ill-treatment. Detentions conditions should never amount to causing increased suffering to inmates with disabilities. In no case should the disability entail added forms of suffering for persons in detention. Improper health conditions in prisons and detention centres could result in the creation of further disabilities in addition to the existing ones. These conditions should be properly identified and preventive measures adopted to avoid the progression of an existing disability or further disabilities in the prisoner. Prison authorities should be obliged to implement appropriate measures to enable persons with disabilities to attain and maintain maximum independence, full physical, mental, social and vocational ability and full inclusion and participation in all aspects of prison life, on an equal basis with others. Rehabilitation and habilitation programmes should be put in place in order to achieve these goals.

4. The Court has adopted the approach taken by the Committee. According to well-established case-law, States must provide reasonable accommodations for disabled detainees, and failure to do so amounts to inhuman and degrading treatment, regardless of any positive intention to humiliate or debase the detainee[6]. The placement of detainees in conditions not suitable for their mental health status and needs represents an unlawful deprivation of liberty[7]. There must be some relationship between the ground of permitted deprivation of liberty relied on and the conditions of detention[8].

The legal treatment of offenders with mental health problems in Austria

5. In Austria, offenders who are found to be criminally responsible (*zurechnungsfähige Rechtsbrecher*) may be punished by a criminal penalty (*Strafe*) and those found not to be criminally responsible (*unzurechnungsunfähige Rechtsbrecher*) may be punished by a preventive detention measure (*vorbeugende Massnahme der Unterbringung*).

In addition, Austrian law provides for three other groups of offenders who may be punished for the same criminal conduct (fact or omission) by both a criminal penalty and a preventive measure, in the framework of a "dual system" of criminal sanctions (*Zweispurigkeit von Strafen and*

---

[6] *Price v. the United Kingdom*, no. 33394/96, 7 October 2001; *Arutyunyan v. Russia*, no. 48977/09, 10 January 2012; and *Z.H. v. Hungary*, no. 28973/11, 8 November 2012.

[7] *Bouamar v. Belgium*, 29 February 1988, Series A no. 129, and *D.G. v. Ireland*, no. 39474/98, 16 May 2002.

[8] *Aerts v. Belgium*, 30 July 1998, § 46, *Reports of Judgments and Decisions* 1998-V.

Massnahmen), which provides in certain cases for the interchangeable execution of both the criminal penalty and the preventive measure (*Vikariieren von Strafe und Massnahme im Vollzug*).

The third group of offenders includes those in need of treatment for alcohol or drug addiction (*entwöhnungsbedürftige Rechtsbrecher*) who committed an offence while in a state of intoxication or in any other way related to their addiction (*wegen einer im Rausch oder sonst im Zusammenhang mit seiner Gewöhnung begangenen strafbaren Handlung oder wegen Begehung einer mit Strafe bedrohten Handlung im Zustand voller Berauschung*). These offenders may be made subject to a preventive measure and a criminal penalty (section 22 of the Austrian Criminal Code). In this case, the criminal penalty is executed after the preventive measure (section 24 § 1 of the Criminal Code), but the maximum duration of the preventive measure is limited to two years (section 25 § 1 of the Criminal Code).

A fourth group of offenders may be made subject to a criminal penalty and a preventive detention measure: the so-called "dangerous recidivists" (*gefährliche Rückfallstäter*). These are offenders who have committed certain types of offences owing to an "inherent tendency to commit these offences" (*wegen seines Hanges zu strafbaren Handlungen*: section 23 of the Criminal Code). In this case, the criminal penalty is executed before the preventive measure (section 24 § 2 of the Criminal Code), but the maximum duration of the preventive measure is limited to ten years (section 25 § 1 of the Criminal Code).

Finally, a fifth group of offenders encompasses so-called "mentally abnormal offenders" (*geistig abnorme Rechtsbrecher*). According to section 21 § 2 of the Criminal Code, this legal classification depends on the following cumulative conditions: (1) the commission of a criminal offence punishable by a term of imprisonment exceeding one year (*Anlasstat*)[9];

---

[9] The wide and heterogeneous range of offences covered by the notion of *Anlasstat* has been described as a "scarcely reliable and transparent criterion" (Nowak/Krisper, cited above, p. 653), and "a formal, abstract parameter which is fictitious for the offender and independent from the facts" (Frottier, "Freiheit, die sich nicht erobern lässt: Die österreichische Massnahme nach § 21 Abs. 2", in *Journal für Neurologie, Neurochirurgie und Psychiatrie*, 2010, p. 13), which allows for less serious crimes to be punished with disproportionately long periods of psychiatric detention (Schwaighofer, "Reformbedarf beim Massnahmenvollzug nach § 21 Abs. 2 StGB", in *Blickpunkte, SonderAusgabe Massnahmenvollzug*, 2012, p. 63; Helmreich, "Erfahrungen in der Begleitungen von Insassen, über die die Massnahme nach § 21 Abs. 2 StGB verhängt ist", in Klopf/Holzbauer (ed.), *Zum österreischischen Massnahmenvollzug nach § 21 Abs. 2 StGB*, Wien, 2012, p. 95; and Bertel, "Die Unterbringung nach § 21 Abs. 2 StGB", in Reindl-Krauskopf and others (ed.), *Festschrift für Helmut Fuchs*, Wien, 2014, p. 22). In 2010, a reform introduced a restriction regarding offences against the property of others. Recently, the Austrian Ministry of Justice (BMJ) study entitled *Arbeitsgruppe Massnahmenvollzug,* cited above, pp. 56, 57, 62 and 86, concluded that the legal parameter should be worded in a "stricter form" in order to avoid false positives under section 21.

(2) the commission of a criminal offence "under the influence of a severe mental or emotional abnormality" (*unter dem Einfluss seiner geistigen oder seelischen Abartigkeit von höherem Grad*)[10] which must not exclude responsibility (*ohne unzurechnungunfähig zu sein*)[11]; (3) a prognosis of

---

[10] The terminology of the law has been criticised, quite rightly, for being not only outdated (Helmreich, cited above, p. 95), but imprecise and, even worse, as being a means of conveying "social resentments against mentally ill persons" (Nowak/Krisper, cited above, p. 653). The 2015 BMJ study cited above, p. 66, concedes this criticism, considering the legal formula "under the influence" as being "frequently difficult to understand". As Frottier put it, psychiatrists face an "almost unsolvable dilemma", since they have to evaluate whether the person suffered from a severe mental disorder which influenced the offending conduct decisively, but nonetheless was still sufficiently capable of understanding and determining freely his or her conduct (Frottier, cited above, p. 11). Although severe, the mental disorder required under section 21 § 2 must not exclude responsibility. Otherwise, the offender would have to be considered as a person lacking responsibility, to whom a preventive measure under section 21 § 1 may be applicable. Hence, courts include among the mental disorders covered by section 21 § 2 paranoiac or neurotic personality disorders, "sexual deviations" and "unsocial" personality disorders. In fact, the decisive criterion for establishing the mental disorder is the "abnormality of the offence" (Frottier, cited above, p. 14, confirmed by the reference made by Bien, "Vorbeugende Massnahmen aus staatsanwaltlicher Sicht", in Soyer/Stuefer (ed.), *Strafverteidigung – Kritik vorbeugender Massnahmen/Sicherheit*, Wien, 2012, p. 65, to facts that are "especially incomprehensible or without apparent motive or especially ruthless, brutal or cruel" as evidence of a mental disorder).

[11] The poor quality of forensic psychiatric expert assessments has been confirmed by psychiatrists, lawyers, scholars and even the Government. Experts do not necessarily base their judgment on clinically acknowledged theories and empirically controllable data, the expert assessments sometimes have a moralistic overtone and the causal link between the offence and the mental disorder is not always confirmed. Frequently, reference is made to a "combined personality disorder" (*kombinierte Persönlichkeitsstörung*) as a vague, catch-all concept in order to ground "empty" expert reports which the judges do not call in question (Frottier, cited above, p. 14; Schwaighofer, cited above, p. 64; Brugger, "Psychologie und Psychiatrie Sachverständigengutachten zur bedingten Entlassung Untegebrachter nach § 21 Abs. 2 ÖStGB", in Gutiérrez-Lobos and others, *25 Jahre Massnahmenvollzug – eine Zwischenbilanz*, Baden-Baden, 2002, pp. 31-40; Klopf, "Bemerkugen zum österreichischen Massnahmevollzug nach § 21 Abs. 2 StGB", in Klopf/Holzbauer (ed.), *Zum österreichischen*…, cited above, p. 99; Minkendorfer, "Wie lang sind 8 Monate*?*", in Klopf/Holzbauer (ed.), *Zum österreichischen*…, cited above, p. 70; Helmreich, cited above, p. 91; Schroll, "Kritische Anmerkungen und Judikatur zu den vorbeugenden Massnahmen nach § 21 StGB aus richterlicher Sicht", in Soyer/Stuefer (ed.), *Strafverteidigung...,* cited above, p. 57; Nowak/Krisper, cited above, pp. 654 and 655; and Bertel, cited above, p. 22). It is worth mentioning in this context conclusion 19 of the study made by the *Institut für Rechts- und Kriminalsoziologie* (IRKS) on behalf of the Austrian Government, entitled "Welcher organisatorischer Schritte bedarf es, um die Zahl der Einweisungen in den Maßnahmenvollzug zu verringern?" (led by Wolfgang Stangl), 2012, p. 63, on the need to restrict the legal criteria under section 21 in so far as people with autism, low IQ, organic brain syndrome or advanced dementia should not be made subject to preventive measures, as well as the 2015 BMJ study cited above, p. 68, which did not refrain from criticising the same lack of quality in expert assessments, confirming the criticisms made in the Court of Auditors' report entitled *Massnahmenvollzug für geistig abnormen Rechtsbrecher,* 29 October 2010.

future commission of one or more punishable offences with "serious consequences" (*mit schweren Folgen*) under the influence of that same mental or emotional "abnormality" (*Prognosetat*)[12]. When these conditions are met, the mentally "abnormal" offender is punished by both a criminal penalty (*Strafe*) and a preventive measure (*vorbeugende Massnahme*). According to section 24 § 1 of the Criminal Code, the period of preventive detention in an institution for mentally "abnormal" offenders should be executed prior to the prison term, and the time spent in the institution should be "taken into account" (*angerechnet*), that is to say, subtracted from the prison term. There is no time-limit for the preventive measure in this case. If the preventive measure is lifted prior to the end of the prison term, the offender will serve the remainder of the prison term (*Strafrest*) in an ordinary prison facility for persons who are criminally responsible (*Strafvollzugsanstalt or Justizanstalt*). Following the reform of the Law on Enforcement of Penalties (*Strafvollzugsgesetz*) in 1987, these offenders may also be placed in a specialised wing of an ordinary prison facility (*besondere Abteilungen der Anstalten zum Vollzug von Freiheitsstrafen*, section 158(5) of the above-mentioned Law)[13].

6. Bearing in mind the intrinsic vagueness of the legal provision of section 21 § 2 of the Austrian Criminal Code, aggravated by a discretionary psychiatric practice and a lack of proper judicial oversight, the lawfulness and proportionality of the preventive detention of "abnormal" criminally responsible persons in Austria is very questionable. The lack of a scientific basis for the outdated "abnormality" concept facilitates a perverse circle whereby offences which are not common, or have uncommon traits, are considered in themselves as reflecting a personality disorder, which is automatically equated to a sign of dangerousness[14]. Like many other "abnormal" offenders, the applicant in the present case was caught in such a perverse circle, having been labelled a dangerous "abnormal" on the basis of a "combined personality disorder" (*kombinierte Persönlichkeitsstörung*).

---

[12] The total lack of precision, both with regard to the gravity and the nature of the future offences, has been noted. Here again the practice is eloquent, showing that a large percentage of detainees had either never been convicted of offences or never been imprisoned prior to their first placement in psychiatric detention (Frottier, cited above, pp. 11 and 15; Minkendorfer, cited above, pp. 70 and 72, speaking of "astrological prognosis" and considering this practice "highly questionable"; Nowak/Krisper, cited above, p. 655; and Bertel, cited above, p. 22, who calls this practice a "grave failure"). The 2012 IRKS study cited above, p. 63 (conclusion 21) concludes that the praxis has expanded the "concept of dangerousness" with regard to section 21 § 2 offenders. The 2015 BMJ study cited above, p. 66, acknowledges the vagueness of the legal concept "it is to be feared" (*zu befürchten*) and suggests its replacement.

[13] On this provision, see Drexler, *Strafvollzugsgesetz Kommentar*, 3. Auflage, Wien, 2014, pp. 319 and 320.

[14] Klopf, cited above, p. 105, and Bertel, cited above, p. 26.

The failure of the "therapy instead of penalty" model

7. Statistics show a trend towards a constant increase of the population subject to preventive measures under section 21 § 2 of the Austrian Criminal Code, caused by two factors: an increase in the number of offenders placed in psychiatric detention and an increase in the duration of their placement[15]. Put another way, the number of people being released from psychiatric detention does not cover the number of people being placed there[16]. Moreover, in the last ten years, the measure set out in section 21 § 2 has been applied increasingly to petty offences, with the trial court combining the application of a short prison term with the cumulative application of the preventive measure[17]. In the large majority of cases, the conditional release (*bedingte Entlassung*) from psychiatric detention takes place only after, and sometimes many years after, the end of the prison term owing to a strict interpretation of the legal requirements of section 47 § 2[18]. The courts are also very reluctant in practice to apply the conditional discount (*bedingter Nachlass*) provided for in section 45 to these offenders[19].

---

[15] I have used the following statistical studies for the purposes of this opinion: the 2015 BMJ study cited above; the 2012 IRKS study cited above; the 2010 report of the Court of Auditors; the study by Gutiérrez-Lobos and others, "Der österreichische Massnahmenvollzug nach § 21 Abs. 2 öStGB – eine empirische Bestandaufnahme der Unterbringung zurechnungsfähiger geistig abnormer Rechtsbrecher", in *25 Jahre Massnahmenvollzug…*, cited above, pp. 43-80; and the study by Heinz Katschnig and others entitled "Legalbewährung nach dem Massnahmenvollzug nach § 21 Abs. 2 öStGB – eine Sonderauswertungen von Strafregisterdaten", also in *25 Jahre Massnahmenvollzug*, cited above, pp. 81-98.

[16] This is also the result of a line of case-law which finds support in scholarly opinion, according to which psychiatric detention is not an *ultima ratio* and thus may be imposed even when there are less intrusive alternatives (Nimmervoll, point no. 21 of preliminary commentary on §§ 21-25 of the *Salzburger Kommentar zum StGB*, 25 Lfg, November 2011). The 2015 BMJ study cited above, pp. 59-60, proposes solving this dispute by stating the principle of *ultima ratio* clearly.

[17] The 2012 IRKS study cited above, pp. 30 and 62 (conclusion 13); Minkendorfer, cited above, p. 70; and Gutiérrez-Lobos and others, cited above, p. 62, who speak about a "levelling function" of preventive measures in so far as these tend to prolong short prison sentences.

[18] The 2012 IRKS study cited above, p. 61 (conclusion 12); Schwaighofer, cited above, p. 64; Schroll, cited above, p. 58; and Gutiérrez-Lobos and others, cited above, p. 67. The 2015 BMJ study cited above, pp. 62-63, admits the need to reform this regime in order to facilitate its application. The insufficient provision of public out-patient therapeutic services contributes to the prolongation of persons' psychiatric detention.

[19] The 2012 IRKS study cited above, pp. 38-41, 63 (conclusion 17: no existing *Salzburger* praxis for section 21 § 2 offenders); the 2015 BMJ study cited above, p. 50; and Birklbauer, point no. 42 of the commentary on § 45 of the *Salzburger Kommentar zum StGB*, 24 Lfg, May 2011. The conditional discount can only be applied to the section 21 § 2 preventive measure simultaneously with the conditional discount of the penalty, which follows

8. In reality, owing to a lack of places in institutions for mentally "abnormal" offenders, the large majority of these offenders are placed in ordinary prison facilities where the punitive character of the penalty prevails over the therapeutic one[20]. Frequently, the offender is considered as "not amenable to therapy" (*nicht therapiebar*) or to the "existing therapeutic possibilities" (*mit den bestehenden therapeutischen Möglichkeiten nicht helfen zu können*)[21]. Thus, the purported legal model of "therapy instead of penalty" (*Therapie statt Strafe*) is replaced by the opposite praxis, with the unavoidable consequence of the dividing line between imprisonment as a criminal penalty and psychiatric detention as a preventive measure being blurred[22]. In practical terms, the psychiatric detention of "abnormal" offenders plays the same incapacitating and neutralising role (*unschädlich zu machen*) as the 1933 German *Sicherungsverwahrung*[23] or, even closer, the 1936 Portuguese "pragmatic defensive penal law" (*pragmatisches Verteidigungsstrafrecht*)[24].

---

different rules (section 43). This additional factor of complexity hinders the applicability of the provisions of section 45 § 1).

[20] As the Court of Auditors established in its 2010 report, p. 85, and conclusion 3, p. 105. In p. 86 of this study, and in its conclusion 13, p. 106, this institution criticised the fact that many detainees did not even undergo a psychiatric expert assessment after being convicted, having to wait for years before having one. Bertel, cited above, p. 33, calls the analysis of the Court of Auditors a "devastating judgment". The situation has been described as a "horror scenario" by Minkendorfer, cited above, p. 69, or a "grave shortcoming" by Gutiérrez-Lobos and others, cited above, p. 71. See also the criticism by Holzbauer, "Die Heilkraft der Staatsgewalt", in Klopf/Holzbauer (ed.), *Zum österreischischen*…, cited above, pp. 26, 30, 33 and 37; Schroll, cited above, p. 57; and Frottier, cited above, p. 12.

[21] Holzbauer, cited above, p. 30.

[22] Holzbauer, cited above, p. 37. This failure is particularly grave, since offenders placed in psychiatric detention under section 21 § 2 have a "subjective public right" to medical, and especially psychiatric, psychotherapeutic and pedagogical treatment, according to national law (Drexler, cited above, p. 327, referring to two judgments of the Austrian Administrative Court of 2008 and 2010).

[23] Holzbauer, cited above, p. 40, and Frottier, cited above, p. 19, who note the disproportionately high percentage of "abnormal" offenders placed in psychiatric detention in Austria in comparison with dangerous offenders placed in *Sicherungsverwahrung* in Germany. This overrepresentation of "abnormal" offenders is a clear sign that something is fundamentally wrong in the Austrian criminal sanctions system.

[24] To use the expression of Hünerfeld, *Die Entwicklung der Kriminalpolitik in Portugal*, Bonn, 1971, p. 216, when referring to the 1936 Portuguese prison reform, which resembles the present Austrian system (see also Cannat, *Droit Pénal et Politique Pénitentiaire au Portugal*, Paris, 1946, pp. 114 to 117; Ancel, *Les Mesures de Sûreté en Matière Criminelle*, Melun, 1950, pp. 38 and 39; Jescheck, "Principes et solutions de la politique criminelle dans la réforme pénale allemande et portugaise", in *Estudos in Memoriam do Prof. Doutor José Beleza dos Santos*, I, Coimbra, 1966, p. 458; and Nils Robert, *La Participation du Juge à l'application des Sanctions Pénales*, Genève, 1972, p. 104; and the whole of chapter 8 of my own doctoral dissertation, *A reforma da justiça criminal em Portugal e na Europa*, Coimbra, 2003).

9. In view of these shortcomings in the legal and institutional framework, it comes as no surprise that offenders are mislabelled (*Etikettenschwindel*) as "abnormal" persons in order to impose truly incapacitating sanctions on them which allow the incarceration of persons who are criminally responsible to be artificially prolonged, if need be for their entire lives (section 25 § 1 of the Austrian Criminal Code). In other words, the preventive measure provided for in section 21 § 2 has become the epicentre of Austrian criminal policy for criminally responsible offenders perceived by society as dangerous, the specific provision of section 23 on "dangerous recidivists" being "dead law" (*Totes Recht*)[25]. The fact that section 23 § 2 provides that placement in an institution for mentally "abnormal" offenders, which is not time-limited, prevails over placement in an institution for "dangerous recidivists", which is time-limited, evidently contributes to the increased mislabelling of offenders[26]. Looking behind appearances, labelling offenders with intellectual and psychosocial impairments as "abnormal" serves the purpose of formally transferring them from the *Normalvollzug* regime to the *Massnahmenvollzug* regime; in fact, most of them never leave the former, the significant difference being that since they are nominally under the latter regime their incarceration may last forever[27]. Consequently, the respondent State does not provide reasonable accommodations in the above-mentioned sense to "abnormal" offenders, imposing a disproportionate and discriminatory punishment on them.

The lack of judicial oversight

10. The specific duration of the psychiatric detention of "abnormal" offenders is decided by a court which conducts an annual, *ex officio* review of the situation of the detained person (section 25 § 3 of the Austrian Criminal Code) and hears evidence from him or her every two years (section 167(1) of the Law on Enforcement of Penalties). During this procedure, "the convicted person has the rights of an accused person" (*der Verurteilte hat die Rechte des Beschuldigten*), according to the explicit wording of section 17(1)(3) of the Law on Enforcement of Penalties.

---

[25] Schanda, "Die aktuelle Psychiatriegesetzgebung in Österreisch: Zivil und Strafrecht aus psychiatrischer Sicht", in *Recht und Psychiatrie*, 23. Jahr, Heft 4, 2005, p. 163; Minkendorfer, cited above, pp. 66 and 70; and Drexler, cited above, p. 298.

[26] This is precisely the reason why the applicant requested his transfer to the *Normalvollzug* regime: as the Steyr Regional Court quite well understood, in its decision of 31 July 2007, the applicant feared that the moment of his *bedingte Entlassung* could be postponed indefinitely.

[27] As in *M. v. Germany*, no. 19359/04, § 128, 17 December 2009, having regard to the realities of the situation of "abnormal" persons in psychiatric detention, it is patent that psychiatric detention under section 21 § 2, like preventive detention in Germany, serves a purely preventive purpose.

11. In the light of this provision, it is obvious that the procedural rights under the criminal limb of Article 6 of the Convention apply to the release proceedings. In Austrian law, "abnormal" persons in psychiatric detention have a set of procedural rights which cannot be disposed of on a discretionary basis by the court. Yet since its implementation, strong criticism has been voiced of the courts' practice in the context of the placement review mechanism, namely of courts hearing detained persons very briefly, rejecting requests by detained persons for evidence to be produced or for the psychiatric expert to be questioned before the court and summoning detainees at very short notice, which does not allow for consultation of the file or with a lawyer or submission of an alternative psychiatric expert report[28]. Of particular importance is the right to call witnesses and to question the psychiatric expert, it being open to the court to reject these requests only within the limited terms of section 55 of the Code of Criminal Procedure[29]. For example, the court cannot reject a request to take evidence on the assumption that it is not necessary, as happened in the present case.

Furthermore, the lack of effective judicial oversight of the psychiatric detention of "abnormal" offenders is aggravated by the Austrian Supreme Court's case-law with regard to the interpretation of section 25 § 3 of the Austrian Criminal Code, in so far as it establishes that the law guarantees review at regular intervals, but does not fix a time-limit for the actual court decision to be taken. According to the Supreme Court, the court's decision may be taken outside the legal one year time-limit. The guarantee of regular

---

[28] Krisper, cited above, p. 22; Nowak/Krisper, cited above, p. 657; Schwaighofer, cited above, p. 64; Schmeikal, "Debasement of state by the law and how to reconstruct social life", in *Zum österreichischen*…, cited above, p. 83; and Bertel, cited above, p. 28, who refers to "grave grievances" with regard to this review procedure and to an "apparent review". The CPT has already recommended that the Austrian authorities take steps to ensure, in the context of the placement review procedure, that prisoners have legal representation, including legal assistance to prisoners who are not in a position to pay for a lawyer themselves (CPT/Inf (2005) 13, para. 118). The same request was made by the UN Special Rapporteur on Torture. Rule 93 of the Standard Minimum Rules on the Treatment of Prisoners should ensure that all persons detained, arrested or imprisoned, suspected or accused, or convicted (including death row inmates), and at all stages of the criminal justice process, including whenever there is a complaint of torture or other ill-treatment, are provided with prompt, independent and effective legal representation of the detainee's own choosing, if available, and otherwise at the State's expense, on the basis of principles 3, 7 and 12 of the United Nations Principles and Guidelines on Access to Legal Aid, and principle 18 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (Report of the Special Rapporteur on Torture, 9 August 2013, A/68/295, paragraph 74).

[29] Bertel, cited above, pp. 29-32: "In practice lawful hearings are not frequent"; "These situations bear no relation to the rule of law and the protection of fundamental rights". Hence, I cannot accept the position of the Government in their observations, page 21, disputing the applicability of Article 6 of the Convention and calling for "a certain flexibility of the procedural guarantees".

judicial review of the person's detention is hence more virtual than real. As this case-law provided the basis for the Linz Regional Court's judgment of 10 September 2007, the finding of a breach of Article 5 of the Convention in the present case directly calls into question this excessively tolerant case-law on the part of the Supreme Court[30].

Conclusion

12. The psychiatric detention provided for in section 21 § 2 of the Austrian Criminal Code is a vague and disproportionate form of involuntary transfer of criminally responsible persons to mental health facilities within or outside of an ordinary prison facility. Moreover, it is a form of discrimination based on mental disability in the context of criminal sanctions and violates Article 14 CRDP. The unlawful, disproportionate and discriminatory nature of this interference with the liberty of "abnormal" offenders also breaches Article 5 of the Convention. The applicant was the victim of such a violation. The protracted proceedings for review of the applicant's detention until his release are not a unique situation in Austria. The groundless rejection of his request for the taking of evidence is also a common feature of the review procedure mechanism. Both shortcomings reflect the widespread failure to comply with the guarantees of Article 5 and 6 of the Convention in proceedings for the release of these offenders.

With a helping hand from attentive scholarly opinion, the national authorities have undertaken a serious assessment of this situation with several well-founded studies, to which I have made reference above[31]. It is now high time for them to take action and reform the deficient legal and institutional framework in accordance with Austria's international obligations.

---

[30] The majority's indirect criticism of this case-law is not sufficient. In my view, the judgment would have been bound to gain in terms of clarity if the majority had explicitly stated that this line of case-law is not admissible under Article 5.

[31] I refer to the 2010 Court of Auditors' report, the 2012 IRKS study and the 2015 BMJ study.