AS TO THE ADMISSIBILITY OF

Application No. 11701/85
by E.
against Norway

The European Commission of Human Rights sitting in private on 12 May 1988, the following members being present:

MM. C.A. NØRGAARD, President
J.A. FROWEIN
G. SPERDUTI
E. BUSUTTIL
G. JÖRUNDSSON
A. WEITZEL
H. DANELIUS
Mrs. G.H. THUNE
Sir Basil HALL
MM. F. MARTINEZ
C.L. ROZAKIS
Mrs. J. LIDDY

Mr. J. RAYMOND, Deputy Secretary to the Commission

Having regard to Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms;

Having regard to the application introduced on 13 May 1985 by E. against Norway and registered on 16 August 1985 under file No. 11701/85;

Having regard to the report provided for in Rule 40 of the Rules of Procedure of the Commission;

Having regard to the information and observations submitted by the respondent Government on 7 March 1986, 16 February 1987 and 7 April 1988, and the information and observations submitted by the applicant on 6 June 1986, 31 March 1987 and 8 April 1988;

Having deliberated;

Decides as follows:

THE FACTS

The facts of the case, as submitted by the parties, may be summarised as follows:

The applicant is a Norwegian citizen, born in 1948. When introducing the application the applicant was placed at Ila National Penal and Preventive Detention Institution (Ila Landsfengsel og Sikringsanstalt) hereafter called Ila. Before the Commission he is represented by his lawyer, Mr. Knut Rognlien, Oslo, Norway.

A. The particular facts of the case

In 1965 the applicant was involved in a traffic accident which caused serious brain damage. This has subsequently led to a distinct tendency to become aggressive.

In 1967 the applicant was convicted of having violated Sections 227, 228 and 292 of the Norwegian Penal Code (assault and inflicting bodily harm) and sentenced to preventive detention

(sikring) for a maximum period of five years in accordance with Section 39 para. 1 a-e of the Penal Code. In an expert opinion obtained at that time, the applicant was declared mentally ill (sinnssyk). Accordingly, during the five year term of preventive detention he spent prolonged periods in psychiatric hospitals.

In 1978 the applicant was subjected to "judicial observation" (judisiell observasjon) in relation to an episode of violence against his father. The expert opinion, now obtained, concluded that the applicant was not mentally ill but should be regarded as a person with underdeveloped and impaired mental capacity (mangelfullt utviklede og varig svekkede sjelsevner). The risk of further criminal offences was therefore imminent.

By judgment of 26 June 1978 pronounced by the District Court of Kragerø (Kragerø herredsrett) the applicant was sentenced to 60 days in prison and subsequent preventive detention under Section 39 para. 1 a-f of the Penal Code for a maximum period of five years due to the incident involving violence against his father as mentioned above. In its judgment the Court pointed out that the preventive detention in a prison should only be used as an emergency measure since such detention was likely to have a negative influence on the applicant. Such detention should therefore, according to the Court, only be imposed insofar as it was necessary to protect the applicant's family and himself from aggressive actions which could easily lead to very serious incidents. The Court expected that the competent social authorities would take the necessary measures in order to avoid prolonged stays in prison.

The 60 days of imprisonment imposed by the Court on 26 June 1978 had already been served in detention on remand but as a consequence of the above judgment the applicant was sent to Ila in accordance with Section 39 para. 1 a-f on 4 July 1978 for the first time. Before sending him there, the prosecuting authorities had requested the Telemark Mental Hospital to receive the applicant. However, the hospital refused, stating that the applicant had already spent nearly four and a half years there, alternately in open and closed wards. It had, however, been impossible to give him any treatment at all. On the contrary, he had been a threat both to the staff and to the other patients.

The question of whether the detention at Ila should continue was taken up by the Ministry of Justice as a consequence of the applicant's request of September 1978 to be released under protective surveillance (sikring i frihet). On 18 September 1978 the Director of Ila informed the Ministry of Justice that although it would not be easy to find an appropriate solution to the applicant's problems it would not seem correct to place him in a prison.

On 5 October 1978 the Ministry decided nevertheless that the applicant should stay there until further notice in accordance with Section 39 para. 1 e.

On 10 January 1979 the applicant's lawyer applied to the Ministry of Justice for the applicant's release from the detention at Ila to protective surveillance in accordance with the court judgment of 26 June 1978. The application was supported by the Director of Ila and it appears that the applicant, on 24 April 1979, was released from Ila under a leave of absence scheme with assigned residence at Skottun near Skien and subjected to restrictions under Section 39 para. 1 a-c. However, after approximately one week he was back at Ila since he did not comply with the conditions imposed. A similar subsequent leave of absence from Ila, with assigned residence at his parents' place at Kragerø also failed and the applicant was brought back to Ila by the police on 16 August 1979.

It furthermore appears that the applicant was transferred, on

1 December 1979, to Telemark Mental Hospital, which provided him with a flat and work under a supervisory regime ("vernet arbeid"). However, on 1 January 1980 he was sent back to Ila because he behaved contrary to the conditions for treatment, on which he and the hospital had agreed.

On 21 January 1980 the Ministry of Justice decided to release the applicant with assigned residence at his parents' home. He arrived there on 4 February 1980. At the end of February 1980, however, the applicant assaulted a person, in March 1980 he assaulted his father and in April 1980 threatened his parents so that they were forced to leave their home. Due to these incidents the applicant was arrested and detained on remand. By judgment of 15 June 1980 the District Court of Kragerø sentenced him to 90 days' imprisonment, which sentence was considered to have been served in detention on remand. During the remand period the applicant was sent to Telemark Mental Hospital twice but returned to prison since the hospital could not take care of him because he threatened the staff and refused to take the prescribed medicine.

On 24 July 1980 the Ministry of Justice decided to place the applicant in preventive detention again at Ila in accordance with Section 39 para. 1 e. He arrived there on 29 July 1980. Whilst in preventive detention at Ila the applicant accepted to be treated with medicine and he was transferred to a hospital on whose premises he got his own flat (hybel). He was also granted a number of permissions to leave the premises. On 2 June 1981 the applicant was again released to his parents' home under protective surveillance in accordance with Section 39 para. 1 a-c but after a number of unfortunate episodes the Ministry of Justice on 1 July 1981 decided to detain the applicant at Ila again under Section 39 para. 1 e. The applicant was thus detained there again on 17 July 1981.

On 5 February 1982 the Ministry decided to apply Section 39 para. 1 f and the applicant was transferred to the district prison of Oslo on 16 February 1982.

He was subsequently transferred to Ullersmo National Penitentiary where he arrived on 4 November 1982.

By judgment of 18 March 1983 the applicant was convicted by the District Court of Asker and Bærum (Asker og Bærum herredsrett) and sentenced to six months' imprisonment for having, in three cases, assaulted prison staff whilst in preventive detention at Ila and Ullersmo National Penitentiary. As before the psychiatric expert concluded that the applicant was not mentally ill but suffered from an underdeveloped and impaired mental capacity. With regard to preventive detention the Court pointed out that the information available showed that this kind of detention in a prison or similar institution was inappropriate and had a destructive influence on the applicant. The Court found that the applicant clearly belonged to the category of persons who needed psychiatric care and thus found that everything should be done to give the applicant adequate treatment. In addition to the six months' prison sentence the Court authorised the competent authority to impose protective measures under Section 39 para. 1, except, however, detention in a prison or similar institution as set out in Section 39 para. 1 e and f.

Having served his six months' prison sentence the applicant was accordingly released on 18 November 1983 and placed in an apartment at Kragerø under the surveillance of the local police. On 19 December 1983, however, he was arrested again and detained on remand charged with a new violation of Sections 227 and 228 of the Penal Code. A new expert opinion on the applicant's mental capacity was obtained but it reached the same conclusion as the two preceding opinions mentioned above. During his detention on remand he was at Reitgjerdet Mental Hospital from 4 to 26 January 1984.

The applicant remained in detention on remand at Ila from 26 January 1984 until 20 September 1984 when the District Court of Kragerø in its judgment of the same date found the applicant guilty of most of the charges brought against him and sentenced him to 120 days' imprisonment which was considered to have been served in detention on remand. Furthermore, the Court authorised the prosecuting authority to impose preventive measures under Section 39 para. 1 a-f for a maximum period of five years. The Court explained thoroughly the extent of the preventive measures and referred to the earlier decision in this respect. The Court found that it would undoubtedly be dangerous to release the applicant, having regard to his almost total lack of self-control in certain situations and his physical strength. The Court would not, therefore, rule out that the competent authorities could use preventive detention in a prison or similar institution under Section 39 para. 1 e and f should this prove necessary. This was apparently found necessary since the applicant remained at Ila.

The applicant appealed against the decision as to the preventive detention to the Supreme Court. However, on 12 January 1985 the Supreme Court upheld the decision.

Whilst the applicant's criminal case was pending, ending with the above Supreme Court judgment, he stayed at Ila. As indicated in the above judgment a programme was worked out for his placement in Telemark but he refused it due to the fact that he would be forced to take certain medicine (depotmedisinering). Therefore the applicant remained at Ila also after the judgment. From 1 January to 30 September 1985 he was given one-day leaves 27 times and during the same period he was placed in solitary confinement five times due to threats and aggressive behaviour. On 30 September 1985 the applicant attacked a prison officer for which reason he was placed in a security cell. On 7 October 1985 he was transferred to solitary confinement.

On 7 November 1985 the applicant was transferred to Ullersmo National Penitentiary.

After the applicant's arrival at Ullersmo the authorities looked for alternative places outside the prison. He was now prepared to fulfil the conditions laid down in the Telemark project mentioned above and on 27 November 1985 an application was lodged with the hospital which was supposed to supervise this. On 13 December 1985 the hospital responded that it was in principle willing to take over the responsibility for the applicant, but it was impossible until a department for difficult patients had been set up.

Previously, on 23 November 1985, Ullersmo submitted an application to Reitgjerdet Mental Hospital, which by letter of 12 December 1985 answered that it was prepared to accept the applicant for treatment. However, according to the present general regulations applicable to that institution, only patients who are "seriously mentally deranged" may be admitted (Temporary General Directions for Reitgjerdet Hospital of 1 July 1982, Section 2). As the applicant did not fall within this group of persons, Reitgjerdet asked the Public Health Department of the Ministry of Social Affairs for a dispensation. On 26 February 1986 the Public Health Department declared that it was legally precluded from making exceptions from the general regulations. Nevertheless, the applicant spent 23 days at Reitgjerdet mental hospital in May 1986. However, he was sent back to Ullersmo since the competent authorities found that the requirements for staying at the hospital were not fulfilled. The applicant was not psychotic in their opinion.

By judgment of 29 October 1986 the applicant was convicted by the District Court of Asker and Bærum and given a suspended sentence of 45 days' imprisonment for the attack on a prison officer, which, as mentioned above, occurred on 30 September 1985.

On 12 January 1987 the applicant was transferred from Ullersmo to Sunnås Rehabilitation Centre near Oslo in order to receive treatment from a psychologist for fourteen days. Certain examinations were carried out but the applicant was returned to Ullersmo due to an attack on a nurse. On 24 February 1987 the applicant was transferred to Reitgjerdet Mental Hospital for certain examinations which showed that he was psychotic. He was therefore kept at the hospital on a compulsory basis. On 4 December 1987, the hospital (which is now called Trøndelag Psychiatric Hospital) decided that he could no longer be considered psychotic but he remained there on a voluntary basis.

After some weeks, the applicant became aggressive towards other patients and the staff. He repeatedly attacked a nurse, seizing her by the throat and threatening to kill her. As a consequence, he could no longer stay in the hospital's ordinary ward. As he refused to be placed in the ward for difficult patients, he was sent back to Ullersmo where he stayed for one month. In the meantime, the authorities pursued their efforts to find a solution under the auspices of Telemark Mental Hospital. With effect from 8 February 1988, the preventive measures were changed. The applicant was no longer to stay at Ullersmo, but was assigned residence in a house in the town of Skien under the supervision of the Probation and Aftercare Service (Kriminalomsorg i frihet). The applicant was there under the daily supervision of two social workers from Telemark Mental Hospital which is responsible for his social training.

By letter of 7 May 1988 the applicant's representative submitted the following:

On 19 April 1988 the Ministry of Justice decided to detain the applicant at Arendal District Prison in accordance with Section 39 para. 1 f of the Penal Code since he had allegedly behaved aggressively towards the two social workers.

On 27 April 1988 the applicant's representative instituted proceedings in the City Court of Oslo (Oslo byrett) maintaining that the applicant should be released since the decision to detain him was null and void. At present this question is pending before the City Court.

B. Relevant domestic law and practice

I. The legal basis for preventive measures is Section 39 of the Penal Code of 22 May 1902. Section 39 para. 1 a - f reads as follows:

> "1. If an otherwise punishable offence is committed in a state of mental disorder or impairment or a punishable offence is committed in a state of unconsciousness which follows from a self-inflicted intoxication, or in a state of momentary reduction of the consciousness, or by a person with an underdeveloped or impaired mental capacity, and there is a danger that the offender, due to this state of mind, again will commit such an offence, the court may decide that the prosecuting authority, as a security measure, must
>
> a. assign him or refuse him a particular residence
>
> b. place him under surveillance by the police or a person appointed for this purpose and order him to report to the police or the appointed person at certain hours
>
> c. forbid him to take intoxicating articles
>
> d. place him in secure private care

e. place him in a psychiatric hospital, health resort, nursing home or security ward

f. keep him in preventive detention."

Preventive measures are not regarded as punishment, but as extraordinary means necessary to protect society from psychologically abnormal recidivists. Preventive measures may be used (instead of punishment) against insane offenders or those who suffered a temporary lapse from consciousness, but also (in addition to punishment) against certain other groups, inter alia persons (like the applicant) with underdeveloped or permanently impaired mental capacity. In any case, the person concerned must have committed an offence, and it is also a general condition that there be a danger that, because of his condition, he will repeat such an act.

It is for the court to decide whether the conditions for preventive measures are fulfilled and, if need be, to authorise the use of the measures listed in para. 1 a-f (the first alternatives being the least far-reaching). The decision may be taken as part of a criminal case, or as a separate case, but at any rate in accordance with the general provisions of Act No. 25 of 22 May 1981 relating to criminal procedure (Straffeprosessloven). Under Section 248 of that Act, a court of examining and summary jurisdiction ("forhørsretten"), applying a simplified procedure, may not decide on cases concerning preventive detention.

If the court authorises the use of preventive measures, it shall fix a maximum period beyond which the measures cannot be upheld without its consent (Section 39 para. 4 second subparagraph of the Penal Code). In practice, the courts are very seldom asked for a prolongation of the stipulated period. The person concerned will therefore usually be released before the time-limit expires, or at that time.

The implementation of and choice between preventive measures lies with the prosecuting authority. However, once that decision has been taken, it is for the Ministry of Justice to terminate, resume or alter the measures (Section 39 para 4 second subparagraph of the Penal Code). The measures shall be terminated when they are no longer regarded as necessary, but may be resumed if there is reason to do so (Section 39 para. 3 first subparagraph).

The competence of the Ministry of Justice is further regulated by the regulations of 1 December 1961 concerning the implementation of preventive measures. According to Section 11 the question of whether to terminate or alter the kind of measures imposed shall be considered regularly by the Ministry of Justice, and at least once a year. A report from a medical specialist shall usually be obtained before a decision is made with regard to changing preventive measures (Section 39 para 4 third subparagraph of the Penal Code). The Ministry will also consider the question of terminating or changing the measures when requested by the person concerned. In practice, the appropriateness of preventive detention in a particular case may be considered several times a year. If a person is subjected to such detention, a medical report will be included in his records.

The decision made by the Ministry is subject to appeal to the King in Council. The appeal must be submitted within three weeks from the date on which the party concerned was notified of the decision, cf. Section 29 of the Public Administration Act of 10 February 1967 (Forvaltningsloven). It follows from Section 27 of the Act that the person concerned shall be informed of the administrative decisions and from Section 12 of the Act it follows that he has the right to the assistance of a lawyer.

If the person subjected to preventive measures does not accept the decision of the King in Council, he may bring his case before the courts. The courts may examine the administrative decision according to the general unwritten constitutional principles of judicial supremacy.

II. Act No. 2 of 28 April 1961 relating to mental health protection (Lov om psykisk helsevern) regulates the conditions for hospitalisation in mental hospitals. Insane persons, i.e. psychotic persons or persons suffering from certain serious malfunctions bordering on the psychotic, may be committed to a mental hospital without their consent. They may be detained as long as they are considered to be "insane" and in need of treatment e.g. to prevent injury to themselves or to other persons. Hospitalisation without the person's consent may be ordered at the request of his closest relatives, of his guardian or of a public authority (Section 5).

Other persons may, when certain conditions are fulfilled, be kept in a mental hospital without their consent for a maximum period of three weeks (Section 3).

In both cases, the superintendent of the hospital must agree to receive the person. This is also the case where the transfer of a person is requested by the Ministry of Justice in order to implement preventive detention in mental hospitals.

Even if a person is sentenced to preventive detention, he cannot be detained in a mental hospital against his own will unless he qualifies as "insane" within the meaning of the Mental Health Care Act.

III. Chapter 33 of the Code of Civil Procedure of 13 August 1915 (tvistemålsloven) relates to review of administrative decisions concerning deprivation of liberty and other enforcement measures and applies to persons who are compulsorily committed to mental hospitals regardless of whether they are subjected to preventive measures or not. Chapter 33 only applies when this is explicitly stated in statutory provisions. It follows from Section 9 A of the Mental Health Care Act that a decision of the Board of Inspection (kontrollkommisjonen) to commit a person to hospital or to refuse to discharge him may be brought before the courts. The courts may control every aspect of the administrative discretion, including matters of pure expediency. Having recourse to psychiatric experts, the courts will decide whether the conditions for compulsory committal to hospital under Section 5 of the Mental Health Care Act are fulfilled, in particular whether the person concerned is suffering from a serious mental illness. Chapter 33 applies to a person subjected to preventive measures under Section 39 para. 1 e of the Penal Code when he is compulsorily committed to a mental hospital in accordance with Section 5 of the Mental Health Care Act. It is not applicable, however, to a person arguing that a decision of the Ministry of Justice to impose preventive measures under Section 39 para. 1 f of the Penal Code (preventive detention) is invalid.

COMPLAINTS

The applicant has been in prison more or less constantly since 1978, most of the time not serving an actual prison sentence but in preventive detention under Section 39 para. 1 f of the Penal Code. During his period of detention he has been in solitary confinement for very long periods of time and by judgment of 12 January 1985 the Norwegian Supreme Court has authorised the authorities to keep the applicant detained until 1990, if necessary. This treatment, the applicant alleges, is inhuman or degrading and thus in conflict with Article 3 of the Convention. The judgment itself might not be contrary to the Convention, but the treatment or rather the lack of treatment is. During the long periods of detention the authorities did not establish adequate remedies in order to help the applicant.

His case did not fit any ordinary social programme and, as indicated again and again, he did not belong in a prison either. However, the result was that he spent an intolerable period of time in solitary confinement.

PROCEEDINGS BEFORE THE COMMISSION

The application was introduced on 13 May 1985 and registered on 16 August 1985.

On 8 January 1986 the respondent Government were requested, pursuant to Rule 40 para. 2, sub-para. a of the Commission's Rules of Procedure, to submit certain information as to the facts of the case.

This information was submitted by the Government on 7 March 1986 and the applicant's comments in reply were submitted on 6 June 1986.

The Commission decided on 13 October 1986 to invite the respondent Government to submit before 9 January 1987 written observations on the admissibility and merits of the above complaint. Furthermore, the respondent Government were requested to explain whether the applicant, when detained by administrative decision under Section 39 of the Penal Code, could rely on an appropriate procedure allowing a court to determine the lawfulness of this measure as guaranteed by Article 5 para. 4 of the Convention.

On 8 January 1987 the respondent Government requested and were granted an extension of the time-limit until 9 February 1987.

The Government's observations were submitted on 16 February 1987. The applicant's observations in reply were submitted on 31 March 1987.

Legal aid under the Addendum to the Commission's Rules of Procedure was granted to the applicant on 13 March 1987.

On 7 October 1987 the Commission decided to invite the parties to a hearing on the admissibility and merits of the application.

At the hearing, which was held on 7 March 1988, the parties were represented as follows:

The Government

Mr. Erik MØSE, lawyer, Attorney General's Office, agent.
Mr. Robert W. KNUDSEN, Minister-Counsellor, Ministry of Foreign Affairs, co-agent.
Ms. Kari MELING, Head of Division, Ministry of Justice, adviser.
Ms. Mette WALAAS, First Counsellor, Directorate of Health, adviser.
Mr. Roger ØSTBØL, Counsellor, Ministry of Social Affairs, adviser.
Mr. Carsten HELGEBY, Head of Division, Ministry of Foreign Affairs, adviser.

The applicant

Mr. Knut ROGNLIEN, lawyer, applicant's representative.
Mr. Øyvind SOLBERG, assisting lawyer.

Following the hearing the Commission decided to adjourn the examination of the application, as far as it concerned the issue under Article 5 para. 4 of the Convention, and declared the remainder of the application inadmissible. It was furthermore decided to obtain from the parties further observations on the issue under Article 5 para. 4 of the Convention.

The Government's further observations were submitted on 7 April 1988 and the applicant's further observations were submitted on 8 April 1988.

SUBMISSIONS OF THE PARTIES regarding Article 5 para. 4 of the Convention.

The Government

The Government observe that the decision to authorise preventive detention is taken by a court. The judgment is subject to appeal to the Court of Appeal and the Supreme Court.

The prosecuting authority has the initial competence to implement preventive measures in accordance with the judgment. Subsequently, the question of whether to terminate, alter or resume the measures is considered by the Ministry of Justice at least once a year. Its decision is subject to appeal to the King in Council. The person concerned shall be informed of the administrative decisions and has the right to be assisted by counsel. The administrative decision may be brought before the courts. The judgment of the court of first instance may be reviewed by the Court of Appeal and the Supreme Court.

According to the case-law under Article 5 para. 4, a person of unsound mind compulsorily confined in a psychiatric institution for an indefinite or lengthy period is in principle entitled, at any rate where there is no automatic periodic review of a judicial character, to take proceedings at reasonable intervals before a court to put in issue the "lawfulness" - within the meaning of the Convention - of his detention, cf. inter alia Eur. Court H.R., Winterwerp judgment of 24 October 1979, Series A No. 33.

It is clear that the applicant must be considered to be a person of "unsound mind" within the meaning of Article 5 para. 1 e, and that he is deprived of his liberty as a consequence of this fact. The principle of periodic judicial review embodied in Article 5 para. 4 is therefore applicable in the present case.

The Norwegian system of preventive detention is in conformity with this principle. It follows from Section 11 of the regulations concerning the use of preventive measures that the Ministry of Justice shall consider the question of whether to terminate or alter the measures imposed at least once a year. Moreover, the question will be considered following a request from the person concerned. The administration's decision is subject to judicial review by the courts. The applicant therefore has the opportunity to bring the question of further preventive detention before the courts once a year and, in addition, whenever his application for changing the measures is rejected by the administration.

The applicant has not availed himself of this opportunity. Nevertheless, the courts have assessed the necessity of preventive detention in connection with judgments authorising preventive measures in 1967, 1978, 1980, 1983, 1984 (District Court) and 1985 (Supreme Court).

Consequently, it is the opinion of the Government that the requirements of regular judicial control in Article 5 para. 4 are fulfilled.

It also follows from Article 5 para. 4 that the courts shall have the competence to decide on the lawfulness of the detention. According to case-law, the periodic review should be wide enough to bear on those conditions which, under the Convention, are essential for the "lawful" detention of a person. However, the provision does not embody a right to judicial control of such scope as to empower the court, on all aspects of the case, including questions of pure

expediency, to substitute its own discretion for that of the decision-making authority, cf. Eur. Court H.R., van Droogenbroeck judgment of 24 June 1982, Series A No. 50.

Whenever a decision has been taken, a person deprived of his liberty has the possibility to bring the matter before the courts in accordance with the unwritten constitutional principles of judicial supremacy. Consequently, there can be no doubt that the Norwegian system is in conformity with the principle of periodic judicial review.

If the case is brought before a court, the court will ascertain that the decision to implement the security measure at issue falls within the authorisation given in the initial judgment. It will also consider whether the requirements of substantive and procedural legal provisions are complied with. At this stage the principle stated in Section 39 para. 3 of the Penal Code will be of particular importance. According to that provision, preventive measures shall be terminated when they are "no longer regarded as necessary". If, for example, the court would find - on the basis of medical expertise - that the person concerned is no longer of unsound mind or does not any more represent a danger to society, an administrative decision to impose preventive measures would be declared invalid; the reason being that a danger would no longer exist that the person concerned will repeat a punishable act, which is the purpose of imposing preventive measures under Section 39 para. 1.

The competence of the court is limited in relation to the administrative discretion, such as an assessment of the most expedient choice between alternative preventive measures. This limitation is based on the presumption that the administration, which is continuously following the development of the convicted person, is more qualified to decide upon these matters than the courts. Moreover, a system where the administrative authorities have the main responsibility for implementing preventive measures opens for considerable flexibility and enables the administration to adapt the measures according to the development of the convicted person.

On the other hand, the administrative discretion is not unlimited. If the decision can be regarded as abuse of power, for instance if it is clearly unreasonable in relation to the person concerned, the court may conclude that the decision is invalid.

This principle gives the courts a certain possibility of controlling the discretionary parts of administrative decisions as well. The decision has to be based on relevant considerations, which shall be given the importance they deserve. A decision may also be found invalid because it is clearly unreasonable in relation to the person concerned, for example if the Ministry decides to impose preventive measures which are obviously much more stringent than necessary.

Furthermore the courts will consider any allegation that the administrative decision is not in conformity with the Convention. Consequently, the Convention would be an important source of law in the interpretation and application of the substantive and procedural legal provisions.

The legal basis of the review of administrative decisions concerning deprivation of liberty and other enforcement measures is Chapter 33 of the Code of Civil Procedure of 13 August 1915. In the context of the present case it should be noted, however, that this Chapter applies to persons who are compulsorily committed to mental hospitals. Whether they are subjected to preventive measures or not is irrelevant. Consequently, a decision of the Ministry of Justice to detain a person in pursuance of Section 39 f of the Penal Code is not subject to court review under Chapter 33.

Chapter 33 was inserted into the Code of Civil Procedure in 1969. It applies to legal proceedings which, pursuant to special statutory provisions, may be instituted against the public authorities for the review of administrative decisions concerning deprivation of liberty or other administative coercive measures. According to Section 482 of the Act, the court shall, within the framework of the relevant Act, examine all aspects of the case. The court shall not be bound by the parties' contentions or allegations. Consequently, the scope of judicial review under Chapter 33 differs from the general system of court control.

Chapter 33 only applies when it is explicitly stated in statutory provisions. It follows from Section 9 A of the Mental Health Care Act that a decision of the Inspection Board (Kontrollkommisjonen) to commit a person to hospital or to refuse to discharge him may be brought before the courts.

Consequently, in cases relating to compulsory committal to or retention in a mental hospital, the courts may control every aspect of the administrative discretion, including matters of pure expediency. Having recourse to psychiatric experts, the court will decide whether the conditions for compulsory committal to hospital under Section 5 of the Mental Health Care Act are fulfilled, in particular whether the person concerned is suffering from a serious mental illness. The underlying reason for this special system of court review is that compulsory detention in a mental hospital is an extremely far-reaching encroachment upon the private sphere of the individual.

It follows from Norwegian case-law that Chapter 33 is applicable to a person subjected to preventive measures under Section 39 para. e when he is compulsorily committed to a mental hospital in accordance with Section 5 of the Mental Health Care Act. The person concerned may therefore avail himself of this judicial procedure provided that he has complained to the Inspection Board.

To sum up: a person detained in prison under Section 39 f of the Penal Code may bring his case before the courts in accordance with the general principles of judicial review. Chapter 33 of the Code of Civil Procedure is not applicable to a person arguing that a decision of the Ministry of Justice to impose preventive measures under Section 39 para. 1 f is invalid. However, should he under Section 39 para. 1 e be compulsorily committed to hospital in accordance with Section 5 of the Mental Helth Care Act, Chapter 33 applies to the decision of the Inspection Board.

If a court finds that a decision of the Ministry of Justice under Section 39 para. 1 f is not lawful, that decision will be declared invalid. The person concerned will then be subjected to the measures applied before the invalid decision was taken, for instance preventive measures outside the institution under Section 39 para. 1 a-c. The Ministry will be legally excluded from making a new decision under Section 39 para. 1 f as long as the court's reason for declaring the decision invalid applies.

To the Government's knowledge, there is no case-law whereby a court has overruled any decision of the Ministry of Justice under Section 39 taken in connection with its annual review or as a consequence of an initiative from a person subjected to preventive measures. However, the court's competence to do so follows from the established constitutional doctrine of judicial supremacy. And the crucial question under Article 5 para. 4 is whether a person deprived of his liberty has the right to bring his case before the courts and not whether he in fact decides to take proceedings to which he is entitled.

In the present case, there has been a remedy available which in the Government's opinion fulfils the requirements of Article 5 para. 4.

Any doubt as to this would have been clarified if the applicant had used this remedy, which he has not. Article 26 is therefore applicable in the present case.

In the Government's view the system of court review in relation to the implementation of preventive measures is in conformity with Article 5 para. 4 of the Convention.

At the same time, it should be noted that the system of preventive measures has been discussed de lege ferenda on several occasions, for instance by the Permanent Committee on Penal Reforms (Straffelovrådet) which on request from the Ministry of Justice submitted a report in 1974 (NOU 1974:17 Strafferettslig utilregnelighet og strafferettslige saerreaksjoner).

Moreover, a commission under the Ministry of Justice is for the time being working on an overall revision of the Penal Code (Straffelovkommisjonen). In its general report in 1983 (NOU 1983:57 Straffelovgivningen under omforming), the commission mentioned (p. 199) that the question had been raised whether the present provisions relating to preventive measures were in breach of Article 5 para. 4. However, the report simply refers to this question and does not contain any study or arguments relating to that Article. A sub-committee under the commission is presently studying the problems relating to criminal liability and preventive measures ("strafferettslige saerreaksjoner").

The applicant

The Government's observations relating to Article 5 para. 4 of the Convention are based on a wrong assumption. The Government allege that the applicant must be considered to be a person of unsound mind within the meaning of Article 5 para. 1 (e) and that he is deprived of his liberty as a consequence of this fact. On the contrary it is clear that the applicant was not considered mentally ill after the judicial observation in 1978. He was considered as a person with an underdeveloped and impaired mental capacity. Only in March 1987 was he considered to be seriously mentally ill within the context of the Mental Health Care Act, Section 5. This means that the applicant in the period from 1978 to 1987 could not be hospitalised in psychiatric institutions without his consent. The detention of the applicant - in the context of the Convention - is not to be considered under Article 5 para. 1 (e) but under Article 5 para. 1 (a).

The Government mention that the applicant once a year has the opportunity to bring the question of further preventive detention before the courts and that the requirements of a regular judicial control in Article 5 para. 4 are fulfilled for this reason. The courts' possibilities to control are, however, quite limited. If the Ministry of Justice makes a decision about the detention of the applicant, the courts have, in reality, no possibility to quash such a decision.

Thus there is no way the courts could possibly test the professional judgment of the administration about which therapy would be the best for the applicant. This is even more difficult as the courts are not presented with concrete, realistic alternatives.

There is nothing the courts can do but, in their judgments, to repeat the urgent requests to avoid detention. This has been done in all the judgments concerning the applicant. However, the courts do not have the competence to order the administration to effect alternatives to detention. This is what has happened in all the judgments concerning the applicant since 1978: Requests from the courts to avoid detention - which are not followed by the administration because it is not obliged to. Therefore, the possibility mentioned by the Government is merely a formal possibility without any realistic content and thus in conflict with Article 5 para. 4 which guarantees a

right to judicial review of both the substantive and the formal lawfulness of the detention.

The available legal procedure in Norway seems to be quite similar to Habeas Corpus proceedings formerly found insufficient to fulfil the requirements of Article 5 para. 4, because the court may only examine whether the decision is the result of abuse of power, incorrect assessments of facts or clearly unreasonable. The discretionary and substantive elements may not be examined and these elements are of the greatest importance.

The Government mention that if for example one of the yearly decisions concerning the use of preventive measures were to be taken notwithstanding the fact that the person was no longer of unsound mind, the decision would be invalid. This seems to imply that a court could examine the substantive lawfulness of detention. However, this would only be the case insofar the person concerned was detained under the Mental Health Care Act.

To impose and continue preventive measures does not necessarily mean that the person is of unsound mind. It is sufficient that he was of unsound mind when the offence was committed or that he suffered from an impaired mental capacity, or that he was in a state of unconsciousness following a self-inflicted intoxication. A change in the mental situation does not prevent preventive measures. Preventive detention also serves punitive ends. (At present preventive detention is considered as punishment in relation to the Constitution, but not in criminal law. A new proposal suggests that preventive detention shall be considered as punishment in both relations.)

The essential question is whether the applicant could have brought his case before a court in order to have the lawfulness of his detention examined. In this connection it is of significance that he was placed in detention several times by administrative decisions. Although the decisions to detain him again or to place him in another kind of detention may be classified as the execution of a court sentence, such detention was nevertheless the direct result of administrative decisions.

The applicant did not attempt to challenge his detention in court, but such attempts would have been found inadmissible by the courts since the question of detention was already considered in the original judgment authorising detention.

There does not appear to be any case-law showing that a court has considered administrative decisions on preventive measures under Section 39 para. 1 f of the Penal Code. According to Forsvarergruppen av 1977 - an association of lawyers dealing with criminal cases - there have probably never been any attempts to challenge administrative decisions of this kind in court. Furthermore Forsvarergruppen av 1977 has expressed the view that it is uncertain whether there is a legal possibility to challenge such decisions in court at all.

According to existing case-law the Supreme Court of Norway has stated that detention in a psychiatric hospital according to Section 39 para. 1 e of the Penal Code could only be enforced when the conditions according to the Mental Health Care Act were also fulfilled. However, that case-law is not applicable if a person is detained under Section 39 para. 1 f of the Penal Code.

If a court would find that the detention ordered by the Ministry of Justice under Section 39 para. 1 f is unlawful, the court would not have the authority to release the person. The court could only state that this decision is unlawful, because the Ministry of Justice might have other reasons for detaining the person in question and this is covered by the discretionary powers of the administration which the court cannot consider.

The court can only give orders to the administration if there are laws prescribing the exact conditions for detention so that the court may conclude that a lack of one condition gives no other alternative than to release the person concerned. But since there is no such law the courts have no possibility to draw such conclusions.

In other words there are no laws by which the lawfulness of the administration's decisions can be considered.

Different committees have discussed changes in the laws about decisions of preventive measures. Some have even discussed if the rules are in conflict with Article 5 of the Convention. They have all concluded that the question is open and therefore propose new laws. But until now such proposals have not been followed up by the Government and the Parliament. The last committee - "Saerreaksjonsutvalget" - has the task to consider this. It has not finished its work yet.

THE LAW

The Commission recalls that, subsequent to its partial decision on admissibility of 7 March 1988, the remaining issue is the question whether the applicant, when detained by administrative decisions, could rely on an appropriate procedure allowing a court to determine the lawfulness of this measure as required by Article 5 para. 4 (Art. 5-4) of the Convention which reads:

"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."

The respondent Government have submitted that the decision to authorise preventive detention is taken by a court. This decision is subject to appeal. Furthermore, when the preventive measure has been implemented in accordance with the judgment, the question of whether to terminate, alter or resume the measure is considered by the Ministry of Justice at least once a year either automatically or at the request of the person concerned. When a person is placed in preventive detention under Section 39 para. 1 f of the Penal Code the Ministry's decision is subject to appeal to the King in Council whose decision may be brought before the courts. Furthermore the Government submit that under the general unwritten constitutional principles of judicial supremacy the courts have the competence to consider the lawfulness of the decision as well as the question whether it is based on a correct assessment of the facts and whether the enforcement of the preventive measure could be considered as an abuse of power. Certain discretionary aspects of a case are not subject to judicial review.

The Government also maintain that, since the applicant did not challenge the lawfulness of his detention under Section 39 in accordance with the above procedure, he has not exhausted the remedies available to him under domestic law and the Government rely in this respect on Article 26 (Art. 26) of the Convention.

The Government accept, however, that Chapter 33 of the Code of Civil Procedure relating to review of administrative decisions concerning deprivation of liberty and other enforcement measures is not applicable in a situation where the applicant is detained under Section 39 para. 1 f of the Penal Code.

The Government furthermore accept that there is no case-law whereby a court has overruled any decision of the Ministry of Justice

under Section 39 taken in connection with its annual review and the applicant has submitted that there is no case-law showing that a court would even examine a decision taken by the Ministry of Justice under this provision. Even if it would, its possibilities of controlling the administrative decisions are quite limited. There is in his view no way in which the courts can examine the decision as to which therapy would be best for the applicant and there is actually nothing the courts can do but repeat their requests to avoid detaining the applicant in a prison.

The Commission notes that a dispute exists between the parties as to whether the remedy available fulfils the requirements of Article 5 para. 4 (Art. 5-4) of the Convention. Therefore the Commission finds no reason to rely on Article 26 (Art. 26) of the Convention as suggested by the respondent Government, but has considered the issue under Article 5 para. 4 (Art. 5-4) in the light of the submissions of the parties.

Having made a preliminary examination of the above issue the Commission has come to the conclusion that it raises a serious question as to the interpretation and application of Article 5 para. 4 (Art. 5-4) of the Convention, and that this issue can only be determined after an examination on its merits. It cannot therefore be rejected as being manifestly ill-founded but must be declared admissible, no other reason for declaring it inadmissible having been found.

For these reasons, the Commission

DECLARES ADMISSIBLE, without prejudging the merits of the case, the issue as to whether the applicant could rely on an appropriate procedure allowing a court to determine the lawfulness of his detention as required by Article 5 para. 4 (Art. 5-4) of the Convention.

Deputy Secretary to the Commission — President of the Commission

(J. RAYMOND) — (C.A. NØRGAARD)