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

COURT (CHAMBER)

CASE OF KEUS v. THE NETHERLANDS

(Application no. 12228/86)

JUDGMENT

STRASBOURG

25 October 1990

In the Keus case*,

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

Mr R. RYSSDAL, *President*,
Mr Thór VILHJÁLMSSON,
Mr L.-E. PETTITI,
Mr B. WALSH,
Mr R. BERNHARDT,
Mr A. SPIELMANN,
Mr N. VALTICOS,
Mr S.K. MARTENS,
Mr I. FOIGHEL,

and also of Mr M.-A. EISSEN, *Registrar*, and Mr H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 27 June and 28 September 1990,

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

PROCEDURE

1. The case was referred to the Court by the European Commission of Human Rights ("the Commission") on 13 December 1989, within the three-month period laid down by Article 32 § 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 12228/86) against the Kingdom of the Netherlands lodged with the Commission under Article 25 (art. 25) by Mr Jacobus Keus, a Netherlands national, on 13 June 1986.

The Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby the Netherlands recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the request was to obtain a decision as to whether or not the facts of the case disclosed a breach by the respondent State of its obligations under Article 5 §§ 1, 2, 4

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* The case is numbered 30/1989/190/250. 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.

** As amended by Article 11 of Protocol No. 8 (P8-11) to the Convention which came into force on 1 January 1990.

*** The amendments to the Rules of Court which came into force on 1 April 1989 are applicable to this case.

and 5 and Article 6 §§ 1 and 3 (art. 5-1, art. 5-2, art. 5-4, art. 5-5, art. 6-1, art. 6-3) of the Convention.

2. In response to the enquiry made in accordance with Rule 33 § 3 (d) of the Rules of Court, the applicant stated that he wished to take part in the proceedings and designated the lawyer who would represent him (Rule 30).

3. On 19 December 1989 the President of the Court decided that, pursuant to Rule 21 § 6 and in the interests of the proper administration of justice, this case and the Koendjbiharie case* should be examined by the same Chamber. The Chamber to be constituted for this purpose included ex officio Mr S.K. Martens, the elected judge of Netherlands nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 § 3 (b)). On 27 January 1990, in the presence of the Registrar, the President drew by lot the names of the other seven members, namely Mr Thór Vilhjálmsson, Mr L.-E. Pettiti, Mr B. Walsh, Mr R. Bernhardt, Mr N. Valticos, Mrs E. Palm and Mr I. Foighel (Article 43 in fine of the Convention and Rule 21 § 4) (art. 43). Subsequently, Mr A. Spielmann, substitute judge, replaced Mrs Palm, who was unable to take part in the consideration of the case (Rule 24 § 1).

4. Mr Ryssdal assumed the office of President of the Chamber (Rule 21 § 5) and, after having consulted - through the Registrar - the Agent of the Netherlands Government ("the Government"), the Delegate of the Commission and the applicant's representative (Rule 38), all of whom had decided not to submit memorials (Rule 37 § 1), directed that the oral proceedings should open on 27 June 1990. The applicant's claims under Article 50 (art. 50) of the Convention reached the registry on 28 May.

5. The hearing took place in public in the Human Rights Building, Strasbourg, on the appointed day. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

- for the Government

Miss D.S. VAN HEUKELOM, Assistant Legal Adviser,
Ministry of Foreign Affairs, *Agent*,
Mr J.C. DE WIJKERSLOOTH DE WEERDESTEIJN, Landsadvokaat, *Counsel*,
Mrs R.E. VAN GALEN-HERRMANN, Ministry of Justice, *Adviser*;

- for the Commission

Mr H. VANDENBERGHE, *Delegate*;

- for the applicant

Mrs G.E.M. LATER, advokate en procureur, *Counsel*,
Mr M.T.M. ZUMPOLLE, *Adviser*.

The applicant was also present.

The Court heard addresses by Miss van Heukelom and Mr De Wijkerslooth de Weerdesteijn for the Government, by Mr Vandenberghe for

* Note by the Registrar: 27/1989/187/247.

the Commission and by Mrs Later for the applicant, as well as their answers to its questions.

AS TO THE FACTS

I. PARTICULAR CIRCUMSTANCES OF THE CASE

6. Mr Jacobus Keus, a Dutch national, currently resides in the Netherlands.

7. On 15 December 1981 the District Court (Arrondissementsrechtbank) of The Hague sentenced him, for murder and a number of attempts to commit armed robbery, to four years' imprisonment, to be followed by two years' placement at the Government's disposal (see paragraph 12 below). The judgment became final on 30 December 1981.

8. While he was serving his sentence, the applicant absconded on several occasions; he remained at liberty a total of 109 days. On 1 May 1984 the Minister for Justice ordered his conditional release with effect from 3 May.

This measure was however purely formal because the applicant had been placed in a psychiatric clinic on 18 February 1983. He absconded regularly from this establishment too. In its decision extending the confinement (see paragraph 10 below), the court noted that, according to the director of the clinic, Mr Keus had spent, since his admission, approximately 19 months at the clinic and 13 months outside.

On 22 May 1984 the Ministry of Justice - in accordance with an administrative practice not provided for by law - wrote to the Crown Prosecutors of The Hague and of Utrecht, and to the director of the clinic, informing them that, unless extended, the applicant's placement would come to an end in 1986, on 14 January and not 3 May. The applicant was, in the Ministry's view, to be regarded as having been held at the Government's disposal during the periods which he had spent outside prison following his escapes. Neither Mr Keus nor his counsel had any knowledge of this letter.

On 14 October 1985 Mrs Later informed the District Court of The Hague that she would be the applicant's lawyer in the proceedings relating to the extension of the confinement. It appeared from her letter that she expected the proceedings to open in April or May 1986.

On 29 November 1985 the applicant escaped from the clinic once more. According to the authorities, he remained in hiding.

9. On 4 December 1985 the Crown Prosecutor requested the District Court of The Hague to extend by two years the applicant's placement; he informed neither Mr Keus nor his lawyer of this.

By a letter dated 18 December 1985, Mr Keus's lawyer requested the Minister for Justice to order her client's release.

10. On 7 January 1986, following a hearing which was attended only by a member of the hospital staff and the Crown Prosecutor, the court granted the request for an extension. According to the Government, the Crown Prosecutor had instructed the police to serve on Mr Keus a summons to appear at this hearing, but they had not succeeded in contacting him.

Mr Keus was notified of the decision - which described him as having no known address - on 19 January, when he telephoned the clinic. After having returned to it, he was held there from 22 February in pursuance of the court's order.

11. By a letter of 20 August 1986 the Secretary of State for Justice informed the applicant's lawyer that the order placing her client at the Government's disposal would not be lifted in the immediate future.

Having observed a significant improvement in his behaviour, the authorities released him provisionally in January 1987. In 1988 the Crown Prosecutor decided not to seek a second extension of the placement at the Government's disposal.

II. RELEVANT DOMESTIC LAW AND PRACTICE

12. Since 1928 the Netherlands Criminal Code (Wetboek van Strafrecht) has contained special provisions applying to persons suffering from a mental deficiency or mental illness. The provisions were substantially amended by an Act of 19 November 1986, which came into force on 1 September 1988. According to Article 37 (as applicable to the events in the present case), the perpetrator of an offence which cannot be imputed to him because he suffers from a mental deficiency or mental illness is not liable to punishment. If the protection of public order so requires, the court may direct that such a person be placed at the Government's disposal so that he can receive treatment at the Government's expense.

Such a measure may also be taken in conjunction with a criminal sanction if the convicted person's responsibility was merely diminished at the time of the offence (Article 37 (a)).

Under Article 37 (b) § 1, the placement lasts for two years unless the Government terminates it earlier. This period commences as soon as the judgment ordering it has become final (paragraph 2 thereof); it is suspended by any other deprivation of liberty resulting from a judicial decision (paragraph 3, according to the most widely accepted interpretation).

13. The court which makes the initial order may extend the confinement, on each occasion for one or two years (Article 37 (b) § 2), on an application by the crown prosecutor, himself acting on the opinion of the director of the clinic. To this end, the crown prosecutor has to submit an

application to the court in question not more than two months and not less than one month before the placement period is due to expire (Article 37 (f) § 1). According to case-law, failure to comply with this requirement renders the application inadmissible.

The prosecutor must attach to his application a copy of the clinic's report on the physical and mental health of the person concerned together with a reasoned declaration - preferably by the doctor treating the patient - on the appropriateness of extending the confinement (Article 37 (f) § 2).

14. Article 37 (g) governs the procedure to be followed for the examination of the application: if possible the court is to hear the person in question and, if it considers additional information to be necessary, interview witnesses and experts. The crown prosecutor and the lawyer of the person confined may attend any hearing, of which a record is drawn up.

By a circular of 16 April 1980, the Minister for Justice issued instructions to the courts to hear the person concerned before extending his placement.

15. By virtue of Article 37 (h) § 1, the court is to give its decision within two months following the lodging of the application. However, Article 37 (b) § 4 states that the person concerned remains at the Government's disposal until the court has ruled on the extension. In a judgment of 14 June 1974 (Nederlandse Jurisprudentie (NJ) 1974, no 436), the Supreme Court (Civil Division) took the view that the last-mentioned rule applied even if the court exceeded the two-month time-limit, which was merely of an exhortatory nature. While recognising how inconvenient this interpretation might be for the person concerned, the court noted that this did not mean that the latter was entirely without a remedy against such a breach:

> "if, once the time-limit laid down in Article 37 (h) has expired, the decision provided for in that provision is arbitrarily delayed, the Government may find itself required, if necessary as a result of legal action by the person confined, to terminate the placement extended pursuant to Article 37 (b) § 4."

By a judgment of 29 September 1989 (NJ 1990, no. 2) the Supreme Court (Civil Division) gave the following clarification regarding the 1974 decision: in itself, the failure to comply with the time-limit laid down in Article 37 (h) does not give rise to an obligation to terminate the placement; the existence of such an obligation depends in particular on the extent to which, and the reasons for which, the time-limit is exceeded as well as the personal and social interests at stake.

According to a judgment of the Supreme Court (Civil Division) of 9 January 1970 (NJ 1970, no. 240), it falls to the court to decide to what extent it must state its reasons in the order extending the confinement, which is neither delivered in public nor appealable (Article 37 (h) § 2), but is served on the person concerned (Article 37 (h) § 3).

16. A person placed at the Government's disposal may at any time request the Minister for Justice to revoke the measure. By virtue of Article 37 (e), the Minister may terminate the confinement at any moment, unconditionally or conditionally, if personal or material circumstances justify such a decision.

In the above-mentioned extract from its judgment of 14 June 1974 (see paragraph 15 above), the Supreme Court was clearly alluding to interlocutory proceedings (kort geding) before the President of the District Court. Thus it confirmed the fundamental role of these proceedings in the Netherlands legal system and practice. The importance of such a remedy in the specific field which is the subject of the present case is moreover illustrated by the three judgments of the Court of Cassation referred to in paragraph 15 above. They were all delivered in interlocutory proceedings, two of which resulted in the President of the District Court ordering the immediate release of the person concerned. In addition, in the proceedings concluded by the judgment of 9 January 1970, the State had argued that the President lacked jurisdiction; its objection was dismissed in accordance with a consistent line of cases decided in interlocutory proceedings and it did not appeal. The Koendjbiharie case also shows the extent to which the "kort geding" constitutes an obvious remedy in the field in question (see the Koendjbiharie judgment given this day, Series A no. 185-B, pp. 35-37, §§ 11 and 14).

Furthermore the adversarial principle is, according to the Supreme Court's decisions, one of the basic principles of Netherlands procedural law. At the time of the events in issue in the present case, the Supreme Court had already drawn striking inferences therefrom. In a judgment of 27 November 1981 (NJ 1983, no. 56), it ruled admissible an appeal against an order extending the confinement of a "mentally ill person", on the ground that it had been made without hearing the person concerned. It did so, having regard to the importance of the principle in question, in spite of the statutory rule restricting the right of appeal to persons heard at first instance. Similarly, by a judgment of 29 March 1985 (NJ 1986, no. 242), it declared admissible, notwithstanding the express provisions of the law, the appeal against a decision ordering the provisional hearing of witnesses, on the ground that the appellant had not been heard first.

PROCEEDINGS BEFORE THE COMMISSION

17. In his application of 13 June 1986 to the Commission (no. 12228/86) Mr Keus criticised the proceedings to extend his confinement. He alleged that neither he nor his lawyer had been informed of these proceedings - his lawyer being accordingly prevented from representing him

- and that the District Court had not heard him. He also complained that he had been unable to challenge in the courts the lawfulness of his continued confinement in the psychiatric hospital. Since no proceedings were available to him to contest the decision of the court in question, his only remedy lay in requesting his release from the Minister for Justice. He relied on Article 5 §§ 1, 2, 4 and 5 (art. 5-1, art. 5-2, art. 5-4, art. 5-5) of the Convention, as well as Article 6 §§ 1 and 3 (art. 6-1, art. 6-3).

18. The Commission declared the application admissible on 6 July 1988. In its report of 4 October 1989 (Article 31) (art. 31), it expressed the unanimous opinion that there had been a violation of Article 5 §§ 4 and 5 (art. 5-4, art. 5-5), but not of Article 5 § 1 (art. 5-1) nor of Article 6 §§ 1 and 3 (art. 6-1, art. 6-3), and that the case did not require separate examination under Article 5 § 2 (art. 5-2).

The full text of the Commission's opinion is reproduced as an annex to this judgment*.

AS TO THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 1 (art. 5-1)

19. The applicant claimed to have been the victim of a violation of Article 5 § 1 (art. 5-1) which, in so far as he relied on it, provides 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:
>
> (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;
>
> ... ."

In the first place, he had, he alleged, not been informed that his placement would end in January 1986, rather than in May 1986 as he had believed. Secondly, he had not been advised of the existence of and the reasons for the application to extend his confinement, or even summonsed

* Note by the Registrar: For practical reasons this annex will appear only with the printed version of the judgment (volume 185-C of Series A of the Publications of the Court), but a copy of the Commission's report is obtainable from the registry.

to appear on 7 January 1986 in the District Court, which deprived him of any possibility of expressing his views on that occasion or being represented there. Finally, no record of the hearing had been drawn up and the order had not been communicated to him until 26 August 1986.

20. Since these complaints all relate to the proceedings which led to the extension of the contested confinement, it is appropriate to examine them in the light of the provision under which those proceedings fall in any event to be dealt with, namely paragraph 4 of Article 5 (art. 5-4).

II. ALLEGED VIOLATION OF ARTICLE 5 § 2 (art. 5-2)

21. Mr Keus also complained of a breach of Article 5 § 2 (art. 5-2), according to which:

> "Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him."

In his submission, that provision placed the authorities under a duty to notify him of the application to extend his confinement and the order extending it, as well as the reasons therefor; since he himself had absconded, they should have alerted his lawyer. In the Government's view, the question should be considered under paragraph 4 of Article 5 (art. 5-4).

22. The Court confines itself to noting that the applicant, who had absconded, acquired knowledge of the extension decided on 7 January 1986 as soon as he contacted the hospital by telephone, twelve days later, and it was confirmed to him on 22 February, the date of his return (see paragraph 10 above).

Accordingly, it finds no violation of paragraph 2 (art. 5-2).

III. ALLEGED VIOLATION OF ARTICLE 5 § 4 (art. 5-4)

23. The applicant also alleged a breach of the requirements of Article 5 § 4 (art. 5-4), according to which:

> "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."

He complained that the lack of any information concerning the proceedings to extend the confinement had prevented him from taking part in the hearing on 7 January 1986 in the District Court (see paragraph 10 above). Moreover, he had not had the benefit of any other remedy satisfying the conditions of Article 5 § 4 (art. 5-4).

In the Government's view, Mr Keus bears the entire responsibility for the situation of which he complains. As always in such cases a summons to appear had been sent to him and the only reason why he failed to receive it was that he had absconded (see paragraph 10 above).

24. Consideration of the Netherlands legal system as described above (see paragraphs 12-16) leads the Court to conclude that the contested proceedings amounted to an "automatic periodic review of a judicial character" within the meaning of the X v. the United Kingdom judgment of 5 November 1981 (Series A no. 46, p. 23, § 52).

According to the case-law on the scope of paragraphs 1 and 4 of Article 5 (art. 5-1, art. 5-4), in order to satisfy the requirements of the Convention, such review must comply with both the substantive and procedural rules of the national legislation and moreover be conducted in conformity with the aim of Article 5 (art. 5): to protect the individual against arbitrariness, in particular with regard to the time taken to give a decision.

25. In so far as they relate to the violation of Netherlands law, the complaints summarised in paragraph 19 above cannot succeed.

In the first place, the information provided to the Court does not disclose the existence of a national legal rule requiring the authorities to indicate to a person placed at the Government's disposal when his placement will finish, or to inform him when an application to extend his confinement is introduced and of the reasons relied on in support thereof.

The applicant did not deny that the police were instructed by the Crown Prosecutor to notify him of the summons to appear at the hearing of 7 January 1986, but failed to contact him because he was in hiding following his escape (see paragraph 10 above). No rule of Netherlands law required the authorities to do more, and in particular to inform the fugitive's lawyer.

In order to complain of the failure to make a record of the hearing held in private on 7 January 1986, Mr Keus relied on Article 37 (g) § 5 of the Criminal Code. However, according to this provision such a document has to be drawn up only in respect of hearings of the person concerned, of witnesses or experts. In fact only the Crown Prosecutor and a member of the clinic's staff attended the hearing; the latter was apparently not examined as a witness or an expert.

Finally, Article 37 (h) § 3, which stipulates that the decision extending the confinement be served on the person concerned, does not relate to the "procedure prescribed by law" to be followed in respect of the deprivation of liberty itself. It cannot therefore be regarded as a procedural rule for the purposes of the application of Article 5 (art. 5) of the Convention. Moreover, the applicant was informed of the decision as soon as possible (see paragraphs 10 and 22 above).

26. Nor can the court be criticised for failing to comply with the Convention. Constrained by both national law and Article 5 § 4 (art. 5-4) to give a ruling speedily, it was entitled to take a decision on the extension as Mr Keus was a fugitive.

27. Nevertheless, a measure depriving a person of his liberty does not afford the fundamental guarantees against arbitrariness if it is taken following proceedings in which neither the person concerned himself nor a

person representing him has participated (see, mutatis mutandis, the Winterwerp judgment of 24 October 1979, Series A no. 33, p. 24, §§ 60 and 61).

Notwithstanding the extension of his placement at the Government's disposal, the applicant therefore retained the right protected by Article 5 § 4 (art. 5-4) to institute proceedings, on his return to the clinic, in a court to obtain a speedy decision on the lawfulness of his detention.

28. The Court shares the view taken by the participants in the proceedings that a request to revoke a placement addressed to the Minister for Justice (see paragraph 16) cannot be regarded as proceedings before "a court". That does not mean however that for nearly two years the applicant was unable to obtain a fresh review on account of Netherlands law. In fact an effective means of contesting the extension was available to him; namely that of filing an interlocutory application with the President of the District Court (see paragraph 16 above). Relying on Article 5 § 4 (art. 5-4), which is directly applicable in the domestic legal system of the Netherlands, and on the fundamental adversarial principle, he could have pleaded that, in the light of the improvement of his mental state, public order no longer required the continuation of his placement. It appears from Netherlands case-law that the President would undoubtedly have ordered the applicant's immediate release if he had accepted his arguments.

When questioned on this point at the hearing on 27 June 1990, the applicant's lawyer moreover recognised - and in this was in agreement with the Government - the existence of the remedy in question. However, in her view, this solution would have been of little practical use in the present case because the applicant had decided to return to the clinic and to abide by the order of 7 January 1986, except for requesting his release from the Minister for Justice.

It is nevertheless true that a remedy satisfying the requirements of paragraph 4 (art. 5-4) was available to the applicant; whether or not he considered it advisable to have recourse thereto makes no difference in this respect.

IV. ALLEGED VIOLATION OF ARTICLE 5 § 5 (art. 5-5)

29. Mr Keus also complained of a violation of Article 5 § 5 (art. 5-5), according to which:

> "Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

This paragraph cannot apply as the Court has not found a breach of any other provision of Article 5 (art. 5).

V. ALLEGED VIOLATION OF ARTICLES 6 §§ 1 and 3 (art. 6-1, art. 6-3)

30. Initially, the applicant relied further on Article 6 §§ 1 and 3 (art. 6-1, art. 6-3), but he withdrew these complaints at the hearing before the Court, which does not consider it necessary to examine them of its own motion.

FOR THESE REASONS, THE COURT

1. Holds unanimously that there has been no violation of paragraph 2 of Article 5 (art. 5-2);

2. Holds by five votes to four that there has been no violation of paragraph 4 (art. 5-4);

3. Holds unanimously that it is not necessary to examine the complaints that the applicant submitted initially, under Article 6 §§ 1 and 3 (art. 6-1, art. 6-3).

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 25 October 1990.

Rolv RYSSDAL
President

Marc-André EISSEN
Registrar

In accordance with Article 51 § 2 (art. 51-2) of the Convention and Rule 53 § 2 of the Rules of the Court the joint dissenting opinion of Mr Ryssdal, Mr Pettiti, Mr Bernhardt and Mr Spielmann is annexed to this judgment.

R. R.
M.-A. E.

JOINT DISSENTING OPINION OF JUDGES RYSSDAL, PETTITI, BERNHARDT AND SPIELMANN

When the applicant returned to the psychiatric hospital on 22 February 1986 he had - notwithstanding the decision of 7 January 1986 of the Regional Court to prolong for two years his placement at the Government's disposal - a right under Article 5 § 4 (art. 5-4) to institute court proceedings on the lawfulness of his continued detention (see paragraph 27 of the European Court's judgment).

The question to be decided is whether at that time he had such a right under Dutch law.

In his application of 13 June 1986 to the Commission, the applicant complained that the only possibility open to him was to request the Minister for Justice to release him. However, such proceedings before the Minister cannot be regarded as proceedings before "a court" (see paragraph 28 of the judgment).

Throughout the lengthy proceedings before the Commission not only the applicant but also the Government maintained that it was not possible for the applicant to have the question of the prolonged detention re-examined by a court. Nor was it possible to have a new examination of the legality of the detention before the expiry of the two-year period authorised on 7 January 1986 by the District Court (see paragraphs 55 and 56 of the Commission's report).

The Commission accordingly stated that "under Dutch law the applicant was, on 22 February 1986, in a situation where he could not obtain a new court review for almost two years" (see paragraph 64 of the Commission's report).

The Government did not challenge this statement when the case was referred to the Court on 13 December 1989. Indeed, they did not submit any memorial to the Court. Neither did counsel for the Government challenge the statement in his address at the public hearing on 27 June 1990. It was only in reply to a question that counsel, towards the very end of the hearing, mentioned that the applicant "could have instituted summary proceedings" (see the verbatim record, page 26).

The Court has accepted that the applicant had an effective means of contesting the extension of his placement at the Government's disposal, namely that of filing an interlocutory application with the President of the District Court (see paragraph 28 of the judgment).

We cannot agree that it is sufficiently clear that such a remedy was available to the applicant in 1986.

If what was at issue had been a plea of non-exhaustion of domestic remedies, it is beyond doubt that the Government could not have invoked at the end of the whole procedure a remedy that had never been mentioned previously. Nor could the Court have relied on such a remedy ex officio.

Even though in the present case a question arises in the context of Article 5 § 4 (art. 5-4) rather than in the context of Article 26 (art. 26), the problems are somewhat similar. It is incumbent on a respondent Government to indicate with adequate clarity the existence of a remedy which meets the requirements of Article 5 § 4 (art. 5-4) (see the Van Droogenbroeck judgment of 24 June 1982, Series A no. 50, pp. 29-32, §§ 54-56).

Taking the position of the Government into account, it could not be expected that in 1986 the applicant and his lawyer could and should have considered that the filing of an interlocutory application with the President of the District Court was a remedy available to the applicant.

Accordingly, we have come to the conclusion that there was a violation of Article 5 § 4 (art. 5-4) of the Convention.