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

**CASE OF AERTS v. BELGIUM**

**(61/1997/845/1051)**

JUDGMENT

STRASBOURG

30 July 1998

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SUMMARY[1]

Judgment delivered by a Chamber

*Belgium – applicant held, for seven months of his total detention, in the psychiatric wing of an ordinary prison, rather than in a social protection centre designated by the relevant mental health board*

I. GOVERNMENT'S PRELIMINARY OBJECTIONS

**A. Applicant's lack of "victim" status**

Applicant could claim to be a "victim" because fact that he had been detained for too long in psychiatric wing of Lantin Prison had affected him directly.

*Conclusion*: objection dismissed (unanimously).

**B. Late submission of the application**

Court of Cassation Legal Aid Board's decision, which had put an end to action brought by applicant and made it impossible for any subsequent compensation claim to succeed, was final decision from which six-month limit began to run – objection could not be upheld.

*Conclusion*: objection dismissed (unanimously).

II. ARTICLE 5 § 1 OF THE CONVENTION

Length of provisional detention pending transfer not specified by any statutory or other provision – nevertheless, necessary to determine whether, in view of detention order's purpose, continuation of provisional detention for seven months could be regarded as lawful – documents produced before Court showed sufficiently clearly that psychiatric wing in question could not be regarded as an institution appropriate for the detention of persons of unsound mind – proper relationship between aim of detention and conditions in which it took place therefore deficient.

*Conclusion*: violation (unanimously).

III. ARTICLE 5 § 4 OF THE CONVENTION

In circumstances of case, application for injunction lodged by applicant satisfied the requirements of Article 5 § 4.

*Conclusion*: no violation (unanimously).

[1]. This summary by the registry does not bind the Court.

IV. ARTICLE 6 § 1 OF THE CONVENTION

Present case did not involve "determination of a criminal charge" – on other hand, outcome of proceedings was decisive for civil rights – dispute concerned lawfulness of a deprivation of liberty – the right to liberty, which was at stake, was a civil right.

Applicant could legitimately apply to Legal Aid Board with a view to an appeal on points of law since in civil cases Belgian law required representation by counsel before Court of Cassation – by refusing application, Board impaired the very essence of the applicant's right to a tribunal.

*Conclusion*: violation (unanimously).

V. ARTICLE 3 OF THE CONVENTION

Living conditions on psychiatric wing at Lantin did not seem to have had such serious effects on applicant's mental health as would bring them within scope of Article 3 – not conclusively established that applicant suffered treatment that could be classified as inhuman or degrading.

*Conclusion*: no violation (seven votes to two).

VI. ARTICLE 50 OF THE CONVENTION

**A. Non-pecuniary damage**

Applicant must have suffered a certain amount of non-pecuniary damage which the finding of the breaches concerned was not in itself sufficient to make good – compensation awarded on an equitable basis.

**B. Costs and expenses**

Reimbursed on an equitable basis.

COURT'S CASE-LAW REFERRED TO

24.10.1979, Winterwerp v. the Netherlands; 5.11.1981, X v. the United Kingdom; 28.5.1985, Ashingdane v. the United Kingdom; 30.10.1991, Vilvarajah and Others v. the United Kingdom; 15.11.1996, Bizzotto v. Greece

**In the case of Aerts v. Belgium**[1],

The European Court of Human Rights, sitting, in accordance with Article 43 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of Rules of Court B[2], as a Chamber composed of the following judges:

Mr R. BERNHARDT, *President,*
Mr L.-E. PETTITI,
Mr J. DE MEYER,
Mr I. FOIGHEL,
Mr R. PEKKANEN,
Mr J.M. MORENILLA,
Mr B. REPIK,
Mr P. JAMBREK,
Mr U. LÕHMUS,

and also of Mr H. PETZOLD, *Registrar,* and Mr P.J. MAHONEY, *Deputy Registrar,*

Having deliberated in private on 27 April and 29 June 1998,

Delivers the following judgment, which was adopted on the last-mentioned date:

## PROCEDURE

1. The case was referred to the Court by a Belgian national, Mr Michel Aerts ("the applicant"), on 7 July 1997 and by the European Commission of Human Rights ("the Commission") on 9 July 1997, within the three-month period laid down by Article 32 § 1 and Article 47 of the Convention. It originated in an application (no. 25357/94) against the Kingdom of Belgium lodged by Mr Aerts with the Commission under Article 25 on 8 August 1994.

The applicant's application to the Court referred to Article 48 of the Convention, as amended by Protocol No. 9 with regard to Belgium; the Commission's request referred to Articles 44 and 48 and to the declaration whereby Belgium recognised the compulsory jurisdiction of the Court (Article 46). The object of the application and of the request was to obtain a decision as to whether the facts of the case disclosed a breach by the

*Notes by the Registrar*

[1]. The case is numbered 61/1997/845/1051. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

[2]. Rules of Court B, which came into force on 2 October 1994, apply to all cases concerning States bound by Protocol No. 9.

respondent State of its obligations under Article 5 §§ 1 and 4 and Articles 6 and 3 of the Convention.

2. On 30 July 1997 the applicant designated the lawyer who would represent him (Rule 31 of Rules of Court B).

3. The Chamber to be constituted included *ex officio* Mr J. De Meyer, the elected judge of Belgian nationality (Article 43 of the Convention), and Mr R. Bernhardt, the Vice-President of the Court (Rule 21 § 4 (b)). On 27 August 1997, in the presence of the Registrar, the President of the Court, Mr R. Ryssdal, drew by lot the names of the other seven members, namely Mr L.-E. Pettiti, Mr I. Foighel, Mr R. Pekkanen, Mr J.M. Morenilla, Mr B. Repik, Mr P. Jambrek and Mr U. Lõhmus (Article 43 *in fine* of the Convention and Rule 21 § 5).

4. As President of the Chamber (Rule 21 § 6), Mr Bernhardt, acting through the Registrar, consulted the Agent of the Belgian Government ("the Government"), the applicant's lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 39 § 1 and 40). Pursuant to the order made in consequence, the Registrar received the Government's and the applicant's memorials on 9 and 14 January 1998 respectively. In a letter of 3 April 1998 the Secretary to the Commission indicated that the Delegate did not intend to reply in writing.

5. On 2 April 1998 the Commission had produced the file on the proceedings before it, as requested by the Registrar on the President's instructions.

6. In accordance with the President's decision, the hearing took place in public in the Human Rights Building, Strasbourg, on 20 April 1998. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

(a) *for the Government*
Mr J. LATHOUWERS, Deputy Legal Adviser,
Head of Section, Ministry of Justice, *Agent*,
Mr E. JAKHIAN, of the Brussels Bar, *Counsel*;

(b) *for the Commission*
Mr J.-C. GEUS, *Delegate*;

(c) *for the applicant*
Mr J.-L. BERWART, of the Liège Bar,
Mr P. FRAIPONT, of the Liège Bar, *Counsel*.

The Court heard addresses by Mr Geus, Mr Fraipont, Mr Berwart and Mr Jakhian.

# AS TO THE FACTS

## I. THE CIRCUMSTANCES OF THE CASE

7. The applicant, a Belgian national born in 1964, was arrested on 14 November 1992 for an assault causing its victim to be certified unfit for work, having attacked his ex-wife with a hammer. He was placed in detention pending trial, first in a two-person cell (see paragraph 23 below) and then on a ward in the psychiatric wing of Lantin Prison.

### A. The detention order and its execution

8. On 15 January 1993 the Committals Chamber (*chambre du conseil*) of the Liège Court of First Instance imposed a detention order on the applicant pursuant to section 7 of the "Social Protection" Act of 1 July 1964 (see paragraph 21 below). It decided that, pending his detention in an institution to be designated by the competent mental health board (see paragraph 21 below), Mr Aerts would be held provisionally in the psychiatric wing of Lantin Prison. The order was worded as follows:

> "The Committals Chamber of the Liège Court of First Instance,
>
> …
>
> Adopting the reasons set out in the public prosecutor's written submissions;
>
> …
>
> Finds that the accused committed the acts referred to in the prosecution submissions…;
>
> Notes that at the material time the accused was suffering from a severe mental disturbance which made him incapable of controlling his actions and that he is still suffering from the same condition;
>
> Orders the accused to be detained;
>
> Orders that, pending the detention of the accused, who is at present in prison, in an institution to be designated by the Mental Health Board, he shall be detained provisionally in the psychiatric wing of Lantin Prison."

9. On 10 March 1993 a psychiatrist sent the mental health board for the psychiatric wing of Lantin Prison the following report:

> "Aerts, a detainee who is at present being held in the psychiatric wing of Lantin Prison, is a subject with a very fragile, badly organised personality and is at best what could be described as a borderline case. He is a severely addicted drug user who has been involved for many years in a sado-masochistic relationship with a young woman. He is extremely anxious in the common room of the wing, continually asks for his medication to be changed and is perpetually plunged in ruminations about how the relationship with his girlfriend on the outside is working out. His mental masochism is patently obvious to anyone listening to him and it would seem that he urgently requires the full benefits of an institution better equipped to calm the constant anxiety he feels at the moment. It is therefore an urgent matter for him to be able to leave the psychiatric wing of Lantin Prison."

10. On 22 March 1993 the Mental Health Board designated the Paifve Social Protection Centre as the place where the applicant should be detained.

11. On 27 July 1993 the applicant requested leave in order to go back to live with his grandfather. In support of this application his family doctor, who had consulted the psychiatrist attached to the psychiatric wing, had on the previous day sent the Mental Health Board the following note:

> "I am writing to you concerning Mr Michel Aerts, who seems to have been making satisfactory progress recently. That applies to both his behaviour and his short and medium-term projects.
>
> Renewable leave would provide just the right opportunity to observe his behaviour and the way he sets about his projects outside the prison environment."

12. In a decision of 2 August 1993 the Mental Health Board rejected the application in the following terms:

> "It is not acceptable that our decision of 22 March 1993 placing [the applicant] in the Paifve Social Protection Centre has still not been executed.
>
> That failure of administration on the part of the responsible authorities is harmful to the person concerned, who is not getting the treatment required by the condition which led to his detention.
>
> However, the Mental Health Board cannot countenance any form of release which would make the person concerned a danger to himself and others."

13. On 27 October 1993, five days after the judgment given by the Liège Court of Appeal (see paragraph 19 below), the applicant was transferred to the Paifve Social Protection Centre.

14. On 19 November 1993 the Mental Health Board, at the applicant's request, decided to release him on probation on the grounds that "the detainee's mental state [seemed] to have improved sufficiently" and that "the conditions of his social rehabilitation [were] such as to permit the belief that he [was] no longer a danger to society". It made its decision subject to a number of conditions, which included the obligation to accept medical and social supervision and the obligation to live at the La Volière Hospital.

15. On 24 November 1993 Mr Aerts was released.

16. On 23 December 1996, having regard to the deterioration of the applicant's behaviour and the breach of the conditions for his release, particularly abstention from heroin and alcohol, the Lantin Mental Health Board again ordered his detention and designated the Paifve Social Protection Centre for that purpose.

## B. The injunction proceedings

### *1. The proceedings before the President of the Liège Court of First Instance*

17. On 14 April 1993, being still detained in the psychiatric wing of Lantin Prison, Mr Aerts, together with three other prisoners in the same situation, applied to the President of the Liège Court of First Instance for an injunction ordering his immediate transfer, with a penalty of 10,000 Belgian francs (BEF) per day of delay. Among other allegations, he submitted that the conditions of his detention constituted inhuman and degrading treatment within the meaning of Article 3 of the Convention.

18. On 10 May 1993 the President of the Court of First Instance ruled that the applicant's continued detention at Lantin was unlawful and constituted a trespass to the person which should be terminated as quickly as possible. He ordered the State to transfer Mr Aerts to Paifve and ruled that if the State did not comply with the injunction within a week of its being served, it would have to pay the applicant a penalty of BEF 10,000 per day of delay.

### *2. The proceedings in the Liège Court of Appeal*

19. The State appealed on 28 June 1993. On 22 October 1993 the Liège Court of Appeal set aside the injunction of 10 May 1993 and ruled that there were no grounds for using the summary procedure. It held in particular that implementation of a mental health board's decisions was an administrative act which fell outside the jurisdiction of the ordinary courts and that in the present case the administrative authorities had not committed a trespass to

the person which was actionable in the civil courts. It gave the following reasons for its judgment:

> "The respondents are subject to a detention order and Paifve Social Protection Centre was designated, by the Mental Health Board's decisions of ... and … respectively, as the place where they were to be detained. They have not been transferred there and are still being held in Lantin Prison psychiatric wing. The appellant submits that, because of a shortage of places in the Paifve Social Protection Centre, it has been obliged to draw up a waiting-list, on a 'first come, first served' basis, and that the person at the top of the list is transferred to Paifve as soon as a place becomes available as a result of the release of another inmate whose condition has improved. The appellant adds that extensive work has been carried out in order to increase the capacity of Paifve Social Protection Centre and that the opening of a new building there on 1 October 1993 has already enabled several detainees on the waiting-list to be transferred; that the others will be admitted there gradually, for security reasons and to allow the supervisory personnel time to familiarise themselves with their duties (see the director's report of 1 October 1993); and that it is possible that the respondents will very shortly benefit from the opening of this new building.
>
> Although the respondents clearly have a right to be transferred to an institution where they will receive a scientifically organised course of treatment devised by psychiatric staff, it has to be recognised that in Paifve the chronic overcrowding, resulting in a deplorable lack of privacy not conducive to successful treatment, is now coupled with a marked lack of security and premises that are close to being unhygienic, so that treatment there is failing (see the descriptions in two cases in Liège Court of First Instance (Injunction Proceedings), one of 27.2.1990, reported in JLMB [*Revue de Jurisprudence de Liège, Mons et Bruxelles*] 1990, 435 and one of 4.6.1993 (Belgium v. B., C. and T., complaint no. R.F. 8349/93). The appellant has had to postpone transferring inmates subject to detention orders to this centre lest this worsen the situation, and has introduced the waiting-list system, which has been severely disrupted by a number of injunctions – accompanied by high penalties – giving certain inmates priority for reasons difficult to justify. The fact that the appellant has complied with these decisions – essentially because of the burden represented by the penalties – cannot be interpreted as meaning that it has decided once and for all to waive any challenge to the ordinary courts' power to intervene in this area; circumstances which suggest that a right has been waived must be interpreted narrowly and such a waiver can be deduced only where those circumstances are not open to any other interpretation (Cass. [Court of Cassation] 20.4.1989, reported in Pas. [Pasicrisie] 1989, I, 861).
>
> Unlike decisions on the release of an inmate subject to a detention order, which count as judgments (*jugements*) by virtue of their subject matter (see Cass. 17.6.1968 in Pas. 1968, I, 1183, and the opinion of Advocate-General Mahaux), mental health board decisions designating the institution in which a person subject to such an order is to be detained do not concern liberty of person, but only the manner in which a detention order is to be executed (see O. Vandemeulebroeke, '*Les commissions de défense sociale*', RDP [*Revue de droit pénal et de criminologie*], 1986, p. 178, § 80). By their very nature, they are not covered by Article 30 of the Constitution.
>
> The execution of these decisions is an administrative act, not a regulation (*règlement*) governed by Article 107 of the Constitution.
>
> The appellant does not deny the respondents' right to be transferred to Paifve, but argues that they should not be transferred immediately because of the overcrowding there, the resulting disorder and the potential security problems both for staff and other

citizens. The decision to continue to hold the surplus numbers of mentally disturbed offenders in prison psychiatric wings is therefore a choice which the authorities have made after weighing the detainees' right to the most appropriate medical treatment against general security requirements.

That choice is an administrative act of exactly the sort not subject to review by the ordinary courts.

Although the ordinary courts have jurisdiction to order the measures necessary to end or prevent any wrongful infringement of an individual right, they are prohibited from examining the appropriateness of a measure taken by an administrative authority, and from acting as an administrative authority (see the conclusions of Mr Velu, now Principal State Counsel but at that time Advocate-General, in Cass. 27.6.1980, Pas. 1980, I, p. 1357, and in particular p. 1349; and Cass. 27.11.1992, RG 7972, Belgium v. V.D.E. (in liquidation)). A judge dealing with applications for injunctions cannot, without interfering with the administration's general policy, question the expediency of a decision to draw up a waiting-list and disrupt the order of that list by ruling, under threat of a penalty, that a mentally-disturbed offender cared for in less favourable conditions in a psychiatric wing must be transferred immediately. There must, in any event, be other possibilities for transfer, since a mental health board – and in cases of emergency, the chairman alone – can, even of its own motion, send an inmate to another State-run – or, in exceptional cases, private – institution.

The only court which has considered this issue on the merits found (see Liège Court of First Instance (Civil Proceedings), case of H. and V. v. Belgium, 16.2.1993) that the detention was nevertheless still legal, thus ruling out the existence of an arbitrary trespass to the person. The shortage of places in prisons no doubt justifies the building of additional accommodation, but this work – besides being impossible to complete overnight – entails financial commitments which are a matter of general policy not subject to review by the courts. The opening of the new building at Paifve is an illustration of the appellant's concern about the problem of dealing with persons subject to detention orders.

The observations made in 1990 by the President of the Liège Court of First Instance, on the basis of an inspection of the premises and a judicial investigation, provide a clear comparison between the regimes and types of treatment provided for the inmates at Paifve and in the Lantin psychiatric wing; this comparison excludes any need for a new inspection and enables this court to draw the conclusion that, although the situation of mentally disturbed offenders in Lantin is not ideal, and may jeopardise their recovery, the regime under which they – including the respondents – live there cannot be likened to inhuman or degrading treatment as prohibited by the Convention for the Protection of Human Rights and Fundamental Freedoms."

### *3. The application to the Legal Aid Board of the Court of Cassation*

20. On 13 January 1994 the applicant applied for legal aid in order to appeal on points of law against the judgment of 22 October 1993. In support of his application, he put forward the following arguments:

"It appears from the judgment that the Court of Appeal left unanswered the appellant's argument alleging a violation of Article 3 of the above-mentioned European Convention.

In its judgment of 22 October 1993 the Court of Appeal did not reply to this argument, although the provision concerned was cited by the appellant, although the

court of first instance did implicitly but undeniably reply to it and although it was implicitly but undeniably reproduced by the appellant in his submissions to the Court of Appeal, which essentially asked the court to uphold the order appealed from.

It therefore appears that the above-mentioned judgment of 22 October 1993 breached, *inter alia*, Article 97 of the Constitution.

Moreover, the Court of Appeal's judgment of 22 October 1993 is in total contradiction with a judgment given by the First Civil Division of the Liège Court of Appeal on 18 January 1993, in which it upheld an injunction made in a similar case, ruling that the detention was unlawful and constituted a trespass to the person."

In a decision of 10 February 1994 the Legal Aid Board of the Court of Cassation refused the application in the following terms:

"Whereas the appellant has supplied evidence of insufficient means;

Whereas the appeal does not at the present time appear to be well-founded;

The application is rejected."

## II. RELEVANT DOMESTIC LAW AND PRACTICE

### A. The Social Protection Act

21. The relevant provisions of the Law of 1 July 1964 "for the protection of society against mental defectives and incorrigible offenders" ("the 1964 Act") read as follows:

**Section 1**

"Where there are reasons to believe that the accused is suffering from a mental disorder or from a severe mental disturbance or defect making him incapable of controlling his actions, the investigating judicial authorities may, in those cases where pre-trial detention is provided for by law, issue an arrest warrant with a view to placing him under observation…"

**Section 7**

"Except in cases of serious crimes committed for political motives or through the medium of the press, the investigating judicial authorities and the trial courts may order the detention of an accused who has committed a serious crime and is suffering from one of the conditions set out in section 1.

…"

**Section 12**

"For each psychiatric wing there shall be a Mental Health Board.

The Mental Health Boards shall be composed of three members: a serving or retired judicial officer, who shall preside, a lawyer and a doctor.

The members of the Board shall be appointed for three years; they shall each have one or more substitutes.

The chairman and his substitutes shall be appointed by the President of the Court of Appeal. The lawyer and his substitutes shall be chosen by the Minister of Justice from two lists of three names, one submitted by the public prosecutor and one by the President of the Bar Association. The doctor and his substitutes shall be appointed by the Minister of Justice.

…"

**Section 14**

"Detention shall take place in the institution designated by the Mental Health Board.

This shall be chosen from the institutions organised by the Government. The Board may, however, for therapeutic reasons and by means of a decision mentioning the precise reasons, order the person concerned to be placed and held in another institution able to provide an appropriate level of security and treatment.

…

If, at the time when the detention order is made, the accused is in prison, he shall be detained provisionally in the prison's psychiatric wing or, where there is no psychiatric wing, in the wing designated by the court which has ordered his detention."

**Section 15**

"The Board may, of its own motion or at the request of the Minister of Justice, the public prosecutor, the detainee or the latter's lawyer, order the detainee to be transferred to another institution.

An application by the detainee or his lawyer may not be resubmitted within the following six months.

The Board may allow the detainee to alternate detention with short periods of leave in accordance with conditions and rules to be laid down by the Minister of Justice."

**Section 17**

"In an emergency the chairman of the Board may provisionally order transfer to another institution. His decision shall be referred to the Board, which shall determine the issue at its next meeting.

In a like case, on grounds of security, the Minister of Justice may also provisionally order the transfer of the person concerned to another institution and shall inform the Board immediately."

**Section 18**

"The Board shall monitor the detainee's condition and may for that purpose visit his place of detention or delegate one of its members to do so. It may, of its own motion or at the request of the public prosecutor, the detainee or the latter's lawyer, order the detainee's release, without conditions or on probation, where his mental condition has improved sufficiently and the appropriate conditions for his social rehabilitation have been established. If an application from the detainee or his lawyer is rejected, it may not be resubmitted within six months of the date of rejection.

…"

**Section 20**

"Where release on probation is ordered, the detainee shall be subject to medical and social supervision whose duration and conditions shall be specified in the order.

Where his conduct or mental condition reveals a danger to society, particularly if he does not comply with the conditions imposed on him, the released detainee may, on an application from the public prosecutor of the district where he is found, be returned to detention in a psychiatric wing. The subsequent procedure shall be as laid down in sections 14 and 16."

## B. Belgian case-law

22. In 1989 the President of the Liège Court of First Instance, as the judge responsible for hearing urgent applications, was for the first time asked to deal with problems arising from the continued detention in the psychiatric wing of Lantin Prison of persons who the Mental Health Board had decided should be detained at the Paifve Social Protection Centre. This first application, lodged by a Mr H. and a Mr V., gave rise to an inquiry which included a visit to the psychiatric wing of Lantin Prison and interviews with the two complainants and the doctors working at the Centre.

23. The report on the visit to the premises and the interviews with Mr H. and Mr V., drawn up on 10 January 1990, is worded as follows:

"At 2 p.m. the Chairman declared the hearing open.

We went into the psychiatric wing, which is separated off from the rest of the prison, and consists of:

– one central office, with three or four supervisors, but no nurse;

– one dormitory with 26 beds in all, arranged along the two sides of the room, with a bedside table next to each bed. Two of these beds are reserved for prisoner-helpers (i.e. prisoners who are not mentally ill who have volunteered for this duty. They are considered trustworthy but have no special qualifications and are there to help the warders in the event of an incident). There are two warders: one on the ward and one in the cell area;

– one day-room with a television, a table-tennis table, two tables and nine chairs, and a surveillance camera covering the whole room. This room is immediately opposite the dormitory, and was initially supposed to be a dormitory as well. The medical authorities decided it was better to designate one as a sleeping area and the other as a day area (where smoking is allowed);

– near the day-room, the washroom, containing two toilets and a washbasin;

– near the dormitory, a separate bathroom with three showers, a bath and five washbasins;

– between the dormitory and the day-room, a corridor in which meals are served;

– a small room where, every week, drawing and French classes are held for an hour;

– a cell area currently housing twenty people, including eight people in twin cells (4 x 2). A central corridor separates the cells, in which the occupants can watch television and play cards between 6 and 9 p.m. In the morning and afternoon, they are allowed to go out into the exercise yard for one or two hours, depending on the weather. In the twin cells, one foam mattress has been placed directly on the floor;

– a fairly spacious exercise yard reserved for the inmates of the wing (of the ward and cell area alike).

When we visited the common room the occupants stated that:

– there were too many of them;

– they had nothing to do;

– they spent all day in the day-room, which seemed a very long time to them;

– it was very hot;

– they did not have enough air because the windows were never opened;

– they were entitled to only one visit per week for an hour and a half;

– they were not allowed to use the telephone;

– they could change their clothes only very rarely;

– they were sent all the misfits from other places;

– there were not enough supervisors (three during the week, and often fewer at the weekend);

– they had regular contact with the psychiatrist and were on very good terms with him.

When we visited the cell area,

Mr H. told us that:

– he had no work to do, so time passed very slowly for him;

– he spent the whole day resting;

– he saw the doctor when he asked to but the doctor did not examine them of his own accord;

– there was no psychologist;

– from time to time he saw a social worker, but she was overworked as she had other duties in the prison and was not there every day; he therefore saw her only once a week at most;

– there were never any trips outside and no leave;

– relations with the doctor and the supervisors were very good.

Mr V. told us that:

– he had no work, and could not do any sport;

– he was not allowed coffee or a lighter;

– there was no psychologist;

– he saw the social worker when he asked to, if she was there;

– the warders were good, but there were not enough of them."

24. On 15 January 1990 the President of the Court of First Instance interviewed the psychiatrist assigned to the psychiatric wing of Lantin Prison. His statement reads as follows:

"…

I am neither a relative nor an associate of the complainants. I am the only neuropsychiatrist (or doctor specialising in psychology) in Lantin Prison. I work there for ten hours a week: two hours on Mondays, three hours on Tuesdays and Thursdays, and one hour on Fridays and Saturdays. The scope of my work is vast, as I am in theory responsible for looking after all the prisoners in Lantin (about 700 of them), not just the inmates of the psychiatric wing. It is the only prison in Belgium where there is only one neuropsychiatrist for so many prisoners and people subject to detention

orders. I spend three-fifths of my time in the psychiatric wing. There are many different types of inmate: people under detention orders; drug addicts who are sent to the wing when they first arrive in Lantin (new ones arrive almost every day); prisoners – on remand or convicted – with a wide range of mental disorders; and finally, people undergoing psychiatric observation, particularly at the request of an investigating judge. The wing has 42 beds, including three for prisoner-helpers, but in fact there are between 35 and 55 inmates. During the holidays there are about 47 to 49. The dormitory has 23 beds and there are 13 cells, currently housing 17 people under detention orders. The figure 40 is much too high, as these people need a lot of psychiatric and neurological care, and occupational therapy. They require treatment for acute problems, which is given. They should also be treated on an ongoing basis with a view to their social rehabilitation. They should have regular consultations with psychologists and social workers. I also think it is essential for them to be given work. And yet this ongoing treatment is non-existent.

As for the people looking after them, there is only one part-time psychiatrist (myself). There are no qualified nurses, only supervisors with no special training. There should be five supervisors per shift, but there are often only four and sometimes even three. The presence of these supervisors is very important for the inmates: they are there to listen to them, talk to them, stay on the ward and play games with those who want to, which is practically impossible given the high number of inmates and the low number of supervisors. They are also supposed to supervise the inmates' visits and the exercise yard. One of these supervisors, who is not a nurse, has to prepare the medication. There is no psychologist, and no occupational therapist, although one is needed to make work part of therapy. There is no tutor. There is only one social worker, who also works in other parts of Lantin (particularly with the women prisoners). The inmates under detention orders are also given a few music, English and French lessons by volunteer teachers, but much more could be done...

Inmates under detention orders may see me on request. I do not examine them systematically every day. It would be better for me to see them regularly and talk with them, but this is quite impossible given their number and the few hours I have at my disposal.

[After the above statement was read back to him, the witness added:]

Ongoing treatment is becoming increasingly necessary, given that the inmates under detention orders are spending longer and longer in the psychiatric wing, whereas they should be in a Social Protection Centre.

[In reply to a question from Mr Berwart:]

The detainees cannot be given intravenous injections, as these must be given by a doctor. They can be given only intramuscular injections, which should be given by a nurse but are given by supervisors whom I have shown how to do it. This cannot cause any serious problems, however. I only see inmates at their request. Often, what they want is very specific, so that I need to spend only a short time with them. However, when they want to 'get things off their chest', I usually spend fifteen minutes or half an hour with them, which I consider too little.

[In reply to a question from Mr Dewez:]

Generally speaking, intravenous injections may be required, particularly for acute depression. These injections cannot possibly be given in the psychiatric wing, owing to the lack of qualified staff.

…"

25. In an injunction of 27 February 1990 issued on the application of Mr H. and Mr V., the judge responsible for urgent applications held that, where it had been decided that a person was to be detained at Paifve, his continued detention in the psychiatric wing was in breach of "both sections 6 and 14 of the Social Protection Act of 1 July 1964 and Article 3 of the Convention". He took the view that the situation at Lantin was much less favourable than at Paifve, noting that those detained there did not have the social, psychological and psychiatric care the Act required, or regular medical attention from a psychiatrist, or an environment suitable for the treatment of psychiatric patients. He accordingly ordered the State to provide the complainants with a detention regime that complied with the Act. When the Liège Court of First Instance came to consider the merits of the case, it held that the detention had remained lawful in spite of the long delay that had occurred before the transfer from Lantin to Paifve.

26. The President of the Liège Court of First Instance, sitting as the judge responsible for urgent applications, subsequently issued a number of injunctions along the same lines as that of 27 February 1990; in each case the State complied.

27. Hearing for the first time an appeal by the State against such an injunction, the Liège Court of Appeal, in a judgment of 18 January 1993 (M. v. Belgium judgment) upheld a decision that it was unlawful to continue to hold a detainee at Lantin despite the Mental Health Board's decision, in the following terms:

"Whereas the Mental Health Board noted on 26 February 1991 that the doctor responsible for the wing had written in his report of 22 February 1991 that:

– the inmates' mental health was deteriorating on account of the conditions they found themselves in on the wing, where they were obliged to mix with a constant stream of drug addicts, who revived a craving for drugs among some of them;

– there was a serious risk of an irreversible deterioration of the patient's mental condition if he was left any longer on the wing, where it was obvious that he could not receive appropriate treatment;

– the failure to execute the detention order within a reasonable time invalidated the detainee's detention, which became unlawful, and a reasonable time had expired.

Whereas the judge responsible for urgent applications rightly ordered payment of a penalty in default of compliance with his decision;

Whereas, indeed, the attitude of the appellant, which had shown some reluctance to execute the earlier decisions, justified such a measure…"

## C. The report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, of 14 October 1994, and its follow-up

### *1. The CPT's report*

28. On a visit to Belgium from 14 to 23 November 1993 the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("the CPT") went to several places of detention, including Lantin Prison. In its report, made public on 14 October 1994, it noted in particular with regard to the psychiatric wing at Lantin:

"188. The psychiatrist mentioned of his own accord the problems and the inadequacies of the regime on the psychiatric wing. All the patients with whom the delegates spoke complained about their lack of contact with qualified staff, although they mentioned the positive attitude of the prison staff.

189. Contact with the psychiatrist was extremely basic. Some patients saw him once every ten days; others, less frequently – for example, one patient who had been on the wing since July 1992 had seen him six times; another, on the wing since March 1993, who was obviously depressed and suicidal, had seen him once; another, who had been transferred to the wing in May 1993, twice. It appears that the consultations are extremely brief. In addition, some patients have claimed that they had to stand up during consultations.

190. During our visit several patients under detention orders were waiting to be transferred to a Social Protection Centre. One had been designated for transfer to Tournai since 22 December 1992 and had been on the wing for over a year (since 22 September 1992), while others had been waiting for their transfer for several months. It is obvious that keeping mental patients detained for lengthy periods in the conditions described above carries an undeniable risk of causing their mental state to deteriorate.

The CPT delegation was informed that, at the time, there was one institution specifically designated as a Social Protection Centre, at Paifve, and six other institutions (either hospitals or prisons) with a section reserved for people subject to detention orders. However, it appears that there are more such people than there are places at these institutions.

191. The psychiatric wing admits patients needing psychiatric observation and/or care, but it has neither the facilities nor the staff appropriate to a psychiatric hospital. The standard of care of the patients on the psychiatric wing fell, in every respect, below the minimum acceptable from an ethical and humanitarian point of view.

192. Consequently, the CPT recommends that the Belgian authorities should take, without delay, the necessary measures to:

– significantly increase the medical staff of the wing, which should include at least the equivalent of a full-time psychiatrist;

– assign sufficient numbers of qualified, psychiatrically trained nursing staff to the wing;

– ensure that qualified nursing staff are on stand-by on the wing at night and end the system of night supervision by prisoner-helpers;

– put in place personalised programmes of therapeutic activities involving the full range of treatment approaches (psychological, social and occupational);

– create a personalised therapeutic environment where material conditions are concerned (personal effects, wardrobes, sitting-rooms, washrooms separated from living quarters, etc.);

– more generally, make significant improvements to the physical living conditions.

193. The CPT further recommends the Belgian authorities to explore the possibility of replacing the dormitory with bedrooms for one or two patients.

194. Lastly, the CPT recommends that the Belgian authorities should make it a high priority to find a solution to the above-mentioned problem of the transfer of patients subject to detention orders.”

### *2. The Belgian Government’s comments*

#### (a) The interim report of 3 May 1995

29. In an interim report made public on 3 May 1995, in reply to the CPT’s report of 14 October 1994, the Belgian Government stated that it was incorrect to say that prisoners on the psychiatric wing at Lantin were left under the sole supervision of prisoner-helpers: two prison officers belonging to the staff of the wing were present at night.

**(b) The follow-up report of 21 February 1996**

30. The Belgian Government filed a follow-up report which was made public on 21 February 1996. This contained, *inter alia*, the following comments on the above-mentioned CPT report (see paragraph 28 above):

> "[re paragraph 192 of the CPT's report]
>
> It is important to note that a guidance and treatment unit (*UOT*) was created at Lantin psychiatric wing in 1993. This unit, which has been operational since 9 December 1993, comprises a psychiatrist, a deputy director, two psychologists, a social worker and an administrative assistant.
>
> The unit has organised a scheme involving co-operation with a social work college which trains prison tutors. As a result, trainee tutors from this college will be able to do the practical part of their course in Lantin Prison, under the supervision of the *UOT* staff.
>
> These trainee tutors will be responsible for designing a work structure capable of being expanded to accommodate other contributions. They will focus essentially on the psychiatric wing and the women's wing.
>
> Their aim will be to introduce occupational activities on the psychiatric wing, such as an occupational therapy workshop, an oral expression workshop, sport, etc….
>
> In addition to the creation of the *UOT*, referred to above, steps are being taken to recruit a psychiatric nurse and a psychiatrist, for thirty hours a week. These trained staff will be assigned exclusively to the psychiatric wing.
>
> [re paragraph 193 of the CPT's report]
>
> Only dormitory accommodation permits continuous (24-hour) surveillance; checks on cells could be made, at most (where the rules require special surveillance) once every fifteen minutes.
>
> The Prison Service considers that it is for the doctor in charge of the psychiatric wing to decide whether, in view of each inmate's particular condition, he should be placed in the dormitory or in a cell. Therefore, both possibilities should exist side by side.

Moreover, it should be remembered that the wing does have a small number of cells (individual, twin or three-bed).

[re paragraph 194 of the CPT's report]

It should be explained at the outset that, under section 14 of the Act of 1 July 1964 'for the protection of society against mental defectives and incorrigible offenders', mental health boards have the power to decide, quite independently, where a person is to be detained.

These administrative authorities, one of which exists for each psychiatric wing, are totally autonomous and have judicial powers. Thus, for instance, they can decide to release someone without conditions or on probation.

A release order may be challenged by the public prosecutor. In this event, the case file is referred to a higher mental health board for a ruling. A decision not to release someone, on the other hand, may be challenged by way of an appeal to the Court of Cassation.

The boards place persons subject to detention orders in special institutions run by the Ministry of Justice (the Paifve Social Protection Centre (*EDS*) and the mental-health sections of Merksplas and Turnhout Prisons) or in institutions run by the Walloon Region (Mons *EDS* for women and Tournai *EDS* for men) or in private psychiatric hospitals which agree to admit them.

It appears that there are particular problems with implementing mental health board placement decisions in the French Community; problems of lack of money and of places.

Historically, the mental health boards in the south of the country have been able to send people subject to detention orders to Mons *EDS* (in the case of women) and Tournai *EDS* (in the case of men). These institutions, which were originally run by the national Ministry of Public Health, and are now run by the Walloon Region, bill the Ministry of Justice to defray the cost of looking after the detainees placed with them.

However, over a very short period and without prior notice, these charges, which are fixed by the National Institute of Sickness and Disability Insurance, have increased very sharply, so that the amount allocated in the budget to cover them has turned out to be insufficient. It was necessary to request a further allocation, but this is granted only for the following financial year.

As regards the problems of capacity, we must point out that the number of places in the Paifve and Tournai Social Protection Centres is such that, for several years now, detainees have spent several months on prison psychiatric wings before they can actually be transferred to the *EDS* designated by the relevant mental health board. They are therefore 'placed' on a waiting-list in chronological order.

The fact that it is impossible to admit them immediately to their designated institution has led some of their lawyers to apply, almost systematically, to the president of the relevant court of first instance for an injunction to force Belgium to implement the boards' decisions.

While the Belgian State has had orders made against it at first instance in several of these cases – orders backed up by penalties – it is noteworthy that this has not been the case on appeal, where, for instance, it has been held (see Civ. Liège, 1 October 1993) that 'it is not for the ordinary courts to substitute their decision for that of the administrative authority and to order a detainee to be transferred regardless of the problems which that will pose for the administration, such as the choice of another State institution or, exceptionally, a private one' and that, 'although the Social Protection Act is not being fully complied with, the fact that the respondent is forced to mix with persons imprisoned under the ordinary criminal law cannot be likened to inhuman or degrading treatment contrary to Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms'. Similarly, an appeal decision of the same court of 16 February 1993 held that the Prison Service could rely on the defence of *force majeure* as it had neither the premises nor the staff to comply properly with the Social Protection Act.

Although no such case is currently pending before the Court of Cassation, it should be pointed out that on 8 August 1994 a person subject to a detention order lodged an application against Belgium with the European Commission of Human Rights. This case is still pending at the present time.

It should also be pointed out that, in theory, Paifve *EDS* could provide sixty more places. This extra capacity can be fully utilised only if considerable renovation work on the disused building is carried out and the staff is increased. The renovation project is planned for the medium term (1999–2000).

If the spare capacity did become available, the total number of places might attain the 'proper' level. However, this increased capacity would obviously not save the boards having to send people to Tournai *EDS*, which has specialised equipment and staff. It is important to retain that possibility since Ministry of Justice and private institutions alone are totally insufficient to meet the demand.

Finally, it must be pointed out that the various federal and regional authorities involved in the problem of placing and treating persons subject to detention orders will be liaising in an attempt to find solutions. These negotiations will be organised by a working party to be set up by the Ministry of Justice, which will include representatives of the different parties involved."

## PROCEEDINGS BEFORE THE COMMISSION

31. Mr Aerts applied to the Commission on 8 August 1994. He complained that he had been detained in breach of Article 5 § 1 (e) of the Convention on account of his continued detention in the psychiatric wing of Lantin Prison pending his transfer to the Paifve Social Protection Centre, which had been designated as his place of detention in the Mental Health Board's decision of 22 March 1993. He further alleged that the Liège Court of Appeal's refusal, on 22 October 1993, to review the lawfulness of his continued detention had infringed his right to take judicial proceedings, set forth in Article 5 § 4. Moreover, the rejection of his application for legal aid for an appeal to the Court of Cassation against the above-mentioned judgment of 22 October 1993 had infringed his right of access to a tribunal, within the meaning of Article 6. Lastly, he complained of the conditions of detention on the psychiatric wing, arguing that they amounted to inhuman and degrading treatment, prohibited by Article 3.

32. The Commission declared the application (no. 25357/94) admissible on 2 September 1996. In its report of 20 May 1997 (Article 31), it expressed the opinion that there had been violations of Article 5 § 1 (twenty-nine votes to two) and Article 3 of the Convention (seventeen votes to fourteen), but no violation of Articles 5 § 4 or 6 (unanimously). The full text of the Commission's opinion and of the dissenting opinions contained in the report is reproduced as an annex to this judgment[1].

## FINAL SUBMISSIONS TO THE COURT BY THE GOVERNMENT

33. In their memorial the Government submitted that "there was no violation of Articles 3, 5 or 6 of the Convention while the applicant was detained in the psychiatric wing of Lantin Prison".

[1]. *Note by the Registrar*. For practical reasons this annex will appear only with the printed version of the judgment (in *Reports of Judgments and Decisions* 1998), but a copy of the Commission's report is obtainable from the registry.

# AS TO THE LAW

## I. THE GOVERNMENT'S PRELIMINARY OBJECTIONS

### A. Applicant's lack of "victim" status

34. The Government submitted that Mr Aerts could not claim to be a victim of a breach of Articles 3 and 5 § 1 of the Convention. His application partook of the nature of an *actio popularis*, in that it was calculated to induce the Convention institutions to make a general ruling on the lawfulness of the conditions of detention of mentally ill persons detained in the psychiatric wing of Lantin Prison. By basing his application on the findings of the Belgian courts and the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("the CPT"), rather than on the particular circumstances of his detention, Mr Aerts had diverted the right of petition from his individual objective in order to pursue a joint objective.

35. The applicant contested this submission. His application was by no means intended to promote general ideas but to secure a declaration that the Minister of Justice's refusal to comply with the Mental Health Board's decision of 22 March 1993 had infringed his rights under the Convention.

36. According to the Delegate of the Commission, the fact that the applicant's fate had been shared by other persons to whom the Social Protection Act applied was of little consequence. What Mr Aerts was complaining of was that he personally had been affected by the detention concerned.

37. The Court notes that the observations on the admissibility of the application submitted by the Government on 20 September 1995 made no mention of the question of the applicant's victim status. The question therefore arises whether the Government are not estopped from raising the issue before it. In any event, even supposing that they are not, the objection cannot be allowed, since Mr Aerts can claim to be the "victim" of an infringement of his rights, the fact that he was detained for too long in the psychiatric wing of Lantin Prison having affected him directly.

### B. Late submission of the application

38. In their memorial the Government submitted – as they had done before the Commission – that the application should be rejected pursuant to Article 26 of the Convention, as the applicant should have lodged it within six months of the end of the situation which, in his opinion, was in breach of Articles 3 and 5 of the Convention, that is before 27 April 1994, since he had been transferred to the Paifve Social Protection Centre on 27 October 1993. His application was out of time, having been lodged on 8 August 1994.

39. The applicant argued that the decision of the Legal Aid Board of the Court of Cassation of 10 February 1994 (see paragraph 20 above) was the final decision from which the six-month time-limit should be calculated. His attempt to appeal on points of law had failed only because that Board had refused to grant him legal aid. But the grant of legal aid had been an indispensable prerequisite, since Articles 1079 and 1080 of the Judicial Code required civil litigants before the Court of Cassation to be represented by counsel, and he did not have sufficient means to pay one. However, an appeal on points of law would have had reasonable prospects of success, given that the Liège Court of Appeal's judgment of 22 October 1993 had been based on legal reasoning subject to review by the Court of Cassation.

40. According to the Commission, it was essential to lodge an appeal on points of law in order to determine what procedure the applicant should follow under domestic law and before the Convention institutions. If the Court of Cassation had ruled that the civil courts had jurisdiction to try his case, Mr Aerts could have submitted a claim for compensation in respect of the damage he had sustained as a result of his continued detention in the Lantin psychiatric wing.

41. The Court notes that the above-mentioned decision of 10 February 1994, by preventing the applicant from taking his case to the Court of Cassation, put an end to the action he had brought and made it impossible for any subsequent compensation claim to succeed. It constituted the final decision from which the six-month time-limit laid down by Article 26 began to run. The objection cannot therefore be upheld.

## II. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

42. The applicant maintained that his detention in the psychiatric wing of Lantin Prison after 22 March 1993, pending his transfer to the Paifve Social Protection Centre, which had been designated as his place of detention, had breached Article 5 § 1 of the Convention, which provides:

"Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

…

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

…"

Firstly, there had been a breach of section 14 of the Social Protection Act of 1 July 1964 ("the 1964 Act"), which provided for the detention of a mentally ill person in a prison as a provisional measure only, pending designation by the relevant mental health board of the institution where he was to be detained. His continued detention on remand had therefore no longer had any legal basis. Secondly, not having been transferred to Paifve, Mr Aerts had been unable to enjoy the benefits of the detention regime his condition required. In the present case the psychiatric wing had not been an appropriate institution for the treatment of the mentally ill. Above all, the treatment he had received had done him harm. The situation on the Lantin psychiatric wing had been described in the two inquiry reports of 10 and 15 January 1990, drawn up after a visit to the premises by the President of the Liège Court of First Instance, to whom the problems of detention in the wing had been submitted, and in the CPT's report of 14 October 1994.

43. The Commission considered that the lawfulness of the applicant's detention should be assessed under Article 5 § 1 (e) only. At the hearing the Delegate observed that the objective of the 1964 Act for persons who, like the applicant, had been charged with an offence but were found on their appearance in court to be severely mentally disturbed, was exclusively therapeutic. The measure laid down for them was detention in a Social Protection Centre until they were cured. As the applicant had not been convicted of an offence, and on account of his mental condition, only sub-paragraph (e) of Article 5 § 1 was applicable.

In the Commission's view, the psychiatric wing could not be regarded as an appropriate therapeutic institution. Accordingly, the applicant's detention had not been in accordance with the measures ordered in his respect and had been unlawful on account of the failure to execute the domestic decisions and to comply with domestic law. At the hearing the Delegate argued that,

under the system established by Parliament in 1964, where a mental health board had designated the place of detention, no period of detention in a psychiatric wing, whatever the quality of the treatment provided there, could be regarded as compatible with domestic law and, therefore, lawful for the purposes of Article 5 § 1 (e).

44. The Government, who had maintained in their memorial that the applicant's detention was justified under Article 5 § 1 (a) and (e), did not contest at the hearing the argument that its lawfulness should be assessed in the light of Article 5 § 1 (e) only. They submitted, however, that, if the Court accepted the Commission's reasoning, according to which the lawfulness of the detention depended on the conditions of detention being appropriately therapeutic, it should find no violation of Article 5 § 1 (e), since in view of the improvement in the applicant's mental health the psychiatric wing could be regarded as an institution which, during the period complained of, was appropriate for his needs.

45. The Court considers that only Article 5 § 1 (e) is applicable to the applicant's detention. Although the Committals Chamber of the Liège Court of First Instance found that Mr Aerts had committed acts of violence, it ordered his detention on the ground that at the material time and when he appeared in court he had been severely mentally disturbed, to the point where he was incapable of controlling his actions (see paragraph 8 above). As he was not criminally responsible, there could be no "conviction" within the meaning of paragraph 1 (a) of Article 5 (see the X v. the United Kingdom judgment of 5 November 1981, Series A no. 46, p. 17, § 39), and in any case the Committals Chamber could not give such a ruling.

46. The Court reiterates that in order to comply with Article 5 § 1, the detention in issue must take place "in accordance with a procedure prescribed by law" and be "lawful". The Convention here refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules of national law, but it requires in addition that any deprivation of liberty should be in keeping with the aim of Article 5, namely to protect the individual from arbitrariness (see, among many other authorities, the Winterwerp v. the Netherlands judgment of 24 October 1979, Series A no. 33, pp. 17–18 and 19–20, §§ 39 and 45, and the Bizzotto v. Greece judgment of 15 November 1996, *Reports of Judgments and Decisions* 1996-V, p. 1738, § 31).

Furthermore, there must be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention. In principle, the "detention" of a person as a mental health patient will only be "lawful" for the purposes of sub-paragraph (e) of paragraph 1 if effected in a hospital, clinic or other appropriate institution (see the Ashingdane v. the United Kingdom judgment of 28 May 1985, Series A no. 93, p. 21, § 44).

47. In the present case, on 15 January 1993, the Committals Chamber decided to order Mr Aerts's detention and stated that, pending a decision by the Mental Health Board designating the institution in which he was to be detained, he would be detained provisionally in the psychiatric wing of Lantin Prison. On 22 March 1993 the Mental Health Board designated the Paifve Social Protection Centre as the place of detention. As there were no spare places at Paifve, the applicant continued to be detained at Lantin for seven months, his transfer not being effected until 27 October 1993 (see paragraph 13 above).

48. The Court notes that the length of provisional detention pending transfer is not specified by any statutory or other provision. Nevertheless, it must determine whether, in view of the purpose of the detention order, the continuation of provisional detention for such a lengthy period can be regarded as lawful.

49. The reports of 10 and 15 January 1990, which reflect the situation obtaining in 1990 (see paragraphs 23 and 24 above), the CPT's report (see paragraph 28 above) and the observations on that report made by the Belgian Government (see paragraphs 29 and 30 above) show sufficiently clearly that the Lantin psychiatric wing could not be regarded as an institution appropriate for the detention of persons of unsound mind, the latter not receiving either regular medical attention or a therapeutic environment. On 2 August 1993, in response to an application for leave lodged by Mr Aerts, the Mental Health Board expressed the view that the situation was harmful to the applicant, who was not receiving the treatment required by the condition that had given rise to his detention. Moreover, the Government did not deny that the applicant's treatment in Lantin had been unsatisfactory from a therapeutic point of view. The proper relationship between the aim of the detention and the conditions in which it took place was therefore deficient.

50. In conclusion, there has been a breach of Article 5 § 1.

## III. ALLEGED VIOLATION OF ARTICLE 5 § 4 OF THE CONVENTION

51. The applicant further submitted that the proceedings in the Liège Court of Appeal had not afforded him access to a tribunal with the power to determine the lawfulness of his continued detention in the psychiatric wing of Lantin Prison. There had therefore been a breach of Article 5 § 4, which provides:

> "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 court concerned had given as the reasons for its refusal to carry out such a review the fact that measures to execute mental health boards'

decisions were administrative acts and that the judicial authorities should not usurp the function of the administrative authorities.

52. The Commission, referring to the Ashingdane case (judgment cited above, p. 23, § 52), expressed the view, in substance, that the object of the applicant's action, namely his immediate transfer to Paifve, did not fall within the scope of the judicial determination of "lawfulness" required by Article 5 § 4, which had therefore not been breached.

53. The Government agreed with the Commission, adding that the remedy exercised by the applicant was not an appropriate means of securing his release for the purposes of Article 5 § 4, regard being had to the fact that the Mental Health Board was the authority empowered to rule on the matter (under section 18 of the 1964 Act).

54. The Court reiterates that the available domestic remedy must afford the possibility of reviewing compliance with the conditions to be satisfied if the detention of a person of unsound mind is to be regarded as "lawful" for the purposes of paragraph 1 (e) (see the X v. the United Kingdom judgment cited above, p. 25, § 58).

55. In the present case Mr Aerts was able to apply to the judge responsible for urgent applications, who held that his continued detention at Lantin was unlawful and accordingly gave judgment in his favour (see paragraph 18 above). On appeal by the State, the Liège Court of Appeal set aside the impugned decision (see paragraph 19 above). However, the judgment given in the present case does not mean that in general an application for an injunction is an unsuitable means of securing enjoyment of the right guaranteed by Article 5 § 4. In a judgment given on 18 January 1993 in a similar case (see paragraph 27 above) the Liège Court of Appeal upheld an injunction issued by the President of the Liège Court of First Instance declaring unlawful a mentally disturbed offender's continued detention at Lantin despite the Mental Health Board's decision that he should be transferred to another institution.

56. In conclusion, in the particular circumstances of the present case, the application for an injunction satisfied the requirements of Article 5 § 4. There has accordingly been no breach of that provision.

## IV. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

57. The applicant further complained of an infringement of his right of access to a court on account of the refusal by the Legal Aid Board of the Court of Cassation to grant him legal aid for an appeal on points of law against the Liège Court of Appeal's judgment of 22 October 1993. He relied on Article 6 § 1 of the Convention, the relevant part of which provides:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a … hearing … by [a] … tribunal…"

In the present case, where determination of a much-disputed issue was sought, the interests of justice required the applicant to be granted legal aid to enable him to submit his arguments to the Court of Cassation. At the hearing the applicant submitted, in the alternative, that if the Court were to consider that no civil right was at stake, it should accept an amended plea to the effect that the refusal to transfer him to Paifve was a matter covered by the concept of a "criminal charge".

58. The Commission and the Government considered that Article 6 § 1 was not applicable because proceedings relating to the detention of a person of unsound mind did not concern civil rights and obligations.

Even supposing that one of the applicant's civil rights was in issue in the case, the Government pointed out that there was no absolute entitlement to legal aid under the Convention. Moreover, the merits of the dispute referred to the courts under the summary procedure still remained to be determined, notwithstanding the Liège Court of Appeal's ruling that the ordinary courts did not have jurisdiction.

59. The Court considers that the present case did not involve "determination of a criminal charge". On the other hand, the outcome of the proceedings was decisive for civil rights, within the meaning of Article 6 § 1. The question of the applicant's transfer to Paifve was not the only matter in issue in the case before the Belgian courts, which concerned in substance the lawfulness of the deprivation of liberty. But the right to liberty, which was thus at stake, is a civil right. In requesting the Court of Cassation to rule that the courts did have jurisdiction to review the compatibility of his detention at Lantin with Belgian law and the Convention, Mr Aerts was seeking a judicial declaration that these courts had jurisdiction not only to order his transfer to a Social Protection Centre, an issue which was no longer relevant, but also and above all to award him compensation for unlawful imprisonment.

60. That being so, the applicant, who did not have sufficient means to pay a lawyer, could legitimately apply to the Legal Aid Board with a view to an appeal on points of law, since in civil cases Belgian law requires representation by counsel before the Court of Cassation. It was not for the Legal Aid Board to assess the proposed appeal's prospects of success; it was for the Court of Cassation to determine the issue. By refusing the application on the ground that the appeal did not at that time appear to be well-founded, the Legal Aid Board impaired the very essence of Mr Aerts's right to a tribunal. There has accordingly been a breach of Article 6 § 1.

## V. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

61. Lastly, the applicant complained of the conditions of detention in the psychiatric wing of Lantin Prison, for anything more than a short period, for persons requiring psychiatric treatment. These constituted inhuman and degrading treatment within the meaning of Article 3 of the Convention, which provides:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

The above-mentioned reports of 10 and 15 January 1990, drawn up when the judge responsible for urgent applications visited the premises and took statements from witnesses before issuing the injunction of 27 February 1990 on an application from Mr H. and Mr V. (see paragraphs 23–25 above), and the report of the CPT (see paragraph 28 above) provided sufficient proof of this. In the present case the applicant had literally been left to his own devices and had not received any regular medical or psychiatric attention. The conditions of detention had caused a deterioration of his mental health. In order to assess how seriously the conditions of detention had affected his mental health, it was sufficient to refer to the opinion of the psychiatrist who, as early as 10 March 1993, wrote that Mr Aerts urgently needed to get away from the psychiatric wing (see paragraph 9 above) and the Mental Health Board's decision of 2 August 1993 finding that failure to comply with its decision of 22 March 1993 was harming the applicant (see paragraph 12 above). That being the case, the treatment imposed should at the least be described as degrading.

62. The Government pointed out that, although the CPT had severely criticised the conditions of detention on the psychiatric wing of Lantin Prison, in its report it had not asserted that the physical conditions of detention or the lack of medical attention constituted inhuman or degrading treatment of the inmates. The fact that there was a risk of the deterioration of their mental health, which was mentioned in the CPT's report, was not sufficient to establish that their treatment reached the minimum level of severity that would bring it within the scope of Article 3. Mr Aerts had not by any means proved that his conditions of detention had aggravated his mental illness, or that he had suffered thereby to such an extent as to make an improvement in his condition unlikely.

63. The Commission noted in the first place that a severely mentally disturbed person could hardly be expected to describe what he had undergone as a result of his detention. The particular situation of mental distress caused by extreme anxiety noted in the psychiatrist's report of 10 March 1993 could not have been alleviated, on account of the lack of treatment noted in the Mental Health Board's decision of 2 August 1993. Since the State had not taken within a reasonable time the measures made necessary by that particular situation, it had caused the applicant, by its omission, to suffer treatment

which, in the circumstances of the case, had been inhuman, or at the very least degrading.

64. The Court reiterates that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case (see the Vilvarajah and Others v. the United Kingdom judgment of 30 October 1991, Series A no. 215, p. 36, § 107).

65. It was not contested that the general conditions in the psychiatric wing of Lantin Prison were unsatisfactory and not conducive to the effective treatment of the inmates. The CPT considered that the standard of care given to the patients placed in the psychiatric wing at Lantin fell below the minimum acceptable from an ethical and humanitarian point of view and that prolonging their detention at Lantin for lengthy periods carried an undeniable risk of a deterioration of their mental health (see paragraph 28 above).

66. In the present case there is no proof of a deterioration of Mr Aerts's mental health. The living conditions on the psychiatric wing at Lantin do not seem to have had such serious effects on his mental health as would bring them within the scope of Article 3. Admittedly, it is unreasonable to expect a severely mentally disturbed person to give a detailed or coherent description of what he has suffered during his detention. However, even if it is accepted that the applicant's state of anxiety, described by the psychiatrist in a report of 10 March 1993 (see paragraph 9 above), was caused by the conditions of detention in Lantin, and even allowing for the difficulty Mr Aerts may have had in describing how these had affected him, it has not been conclusively established that the applicant suffered treatment that could be classified as inhuman or degrading.

67. In conclusion, the Court considers that there has been no breach of Article 3.

## VI. APPLICATION OF ARTICLE 50 OF THE CONVENTION

68. Under Article 50 of the Convention,

> "If the Court finds that a decision or a measure taken by a legal authority or any other authority of a High Contracting Party is completely or partially in conflict with the obligations arising from the ... Convention, and if the internal law of the said Party allows only partial reparation to be made for the consequences of this decision or measure, the decision of the Court shall, if necessary, afford just satisfaction to the injured party."

### A. Non-pecuniary damage

69. The applicant asserted that he had sustained non-pecuniary damage caused by the extreme distress resulting from his detention in the psychiatric wing of Lantin Prison. While detained there he had to all intents and purposes been left to his own devices, and in deplorable conditions of detention at that. This had caused him acute anxiety, aggravated by the lack of proper psychiatric treatment. The causal connection was sufficiently established by the psychiatrist's report of 10 March 1993 and the Mental Health Board's decision of 2 August 1993 in which it noted that the applicant's continued detention on the wing was causing him direct harm. With reference to the Law of 13 March 1973 on wrongful pre-trial detention, which establishes a right to compensation calculated on the basis of the number of days of detention undergone, the applicant claimed the sum of 438,000 Belgian francs (BEF) for this non-pecuniary damage, which represented 219 days at BEF 2,000 per day.

70. The Government submitted that the basis of this claim was not relevant, since the compensation awarded under the law in question was justified by the fact that, for one reason or another, the person concerned should not have been imprisoned. That was not so in the present case. In their opinion, the Court's judgment would constitute sufficient satisfaction.

71. The Court considers that the applicant must have suffered, on account of the two breaches of the Convention it has found, a certain amount of non-pecuniary damage which the finding of the breaches concerned is not in itself sufficient to make good. It awards him just satisfaction under this head, as the Delegate of the Commission suggested, which the Court assesses on an equitable basis in the sum of BEF 50,000.

### B. Costs and expenses

72. Mr Aerts claimed reimbursement of BEF 115,605 for the court fees and expenses he had incurred in attempting to prevent or rectify the violations of the Convention. For lawyers' fees he claimed BEF 460,000, representing one hundred and fifteen hours of work at an hourly rate of BEF 4,000. The total hours worked were broken down as follows:

– thirty-five hours for the proceedings before the Belgian courts, fifteen of these being for the injunction proceedings, fifteen for the appeal proceedings and five for the appeal on points of law;

– eighty hours for the proceedings before the Commission and the Court.

73. The Government accepted that the costs incurred for the injunction proceedings were necessary, but argued that they should be divided by four, since the case had been brought by Mr Aerts and three other detainees. The claim for the costs of the proceedings before the Court of Cassation should be dismissed, since the applicant's action had become devoid of purpose after his transfer to the Paifve Social Protection Centre. Lastly, the costs for the proceedings before the Convention institutions should be reduced to take into account only those complaints which had been usefully submitted, namely those in respect of which the Court had found violations. In those conditions, the costs and expenses usefully and necessarily incurred by Mr Aerts before the domestic courts and the Convention institutions could be reimbursed.

74. The Delegate of the Commission left the matter to the discretion of the Court, which, making an assessment on an equitable basis, on the basis of the information in its possession and its relevant case-law, awards the applicant BEF 400,000, minus 10,166 French francs he has already received from the Council of Europe in legal aid.

### C. Default interest

75. According to the information available to the Court, the statutory rate of interest applicable in Belgium at the date of adoption of the present judgment is 7% per annum.

## FOR THESE REASONS, THE COURT

1. *Dismisses* unanimously the Government's preliminary objections;

2. *Holds* unanimously that there has been a breach of Article 5 § 1 of the Convention;

3. *Holds* unanimously that there has been no breach of Article 5 § 4 of the Convention;

4. *Holds* unanimously that there has been a breach of Article 6 § 1 of the Convention;

5. *Holds* by seven votes to two that there has been no breach of Article 3 of the Convention;

6. *Holds* by eight votes to one
(a) that the respondent State is to pay the applicant, within three months, the following sums:
(i) 50,000 (fifty thousand) Belgian francs for non-pecuniary damage;
(ii) 400,000 (four hundred thousand) Belgian francs for costs and expenses, minus 10,166 (ten thousand one hundred and sixty-six) French francs to be converted into Belgian francs at the rate applicable on the date of delivery of the present judgment;
(b) that simple interest at an annual rate of 7% shall be payable on these sums from the expiry of the above-mentioned three months until settlement;

7. *Dismisses* unanimously the remainder of the claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 30 July 1998.

*Signed*: Rudolf BERNHARDT
President

*Signed*: Herbert PETZOLD
Registrar

In accordance with Article 51 § 2 of the Convention and Rule 55 § 2 of Rules of Court B, the following separate opinions are annexed to this judgment:
(a) partly dissenting opinion of Mr Pekkanen joined by Mr Jambrek;
(b) partly dissenting opinion of Mr Foighel.

*Initialled*: R. B.
*Initialled*: H. P.

# PARTLY DISSENTING OPINION OF JUDGE PEKKANEN JOINED BY JUDGE JAMBREK

I have voted in this case for a violation of Article 3 of the Convention for the following reasons.

1. The main question in this case is whether the ill-treatment of the applicant attained the minimum level of severity required for treatment to be described as "inhuman" or "degrading". According to the Court's case-law, treatment is degrading if it grossly humiliates the person concerned before others or drives him to act against his will or conscience, and is inhuman if it deliberately causes severe suffering, mental or physical.

It should be noted that the Commission in its case-law has concluded that inhuman treatment may be found to exist when a person's detention as such causes his ill-health (see Commission's report, paragraph 79).

2. The applicant was arrested on 14 November 1992 and ordered on 15 January 1993 by the Liège Court of First Instance to be confined on the grounds of his mental health. He was provisionally detained in the psychiatric wing of Lantin Prison.

On 22 March 1993, the Mental Health Board for Lantin Prison psychiatric wing ordered the applicant to be transferred to Paifve Social Protection Centre.

The applicant was not transferred to Paifve until 27 October 1993.

3. As regards the state of the applicant's mental health, a psychiatrist at Lantin Prison's psychiatric wing stated in his report of 10 March 1993 to the Mental Health Board for the wing, *inter alia*: "He is extremely anxious in the common room of the wing, constantly asks for his medication to be changed and is perpetually plunged in ruminations about how the relationship with his girlfriend on the outside is working out" (see the judgment, paragraph 9).

This report clearly shows that the applicant at the time urgently needed appropriate psychiatric treatment and that keeping him in the Lantin Prison psychiatric wing caused him severe suffering.

4. The doctor in charge of the Lantin Prison psychiatric wing wrote in his report of 22 February 1991 to the Mental Health Board on the conditions in the Lantin Prison psychiatric wing in another case:

> " – the inmates' mental health is deteriorating on account of the conditions they find themselves in on this wing, where they are obliged to mix with a constant stream of drug addicts, who revive a craving for drugs among some of them;
>
> – there is a serious risk of an irreversible deterioration of the patient's mental condition if he is left any longer on the wing, where it is obvious that he cannot receive appropriate treatment..." (see the judgment, paragraph 27).

The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("the CPT") stated in its report of 14 October 1994 on the Lantin Prison psychiatric wing (see the judgment, paragraph 28), *inter alia*, the following:

> "191. The psychiatric wing admits patients needing psychiatric observation and/or care, but it has neither the facilities nor the staff appropriate to a psychiatric hospital. The standard of care of the patients on the psychiatric wing fell, in every respect, below the minimum acceptable from an ethical and humanitarian point of view."

5. These facts show in my opinion that the applicant urgently needed appropriate psychiatric treatment and that the Lantin Prison psychiatric wing clearly was not able to provide proper treatment. In addition, the applicant was subjected in Lantin to a serious risk of an irreversible deterioration of his mental health. Furthermore, the standard of care of the patients was, in every respect, below the minimum acceptable level, which caused him suffering. The applicant was kept in Lantin altogether for more than nine months, of which more than six months were spent after the State became aware of his situation as a result of his injunction application (see the judgment, paragraphs 17–20). The suffering caused to the mentally ill applicant by keeping him in the above-described conditions for such a long time exceeds in my opinion the minimum level of severity required for inhuman treatment under Article 3 of the Convention.

6. According to the majority's opinion it has not been demonstrated in any satisfactory manner that the applicant was treated in a way which could be described as "inhuman" or "degrading". However, there is no evidence either that the applicant was treated differently from the other patients in Lantin. Therefore, it can in my opinion safely be assumed that the treatment he received was comparable to the general conditions described above in paragraph 5. If the applicant, suffering from extreme anxiety, received similar treatment to all the other patients in the common room of the psychiatric wing, as I am convinced he did, this treatment caused him suffering which should be considered to be "inhuman" within the meaning of Article 3 of the Convention.

7. In my opinion Article 3 of the Convention has been violated in the present case.

# PARTLY DISSENTING OPINION OF JUDGE FOIGHEL

I am partly in disagreement with the majority concerning the award for costs and expenses.

The applicant claimed reimbursement of BEF 115, 605 for court fees and certain documented expenses. He claimed BEF 460,000 for lawyers' fees.

As he presented the Court with a reasonable breakdown of the total number of hours worked by the lawyer, and as the hourly rate of BEF 4,000 corresponds to the general local rate, the Court should have awarded the applicant BEF 565,605 under this head subject to the conditions set out in point 6(ii) of the operative part of the judgment.

In this case there are no convincing reasons why the Government should not reimburse the actual costs and expenses usefully and necessarily incurred by the applicant.