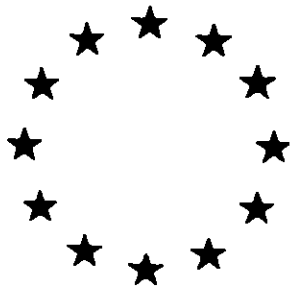
COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

EUROPEAN COMMISSION
OF HUMAN RIGHTS

Application No. 6301/73

Fritz WINTERWERP

against

NETHERLANDS

Report of the Commission

(Adopted on 15 December 1977)

STRASBOURG

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INTRODUCTION

1. The facts of the case, as presented to the European Commission of Human Rights by the parties, may be summarised as follows:

The substance of the applicant's complaints

2. The applicant is a Netherlands national, aged 53. In 1968, at his wife's request, he was placed in a psychiatric hospital under a provisional order made by the cantonal court of his place of residence. At his wife's further request and subsequently on application by the public prosecutor, the order was extended from year to year by the district court on the basis of medical reports from the doctor treating the applicant.

3. The applicant complains that he was never heard by the court, that he was never notified of the orders concerning his detention, that he did not have any legal representation and that he had no opportunity of challenging the doctor's medical reports. He contends that his deprivation of liberty cannot be considered lawful within the meaning of Art. 5 (1) and claims that he was unable to institute the proceedings envisaged by Art. 5 (4) to test its lawfulness. In that his detention also deprived him ipso jure of his civil capacity, he alleges a violation of Art. 6 of the Convention.

Proceedings before the Commission

4. The present application was lodged with the Commission on 13 December 1972 and registered on 27 September 1973.

On 30 September 1975, after receiving information and written observations from the parties, the Commission decided that the applicant's complaints as to Art. 5 of the Convention raised a number of significant issues under the Convention of such complexity that their determination should depend on a full examination of the merits of the case.

The Commission accordingly decided to declare the application admissible. It also initiated the procedure for the grant of legal aid to the applicant. The procedure proved particularly lengthy owing to the applicant's detention and the fact that his affairs were in the hands of an administrator.

5. Written observations on the merits were submitted by the applicant on 8 September 1976 and by the respondent Government on 22 November 1976.

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The parties' arguments were further expounded at an oral hearing in Strasbourg on 13 May 1977 which was largely devoted to problems raised by the case regarding the interpretation of the Convention. For this purpose a written questionnaire had been sent to the parties beforehand.

The applicant, who had been granted legal aid in accordance with the Legal Aid Addendum to the Commission's Rules of Procedure, was represented at the hearing by Mr. J. H. A. Van Loon, a barrister from The Hague.

The Government of the Netherlands was represented by:

Mr. Van Santen, its Agent,
Mr. Geelhoed, Counsellor at the Ministry of Justice.

The present Report

6. This was drawn up by the Commission in accordance with Art. 31 of the Convention, after deliberations and votes in plenary session, at which the following members were present:

MM. J. E. S. Fawcett, President
G. Sperduti, First Vice-President
C. Nørgaard, Second Vice-President
F. Ermacora
E. Busuttil
L. Kellberg
B. Daver
T. Opsahl
J. Custers
C. Polak
J. Frowein
G. Jörundsson
J. Dupuy
S. Trechsel
B. Kiernan
N. Klecker

7. The text of the Report was adopted by the Commission on 15 December 1977 and is now transmitted to the Committee of Ministers in accordance with Art. 31 (2).

8. A friendly settlement of the case has not been reached, and the purpose of the present Report, as provided in Art. 31 (1) is:

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(1) to establish the facts, and

(2) to state an opinion as to whether the facts found disclose a breach by the respondent Government of its obligations under the Convention.

9. A schedule setting out the history of proceedings before the Commission and the Commission's decision on admissibility are attached hereto as Appendices I and II.

An account of the Commission's unsuccessful attempts to reach a friendly settlement has been produced as a separate document (Appendix III).

10. The full text of the pleadings of the parties, together with other documents lodged as exhibits are held in the archives of the Commission and are available to the Committee of Ministers, if required.

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II. ESTABLISHMENT OF THE FACTS

On the whole, the facts of the case are not in dispute between the parties.

A. Netherlands legislation governing detention of persons of unsound mind

11. The detention of persons of unsound mind is governed by an "Act of 27 April 1884 on State supervision of insane persons" (wet van 27 April 1884, Stb 96, tot Regeling van het Staatstoezicht op krankzinnigen). Usually referred to as the Insane Persons Act (krankzinnigenwet), the Act has been amended several times, in the last instance by an Act of 20 August 1970 which came into force on 15 May 1972. A bill providing for a complete reform of the system is at present before the Netherlands Parliament.

The insane Persons Act is divided into five main chapters, dealing with

(a) State supervision of insane persons and specialised institutions through public health inspectors, burgomasters and the public prosecutor's office.

(b) The opening and closure of institutions specialising in the treatment of insane persons.

(c) The admission of persons to such institutions and their stay therein.

(d) Leave of absence and discharge.

(e) The administration of the property of persons admitted to specialised institutions.

In relation to the application under consideration, the only really relevant chapters of the Act are (c) and (d), i.e., those dealing with the admission of persons to psychiatric hospitals, their stay therein and their release therefrom.

As the facts submitted to the Commission cover a period of several years, due account will be taken of the amendments made to the Act during the applicant's detention.

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The detention procedure may be divided into four stages:

- Issue of a provisional detention order and admission to a psychiatric hospital.
- Issue of a detention order.
- Extension of a detention order.
- Suspension and termination of a detention order.

These stages are described in detail below.

(1) Issue of a provisional detention order
(Sections 12 - 17 of the Act)
Admission and medical supervision
(Sections 18 - 21 of the Act)
/valid for six months/

12. Apart from urgent cases, where the burgomaster has power to order the compulsory admission of a person of unsound mind to a psychiatric hospital for a maximum period of three weeks (Section 14), no one may be detained on grounds of mental illness or insanity except under a provisional order issued by a court.

13. Application (Sections 12 - 16 of the Act)

The cantonal court judge (Kantonrechter) may make a provisional detention order on written application (verzoek) by the patient's close relatives, spouse or legal representative, either in the interests of public order or in the interests of the patient himself. It may also make such an order on application by a person of full age who considers that the patient's condition is such as to require suitable treatment.

In addition, a provisional detention order may be made by the president of the district court (Arrondissementsrechtbank) on application by the public prosecutor (Officier van Justitie).

In these various cases, the application must be accompanied by a declaration (verklarung) drawn up not more than seven days before the application by a doctor who is licensed to practise in the Netherlands and is not attached to the institution to which it is proposed admitting the patient. The declaration must be to the effect that "the person concerned is in a state of mental unsoundness (toestand van krankzinnigheid) which makes it necessary or desirable to treat him in a specialised institution".

The application may also include detailed evidence of the state of mental illness, but this is purely optional.

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The Act of 28 August 1970, which came into force on 15 May 1972, i.e. after the applicant's provisional detention, made the following clarifications or changes:

The medical declaration must be made by a psychiatrist who is not himself treating the patient; it must also state, if possible with reasons, whether the condition of the patient is such that it would be unnecessary or inadvisable from the medical point of view for him to be heard by the court. Before making the declaration, the psychiatrist must, if he can, consult the family doctor.

14. Examination by the judge (Section 17 of the Act)

The judge makes a provisional detention order if he finds that the medical declaration, either on its own or in conjunction with any evidence produced, establishes that the state of insanity of the person concerned makes it necessary or desirable for him to be treated in a psychiatric hospital.

Until 15 May 1972, the date on which the latest amendment Act came into force, the judge's examination of the application was not subject to any restrictive formalities. Section 17, which was in force when the facts of the present application occurred, provided merely that "the court shall be competent (bevoegd) to hear beforehand the person whose detention is being applied for" as well as members of his family. The judge was not therefore under any obligation to hear the person concerned. At the same time he was competent to hear the doctor who had made the declaration and to obtain expert advice.

As a result of the above-mentioned amendment Act, the judge is now obliged to hear the person whose detention is being sought, unless he concludes from the medical declaration that such a hearing would be either unnecessary or medically inadvisable.

The judge may, either ex officio or at the request of the person concerned, provide the latter with legal representation.

The judge is also obliged to seek all possible information from the person applying for the detention order. He retains the right to call witnesses and experts and may, if he considers it necessary, summon the persons applying for the detention order to appear before him.

15. Notification and appeal

A provisional detention order is not subject to appeal and moreover is not notified to the person concerned.

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16. Admission under a provisional order
(Sections 18 - 21 of the Act)

The admission to a psychiatric hospital or other specialised institution of a person who is not yet hospitalised must take place within fifteen days, on production of the court order.

The close relatives, spouse or guardian must be informed of the patient's admission by the burgomaster, who is notified thereof by the court. The medical declaration on which the judge based his decision must be transmitted to the patient's own doctor. The institution's doctor dealing with the patient must keep a daily record of his medical observations. After the first fortnight, the record is kept on a weekly basis for six months, then on a monthly basis.

Within a fortnight of the patient's admission, the doctor responsible for the patient is required to send the public prosecutor of the district in which the psychiatric hospital is situated a reasoned declaration giving information and an opinion on the patient's mental condition and on the necessity or desirability of further treatment in a psychiatric hospital.

(2) Detention order
(Sections 22 and 23 of the Act)
/valid for not more than one year/

17. Application (Section 22)

Within six months following the making of the provisional detention order, the relatives or the public prosecutor may make a further application to the district court for the patient to be kept in a psychiatric hospital for up to one year.

Any such application must be accompanied by a copy of the medical records of the doctor in charge, together with a reasoned declaration by him as to whether it is necessary or desirable for the patient to undergo further treatment in a psychiatric hospital.

18. Examination by the court (Section 23)

A decision on the application is taken by the district court.

Apart from being obliged to hear the public prosecutor, the court does not have to follow any set procedure. It may call for evidence, hear the patient and consult experts, but it is not required to do so. During the court's examination of the application, the patient must remain in detention, if necessary for longer than six months after the making of the provisional order.

19. Notification and appeal

The court's decision is not delivered at a public hearing, nor is it notified to the person concerned. It is not subject to appeal.

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(3) Extension of a detention order
(Section 24 of the Act)
/valid for not more than one year/

20. Not more than fourteen and not less than eight days before the expiry of the period covered by the court's detention order, an application for the extension of the patient's detention for up to one year may be made to the district court.

Subsequent procedure is the same as for the making of the detention order provided for in Section 23 of the Act.

(4) Suspension and termination of a detention order
(Sections 27 - 31 of the Act)

21. Leave of absence (Verlof)

Leave of absence for varying periods may be granted to a patient by the doctor in charge.

22. Release (Ontslag)

The authorities of a psychiatric hospital may at any time release a patient on the basis of a written declaration from the doctor or doctors responsible for him to the effect that he shows no signs of mental illness or that his treatment in a psychiatric hospital is no longer necessary or desirable (Section 28).

The patient himself, the person who applied for his detention, or a member of his family may make a written application for his release. The application must be addressed to the hospital authorities who, after consulting the doctor or doctors concerned, may thereupon release him.

Should the hospital authorities refuse the application, they must transmit it, together with the doctor's opinion, to the public prosecutor, who will, as a rule, refer it to the district court for a decision. The latter's procedure for this purpose is the same as that already described. Its decision is not subject to appeal.

However, the public prosecutor is not obliged to refer the application to the court for a decision if it is manifestly inadmissible, if a previous application is still pending, or if the court has already dismissed a similar application during the period covered by the detention order and the circumstances have not changed (Section 29).

The public prosecutor, being responsible for the supervision of psychiatric hospitals, has a duty to see that no one is detained in such a hospital unlawfully.

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If the doctor in charge agrees, he may order the release of a patient whom he considers it unnecessary to detain further. If the doctor in charge does not agree, the public prosecutor may refer the matter to the district court.

Should the public prosecutor have doubts about the need for the patient's continued detention, he may refer the matter to the court; he is in any event obliged to do so if a public health inspector so requests (Section 30).

When the period covered by a detention order expires, the hospital authorities must inform the public prosecutor of the fact, and if no application has been made to the court to extend the detention, he must thereupon order the patient's release, or else make an application himself for an extension (Section 31).

23. Detention and civil capacity
(Sections 32 and 33 of the Act)

Any person of full age who is actually so detained loses ipso jure the capacity to administer his property. At the request of any of the persons entitled to apply for the detention, or on application by the public prosecutor, the district court may appoint a provisional administrator should this be deemed desirable or necessary.

B. The circumstances of the case

24. The applicant is a citizen of the Netherlands, born on 4 February 1924 at Pangkal Pinang (in the then Dutch East Indies). After the war he was employed by the Ministry of Defence.

He married in 1956. Several children were born of the marriage.

25. On 24 June 1968, his wife applied to the Amersfoort Cantonal Court on a standard form for his provisional detention in the "Zon en Schild" hospital at Amersfoort, in the interests of public order as well as those of her husband. In fact, he had already been in that hospital for three weeks, under an order made by the burgomaster in accordance with the emergency procedure provided for in Section 14 of the Insane Persons Act. The application was accompanied by a medical declaration, dated 20 June, made out by a doctor who had examined the patient for the first time that day.

The declaration stated that the patient had been detained in 1966 for "attempted murder" and had been under psychiatric treatment between May and August 1967. It also stated that the patient was "a schizophrenic, suffering from imaginary and Utopian ideas who has for a fairly long time been destroying himself as well as his family" and that he "is unaware of his morbid condition". The doctor concluded that the patient "can in no event be left at large in society for the time being".

On 24 June, on the basis of this declaration, the court granted the application and made a provisional order for the applicant's detention, without first exercising its power to hear him or to seek expert advice.

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26. On 1 November 1968, the applicant's wife applied to the Utrecht district court for a one-year detention order.

Her application was accompanied by the daily and weekly records of the doctor in charge as well as the declaration referred to in Section 22 (2) of the Act concerning the necessity or desirability of further treatment in a psychiatric hospital.

On 23 December 1968, on the basis of these documents, the "single-judge chamber" (Enkelvoudig Kamer) of the district court, responsible for hearing civil cases, made a one-year detention order.

27. On 16 December 1969, following a request from the applicant's wife and on the basis of the monthly records of the doctor in charge and his declaration, identical to that of the previous year, the court made an order extending the applicant's detention "by one year if necessary" as from 23 December 1969.

On 6 August 1970, the applicant was moved to another hospital, the "Rijks Psychiatrisch Inrichting" at Eindhoven, which was further away from the home of his wife, whom he had previously been able to visit on several occasions.

28. On 14 December 1970, the public prosecutor at 's-Hertogenbosch applied for the extension of the detention order by a further year, on the basis of the monthly records of the doctors who had successively dealt with the applicant and a declaration by the doctor at Eindhoven, which read as follows:

> "The patient is suffering from a mental illness with the following symptoms: psychopathic personality, vindictive and scheming nature, paranoiac tendency, untrustworthiness; shows signs of dementia /such as/ emotional withdrawal and egocentric tendency; in need of strict supervision and special care. Continued treatment in a psychiatric hospital must be considered necessary."

On 7 January 1971, i.e. a little over a year after the order of 16 December 1970, the first ordinary chamber of the district court at "s-Hertogenbosch extended the detention order by a further year.

29. On 21 December 1971, 15 December 1972 and 14 December 1973, the same court made further one-year extensions to the detention order on application by the public prosecutor and on the basis of the monthly medical records and another identical declaration by the doctor in charge, who had however changed in the course of 1972.

On 19 December 1974 and 15 December 1975, the district court again granted the public prosecutor's applications for one-year extensions to the detention. The medical documents accompanying these two applications are not included in the file.

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30. Meanwhile, on 20 February 1973, the patient had made a request for his release to the authorities of the "Rijks Psychatrisch Inrichting", in accordance with Section 29 of the Act. The medical director of the institution rejected the request and forwarded it to the public prosecutor with his medical comments, which may be summarised as follows: the patient was suffering from a paranoiac psychosis which could be successfully treated by psycho-pharmacological methods, but during previous leaves of absence he had failed to take the drugs prescribed, with the result that he had had to be re-admitted after a relapse. The patient was gradually being reintegrated into society and was living outside the hospital. In the light of previous experience, it would have been pointless to release him.

On the strength of this medical opinion, the public prosecutor refused the request and refrained from referring it to the court, as he is entitled to do in certain cases under Section 29 of the Act. He notified the applicant of this on 17 May 1973.

31. In addition, according to a declaration first made to the Commission by the Government at the hearing on 13 May 1977, which Mr. Winterwerp did not contest, the latter had made three previous requests to be released.

In February 1969, an initial request was referred by the public prosecutor to the court, which dismissed it after hearing the patient at the hospital.

In April 1971, a second request, forwarded to the public prosecutor with a negative recommendation by the hospital authorities was rejected by the public prosecutor after he had heard the patient. The same procedure was followed in the case of the applicant's third request, in July 1972. The Commission did not call for the official documents relating to these three requests, and they have not been included in the file.

32. The applicant was divorced in 1975 and is no longer in touch with his family. His property is in the hands of an administrator appointed by the district court on 11 August 1971. The administrator has made no request for Mr. Winterwerp's release.

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III. SUBMISSIONS OF THE PARTIES

A. The applicant's submissions

(1) As to Article 5 (1)(e) of the Convention

(a) General considerations

33. Art. 5 (1)(e) authorises the detention of persons of unsound mind, alcoholics, drug addicts, vagrants and persons liable to spread infectious diseases, provided this is done in accordance with a procedure prescribed by law.

The applicant's counsel submits that this provision extends the power of the State to deprive an individual of his liberty beyond its natural field, i.e. the prevention and punishment of crime. It is thus of an exceptional character and calls for strict interpretation.

34. The detention of a person is permissible in cases where his state or condition is such as to cause society a serious problem (a danger of attacks on other persons or on property) or to render society responsible for the safety of that person (a danger of suicide, self-mutilation, etc.). The deprivation of liberty referred to in the provision concerned thus has a specific purpose of protection. If, therefore, the patient is no longer a danger to others or to himself, his detention is no longer justifiable under Art. 5 (1)(e).

In support of his argument, the applicant's counsel relies on the exhaustive nature of the list of derogations from the right to liberty in Art. 5 (1). Taking Art. 5 (1)(e) in conjunction with Art. 14, he maintains that a difference of treatment between persons of unsound mind and other persons is not valid according to the Court's decision in the "Belgian linguistic" Case unless the following conditions are satisfied: the difference must be based on objective and reasonable grounds and there must be a reasonable relationship of proportionality between the means employed and the aim sought.

35. This has various implications with regard to detention proceedings: such proceedings must have enabled the competent authority to obtain prima facie evidence of insanity and to establish the necessity for confinement in a psychiatric hospital.

No specific definition of the concept of "unsound mind" is to be found in the Convention, nor indeed in Netherlands legislation. This is no matter for regret, seeing that the concept is linked with that of normality, whose meaning is constantly evolving. Homosexuality, for instance, which twenty years earlier was regarded as abnormal, is now largely accepted in Netherlands society.

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In any case, the decision to make a detention order must be based on objective psychiatric findings by experts, diagnosing a case of mental illness. It must be based on the conclusion that the mental illness makes detention necessary or, in other words, that the patient constitutes a serious danger to himself or to others and that there is no other satisfactory form of treatment for him.

36. The applicant's counsel argues that as Art. 5 (1)(e) authorises a person's detention only on account of his condition, the factors relating to the patient's mental health must be kept under review throughout his detention. For this purpose there should be a system of regular checks offering full guarantees of objectivity and competence.

37. The applicant's counsel next argues that the provision in question entails a right to treatment, so as to ensure that the patient is not detained longer than absolutely necessary. Such treatment, whose form it is for the State to specify, should satisfy the following minimum requirements: the physical and psychological environment must be favourable, the number of staff adequate and each patient must be treated individually.

(b) Submissions relating to the circumstances of the case

- Detention of a person of unsound mind ?

38. The first question is whether the applicant could be considered as being "a person of unsound mind" throughout his years of detention and, in particular, at the time of his admission in 1968.

His counsel maintains that the medical declaration of 20 June 1968 made by a non-specialist doctor after a single examination, could not enable the court to decide whether to order the applicant's provisional detention as a "person of unsound mind". The declaration was incoherent, was based only very partially on the doctor's personal observations and did not state wherein lay the danger to others or to public safety.

In the same way, the annual declarations were too laconic, contradictory and repetitive to permit of any objective confirmation of the applicant's mental illness during the subsequent years.

- In accordance with a procedure prescribed by law ?

39. Even supposing that the applicant could, in 1968 and throughout the period that followed, have been considered as being a person of unsound mind - something which must be decided by the Commission (cf. Judgment of 18 June 1971 of the Eur. Court H.R., "Vagrancy" Cases, paras. 68-69) - there remains the question of whether the deprivation of liberty was ordered and extended "in accordance with a procedure prescribed by law" and whether it was "lawful".

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These expressions imply that deprivation of liberty is subject to procedural safeguards as well as substantive-law requirements. On this point the Convention mainly leaves matters to national law, but not exclusively; the expressions have, at least to some extent, a meaning of their own.

The applicant's counsel submits that his client's detention does not satisfy this dual condition.

40. It was not ordered and extended "in accordance with a procedure prescribed by law", a phrase that is clearer than the French "selon les voies légales".

It is doubtful whether it is possible to talk of any "procedure" in the present case since the term implies, at the very least, that the person concerned should be aware of the application for his detention and be able to take some action of his own at some stage of the procedure. Thus, in the "Vagrancy" Cases submitted to the European Court of Human Rights, the persons concerned had been brought before a court within twenty-four hours, with the result that they had known about the procedure and been able to take part in it.

In the present case, on the contrary, the whole of the procedure took place without the knowledge of the applicant, who never appeared before a court and was not notified of the detention orders.

In any case, the procedure followed was not "prescribed by law". The law leaves the court completely free to decide whether or not to apply certain elementary procedural principles, viz hearing the person concerned, providing him with legal assistance, calling for a second expert opinion, summoning witnesses.

The very fact that the concept of "person of unsound mind" cannot be fully defined by the law makes it all the more necessary to comply with the law's essential procedural requirements.

41. Since the "procedure prescribed by law" was not followed, the detention cannot be considered "lawful". It was ordered and extended on the basis of inadequate medical observations, and the fact that the only information that was submitted to the court emphasises the routine character of the procedure.

42. On two occasions (in December 1968 and January 1970) the detention order had been made by a court not lawfully constituted for the purpose, since, in the absence of any express legal provision to that effect, it was not for the single-judge chamber of the district court to rule on the applications for a detention order.

43. A further submission by the applicant, to which however he apparently does not attach much importance, is that his detention became unlawful in December 1969 through having continued twelve months beyond the period without any renewed court order; such an order was not in fact made until January 1971.

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- Right to treatment

44. It is claimed that in any case the applicant's detention was not compatible with Art. 5 (1)(e) because of the authorities' failure to give him effective treatment which would have enabled his period of detention to be restricted to the bare minimum. His lawyer states that, to the best of his knowledge, the applicant had merely been given tranquillisers without any real psychiatric treatment. Furthermore, his periods of leave from the institution were inadequately prepared and supervised.

(2) As to Article 5 (4) of the Convention

45. The applicant's counsel points out that paragraphs 1 and 4 of Art. 5 are separate provisions. Hence, a violation of the Convention can result "either from a detention incompatible with paragraph 1, or from the absence of any proceedings satisfying paragraph 4, or even from both at the same time" (Eur. Court H.R., "Vagrancy" Cases, Judgment of 18 June 1971, para. 73).

- Scope of the control of lawfulness

46. The control of lawfulness through court proceedings as guaranteed by this provision covers not only the formal legality of detention orders but also the substantive justification for detention. Every person deprived of his liberty ought to be able to have the lawfulness of his detention determined by a court - the ultimate guarantor of individual freedom - whenever there is a fundamental change in the material circumstances.

- Conditions for exercising the right of recourse to a court

47. The exercise of such a remedy may, of course, be subject to certain conditions. In particular, an application may be deemed inadmissible if it is made immediately after one has been rejected. However, a reasonable interval between two applications ought not to exceed six months.

- As to the annual decisions of the courts

48. The applicant's counsel raises firstly the question whether the provisional detention order, the detention order and the extension orders made by the cantonal court judge and the district court may really be regarded as decisions by courts within the meaning of Art. 5 (4); that is to say, by organs whose procedure has "a judicial character and gives to the individual concerned guarantees appropriate to the kind of deprivation of liberty in question" (ibid., para. 76).

Even if it were possible to use the term "procedure" the procedure followed by the judge does not, according to counsel, have any judicial character since it enables him to suspend certain fundamental rights. For instance, while the judge has the right to hear the person concerned,

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the latter has no right to be heard, and he is in fact heard only in exceptional cases. That the law should preclude the right to be heard is all the more incomprehensible as such a right is granted by Netherlands legislation to the person concerned when an application is made to place his affairs in the hands of an administrator.

Noting that the Bill at present before the Netherlands Parliament also does not give a patient the right to be heard despite criticism by several Members of Parliament, the applicant's counsel maintains that the Government have not advanced any valid reason for such an exception to the general principles of procedural law.

49. Other anomalies to be noted are the absence of any right to be assisted by an adviser, to call witnesses or experts and to be notified of decisions reached from which there is no appeal.

Accordingly the condition relating to a "court" in the sense of Art. 5 (4) is not fulfilled.

50. Observing, moreover, that in the present case the whole of the procedure took place without involving the applicant in any way, counsel argues that the applicant had no opportunity "to institute proceedings" ("introduire un recours"), either in person or through a representative. This is true whether his detention since 1968 is regarded as a continuous period of confinement or if it is regarded as a series of distinct annual decisions. In the latter case, the decisions of the judge cannot have been concerned with the lawfulness of the detention within the meaning of Art. 5 (4), since they dealt not with the lawfulness of the applicant's being placed in confinement in 1968 but with the lawfulness of the extension of his detention for further periods of a year.

- As to the decisions on the requests for release

51. Turning, finally, to the action taken on the applicant's request of 20 February 1973 for release counsel submits that the public prosecutor, who refused the request, cannot be regarded as a "court" within the meaning of Art. 5 (4). The applicant had no access to a court, owing to the public prosecutor's option, under Section 29 of the Act, of not referring the matter to a court if he considers that there is no prospect of the request being granted. The screening powers thus granted to the public prosecutor are dangerous. Nor is there anything to show that they are necessary: the courts would not be inundated with manifestly ill-founded requests if patients had the assistance of a lawyer.

52. As may be seen from the Government's statements, which the applicant does not contest, the latter had been heard by the court in 1969, in connection with an earlier request for release. He had not, however, been assisted by a lawyer; nor apparently had his attention been drawn to the possibility of calling for counter expert opinion. Accordingly, the court's rejection of his request on that

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occasion cannot be regarded, either, as meeting the requirement as to verification of lawfulness by a court within the meaning of Art. 5 (4).

(3) As to Art. 6 (1) of the Convention

53. The applicant's counsel alleges that the automatic loss of the applicant's capacity to exercise civil rights as a result of his detention (Section 32 of the Insane Persons Act) concerns a civil right within the meaning of Art. 6 of the Convention.

As it entails deprivation of the right to exercise civil rights in person, the committal of a person to a psychiatric hospital is equivalent to the determination of his civil rights and obligations. In the present case, the applicant was even unable to exercise his rights through the agency or with the help of another person, since between June 1968 and August 1971 no trustee or provisional administrator had been appointed.

Even supposing that one and the same judgment could decide both the question of the applicant's detention and his civil capacity - which under most modern legislative systems are regarded as separate issues - the procedure before the cantonal court judge and the district court did not have any judicial character, with the result that Art. 6 (1) was violated.

B. The Government's submissions

(1) As to Art. 5 (1)(e) of the Convention

(a) General considerations

54. The Government submit firstly that the concept of "person of unsound mind" under the Insane Persons Act is undoubtedly compatible with that of "person of unsound mind" under Art. 5 (1)(e) of the Convention.

This is because the Netherlands Act, as interpreted by the courts, is particularly cautious as regards the deprivation of liberty of a person of unsound mind: for this purpose the patient must constitute an immediate danger to himself or to others.

55. The Government share the applicant's view that for a particular individual to be regarded as being of unsound mind within the meaning of Art. 5 (1)(e), the competent national authority must have established, prima facie, on the basis of a medical opinion, the existence of serious mental disorders. Mere suspicion or third-party statements would not be sufficient grounds for detention under the Convention.

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56. The Government consider deprivation of liberty justifiable only so long as the patient's state of health renders him dangerous to himself or to others. If his state of health improves, the legal grounds for his detention cease to exist and he must be released.

57. The Government do not think it possible to deduce a general right to treatment from Art. 5 (1)(e) or to lay down, in abstracto, minimum standards for such treatment. They submit that such a right is very difficult to define and may have to be weighed against a different right of a patient, which does not result from the Convention, namely the right to refuse treatment.

(b) Submissions relating to the circumstances of the case

- Detention of a person of unsound mind ?

58. The Government maintain that, contrary to the applicant's allegations, the courts which made the various detention orders did so after procedures which enabled them to establish, prima facie, a case of mental illness.

In particular, the medical declaration of 20 June 1968 mentioned facts, observations and circumstances of such a kind as to enable the cantonal court judge to decide that the patient's provisional admission to a psychiatric hospital was essential.

The declaration was subsequently confirmed by the regular findings of two specialists concerning both the applicant's mental condition and the reasons why there was no alternative to his detention.

- In accordance with a procedure prescribed by law ?

59. The Government reject the applicant's argument that the provisions of the Insane Persons Act under which he was committed to a psychiatric hospital against his will and kept in detention do not constitute "a procedure prescribed by law" or "voies légales" within the meaning of Art. 5 (1) of the Convention.

After commenting on these provisions, chiefly Sections 12, 16 and 17, 23 and 24 of the Act, the Government summarise them in four main points:

- When ordering a person's provisional detention (Section 17), his definitive detention (Section 23), or the extension of such detention (Section 24), the judge decides independently whether the information given in the medical declaration and records makes it necessary, in the interests of public order or in the patient's own interests, to commit him to a psychiatric hospital or to continue his treatment in such an institution.

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- Under the Act, the judge has considerable freedom in exercising the powers conferred on him therein to obtain additional facts or information from or about patients whose cases are referred to him.

- The Act contains detailed provisions regarding the medical records which must be kept on a patient confined in a psychiatric hospital on the basis of a court order and which are available to the judge for the periodic review of the patient's detention in the light of the interests of public order and those of the patient himself.

- When making or extending a detention order, the judge is required to hear the views of the public prosecutor's office which may express opinions on the basis of information acquired in the course of its supervisory duties.

The Government submit that a procedure by which deprivation of liberty is subject "to the decision - renewed at regular intervals in the case of extended detention - of a judge who bases his decision, at the very least, on a medical declaration presented to him and drawn up in accordance with the law, undoubtedly meets the minimum requirement laid down in Art. 5 (1) of the Convention and should be considered as 'a procedure prescribed by law'".

60. The Government claim that these statutory provisions were fully complied with in the present case, as may be seen from an examination of the relevant documents. On this point they content themselves with denying some of the applicant's allegations and criticisms.

They challenge the applicant's view that the text of the Act precludes the single-judge chamber of a district court from making a detention order.

The Government reject the applicant's allegation that an order made on 7 January 1971 by the district court of 's-Hertogenbosch must be regarded as invalid through having been made after the expiry of the one-year time-limit laid down in the detention order of 16 December 1970. They claim that the Act does not regulate this matter; that failure to observe the time-limit does not entail nullity; and that the application lodged by the public prosecutor on 14 December 1970 was submitted before the time-limit expired.

61. The Government argue, lastly, that the applicant's deprivation of liberty was lawful, rejecting his allegations that the orders for its extension were made in a routine manner on the basis of imprecise medical records and declarations and that he was not given any proper treatment while confined.

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In particular, the Government submit that the medical declarations by two different doctors are substantially concordant and that several attempts were made to treat the applicant elsewhere than in a psychiatric hospital.

(2) As to Art. 5 (4) of the Convention

62. The Government agree with the applicant that judicial control of the lawfulness of detention upon application by the detainee, as provided for in Art. 5 (4), includes verification of the substantive justification for detention.

They accordingly concentrate their arguments on the question of what is to be understood by "proceedings /before/ a court" ("recours devant un tribunal").

63. The Government point out that, according to the interpretation of this term by the European Court of Human Rights "the intervention of one organ satisfies Art. 5 (4), but on condition that the procedure followed has a judicial character and gives to the individual concerned guarantees appropriate to the kind of deprivation of liberty in question". The Court further specified that "In order to determine whether a proceeding provides adequate guarantees, regard must be had to the particular nature of the circumstances in which such proceeding takes place" (Eur. Court H.R., "Vagrancy" Cases, Judgment of 18 June 1971, paras. 76 and 78).

The proceedings provided for in the Insane Persons Act should be appraised in the light of these principles.

In the Government's view, the procedures for making provisional and definitive detention orders, for extending such orders and for dealing with requests for release do comply with the provisions of Art. 5 (4), as they take place before a court which is undoubtedly independent of the executive and provide adequate guarantees for the persons concerned.

In support of this view, the Government put forward the following arguments:

a) In the case of a person of unsound mind, deprivation of liberty has a special character of which due account should be taken in any assessment of the procedural guarantees afforded by the law.

64. Subjecting the procedure to detailed, mandatory rules might result in less substantial guarantees being afforded than under the present system, which allows the judge to take whatever measures are suitable for each individual case.

It is desirable, indeed necessary, that specific though not unlimited, weight should be attached to the medical declaration, which in most cases is drawn up by a specialist. The obtaining of medical evidence is subjected by the Act to specific rules providing guarantees for the patient.

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The findings appearing in the first medical declaration have to be verified by another doctor during the period of provisional detention. The judge, whose decision is final, may also obtain information by other means.

The Government draw the Commission's attention to the guarantee provided by the supervision exercised by the public prosecutor: an improvement in the patient's health may result in the legal grounds for his detention ceasing to exist, and the public prosecutor, being responsible for ensuring that no one is kept in a psychiatric hospital unlawfully, can order a patient's release (Section 30 of the Act).

b) The procedure must be considered as a whole.

65. The procedures for making provisional and definite detention orders, for extending detention orders and for dealing with requests by patients for release ought not to be considered separately but as a set of provisions guaranteeing constant judicial supervision of the lawfulness of the detention decisions (cf. para. 41 (c): decisions not subject to appeal).

c) The prescribed procedures offer patients adequate legal security.

66. The prescribed procedures do not need to satisfy the specific conditions laid down in Art. 6 (1) (Eur. Court H.R., "Neumeister" Case, Judgment of 27 June 1968). They provide adequate guarantees, in which the judge plays a decisive role, having numerous means at his disposal for investigating the merits of each case referred to him.

The Act also provides a set of procedural guarantees designed to ensure that deprivation of liberty does not last longer than is strictly necessary.

In pointing to a number of "anomalies", the applicant fails to take into account the special features of the procedure for ordering the detention of a person of unsound mind.

67. The Government then deal in turn with some of these alleged anomalies:

No obligation for the court to hear the person concerned. In drawing up the new Act, the legislature's intention was that the person concerned should be heard by the court at the time the provisional detention order is being made.

The reason why there is no mandatory provision for a hearing at subsequent stages is that the court will by then be in possession of detailed information in the form of the medical records and the public prosecutor's opinion.

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No right for the person concerned to call witnesses or experts. The judge's unlimited discretion is justified in such cases. If he were obliged to hear such persons, the proceedings might be absurdly and painfully protracted.

Legal assistance. Here too the judge should retain unlimited discretion in order to prevent legal assistance from being automatically provided in cases where it is not necessary.

Decisions not subject to appeal. Since decisions by a cantonal court judge or a district court are decisions by a judicial organ within the meaning of Art. 5 (4) of the Convention, they do not need to be subject to appeal.

On this point, the Government draw attention to the need to take a comprehensive view of the system provided for in the Insane Persons Act.

Thus, the detention order that has to be made within six months after the provisional order places an obligation on the court to verify the lawfulness of the continued deprivation of liberty. The same applies to subsequent periods of deprivation.

Moreover, on the basis of the information communicated to him, the public prosecutor may order the release of a person whose detention does not appear justified.

Within this system, an application by a patient for his discharge in accordance with Section 29 of the Act ought not to be regarded as a separate remedy against individual judicial decisions. The public prosecutor's powers in considering such applications are the same as those provided for in various sets of regulations governing administrative appeals: a manifestly ill-founded appeal may be rejected without any examination of the merits. In this respect, the Government rely on Art. 27 (2) of the Convention.

No notification of the judge's decision to the person concerned. The legislature did not consider it desirable for the judge's decision to be notified to the person concerned without arrangements being made for satisfactory medical supervision. It accordingly left it to hospital authorities to decide if and when notification of the judge's decision was warranted from the medical point of view.

(3) As to Art. 6 (1) of the Convention

68. The Government point out that, strictly speaking, it is not the judge's detention order but the patient's admission to a psychiatric hospital that entails, ipso jure, incapacity to exercise civil rights.

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However, in the Bill before Parliament, the Government have distinguished between the detention of a person of unsound mind and the loss of civil capacity: in future an order committing a patient to a psychiatric hospital will not deprive him, ipso jure, of his legal capacity.

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IV. POINTS AT ISSUE

69. Following the Commission's Decision on Admissibility, the main points at issue in the present case relate to Art. 5 of the Convention.

a) Was the applicant's deprivation of liberty compatible with Art. 5 (1) of the Convention in that it constituted the "lawful detention of a person of unsound mind", within the meaning of sub-paragraph (e) of this provision, and was "in accordance with a procedure prescribed by law" ?

b) Was the applicant entitled to take proceedings by which the lawfulness of his detention could be determined by a court, as guaranteed by Art. 5 (4) of the Convention ?

70. In the proceedings on the merits, a further question was raised: In view of the fact that the Netherlands Act deprives a person of unsound mind admitted to a psychiatric hospital of his capacity to exercise certain rights, was Art. 6 applicable to the detention proceedings ? Was it complied with ?

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V. OPINION OF THE COMMISSION

(1) As to the alleged violation of Art. 5 (1)

71. The provisions of Art. 5 (1) applicable to the present case are as follows:

> "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 :
>
> (.....)
>
> (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;
>
> (.....)"

72. The Commission is required to consider, firstly, whether the applicant's deprivation of liberty was covered by sub-paragraph (e) as being the lawful detention of a person of unsound mind, and, secondly, whether such deprivation of liberty had been effected in accordance with a procedure prescribed by law.

Lawful detention of a person of unsound mind

73. The Convention does not define the term "person of unsound mind" for the purposes of this provision. The term's usual meaning can scarcely be said to be very precise, since its French counterpart, "aliéné", may denote either any person suffering from a mental disorder (cf. P. Robert, Dictionnaire de la langue française en six volumes), or a mentally-ill patient whose condition necessitates his detention because his dangerous reactions are such as to prejudice public safety and order (cf. Dictionnaire Larousse en trois volumes).

The same applies to the corresponding English term used in the English text of the Convention: "person of unsound mind".

As pointed out by the parties, the meaning of this term is evolving over the years, as psychiatry progresses and society's attitude towards mental illness changes. It would be both idle and rash to attempt to give it a general or definitive interpretation.

74. However, in providing for the lawful detention of a person of unsound mind, Art. 5 (1)(e) cannot be regarded as enabling any person whose public or private behaviour deviates from the prevailing standards, ideas or even fashions, to be deprived of his freedom or as allowing States to class as being of unsound mind any citizen considered "a-social" or "marginal".

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This is plain from the provision's context as well as from the object and aim of the Convention as a whole. By proclaiming everyone's right to liberty and security of person, Art. 5 (1) protects the individual from any kind of arbitrary detention. The list of permitted exceptions to this general principle is an exhaustive one (Eur. Court H.R., Case of Engel and others, Judgment of 8 June 1976, para. 57). Moreover, according to the general principles of law common to the member States of the Council of Europe, legislation that permits any interference with individual liberty must be strictly interpreted.

75. According to the concordant statements of the parties, the Netherlands Insane Persons Act defines as being of unsound mind only those persons whose mental disorders are of such a kind or of such gravity as to make them an actual danger to themselves or to others. This definition, based as it is on recognition both of a need for treatment and of a need for protection, does not appear in any way incompatible with a reasonable interpretation of the term "person of unsound mind". The Commission considers, therefore, that a person who is of unsound mind within the meaning of Section 12 of the Netherlands Act, in principle, falls within the scope of the exception provided for in Art. 5 (1)(e) of the Convention.

76. Even so, any detention authorised on the strength of the Act must not be free from all arbitrariness; in other words, the patient must not have been admitted, still less kept, in a psychiatric hospital without it having been medically established and confirmed that his mental state was such as to justify his compulsory hospitalisation (cf. Decision on Application No. 6859/74 v. Belgium, D. & R. No. 3, p. 139). As the parties pointed out, detention based only on statements by the patient's relatives or neighbours involves a serious risk of abuse.

77. In the present case, after a short period of detention under an administrative order, the applicant's compulsory admission to a psychiatric hospital for a maximum period of six months was authorised by the cantonal court judge on the basis of a report by a general medical practioner. From the beginning, the hospital's psychiatrist kept a record - first daily, then monthly - of his observations regarding the patient's behaviour and statements. A copy of these records, accompanied by the medical findings and observations on the need for the patient's detention, was forwarded each year to the judge required to decide on continued detention. Although fairly brief, the records indicate that the applicant showed schizophrenic and paranoiac reactions, that he was unaware of his pathological condition and that, on several occasions, he had committed various quite serious acts without appreciating their consequences. For instance, in pursuance of some fanciful schemes, the applicant went abroad with family savings and soon became penniless, without realising either the state of neglect in which he had left his family or his own dependence on the consular authorities who had to assist and repatriate him.

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Several attempts at gradual rehabilitation failed because he did not follow the treatment prescribed.

78. The Commission concludes that the applicant's detention throughout the period under consideration falls clearly within the category referred to in sub-paragraph (e) of Art. 5 (1).

Compliance with a procedure prescribed by law

79. The Commission's next task is to establish whether the deprivation of liberty was carried out in accordance with a procedure prescribed by law; that is, by virtue of decisions taken by a competent authority and in accordance with the procedure prescribed by Netherlands law (cf. Eur. Court H.R., "Vagrancy" Cases, Judgment of 18 June 1971, para. 69).

80. The applicant does not dispute that the detention orders at the various stages of the procedure were made by the competent authority, viz by the burgomaster in the case of an urgent admission, by the cantonal court judge in the case of the provisional detention order and by the district court in the case of the detention order and its extensions.

He alleges, however, that on two occasions, on 23 December 1968 and 1969, the district court was not properly constituted, as his case was dealt with by a single-judge chamber of the court, in the absence of any express statutory provision to that effect.

The Commission notes, however, that the plenary chamber of the court may refer to the single-judge chamber such cases as it deems suitable for that purpose (Section 288 (b) of the Code of Civil Procedure). It appears from the practice and jurisprudence that the district court's rules of procedure allow the single judge to be permanently responsible for the examination of certain types of cases.

The Government have filed a copy of the Utrecht District Court's rules of procedure, Rule 6 of which provides that applications under the Insane Persons Act shall be dealt with by a single judge. It is true that the latest version of these rules, as submitted by the Government, dates from 20 February 1973; but in the light of the above considerations the Commission considers that detention orders are not alien to the competence of a single-judge chamber.

81. The procedure laid down by Netherlands law for the detention of persons of unsound mind contains few mandatory provisions. The law merely prescribes what persons are entitled to apply for a detention order, what form such applications must take and what conditions the medical certificates must satisfy; it also stipulates that the judge must hear the public prosecutor.

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For the rest, it lays down the judge's discretionary powers, viz calling of witnesses or experts, the grant of legal assistance, etc. Although, since 1972, the hearing of the person concerned has been the rule for admission to a psychiatric hospital, such a hearing is still purely optional for decisions on the continuation of compulsory hospitalisation.

82. Subject to the above observations regarding the necessity for medical reports (see para. 76 above), the Commission considers that Art. 5 (1)(e) merely leaves such matters to national law without laying down any minimum procedural guarantees. The patient is not thereby denied the fundamental guarantees provided by the Convention regarding deprivation of liberty because a right to take proceedings by which the lawfulness of his detention may be decided by a court is provided for in Art. 5 (4).

83. The mandatory provisions of Netherlands law regarding procedure were complied with in the present case, with the result that the applicant was deprived of his liberty in accordance with a procedure prescribed by law, as referred to in Art. 5 (1) of the Convention.

Detention of a person of unsound mind and the right to treatment

84. The Commission has also considered the subsidiary argument put forward by the applicant's counsel that his detention was not covered by Art. 5 (1)(e) because of the authorities' failure to provide him with medical treatment calculated to improve his mental condition and thus limit his period of detention to what was strictly necessary.

The Government have not adopted a clear position on the question of the right to treatment, having merely drawn the Commission's attention to the difficulty of giving specific substance to such a right and the relationship between that right and the right to refuse treatment. In the opinion of the Commission, a patient's right to medical treatment appropriate to his condition does not, as such, derive from this provision. It is true that compulsory admission to a psychiatric hospital should fulfil a dual function, therapeutic and social; but the Convention deals only with the social function of protection in authorising the deprivation of liberty of a person of unsound mind under certain conditions as specified above.

85. No doubt the absence or refusal of treatment could, depending on the circumstances, give rise to certain questions, viz: Is the patient not in fact, as the result of a misuse of powers, being detained for punitive purposes, in violation of Art. 18 of the Convention read in conjunction with Art. 5 ? Is he not being subjected to inhuman treatment, prohibited by Art. 3 ? That is not the case in the present instance, however. The applicant has merely alleged, without giving any further details, that his meetings with the psychiatrist were too short and infrequent and that the medication administered to him was excessively made up of tranquillisers.

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CONCLUSION

86. The Commission concludes unanimously that in the present case there has been no violation of Art. 5 (1)(e) of the Convention.

(2) As to the alleged violation of Art. 5 (4)

87. Art. 5 (4) of the Convention provides as follows:

> "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."

Scope of the control of lawfulness

88. The parties to the case agree that the control of lawfulness referred to in this provision should cover both the formal propriety of the detention procedure and the substantive justification for the deprivation of liberty. They point out that in the event of an improvement in a psychiatric patient's condition the legal grounds for his detention may cease to exist.

89. In its Report on the "Vagrancy" Case, the Commission expressed the view that "to satisfy the requirements of paragraph 4 of Art. 5 the body determining the lawfulness of the detention must have jurisdiction enabling it to control all aspects of the decision to detain, whether relating to fact or law" (para. 180). More recently, in its decision on the admissibility of an application in respect of a case of indefinite detention, the Commission stated that it was the responsibility of the court referred to in Art. 5 (4) "to establish that the conditions prescribed by law - a state of mental deficiency - are (still) satisfied and justify the continuation of the detention or, if not, require the release of the detainee" (Decision of 2 October 1975 on Application No. 6859/74 v. Belgium, D. & R. No. 3, p. 139).

90. Article 5 (4) is thus to be interpreted as conferring, on anyone who considers himself to have been wrongly committed to a psychiatric hospital, following a procedure which the Convention leaves largely to the discretion of each State, the right to have both the substantive and the formal lawfulness of his detention verified by a court.

91. It is clear from the provisions of the Netherlands Act, in particular Sections 23 and 29 (6), that, when deciding on an application for a detention order or for the extension of such an order and when ruling on a request for release, the District Court is competent to verify whether the material conditions for deprivation of liberty are satisfied. The judge possesses the necessary powers for that purpose, such as the power to call witnesses or experts and to hear the patient himself.

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Proceedings before a court

92. In the present case, the main issue is not, therefore, whether the control of lawfulness provided for in the Netherlands Act is sufficiently extensive as regards Art. 5 (4), but whether it was carried out on the application of the person concerned and by a court.

93. At first sight, it would appear that the only decision taken on application by the patient was in February 1969, when the district court dismissed the applicant's request to be released.

94. The Government submit, however, that the annual decisions by the district court, authorising the applicant's detention for a maximum period of one year, met the requirements of Art. 5 (4). On this point they rely on the jurisprudence of the European Court of Human Rights, whereby when a decision depriving a person of his liberty is made by a court at the close of judicial proceedings, the supervision required by Art. 5 (4) is incorporated in that decision (Eur. Court H.R., "Vagrancy" Cases, Judgment of 18 June 1971, paras. 75-76).

95. The Commission has already expressed the view that this conclusion of the Court's cannot be sustained, as such, in the case of the detention of a person of unsound mind, at any rate when that detention is for an indefinite period (Decision on Application No. 6859/74 v. Belgium, D. & R. No. 3, p. 139).

However, the Commission considers the further examination of this question superfluous without first establishing whether the district court's annual decisions were in fact those of a judicial body.

District court : organisation

96. There is no doubt that, from the point of view of its organisation, the district court is a judicial body in the sense that it is "independent both of the executive and of the parties in the case" (cf. Eur. Court H.R., "Neumeister" Case, Judgment of 27 June 1968, para. 24).

District court : procedure

a) Procedure for making and extending a detention order

97. When the annual decisions to extend his detention were taken, was the applicant afforded the guarantee of a judicial procedure ? The Court has observed that "The forms of the procedure required by the Convention need not /.../ necessarily be identical in each of the cases where the intervention of a court is required." The Court added that in order to determine whether a proceeding provides adequate guarantees regard must be had to the kind of deprivation of liberty in question and to "the particular nature of the circumstances in which such proceeding takes place" (Eur. Court H.R., "Vagrancy" Cases, Judgment of 18 June 1971, paras. 78 et seq.).

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It is in any event accepted that these guarantees are not altogether the same as those of the fair hearing provided for in Art. 6 (1) of the Convention (Eur. Court H.R., "Neumeister" Case, Judgment of 27 June 1968, para. 24).

98. In this respect the Commission refers to a previous case concerning the control of the lawfulness of the detention of a person of unsound mind in which the Commission indicated that the existence of the following procedural guarantees may exclude a violation of Art. 5 (4): if the patient had the effective assistance of a lawyer who was able to consult the case file and submit a memorial; if he was heard by the judicial body concerned; and if he was able to arrange a counter-expert opinion by a doctor of his choice (Decision on Application No. 6859/74 v. Belgium, D. & R. No. 3, p. 139).

99. In the present case, the Government put forward a series of arguments to justify the judge's right not always to grant the person concerned certain procedural guarantees generally recognised in cases of deprivation of liberty. Thus, except in the case of the original detention order, the judge has before him sufficient medical data which, together with the public prosecutor's opinion, is enough to allow him to dispense with hearing the patient; the judge should be left full discretion to decide whether to call witnesses or experts, otherwise the proceedings would be unnecessarily slow or complicated. A general right to legal assistance would often result in patients being given such assistance unnecessarily. Finally, holding the proceedings in public would not be in the patient's own interests. Moreover notification of the Court's decision to the patient might be medically inadvisable. It should not therefore be done automatically.

100. The applicant's counsel, for his part, argues that no procedure which entitles the judge to suspend certain fundamental rights of defence can be deemed judicial. He points out that the applicant was not heard by the judge and was at no stage directly involved in the proceedings or informed of their outcome.

101. The Commission considers that, in deciding on the merits of the detention or release of a person of unsound mind, it may indeed be necessary, in the interests of the patient, for the proceedings not to take place in public and for the patient not to be personally informed of all the evidence on which the competent authority has to base its decision (Decision on Application No. 3151/67 v. Federal Republic of Germany, Collection 27, p. 128). In the present case, the fact that the applicant was not allowed access to the medical records relating to him is not incompatible with the requirements of a judicial procedure.

102. On the other hand, no procedure can be described as judicial which provides no opportunity for both sides to express their views in some way or other. In the opinion of the Commission, the right of the person concerned to present his own case and to challenge the medical and social evidence adduced in support of his detention constitutes, in the case of a person of unsound mind, the absolute minimum for a judicial procedure.

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It is naturally the responsibility of the national legislature or of the judge dealing with a particular case to arrange for these rights to be exercised in whatever way is considered most suitable, eg : the hearing by the court either of the person concerned himself or of his representative (lawyer, guardian, etc.); the appointment of an independent expert by the court; the right for the person concerned to submit the findings of a doctor of his choice.

103. The Commission notes that, under the Netherlands Insane Persons Act, the judge has power to hear the patient and to call witnesses or experts.

The Commission is, however, required to state whether, in its view, the applicant was in fact entitled to these minimum guarantees before the district court. In the present case, it is not disputed that neither the applicant nor his representative was notified before the annual detention or extension orders were made that the proceedings relating thereto were in progress; that the applicant was given no opportunity of any kind to argue his case before the court or that he was given no opportunity of challenging the medical findings submitted to the court.

104. The Commission accordingly finds that the district court's annual orders were not, in the present case, made in accordance with the requirements of Art. 5 (4) regarding the judicial control of the lawfulness of detention on application by the detainee.

b) Procedure for release

105. It now remains to be examined whether the procedure whereby the applicant was himself able to apply for his release did in fact afford him the remedy provided for in Art. 5 (4) of the Convention.

106. The Commission feels it appropriate to mention briefly, at this point, what Section 29 of the Netherlands Insane Persons Act involves and how it was applied in the present case.

Under Section 29, the patient may apply in writing for his release. The request must be addressed to the hospital director, who may grant the release after consulting the doctor or doctors dealing with the patient. If he refuses the request, he must forward it to the public prosecutor who as a rule refers it to the district court for a decision according to the procedure previously described for other decisions relating to detention.

However, the public prosecutor may decide not to refer the request to the court, notably when it appears to him manifestly impossible to grant the request ("indien het verzoek klaarblijkelijk niet voor inwilling vatbaaris").

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The applicant made four requests for his release in 1969, 1971, 1972 and 1973. These were refused by the authorities of the psychiatric hospitals concerned and forwarded to the public prosecutor, who, except in 1969, decided not to refer them to the court.

107. The court was therefore only once required to verify, on application, the lawfulness of the deprivation of liberty. It has been established that, on that occasion, the judge went to see the applicant. On the other hand, the parties have been unable to state with certainty whether the applicant was given any opportunity of calling for a second medical opinion.

108. In the course of the next three years, the public prosecutor decided not to refer the applicant's further requests for release to the court, probably because he regarded them as manifestly impossible to grant.

109. The Commission accepts in principle the Government's argument that exercise of the right of recourse to a court may be subjected to certain restrictions so as to prevent the courts from being inundated with an endless stream of identical requests devoid of any prospect of success.

In a case of indeterminate detention, the Commission took the view that the rule prohibiting a request from being made within six months of the rejection of an earlier application did not prejudice the patient's right of recourse to a court as guaranteed by Art. 5 (4), "given the nature of the internment under consideration which is justified by a mental disease excluding any sudden positive development" (Decision on Application No. 6692/74 v. Belgium, D. & R., No. 2, p. 108).

At first sight, the terms of Section 29 (3) of the Netherlands Insane Persons Act, dispensing the public prosecutor from referring a request for release to the court when an earlier request is still pending or when the court has already rejected a similar request in the course of the year covered by the detention order and there has been no change of circumstances, are based on much the same considerations as those set out by the Commission in the decision cited above.

110. In the present case, however, the public prosecutor's continual refusal to refer to the court requests made two, three and four-and-a-half years after the court's rejection of the original request in February 1969, on the grounds that they could not be granted, goes beyond what may merely be regarded as reasonable or debatable conditions or restrictions concerning the exercise of the right of recourse to a court as provided for in Art. 5 (4) of the Convention and constitutes in fact a denial of that right. For what the prosecutor did was permanently to substitute himself for the court in assessing the lawfulness of the applicant's detention.

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111. Even assuming that the district court's decision of February 1969 did meet the requirements of Art. 5 (4), the applicant was subsequently refused the right to challenge before a court the lawfulness of the annual detention orders and, more generally, the lawfulness of his detention.

CONCLUSION

112. Consequently, after examining the whole of the proceedings which took place before the district court in the present case, the Commission finds that, at least since February 1969, the applicant has been unable to take proceedings by which the lawfulness of his detention could be determined by a judicial body competent to order his release.

It therefore concludes unanimously that Art. 5 (4) of the Convention has been violated.

(3) As to the alleged violation of Art. 6 (1)

113. Art. 6 (1) of the Convention provides, in particular, that "in the determination of his civil rights and obligations ... , everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".

114. Under Section 32 of the Netherlands Insane Persons Act, any person confined in a psychiatric hospital loses, ipso jure, his capacity to administer his property. In the absence of any more precise information from the parties, the Commission notes here, from the terms of the Act, that the person concerned loses his capacity to engage in property transactions, without going into the question of whether, as the result of an extension by case-law, his capacity to exercise purely personal rights (marriage, marriage contract, adoption, divorce, recognition of a child, etc.) is also affected.

115. The Government point out that it is the actual detention and not the court order which results in civil incapacity. However, under Netherlands law, a patient's compulsory admission to and detention in a psychiatric hospital are lawful only if expressly ordered by a court. And so, although the district court decision is merely a detention order, it is nevertheless crucial to the civil capacity of a person of full age suffering from a mental illness.

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116. Was Art. 6 (1) applicable and, if so, was it violated ?

This question, which was raised by the applicant's counsel in the course of the examination of the merits, relates to facts distinct from those originally presented to the Commission, which has not received any detailed submissions thereon.

The Commission therefore considers that it ought not, in the present case, to express an opinion on this important new point.

Secretary to the Commission — President of the Commission

(H.C. KRÜGER) — (J.E.S. FAWCETT)

A P P E N D I X I

History of Proceedings

Item	Date	Note
Examination of admissibility		
Date of introduction of application	13.12.1972	
Date of its registration	27.9.1973	
Preliminary examination of the application by a Rapporteur under former Rule 45 (1) of the Commission's Rules of Procedure. Decision by the Rapporteur to request information from the respondent Government (former Rule 45 (2)(a) of the Rules of Procedure	1.4.1974	
Information submitted by the Government	7.5.1974	
Comments by the applicant	26.5.1974	
Second examination by the Rapporteur	18.12.1974	
Commission's deliberations. Decision to invite the respondent Government to submit written observations on admissibility (Rule 42 (2) (b) of the Rules of Procedure)	16.3.1975	MM. Fawcett, Sperduti, Ermacora, Triantafyllides, Kellberg, Opsahl, Mangan, Polak, Jörundsson
Decision of the President, at the Government's request, to extend to 4 June 1975 the time-limit for the submission of their observations on admissibility	20.5.1975	
Government's observations on admissibility	4.6.1975	
Letter from the applicant replying to the Government's observations	16.6.1975	

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Item	Date	Note
Examination by the Rapporteur in accordance with Rule 40 (1) and (3) of the Rules of Procedure	28.8.1975	
Commission's Decision on admissibility	30.9.1975	MM. Fawcett Nørgaard Ermacora Busuttil Kellberg Daver Custers Polak Jörundsson Dupuy Tenekides Trechsel Kiernan
Examination of the merits		
Decision of the President to invite the applicant, then in receipt of free legal aid, to submit his written observations on the merits by 30 June 1976	11.5.1976	
Decision by the President, at the applicant's request, to extend the above time-limit to 30 August 1976	16.7.1976	
Submission of the applicant's memorial on the merits	8.9.1976	
Decision of the President to fix 8 November 1976 as the time-limit for the submission of the Government's counter-memorial	14.9.1976	
Decision of the President, at the Government's request, to extend the above time-limit to 22 November 1976	15.11.1976	
Submission by the Government of their counter-memorial on the merits	22.11.1976	

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Item	Date	Note
Decision of the Commission to hold an oral hearing of the parties on the merits	4.3.1977	MM. Fawcett Sperduti Nørgaard Busuttil Kellberg Daver Opsahl Custers Polak Frowein Jörundsson Tenekides Trechsel Kiernan Klecker
Oral hearing of the parties on the merits	13.5.1977	MM. Fawcett Sperduti Nørgaard Busuttil Kellberg Opsahl Custers Polak Jörundsson Tenekides Trechsel Kiernan Klecker
Commission's deliberations: provisional opinion on the merits and decision to initiate the friendly settlement procedure	13 and 14.5.1977	MM. Fawcett Nørgaard Busuttil Kellberg Opsahl Custers Polak Jörundsson Tenekides Trechsel Kiernan Klecker
Applicant's letter concerning a friendly settlement	8.6.1977	

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Item	Date	Note
Commission's deliberations and decision to adjourn its examination of the case until its session in December 1977	11.7.1977	MM. Fawcett Sperduti Nørgaard Triantafyllides Busuttil Kellberg Daver Opsahl Custers Frowein Dupuy Tenekides Trechsel Kiernan Klecker
Meeting of the Agent of the Netherlands Government and the Secretary of the Commission concerning a friendly settlement	15.7.1977	
Commission's deliberations and adoption of the Report	15.12.1977	MM. Fawcett Sperduti Nørgaard Ermacora Busuttil Kellberg Daver Opsahl Custers Polak Frowein Jörundsson Dupuy Trechsel Kiernan Klecker