

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

THIRD SECTION

DECISION

Application no. 53764/07
D.B.
against the Netherlands

The European Court of Human Rights (Third Section), sitting on 5 March 2013 as a Chamber composed of:

Josep Casadevall, *President,*
Alvina Gyulumyan,
Corneliu Bîrsan,
Ján Šikuta,
Luis López Guerra,
Nona Tsotsoria,
Johannes Silvis, *judges,*

and Santiago Quesada, *Section Registrar,*

Having regard to the above application lodged on 6 December 2007,

Having regard to the decision to grant anonymity to the applicant under Rule 47 § 3 of the Rules of Court,

Having regard to the observations submitted by the respondent Government and the observations in reply submitted by the applicant,

Having deliberated, decides as follows:

THE FACTS

1. The applicant is a Netherlands national who was born in 1983. As far as the Court is aware, he is currently detained in a custodial clinic in Venray. He was represented before the Court by Ms C.F. van Drumpt, a lawyer practising in Amsterdam. The Netherlands Government ("the Government") were represented by their Agent, Mr R.A.A. Böcker, and

Deputy Agent, Ms L. Egmond, both of the Netherlands Ministry for Foreign Affairs.

2. The facts of the case, as presented by the parties, may be summarised as follows.

A. Criminal proceedings

3. On 5 December 2003, following adversarial proceedings on appeal, the Arnhem Court of Appeal (*gerechtshof*) convicted the applicant of several counts of rape and theft preceded and/or accompanied by violence. It sentenced him to eight years' imprisonment with deduction of the time spent in pre-trial detention. Having further noted the contents of a multidisciplinary report drawn up by a psychiatrist and a psychologist who had examined the applicant, the Court of Appeal also found that, given the inadequate development and pathological disturbance of the applicant's mental faculties and personality, there was a high risk of reoffending. It therefore also imposed the measure of TBS with confinement in a custodial clinic (*terbeschikkingstelling met bevel tot verpleging van overheidswege*; "TBS order"). In respect of the latter decision, the Court of Appeal held:

> "The accused has shown at the hearing that he realises that there are good reasons to order treatment [in a custodial clinic], but he has indicated that he has strong objections if treatment would only commence after he has served a lengthy [prison] sentence. The court considers that the imposition of a [prison] sentence of considerable duration is indicated, noting the great seriousness of the facts, and further finds that clinical treatment is necessary. In its decision the court has had regard to Rule 42(1) of the 1999 Prison Rules (*Penitentiaire maatregel*), in which it is provided that a convicted person on whom both a prison sentence and a TBS order has been imposed, will in principle be admitted to a TBS custodial clinic after having served one-third of the prison sentence, and to Rule 43(3) of those Rules, in which the possibility of an even earlier admission is opened if the convict is younger than 23. The court assumes that, if this judgment should become final, these provisions will serve as guidance in the execution of the prison sentence."

This judgment became final on 2 March 2004, after the Supreme Court (*Hoge Raad*) had rejected the applicant's appeal on points of law (*cassatie*).

B. Administrative proceedings concerning the applicant's admission to a custodial clinic

4. On 6 May 2004, the Head of the Department for Individual TBS cases of the Ministry of Justice informed the applicant that he would have served one-third of his prison sentence by 8 August 2005, and that – as he had been sentenced to more than three years' imprisonment – advice on the exigency of admission to a TBS custodial clinic would be sought from the head of the penitentiary institution where he was being held before a decision was taken

about early admission to a TBS custodial clinic (i.e. before he had served two-thirds of his sentence).

5. By letter of 19 July 2004, the applicant was informed that in accordance with Rules 42 and 43 of the 1999 Prison Rules (see paragraph 24 below), forming part of the so-called "Fokkens rules" (*Fokkensregeling*), he would become eligible for early admission to a TBS custodial clinic on 8 August 2005. On this date he was effectively placed on the waiting list for persons awaiting admission to a TBS clinic under the "Fokkens rules".

6. By letters of 26 January, 27 April and 24 July 2006, the applicant was informed that, as admission to a custodial clinic was not possible within the six months' waiting period referred to in section 76 § 1 of the 1999 Prisons Act (*Penitentiaire Beginselenwet*), the Minister of Justice had – in accordance with section 76 § 2 of the 1999 Prisons Act – extended the waiting period for admission until 5 May, 2 August and 31 October 2006, respectively. The applicant's appeals against these decisions were all rejected by the Appeals Board (*beroepscommissie*) of the Council for the Application of Criminal Law and the Protection of Juveniles (*Raad voor Strafrechtstoepassing en Jeugdbescherming*) (hereafter "the Appeals Board").

7. On 23 October 2006 the Minister extended the waiting period by a fourth period of three months, until 30 January 2007.

C. Proceedings before the Appeals Board

1. The applicant's appeals

8. On 30 October 2006 the applicant lodged an appeal with the Appeals Board against the Minister's decision of 23 October 2006.

9. On 16 January 2007, the Minister extended the waiting period by a fifth period of three months. As his appeal against the last extension was still pending, the applicant did not lodge a separate appeal against this decision but requested the Appeals Board by letter of 8 March 2007 to review this new decision in the still pending appeal proceedings also.

10. By letter of 5 April 2007, the Appeals Board reminded the Minister of Justice of its repeated requests to make available all documents relating to the applicant's appeal of 30 October 2006 and to submit a statement of defence (*verweerschrift*). The documents and statement requested were received by the Appeals Board on 18 April 2007.

11. On 25 April 2007, the Minister extended the waiting period by a sixth period of three months until 28 July 2007. On 27 April 2007, the applicant requested the Appeals Board to review this decision in the pending appeal.

2. The first decision of the Appeals Board

12. The Appeals Board gave its decision on 7 June 2007. It noted that the applicant had been informed by the Minister on 19 July 2004 that, as from 8 August 2005, he was eligible for early admission to a TBS custodial clinic, which had however proved impossible owing to a lack of capacity, and that the waiting period for admission had been prolonged by three months up to and including 29 January 2006. It further noted that 17 May 2008, being the date of the applicant's early release, was the date on which the consecutive TBS order imposed on him would take effect.

13. The Appeals Board further held that the applicant's appeal as received by it on 30 October 2006 was directed against the Minister's decision of 23 October 2006 only and that this appeal could not be admitted as being directed against also any decisions still to be taken by the Minister at that time, even though they were actually taken later in 2007.

14. Turning to the appeal against the Minister's decision of 23 October 2006, the Appeals Board noted that due to a shortage of capacity the applicant had not yet been placed in a custodial clinic, but also that at the time of the impugned decision the applicant's detention was based on the prison sentence imposed and not on the TBS order imposed in addition, which had not yet taken effect. The Appeals Board accepted that the capacity shortage constituted a ground to postpone the intended earlier admission to a custodial clinic unless there were exceptional circumstances, for example if the psychological condition of the person concerned would render a longer stay in a prison medically irresponsible. Such a situation would concern unsuitability for detention warranting priority placement in a custodial clinic for that reason. However, having noted a medical report dated 4 April 2007 by the Netherlands Institute for Forensic Psychiatry and Psychology on the psychiatric condition of the applicant, and in the absence of any signals from the prison where the applicant was serving his prison sentence indicating unsuitability for detention, the Appeals Board accepted that on 23 October 2006 there was no reason for priority placement in the applicant's case.

15. As to the applicant's argument that his rights under Article 5 of the Convention were being violated – in which respect he relied on the Court's judgments in the cases of *Morsink v. the Netherlands*, no. 48865/99, 11 May 2004, and *Brand v. the Netherlands*, no. 49902/99, 11 May 2004 –, the Appeals Board held that it did not follow from these judgments that a waiting period prior to the date on which a TBS order took effect was contrary to the right to liberty guaranteed by Article 5. At the time of the impugned decision, the applicant was held in prison on the basis of a prison sentence. The fact that the applicant had become eligible as from 8 August 2005 for an earlier execution of the TBS order that had also been imposed on him did not, even if admission to a custodial clinic at that moment would be desirable, affect the lawfulness of his stay in prison on

the basis of the prison sentence imposed for as long as a place in a custodial clinic was not available due to a capacity shortage and for as long as the applicant's psychiatric condition did not render him unsuitable for detention.

16. No further appeal lay against this decision.

3. The second decision of the Appeals Board

17. On 14 August 2007, the Appeals Board rejected a fresh appeal lodged by the applicant against the Minister's prolongation decision of 25 April 2007. It did so for the same reasons as given in its earlier decision of 7 June 2007. It further rejected the applicant's argument that he did not have an effective remedy within the meaning of Article 13 of the Convention in respect of the Minister's decision, holding that he had at his disposal an effective remedy before a domestic appellate body.

D. The applicant's admission to a custodial clinic

18. The applicant would have become eligible for early release (had there been no TBS order with confinement in a custodial clinic) on 17 May 2008, after serving two-thirds of his sentence. He was admitted to a custodial clinic, *Rooyse Wissel* in Venray, on 9 February 2009.

E. The settlement agreement

19. The Government have submitted an agreement between the Netherlands State and the applicant. It is in the following terms:

"The undersigned

1. **The State of the Netherlands** (Ministry of Justice), which has its seat in The Hague, herein after the State,

and

2. **B.** [the applicant], currently detained in the penitentiary institution at Grave, hereinafter B.,

Considering that:

- B. is detained in the remand centre (*huis van bewaring*) as a time-expired convict prisoner awaiting placement under a TBS order (*TBS-passant*) and has not as yet been admitted to a custodial clinic;

- the Supreme Court, in its judgment of 21 December 2007, has held that a waiting period for time-expired convict prisoners (*passantentermijn*) of no longer than four months is acceptable;

- B. is therefore entitled to compensation for each month of his waiting period with effect from 14 September 2008;

- the Appeals Board of the Council for the Application of Criminal Law and the Protection of Juveniles, according to its consistent case-law, considers 350 euros (EUR) reasonable indemnification, on the understanding that this sum is increased by EUR 125 for each additional period of three months;

- in this light, compensation in an amount of EUR 225 for the fifth and sixth months is reasonable;

Have agreed as follows:

1. The State shall pay to B. a sum corresponding to the standard set out above in compensation for the damage which he has suffered and continues to suffer as a result of his waiting period since 14 September 2008.

2. Following signature of the present settlement agreement by both parties and B.'s placement in a custodial clinic the State shall proceed to transfer the sum that shall at that time be due to the account which shall be kept on B.'s behalf at the institution in which he shall be placed.

3. B. expressly declines to waive the right to be placed as soon as possible in a custodial clinic in accordance with the rights guaranteed him by the European Convention on Human Rights. It is standing case-law that the compensation aforementioned does not discharge the State of its duty to respect those rights and ensure that they are given effect.

4. Any dispute arising from this agreement shall be brought before the competent court."

This agreement was signed in two copies, first by the applicant himself (on 6 January 2009), then by a representative of the Ministry of Justice (on 3 February 2009).

F. Relevant domestic law and practice

1. The Criminal Code

20. The relevant provisions of the 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, can 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 apply by analogy.

2. If a TBS order with confinement in a custodial clinic is imposed on a person in addition to a sentence of imprisonment, it shall be assessed at regular intervals whether the sentenced person must be admitted to a custodial clinic. Further rules concerning this assessment will be laid down by Order in Council (*algemene maatregel van bestuur*). ...

3. The placement [in a custodial clinic] and the termination thereof shall take place according to rules to be laid down by Order in Council, by order of the Minister of Justice ...

4. The convicted person can file an appeal against the placement decision, the decision to terminate placement and the decision not to place in deviation from the advice of the judge in accordance with the provisions of Article 37b § 2 [of the Criminal Code] within four weeks after notification of that decision with the Council for the Application of Criminal Law and the Protection of Juveniles. ...

Article 37a

1. The court 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, section 175 § 2 of the 1994 Road Traffic Act (*Wegenverkeerswet*), section 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 goods.

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

Article 37b

1. The court may order that a person on whom a TBS order is imposed shall be confined in 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 goods.

2. If the court has imposed a prison sentence in addition to a TBS order with confinement in a custodial clinic, has, it can include in its judgment advice as to the time when the TBS order is to take effect. ...

Article 38f

1. The period of validity of a TBS order shall be suspended:

a. for any period during which the person subject to the order is lawfully deprived of his liberty on other grounds or any period during which he evades such deprivation of liberty; ...”

2. The TBS system

21. The TBS system is described in *Morsink v. the Netherlands*, no. 48865/99, §§ 26-37, 11 May 2004.

3. Admission to a custodial clinic

22. Under section 11 of the TBS Act (*Beginselenwet verpleging ter beschikking gestelden*), admission to a custodial clinic shall take place on the order of the Minister of Justice, who must further decide in which specific custodial clinic the person concerned is to be placed and that decision should – at least – take into account the requirements of the protection of society against the dangerousness of the person subject to a TBS order, the safety of persons other than the detainee or the general safety of others or goods, and the requirements of the treatment of the person concerned in view of the nature of the established inadequate development or pathological disturbance of his or her mental faculties.

23. Section 76 § 1 of the 1999 Prisons Act and section 12 § 1 of the TBS Act both state that a person subject to a TBS order must be admitted to a custodial clinic within six months after the date on which the TBS order has taken effect. Both section 76 § 2 of the 1999 Prisons Act and section 12 § 2 of the TBS Act indicate that this waiting period can be extended by the Minister of Justice by further periods of three months each if admission proves impossible. An appeal against the Minister’s decision to extend the waiting period lies with the Council for the Application of Criminal Law and the Protection of Juveniles (section 69 (1)(b) of the TBS Act).

24. The relevant provisions of the 1999 Prison Rules read as follows:

“Rule 41

1. The placement decision referred to in Article 13 ... of the Criminal Code shall be taken by Our Minister [of Justice]. ...

Rule 42

1. The placement [in a custodial clinic] of a convicted person sentenced to imprisonment on whom a TBS order with confinement in a custodial clinic has also been imposed shall in principle occur after one-third of the prison sentence imposed has been served. ...

Rule 43

1. In derogation of Rule 42 § 1, the placement of a person sentenced to imprisonment on whom a TBS order with confinement in a custodial clinic has also been imposed can for the following reasons take place at an earlier or later time than mentioned in Rule 42 § 1.

2. Reasons for placement at a later time than mentioned in Rule 42 § 1can be:

a. the advice of the court referred to in Article 37b § 2 of the Criminal Code,

b. advice of behavioural experts drawn up on the convicted person from which it appears that this person is unreceptive of treatment,

c. it has appeared that the convicted person poses an extreme risk of absconding.

3. Reasons for placement at an earlier time than mentioned in Rule 42 § 1can be:

a. the advice of the court referred to in Article 37b § 2 of the Criminal Code,

b. the necessity of speedy treatment of the convicted person,

c. the stay in the penitentiary establishment, if this leads to serious behavioural problems of the convicted person,

d. the age of the convicted person, if this person is younger than 23 years."

25. These provisions, often referred to as the "Fokkens rules" because they were based on a recommendation of the "Fokkens Committee" (the Committee for TBS and sanction application in respect of mentally deranged delinquents – *Commissie TBS en Sanctietoepassing Geestelijk Gestoorde Delinquenten* –, named colloquially after its chairman, Professor J.W. Fokkens), reflected the idea that treatment in a custodial clinic was more likely to be successful if the length of any prior detention was not too long.

26. In two decisions given on 23 June 2006 and 17 August 2006 respectively, the Appeals Board quashed a decision taken by the Minister of Justice in which the latter had decided, for reasons of a continuous capacity shortage, to stay the appellant's placement on a waiting list for admission to a custodial clinic under the "Fokkens rules" until the appellant would become eligible for early release. It held that capacity shortage was not a circumstance allowing the Minister under Rule 43 of the 1999 Prison Rules to stay the date for inclusion in the waiting list for admission to a custodial clinic until the persons concerned would have served the prison sentence imposed.

27. The "Fokkens Rules" were revoked by the Minister of Justice on 24 July 2010 with effect from 4 August 2010.

4. The Council for the Application of Criminal Law and the Protection of Juveniles

28. The Council for the Application of Criminal Law and the Protection of Juveniles is a public body whose duties include advising the Minister of Justice, either when so requested or *sua sponte*, on matters affecting the implementation of legislation and policy as regards criminal justice and juveniles and acting as a judicial body in accordance with the jurisdiction entrusted to it by the law (section 3(1) and (2) of the Council for the Application of Criminal Law and the Protection of Juveniles (Institution) Act (*Instellingswet Raad voor Strafrechtstoepassing en Jeugdbescherming*). Its composition includes serving judges, experts on social work, experts on behavioural science, lawyers and doctors (section 5(2)).

29. The Council for the Application of Criminal Law and the Protection of Juveniles appoints Appeals Boards from among its members to carry out its judicial duties (Rule 22(1) of the Administrative Rules (*Bestuursreglement*) of the Council for the Application of Criminal Law and the Protection of Juveniles).

5. Decisions of the Appeals Board of the Council for the Application of Criminal Law and the Protection of Juveniles

30. In two decisions of 20 October 2010 the Appeals Board held that decisions no longer to admit convicts to custodial clinics after serving only one-third of their prison term, in pursuance of a policy announced in November 2009 in anticipation of the revocation of the "Fokkens Rules", lacked any legal basis absent one of the reasons set out in Rule 43 of the Prisons Order or a stated shortage of suitable vacancies. In the first of these two cases (nos. 10/109/TP – 10.521/TR), the time-limit for placement had already been missed; the Minister was ordered to pay the appellant compensation in an amount of EUR 350 per month of further delay, that sum to be increased by a further EUR 125 per month after the lapse of any further three-month period.

COMPLAINTS

31. The applicant complained under Article 5 § 1 of the Convention about the failure to admit him to a custodial clinic after he had served one-third of his prison sentence in accordance with the "Fokkens rules".

32. He complained under Article 7 of the Convention about the repeated extension of the waiting period which he had had to spend in a punitive setting while awaiting his admission to a custodial clinic, which in his submission constituted an unlawful increase of the penalty beyond the sentence imposed by the Court of Appeal.

33. Finally, he complained under Article 13 of the Convention, firstly, that the Appeals Board of the Council for the Application of Criminal Law and the Protection of Juveniles had unreasonably refused to consider his complaints about the Minister's decisions of 16 January and 25 April 2007 in the proceedings initiated by his appeal against the Minister's decision of 23 October 2006, which were still pending at the relevant time; and secondly, that the procedure of the Appeals Board was ineffective in cases such as the present since that body routinely failed to entertain legal arguments, confining itself to reviewing prisoners' suitability to undergo detention in a penal setting.

THE LAW

A. Alleged violation of Article 5 § 1 of the Convention

34. The applicant complained that the failure to admit him to a custodial clinic after he had served one-third of his prison sentence, in accordance with the "Fokkens rules", meant that his detention had not been "in accordance with a procedure prescribed by law" as provided in Article 5 § 1 of the Convention, which, in its relevant parts, 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 ..."

1. Exhaustion of domestic remedies

35. The Government argued on two separate grounds that the applicant had failed to exhaust the available effective domestic remedies.

36. The Court will consider these objections in the light of the principles developed in the Commission's and its own case-law. It has stated them on many occasions, including in *Kozacıoğlu v. Turkey* [GC], no. 2334/03, § 40, 19 February 2009 (case-law references omitted):

> "The Court ... emphasises that the application of the exhaustion of domestic remedies rule must make due allowance for the fact that it is being applied in the context of machinery for the protection of human rights that the Contracting Parties have agreed to set up. Accordingly, it has recognised that Article 35 § 1 must be applied with some degree of flexibility and without excessive formalism. It has further

> recognised that the rule of exhaustion is neither absolute nor capable of being applied automatically; in monitoring compliance with this rule, it is essential to have regard to the circumstances of the individual case. This means amongst other things that it must take realistic account not only of the existence of formal remedies in the legal system of the Contracting Party concerned but also of the context in which they operate as well as the personal circumstances of the applicant. It must then examine whether, in all the circumstances of the case, the applicant did everything that could reasonably be expected of him or her to exhaust domestic remedies (...). It should also be reiterated that an applicant must have made normal use of domestic remedies which are likely to be effective and sufficient and that, when a remedy has been pursued, use of another remedy which has essentially the same objective is not required (...)."

(a) Summary civil proceedings against the State

37. The Government submitted that the applicant could have sought an injunction against the State in summary civil proceedings before the provisional measures judge (*voorzieningenrechter*). They pointed to a judgment of the Provisional Measures Judge of the Regional Court of Breda of 23 September 2005, in which a person subject to a TBS order with an order for confinement in a custodial clinic had obtained an order for her transfer to a custodial clinic by a certain date or her release otherwise.

38. The applicant countered that the judgment cited by the Government related to regular time-expired prisoners awaiting admission to a custodial clinic, who were in the situation of the applicants in *Morsink* and *Brand*. In the case cited by the Government, moreover, it had been determined by the Council for the Application of Criminal Law and the Protection of Juveniles that the modality of the plaintiff's detention was unlawful; this had been binding on the civil courts. In contrast, the Council for the Application of Criminal Law and the Protection of Juveniles had made no such determination in the applicant's case; consequently the civil courts would have been bound to declare any action brought by the present applicant inadmissible.

39. The Court observes that the Government submitted a preliminary objection based on the same domestic case-law in *Nelissen v. the Netherlands*, no. 6051/07, 5 April 2011 (see § 42 of the judgment). That case concerned a time-expired prisoner awaiting admission to a custodial clinic (or regular "pre-placement detainee"), to whom the "Fokkens rules" did not apply. In §§ 44-49 of its judgment, the Court dismissed the objection, finding that the overwhelming weight of the domestic case-law postdating that judgment pointed away from the civil courts as an effective remedy.

40. The same reasoning applies in the present case. The Court would add that no case has come to its attention of a prisoner successfully making use of civil proceedings to secure early admission to a custodial clinic in accordance with the "Fokkens rules".

41. It follows that this preliminary objection must be dismissed.

(b) Failure to appeal

42. The Government submitted that the applicant had not appealed against the Minister's decisions of 16 January and 25 April 2007. The application was therefore inadmissible in so far as it was directed against these. Although the applicant had asked the Appeals Board to review these decisions together with the appeal against the decision of 23 October 2006, the Appeals Board had rightly held that that appeal could not extend to decisions yet to be taken at the time when it was lodged.

43. The applicant pointed to the capacity shortage which had in any event prevented his admission to a custodial clinic at the relevant time.

44. The Court is unconvinced that after the dismissal of the applicant's first appeal any subsequent appeal which the applicant might have brought would have offered any greater prospects of success. Rather, it would appear that prospects of success were nonexistent throughout the period that the applicant might otherwise have benefited from the "Fokkens rules". The shortage of suitable places in custodial clinics had not been cured by the time when the applicant became a regular pre-placement detainee as a time-expired convict, on 17 May 2008. What is more, there was no place for him even then: it took nearly nine more months, until 9 February 2009, for the applicant to be admitted to a custodial clinic.

45. The Court therefore dismisses this objection also.

2. Victim status

46. The Government submitted a settlement agreement (paragraph 23 above), by which in their contention the applicant had waived his victim status against fitting compensation for the period from 14 September 2008 until the date on which he was actually admitted to a custodial clinic.

47. The applicant pointed out that this agreement related to the waiting period as a regular time-expired convict prisoner awaiting placement under a TBS order, i.e. as a regular pre-placement detainee.

48. The Court finds that the agreement has no bearing on the failure to advance the applicant's admission to a custodial clinic under the "Fokkens rules". Rather, it relates to his legal situation as a regular pre-placement detainee, again as in the cases of *Morsink* and *Brand*.

49. It follows that this objection too must be dismissed.

2. Merits of the complaint

(a) Argument before the Court

50. The applicant considered that Rule 42(1) of the 1999 Prison Rules entitled him to admission to a custodial clinic after he had served one-third of his prison sentence so that he could undergo treatment the necessity of which he acknowledged. Although it might well be that there was a shortage

of suitable capacity in custodial clinics, this could not justify his continued detention in a punitive setting: the Government had had sufficient time to remedy this problem but had failed to do so. Moreover, the Court of Appeal, in its judgment, had indicated that the applicable rules should serve as "guidance" in the execution of the prison sentence.

51. The Government countered that the ground of the applicant's deprivation of liberty at the relevant time had been his prison sentence, so that his detention in a prison setting had been adequately justified under Article 5 § 1 (a) of the Convention. The present case was distinguishable from those of *Morsink* and *Brand* aforementioned in that in the latter cases the TBS order had already entered into force, whereas the applicant had still been serving his regular prison sentence, as according to Netherlands standards he was bound to do as long as no more than two-thirds of the prison sentence had expired. Therefore the detention of the applicant, at the stage under scrutiny here, was not grounded in any way on a delay in the execution of a TBS measure.

52. Rules 42 and 43 of the 1999 Prison Rules did not create for the applicant any right to be admitted to a custodial clinic. They constituted no more than a statement of principle. The fact that the applicant had been placed on a waiting list could not be construed as creating any legitimate expectations either.

(b) The Court's assessment

53. 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, among other authorities, the above-mentioned *Morsink* judgment, § 61). In the present case the applicant's detention at the relevant time was covered by Article 5 § 1 (a) and (e), the applicant having been found to be of "unsound mind"; indeed, this is not in dispute.

54. It must next be established whether the applicant's detention at the relevant time 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 (see, among many other authorities, *Morsink*, § 63).

55. Rule 42(1) of the 1999 Prison Rules, as in force at the relevant time, provided that convict prisoners on whom a TBS order had been imposed in addition to their sentence should in principle be transferred to a custodial clinic after having served one-third of their prison sentence. Rule 43(3) of the 1999 Prison Rules, moreover, enumerated circumstances in which

transfer to a custodial clinic could be effectuated even sooner (see paragraph 24 above).

56. The use of the expression "in principle" in Rule 42(1) admits of possible exceptions and thus creates a certain flexibility. This is reflected in the decisions given by the Appeals Board of the Council for the Application of Criminal Law and the Protection of Juveniles on 20 October 2010, in which it was held that decisions no longer to admit convicts to custodial clinics after serving only one-third of their prison term, in pursuance of a policy announced while the "Fokkens Rules" were still in force, lacked any legal basis absent one of the reasons set out in Rule 43(2) of the 1999 Prison Rules or a stated shortage of suitable vacancies (see paragraph 30 above).

57. In the present case, the latter situation obtained: the same Appeals Board of the Council for the Application of Criminal Law and the Protection of Juveniles twice found that although the applicant was on a waiting list for accelerated placement in a custodial clinic, a suitable place was not available; moreover, the applicant's condition was not such as to justify granting him priority over others (see paragraphs 15 and 17 above). Already for this reason the applicant's case is distinguishable from those referred to in the preceding paragraph.

58. The Court recognises that the applicant was informed by letter of 19 July 2004 that he was eligible for transfer to a custodial clinic after having served one-third of his sentence (see paragraph 5 above). This, however, meant nothing more than that he had been placed on the waiting list for early transfer.

59. Nor does the Court overlook the fact that the Court of Appeal, in setting the applicant's prison sentence, explicitly proceeded on the assumption that Rules 42(1) and 43(3) of the 1999 Prison Rules would "serve as guidance in the execution of the prison sentence" (see paragraph 3 above). Even so, it did not formulate "advice" within the meaning of Article 37b § 2 of the Criminal Code (see paragraph 20 above).

60. The foregoing considerations are sufficient to enable the Court to conclude that the delay in transferring the applicant to a custodial clinic in accordance with the "Fokkens Rules" was in accordance with a procedure prescribed by law.

61. It follows that this part of the application is manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

B. Alleged violation of Articles 7 and 13 of the Convention

62. The applicant complained under Article 7 of the Convention that the repeated extension of the waiting period, which he had had to spend in a punitive setting, constituted an unlawful increase of the penalty beyond the sentence imposed by the Court of Appeal.

63. The applicant made two complaints under Article 13 of the Convention: firstly, that the Appeals Board of the Council for the Application of Criminal Law and the Protection of Juveniles had unreasonably refused to consider his complaints about the Minister's decisions of 16 January and 25 April 2007 in the proceedings initiated by his appeal against the Minister's decision of 23 October 2006; and secondly, that the procedure of the Appeals Board was ineffective in cases such as his since that body routinely confined itself to reviewing prisoners' suitability to undergo detention in a penal setting, ignoring legal arguments.

64. In the light of all the material in its possession, and in so far as the matters complained of are within its competence, the Court finds that they do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that these complaints are manifestly ill-founded and must be rejected in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Santiago Quesada
Registrar

Josep Casadevall
President