COURT (CHAMBER)

CASE OF WINTERWERP v. THE NETHERLANDS

(Application no. 6301/73)

JUDGMENT

STRASBOURG

24 October 1979

In the Winterwerp 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:

Mrs. H. Pedersen, President,
Mr. G. Wiarda,
Mr. D. Evrigenis,
Mr. P.-H. Teitgen,
Mr. G. Lagergren,
Mr. L. Liesch,
Mr. F. Gölcüklü,

and also, Mr. M.-A. Eissen, Registrar, and Mr. H. Petzold, Deputy Registrar,

Having deliberated in private on 29 November 1978 and from 25 to 26 September 1979,

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

PROCEDURE

1. The Winterwerp case was referred to the Court by the European Commission of Human Rights ("the Commission") and the Government of the Kingdom of the Netherlands ("the Government"). The case originated in an application against the said State lodged with the Commission in 1972 under Article 25 (art. 25) of the Convention by Mr. Frits Winterwerp, a Netherlands National.

2. Both the Commission's request, to which was attached the report provided for in Article 31 (art. 31) of the Convention and the Government's application, which referred to Article 48 (art. 48), were lodged with the registry of the Court within the period of three months laid down by Articles 32 para. 1 and 47 (art. 32-1, art. 47). The request was filed on 9 March 1978 and the application on 21 April. Their purpose is to obtain a decision from the Court as to whether or not the facts of the case disclose a breach by the respondent State of its obligations under Articles 5 para. 1, 5 para. 4 and 6 para. 1 (art. 5-1, art. 5-4, art. 6-1).

3. The Chamber of seven judges to be constituted included, as ex officio members, Mr. G. Wiarda, the elected judge of Netherlands nationality (Article 43 of the Convention) (art. 43), and Mr. G. Balladore Pallieri, the President of the Court (Rule 21 para. 3 (b) of the Rules of Court). On 11 March 1978, the President of the Court drew by lot, in the presence of the Deputy Registrar, the names of the five other members, namely Mrs. H. Pedersen, Mrs. D. Bindschedler-Robert, Mr. D. Evrigenis, Mr. L. Liesch and Mr. F. Gölcüklü (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43). Subsequently, Mrs. Bindschedler-Robert was exempted from sitting (4 July 1978) and Mr. Balladore Pallieri was prevented from taking part in the consideration of the case (25 September 1979); they were replaced by the first two substitute judges, Mr. Lagergren and Mr. Teitgen (Rules 22 para. 1 and 24 paras. 1 and 4).

Mr. Balladore Pallieri and then, as from 25 September 1979, Mrs. Pedersen assumed the office of President of the Chamber (Rule 2l para. 5).

4. Acting through the Deputy Registrar, the President of the Chamber ascertained the views of the Agent of the Government and the Delegates of the Commission regarding the procedure to be followed. On 19 May, he decided that the Agent should have until 1 August 1978 to file a memorial and that the Delegates should be entitled to file a memorial in reply

within two months from the date of the transmission of the Government's memorial to them by the Registrar.

The Government's memorial was received at the registry on 24 July 1978. On 18 September, the Secretary to the Commission advised the Registrar that the Delegates did not propose to submit a memorial in reply.

5. After consulting, through the Registrar, the Agent of the Government and the Delegates of the Commission, the President of the Chamber directed on 6 October that the oral hearings should open on 28 November. On 21 October, he invited the Government to produce a certain document; it was filed at the registry on 10 November.

6. The oral hearings took place in public at the Human Rights Building, Strasbourg, on 28 November. Immediately prior to their opening, the Court had held a short preparatory meeting.

There appeared before the Court:

- for the Government:

Miss F.Y. van der Wal, Assistant Legal Adviser
to the Ministry of Foreign Affairs, *Agent*,
Mr. E.A. Droogleever Fortuijn, Landsadvocaat,
Mr. L.A. Geelhoed, Official
at the Ministry of Justice, *Counsel*;

- for the Commission:

Mr. J.E.S. Fawcett, Principal Delegate,
Mr. C.H.J. Polak, Delegate,
Mr. J.H.A. Van Loon, who had represented
the applicant before the Commission, assisting the
Delegates under Rule 29 para. 1, second sentence, of the
Rules of Court.

The Court heard addresses by Miss van der Wal, Mr. Droogleever Fortuijn and Mr. Geelhoed for the Government and by Mr. Fawcett and Mr. Van Loon for the Commission, as well as their replies to questions put by the Court.

7. Acting on a suggestion made by the Principal Delegate, the President of the Chamber declared the proceedings only provisionally closed so as to allow the Commission to submit, within a time-limit of two weeks, a written statement from the Government of the United Kingdom of Great Britain and Northern Ireland on the interpretation of Article 5 para. 4 (art. 5-4). In November there had been an exchange of letters between the United Kingdom Government and the Registrar in this connection.

On 15 December 1978, in response to a request from the Commission, the President extended the aforesaid time-limit until 5 January 1979. The written statement from the United Kingdom Government was filed at the registry by the Commission on 9 January; the Delegates indicated at the same time that they had no observations of their own to make. By letter received on 2 February, the Agent of the Netherlands Government informed the Registrar that her Government felt no need to comment on the points raised in the said statement.

8. On 27 December 1978, Mr. Van Loon communicated to the Court certain documents that he had referred to during the hearings.

9. The Chamber made final the closure of the proceedings on 26 September 1979.

AS TO THE FACTS

10. Mr. Frits Winterwerp resides in the Netherlands. He married in 1956 and several children were born of the marriage. In 1968, he was committed to a psychiatric hospital by direction of the local burgomaster in accordance with an emergency procedure. Six weeks later, on his wife's application, he was confined to the same hospital under an order made by the District Court (kantongerecht) of his place of residence. On his wife's further application and subsequently at the request of the public prosecutor (officier van justitie), the order was renewed from year to year by the Regional Court (arrondissements- rechtbank) on the basis of medical reports from the doctor treating the applicant.

Mr. Winterwerp complains of the procedure followed in his case. In particular, he objects that he was never heard by the various courts or notified of the orders, that he did not receive any legal assistance and that he had no opportunity of challenging the medical reports. His complaints are also directed against the decisions on his requests for discharge and against his loss of civil capacity.

A. Netherlands **legislation on detention of persons of unsound mind**

11. The detention of persons of unsound mind is governed by an Act of 27 April 1884 on State supervision of mentally ill persons (wet van 27 April 1884, Stb 96, tot regeling van het Staatstoezicht op krankzinnigen). Usually referred to as the Mentally Ill Persons Act (krankzinnigenwet), the Act has been amended several times, in the last instance by an Act of 28 August 1970 which came into force on 15 May 1972, that is some time after the applicant had first been detained. A Bill providing for a complete reform of the system is at present pending before the Netherlands Parliament.

The Mentally Ill Persons Act is divided into five main chapters. Principally relevant for the present proceedings are the three chapters dealing firstly with the admission of persons to psychiatric hospitals and their stay therein, secondly with leave of absence and discharge therefrom, and thirdly with the administration of the property of persons admitted to psychiatric hospitals.

The Act does not define who are "mentally ill persons" but lays down the grounds for committing such persons to hospital (see the following paragraphs). It would appear from the evidence submitted that, according to the general practice currently followed, the Netherlands courts will authorise the confinement of a "mentally ill person" only if his mental disorder is of such a kind or of such gravity as to make him an actual danger to himself or to others.

(i) The procedure for detention in emergency cases

12. In urgent cases, the burgomaster has the power to direct the compulsory admission of a "mentally ill person" to a psychiatric hospital.

Until 1972, the burgomaster had to obtain prior medical advice only if circumstances permitted; his decision was valid for three weeks but the public prosecutor could shorten or extend the term (section 14 of the Act).

This procedure was considerably changed by the 1970 Act, section 14 being repealed and replaced by sections 35b to 35j. The burgomaster is now obliged to seek the prior opinion of a psychiatrist or, should that not be possible, another medical practitioner. Once he has issued a direction to detain, he must immediately inform the public prosecutor and send him the medical declarations on which the direction was based. The public prosecutor is in his turn required to transmit these declarations not later than the following day to the President of the Regional Court with, where appropriate, an application for a continuation of the detention. Such continuation, if made, is valid for three weeks but may be renewed by the President for a second period of similar duration. Thereafter the procedure concerning applications for a provisional detention order is to be followed (see paragraphs 13 and 15 below).

(ii) Issue of a provisional detention order

13. Apart from the above-mentioned emergency cases, no one may be deprived of his liberty on grounds of mental illness or insanity except under a provisional detention order made by a court.

The District Court judge (kantonrechter) may issue a provisional detention order on written application (verzoek) made by a close relative by blood or marriage of full age, the spouse or the legal representative of the individual concerned and seeking his confinement either in the interests of public order or in his own interests (section 12 of the Act). The judge may also issue such an order on application by a person of full age who considers that his own condition is such as to require suitable treatment (section 15). In addition, a provisional detention order may be made by the President of the Regional Court following a request (requisitoir) by the public prosecutor (section 13).

The application or request must, according to section 16 of the Act, be accompanied by a declaration drawn up not more than seven days earlier by a doctor licensed to practise in the Netherlands but not attached to the institution to which it is proposed admitting the patient. The declaration must be to the effect that the person concerned "is in a state of mental illness (toestand van krankzinnigheid) and that it is necessary or desirable to treat him in a psychiatric hospital". An application may also mention facts and documents giving a clearer indication of the state of mental illness, but this is purely optional.

Since the entry into force of the 1970 Act, the medical declaration must be made by a psychiatrist who is not himself treating the patient; as far as possible, it must state, with reasons, whether the patient's condition is such that it would be pointless or medically inadvisable for him to be heard by the court. The psychiatrist must, if he can, first consult the family doctor.

14. The judge makes a provisional detention order if the medical declaration, either on its own or in conjunction with the facts related or the documents supplied, adequately establishes that treatment in a psychiatric hospital is necessary or desirable (section 17 para. 1 of the Act).

Until 1972, the examination of the application or request was not subject to any limitative formalities. Section 17, in the version in force when the facts of the present case occurred, provided that the judge had competence to hear beforehand the person whose detention was being sought. As a result of the above-mentioned amending Act, the judge is now obliged to hear the person in question unless he concludes from the medical declaration that this would be pointless or medically inadvisable; he may, either of his own motion or at the request of that person, provide the latter with legal assistance (section 17 para. 3). The judge must seek all possible information both from the individual who made the application or the request mentioned in sections 12 and 13 and from certain other individuals (section 17 para. 4). He retains the power to call witnesses and experts (section 17 para. 5) and may, if he thinks fit, summon anyone who made an application for a detention order pursuant to section 12 to appear before him (section 17 para. 6).

15. A provisional detention order is not subject to appeal and is, moreover, not notified to the person concerned (section 17); it is valid for six months (section 22).

The order, like detention orders (see paragraphs 16 and 17 below), authorises rather than enjoins compulsory confinement and it may happen that it is not put into effect. In the case of a person who is not yet hospitalised, the admission to a psychiatric hospital or other specialised institution must take place within fourteen days, on production of the court order (sections 17 and 18). The closest relatives by blood or marriage, the spouse or the legal representative must be informed of the patient's admission by the burgomaster, who is notified thereof by the court or the public prosecutor (section 19). The medical declaration on which the judge based his decision must be transmitted to the institution's doctor treating the

patient. This doctor has to enter his findings on a register every day for the first fortnight, then on a weekly basis for the ensuing six months and thereafter on a monthly basis (section 20).

Within a fortnight of the admission, the doctor responsible for the patient's treatment is required to send to the public prosecutor of the district in which the psychiatric hospital is situated a reasoned declaration on the patient's mental condition and on the necessity or desirability of prolonging his stay in a psychiatric hospital (section 21).

(iii) Issue of a detention order

16. Within six months following the issue of the provisional detention order, a further application or request, seeking the continuation of the patient's confinement in a psychiatric hospital for up to one year, may be submitted to the Regional Court. Any such application or request must be accompanied by the medical records of the doctor responsible, together with a reasoned declaration by him as to whether it is necessary or desirable for the patient to undergo further treatment in a psychiatric hospital (section 22).

The patient need not be notified of the application or request or of the proceedings relating thereto.

17. A decision on the application or request is taken by the Regional Court (section 23). Apart from being obliged to hear the public prosecutor, the Court does not have to follow any set procedure. It may call for evidence from witnesses or other sources, hear the patient, grant him legal assistance and consult experts, but it is not bound to do so. During the examination of the case, the patient must remain in the institution, if necessary for longer than six months after the making of the provisional order.

The Regional Court's decision, which is not subject to appeal, is not delivered at a public hearing, nor is it notified to the person concerned. In practice, it is left to the hospital authorities to determine if and when such notification is warranted from the medical point of view.

The general rule is that, when hearing civil cases, the Regional Court sits as a chamber composed of at least three judges (section 49 para. 1 of the Judicial Organisation Act). However, this chamber may refer to a single-judge chamber (enkelvoudige kamer) such cases as it deems suitable (Article 288 (b) of the Code of Civil Procedure). Each Regional Court has its own Rules of Order (reglement van orde) which are approved by Royal Decree on the advice of the Supreme Court (Hoge Raad). Under the Rules of Order of the Utrecht Regional Court, as in force at the relevant time (see paragraphs 25 and 26 below), jurisdiction in all cases regarding the detention and stay of persons in psychiatric hospitals was allotted to a single-judge chamber.

(iv) Renewal of a detention order

18. Not more than fourteen and not less than eight days before the expiry of the period covered by the Court's detention order, an application or request for the prolongation of the patient's detention for up to one year may be made to the Regional Court (section 24 of the Mentally Ill Persons Act).

Subsequent procedure is the same as for the making of the detention order provided for in section 23 of the Act. The Act does not specify when the Court has to give its ruling.

(v) Suspension and termination of a detention order

19. Leave of absence (verlof) for a specified period may be granted to a patient by the doctor in charge of the institution (section 27).

20. The authorities of a psychiatric hospital may at any time grant the discharge (ontslag) of a patient on the basis of a written declaration from the aforesaid doctor to the effect that the

patient shows no signs of mental illness or that his treatment in a psychiatric hospital is no longer necessary or desirable (section 28).

A written request for the patient's discharge may be made to the hospital authorities by the patient himself, the person who applied for his detention or, in the latter's absence, another of the relatives by blood or marriage mentioned in section 12 (section 29 para. 1, in the version in force prior to the 1970 Act). The authorities must at once consult the doctor in charge of the institution and, if his opinion is favourable, must discharge the patient. If the doctor's opinion is unfavourable, the authorities must transmit the request, together with the opinion, to the public prosecutor who will, in principle, refer it to the Regional Court for decision. The Court's procedure for this purpose is the same as that applicable to the making of detention orders (see paragraph 17 above); its decision is not subject to appeal (section 29 paras. 2 and 4).

However, the public prosecutor is not obliged to forward the request to the Court if it appears manifestly impossible to grant the request (indien het verzoek klaarblijkelijk niet voor inwilliging vatbaar is), if a previous request is still pending, or if the Court has already dismissed a similar request during the period covered by the detention order and the circumstances have not changed (section 29 para. 3).

The public prosecutor, being responsible for the supervision of psychiatric hospitals, has a duty to see that no one is unlawfully detained in such an institution. If the doctor in charge of the institution agrees, the public prosecutor may order the discharge of a patient whose continued confinement he considers unnecessary. If the doctor in charge does not agree, the public prosecutor may refer the matter to the Regional Court. Should the public prosecutor have doubts about the need for the patient's continued confinement, he may refer the matter to the Court; he is obliged to do so if a public health inspector so requests (section 30).

When the period covered by a detention order expires, the hospital authorities must inform the public prosecutor of the fact within eight days and, if no application has been made to the Court to prolong the detention, he must thereupon order the patient's discharge unless he concludes from a reasoned declaration in writing by the doctor in charge that such a step would present a danger to public order; in the latter event, he must himself request the Court to prolong the detention (section 31).

(vi) Detention and civil capacity

21. Any person of full age who is actually confined in a psychiatric hospital automatically loses the capacity to administer his property (section 32). As a consequence, all contracts entered into by the person concerned after his confinement are void and he cannot legally transfer property or operate his bank account. The patient regains the capacity to manage his property only when he is formally discharged but not, for instance, when he is granted leave of absence.

On application by any of the persons entitled to seek an individual's detention, or at the request of the public prosecutor, the Regional Court may appoint a provisional administrator (provisioneel bewinsdvoerder) for anyone confined in a psychiatric hospital, should this be deemed necessary or desirable (section 33). In addition, the general rule laid down in Article 378 of the Civil Code enables the Regional Court to nominate a guardian (curator) on behalf of a person, whether in custody or not, who, by reason of mental illness or dipsomania, is no longer capable of managing his own affairs.

(vii) The Bill pending before Parliament

22. The overall aim of the Bill is to improve the position of the psychiatric patient: it seeks to strengthen the procedural guarantees accompanying his detention and to allow him more freedom within the hospital.

The criterion justifying confinement in a psychiatric hospital would henceforth be that the individual, on account of his mental state, constitutes "a danger for himself, for others or for the general safety of persons and goods". Further modifications of relevance would include the following: the competent court at all stages would be the single-judge chamber of the Regional Court; the provisional detention order would be valid for three weeks only; before making an order or determining a request for discharge, the court would as a general rule have to hear the person concerned; the only occasion when the court might decide not to hear the patient would be when examining the application or request for the first detention order, that is three weeks after the making of the provisional detention order; the court would be obliged to grant legal assistance to the person concerned at his request; there would be a right of appeal against orders authorising detention; admission to a psychiatric hospital would not automatically bring about loss of civil capacity.

B. Particular facts of the case

23. Mr. Winterwerp received voluntary treatment in a psychiatric hospital from 28 March to 12 September 1967. At some time prior to this, he had apparently suffered severe brain damage in an accident. On 17 May 1968, he was committed to the "Zon en Schild" ("Sun and Shield") psychiatric hospital at Amersfoort on the direction of the Amersfoort burgomaster in accordance with the emergency procedure then in force under section 14 of the Mentally Ill Persons Act (see paragraph 12 above). The events prompting this decision were that the applicant had stolen documents from the local registry office, been detained by the police and then been found lying naked on a bed in a police cell. The term of the detention was extended by the public prosecutor, as was possible under paragraph 3 of section 14.

24. On 24 June 1968, during the currency of the "emergency" confinement, Mr. Winterwerp's wife applied to the Amersfoort District Court on a standard form for his provisional detention in the "Zon an Schild" hospital in the interests of public order as well as those of her husband.

The application was accompanied by a medical declaration, dated 20 June, made out by a general medical practitioner who had examined the patient for the first time that day. The declaration stated that the patient had been detained in 1966 for "attempted murder" and had been under psychiatric treatment in 1967. It also stated that the patient was "a schizophrene, suffering from imaginary and Utopian ideas, who has for a fairly long time been destroying himself as well as his family" and that he "is unaware of his morbid condition". The doctor concluded that "for the time being" the patient certainly could not "be left at large in society".

On 24 June, on the basis of this declaration, the District Court granted the application and authorised the applicant's provisional detention, without first exercising its power to hear him or to seek expert advice.

25. On 1 November 1968, the applicant's wife applied to the Utrecht Regional Court for a one-year detention order in respect of her husband.

Her application was accompanied by the daily and weekly records of the doctor in attendance as well as the declaration as to the necessity or desirability of further treatment in a psychiatric hospital.

On the basis of these documents, the single-judge chamber responsible for hearing such cases made the order on 23 December 1968.

26. On 16 December 1969, following an application by Mrs. Winterwerp and on the basis of the monthly records of the doctor in attendance and his declaration, identical to that of the previous year, the single-judge chamber made an order authorising the prolongation of the detention "by one year if necessary" as from 23 December 1969.

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

27. On 14 December 1970, the public prosecutor at ‘s-Hertogenbosch requested the renewal of the detention order for a further year, on the basis of the monthly records of the doctors who had successively treated Mr. Winterwerp and a declaration by the doctor in attendance at Eindhoven, which read as follows:

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

On 7 January 1971, that is to say, two weeks after the previous order had lapsed, the first ordinary chamber of the Regional Court at ‘s-Hertogenbosch authorised detention for a further year.

28. On 21 December 1971, 15 December 1972 and 14 December 1973, the same court made further one-year renewals of the detention order following requests by the public prosecutor and on the basis of the monthly medical records and identical declarations by the doctor in attendance, who had however changed in the course of 1972. On 19 December 1974 and 15 December 1975, the Regional Court again granted similar requests by the public prosecutor. The most recent renewal order referred to in the evidence dates from December 1977.

29. The medical records forwarded each year to the courts, although fairly brief, indicated that the applicant showed schizophrenic and paranoiac reactions, that he was unaware of his pathological condition and that, on several occasions, he had committed quite serious acts without appreciating their consequences. For example, the records relate how, in pursuance of some fanciful schemes, Mr. Winterwerp went abroad with family savings and soon became penniless, without realising either the state of neglect in which he had left his family or his own dependence on the consular authorities who had to assist and repatriate him.

30. In February 1969, the applicant had made a first request to the hospital authorities for his discharge in accordance with section 29 of the Act (see paragraph 20 above). The hospital authorities forwarded the request to the public prosecutor who in turn referred it to the Regional Court. The latter Court, after hearing the patient at the hospital, dismissed the request.

In April 1971, the hospital authorities forwarded a second request to the public prosecutor with a negative recommendation. After hearing Mr. Winterwerp, the public prosecutor, pursuant to paragraph 3 of section 29, rejected the request without referring it to the Regional Court for decision. The same applied to a third request, made in July 1972.

On 20 February 1973, the patient made a further request for his discharge to the authorities of the "Rijks Psychiatrisch Inrichting". On 26 April 1973, the medical director of the institution forwarded the request to the public prosecutor with his comments, which may be summarised as follows: the patient was suffering from a paranoiac psychosis which could be successfully treated by psychopharmacological methods, but during previous leaves of absence he had failed to take the drugs prescribed, with the result that he had had to be readmitted after a relapse; steps were being taken to reintegrate the patient gradually into society and he was spending his nights outside the hospital; in the light of the past setbacks, there would have been little point in discharging him. On the strength of this opinion and after hearing Mr. Winterwerp, the public prosecutor again refused the request and refrained from referring it to the Regional Court. He notified the applicant of his decision on 17 May 1973.

The applicant’s four requests for discharge took the form of simple statements that he was not mentally deranged, that he had been falsely accused of misdemeanours and that he did not

constitute a danger for himself or to others. The public prosecutor did not refer the three later requests to the Regional Court because it appeared manifestly impossible to grant them.

31. Mr. Winterwerp has from time to time been given leave of absence for various periods. On at least four occasions - nine months in 1974, four months in 1976-1977, one month and two and a half months in 1978 - he has been allowed to lodge outside the hospital on an experimental basis. Each time, he has had to be readmitted to hospital. Several reasons are adverted to in the evidence: he failed to follow the treatment prescribed; his lodging was found to be in a filthy state; and, most recently, he smashed a window in Germany where he was wandering.

32. Mr. Winterwerp automatically lost the capacity to administer his property on being detained in a psychiatric hospital (section 32 of the Act; see paragraph 21 above). No provisional administrator was appointed (section 33) and his affairs were at first managed, so it seems, by his wife. Then, on 11 August 1971, a guardian was nominated by the Regional Court (Article 378 of the Civil Code). The guardian has made no request for Mr. Winterwerp's release.

PROCEEDINGS BEFORE THE COMMISSION

33. In his application of 13 December 1972 to the Commission, Mr. Winterwerp complained that he was being arbitrarily deprived of his liberty, that he had not been allowed a hearing by a court and that he had not been informed of the decisions by which his confinement was several times prolonged.

On 30 September 1975, the Commission accepted the application, specifying that it had "examined the application ... with reference to Article 5 (art. 5) of the Convention".

During the course of the proceedings on the merits, the applicant's lawyer put forward a further claim: his client's automatic loss of capacity to administer his property involved a "determination of his civil rights and obligations" which had taken place in the absence of a genuinely judicial procedure, with the result that Article 6 para. 1 (art. 6-1) had been contravened.

34. In its report of 15 December 1977, the Commission expressed the unanimous opinion that there had been a breach of Article 5 para. 4 (art. 5-4) but not of Article 5 para. 1 (art. 5-1). On the other hand, the Commission considered that it ought not to state any view on the alleged violation of Article 6 para. 1 (art. 6-1) since "this issue ... relates to facts distinct from those originally submitted ... for its examination and has not been the subject of any detailed argument before it".

AS TO THE LAW

I. ON THE ALLEGED VIOLATION OF ARTICLE 5 PARA. 1 (art. 5-1)

35. There is no dispute that since 1968, except for a few periods of interruption, the applicant has been deprived of his liberty in pursuance of the Mentally Ill Persons Act (see paragraphs 23 to 31 above). He claims to be the victim of a breach of Article 5 para. 1 (art. 5-1) which, insofar as relevant for the present case, reads as follows:

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

...

(e) the lawful detention ... of persons of unsound mind ...;

..."

A. "The lawful detention of persons of unsound mind"

36. Mr. Winterwerp maintains in the first place that his deprivation of liberty did not meet the requirements embodied in the words "lawful detention of persons of unsound mind". Neither the Government nor the Commission agrees with this contention.

37. The Convention does not state what is to be understood by the words "persons of unsound mind". This term is not one that can be given a definitive interpretation: as was pointed out by the Commission, the Government and the applicant, it is a term whose meaning is continually evolving as research in psychiatry progresses, an increasing flexibility in treatment is developing and society's attitude to mental illness changes, in particular so that a greater understanding of the problems of mental patients is becoming more wide-spread.

In any event, sub-paragraph (e) of Article 5 para. 1 (art. 5-1-e) obviously cannot be taken as permitting the detention of a person simply because his views or behaviour deviate from the norms prevailing in a particular society. To hold otherwise would not be reconcilable with the text of Article 5 para. 1 (art. 5-1) which sets out an exhaustive list (see the Engel and others judgment of 8 June 1976, Series A no. 22, p. 24, para. 57, and the Ireland v. the United Kingdom judgment of 18 January 1978, Series A no. 25, p. 74, para. 194) of exceptions calling for a narrow interpretation (see, mutatis mutandis, the Klass and others judgment of 6 September 1978, Series A no. 28, p. 21, para. 42, and the Sunday Times judgment of 26 April 1979, Series A no. 30, p. 41, para. 65). Neither would it be in conformity with the object and purpose of Article 5 para. 1 (art. 5-1), namely to ensure that no one should be dispossessed of his liberty in an arbitrary fashion (see the Lawless judgment of 1 July 1961, Series A no. 3, p. 52, and the above-mentioned Engel and others judgment, p. 25, para. 58). Moreover, it would disregard the importance of the right to liberty in a democratic society (see the De Wilde, Ooms and Versyp judgment of 18 June 1971, Series A no. 12, p. 36, para. 65, and the above-mentioned Engel and others judgment, p. 35, para. 82 in fine).

38. Just as the Convention does not give any definition of "persons of unsound mind", so the Netherlands legislation does not define "mentally ill persons" (krankzinnige); what the legislation does is to lay down the grounds for committing such persons to a psychiatric hospital (see paragraph 11 above). Thus, an application may be made for the provisional detention of a "mentally ill person" either in his own interests or in the interests of public order; there must be a medical declaration to the effect that the person concerned "is in a state of mental illness and that it is necessary or desirable to treat him in a psychiatric hospital" (sections 12 and 16 of the Act; paragraph 13 above). The District Court makes a provisional detention order if it finds this to be adequately established (section 17 of the Act; paragraph 14 above). Similarly, the application for a detention order, on which the Regional Court decides, must be accompanied by a reasoned declaration by the doctor responsible that it is necessary or desirable for the patient to undergo further treatment in a psychiatric hospital (sections 22 and 23 of the Act; paragraphs 16 and 17 above). In addition, it appears from the evidence that, according to the general practice currently followed, the Netherlands courts authorise the confinement of a "mentally ill person" only if his mental disorder is of such a kind or of such gravity as to make him an actual danger to himself or to others; the Bill presently pending before Parliament speaks of "a danger for [the individual concerned], for others or for the general safety of persons and goods" (see paragraphs 11 and 22 above).

Having regard to the above-mentioned practice, the law in force does not appear to be in any way incompatible with the meaning that the expression "persons of unsound mind" is to

be given in the context of the Convention. The Court therefore considers that an individual who is detained under the Netherlands Mentally Ill Persons Act in principle falls within the ambit of Article 5 para. 1 (e) (art. 5-1-e).

39. The next issue to be examined is the "lawfulness" of the detention for the purposes of Article 5 para. 1 (e) (art. 5-1-e). Such "lawfulness" presupposes conformity with the domestic law in the first place and also, as confirmed by Article 18 (art. 18), conformity with the purpose of the restrictions permitted by Article 5 para. 1 (e) (art. 5-1-e); it is required in respect of both the ordering and the execution of the measures involving deprivation of liberty (see the above-mentioned Engel and others judgment, p. 28, para. 68 in fine).

As regards the conformity with the domestic law, the Court points out that the term "lawful" covers procedural as well as substantive rules. There thus exists a certain overlapping between this term and the general requirement stated at the beginning of Article 5 para. 1 (art. 5-1), namely observance of "a procedure prescribed by law" (see paragraph 45 below).

Indeed, these two expressions reflect the importance of the aim underlying Article 5 para. 1 (art. 5-1) (see paragraph 37 above): in a democratic society subscribing to the rule of law (see the Golder judgment of 21 February 1975, Series A no. 18, pp. 16-17, para. 34, and the above-mentioned Klass and others judgment, p. 25, para. 55), no detention that is arbitrary can ever be regarded as "lawful".

The Commission likewise stresses that there must be no element of arbitrariness; the conclusion it draws is that no one may be confined as "a person of unsound mind" in the absence of medical evidence establishing that his mental state is such as to justify his compulsory hospitalisation (see paragraph 76 of the report). The applicant and the Government both express similar opinions.

The Court fully agrees with this line of reasoning. In the Court’s opinion, except in emergency cases, the individual concerned should not be deprived of his liberty unless he has been reliably shown to be of "unsound mind". The very nature of what has to be established before the competent national authority - that is, a true mental disorder - calls for objective medical expertise. Further, the mental disorder must be of a kind or degree warranting compulsory confinement. What is more, the validity of continued confinement depends upon the persistence of such a disorder (see, mutatis mutandis, the Stögmüller judgment of 10 November 1969, Series A no. 9, pp. 39-40, para. 4, and the above-mentioned De Wilde, Ooms and Versyp judgment, p. 43, para. 82).

40. The Court undoubtedly has the jurisdiction to verify the "lawfulness" of the detention (see the above-mentioned Engel and others judgment, p. 29, para. 69). Mr. Winterwerp in fact alleges unlawfulness by reason of procedural defects in the making of three of the detention orders under consideration. Those allegations are dealt with below in connection with the closely linked issue of compliance with "a procedure prescribed by law" (see paragraphs 44 to 50). In the present context it suffices to add the following: in deciding whether an individual should be detained as a "person of unsound mind", the national authorities are to be recognised as having a certain discretion since it is in the first place for the national authorities to evaluate the evidence adduced before them in a particular case; the Court’s task is to review under the Convention the decisions of those authorities (see notably, mutatis mutandis, the Handyside judgment of 7 December 1976, Series A no. 24, pp. 22 and 23, paras. 48 and 50, the above-mentioned Klass and others judgment, p. 23, para. 49, and the above-mentioned Sunday Times judgment, p. 36, para. 59).

41. As to the facts of the instant case, the medical evidence submitted to the courts indicated in substance that the applicant showed schizophrenic and paranoiac reactions, that he was unaware of his pathological condition and that, on several occasions, he had committed some fairly serious acts without appreciating their consequences. In addition,

various attempts at his gradual rehabilitation into society haven failed (see paragraphs 24, 27, 29 and 30 above).

42. Mr. Winterwerp criticises the medical reports as unsatisfactory for the purposes of Article 5 para. 1 (e) (art. 5-1-e). In addition, he queries whether the burgomaster's initial direction to detain was founded on psychiatric evidence.

In the Court's view, the events that prompted the burgomaster's direction in May 1968 (see paragraph 23 above) are of a nature to justify an "emergency" confinement of the kind provided for at that time under section 14 of the Netherlands Act. While some hesitation may be felt as to the need for such confinement to continue for as long as six weeks, the period is not so excessive as to render the detention "unlawful". Despite the applicant's criticisms, the Court has no reason whatsoever to doubt the objectivity and reliability of the medical evidence on the basis of which the Netherlands courts, from June 1968 onwards, have authorised his detention as a person of unsound mind. Neither is there any indication that the contested deprivation of liberty was effected for a wrongful purpose.

43. The Court accordingly concludes that Mr. Winterwerp's confinement, during all the various phases under consideration, constituted "the lawful detention of [a person] of unsound mind", within the meaning of sub-paragraph (e) of Article 5 para. 1 (art. 5-1-e).

B. "In accordance with a procedure prescribed by law"

44. The applicant maintains that his deprivation of liberty was not carried out "in accordance with a procedure prescribed by law". For the applicant, this expression implies respect of certain elementary principles of legal procedure, such as informing and hearing the person concerned and affording him some kind of participation and legal assistance in the proceedings. In his submission, these principles have not been observed in his case.

The Government reply that the relevant procedure under Netherlands law, in ensuring regular review by an independent judge who bases his decision on medical declarations, undoubtedly meets such requirements as may be made in this respect by Article 5 para. 1 (art. 5-1).

According to the Commission, Article 5 para. 1 (e) (art. 5-1-e), apart from making medical reports necessary, involves a simple reference back to domestic law without laying down any minimum procedural guarantees.

45. The Court for its part considers that the words "in accordance with a procedure prescribed by law" essentially refer back to domestic law; they state the need for compliance with the relevant procedure under that law.

However, the domestic law must itself be in conformity with the Convention, including the general principles expressed or implied therein. The notion underlying the term in question is one of fair and proper procedure, namely that any measure depriving a person of his liberty should issue from and be executed by an appropriate authority and should not be arbitrary. The Netherlands Mentally Ill Persons Act (described above at paragraphs 11 to 20) satisfies this condition.

46. Whether the procedure prescribed by that Act was in fact respected in the applicant's case is a question that the Court has jurisdiction to examine (see, for example, the above-mentioned De Wilde, Ooms and Versyp judgment, pp. 38-39, paras. 69-70, and the above-mentioned Engel and others judgment, p. 28, para. 68 in fine). Whilst it is not normally the Court's task to review the observance of domestic law by the national authorities (see the Ringeisen judgment of 16 July 1971, Series A no. 13, p. 40, para. 97), it is otherwise in relation to matters where, as here, the Convention refers directly back to that law; for, in such matters, disregard of the domestic law entails breach of the Convention, with the consequence that the Court can and should exercise a certain power of review (see the decision of the

Commission on the admissibility of Application no. 1169/61, X v. Federal Republic of Germany, Yearbook of the Convention, vol. 6, pp. 520-590, at p. 588).

However, the logic of the system of safeguard established by the Convention sets limits upon the scope of this review. It is in the first place for the national authorities, notably the courts, to interpret and apply the domestic law, even in those fields where the Convention "incorporates" the rules of that law: the national authorities are, in the nature of things, particularly qualified to settle the issues arising in this connection (see the above-cited decision of the Commission, ibid.; see also, mutatis mutandis, paragraph 40 above).

47. In two respects, Mr. Winterwerp alleges formal defects in the detention orders made against him.

48. Firstly, he contends that the orders issued on 23 December 1968 and 16 December 1969 by the single-judge chamber of the Utrecht Regional Court (see paragraphs 25 and 26 above) were "irregular" under Netherlands law. According to the applicant, by allotting to such a chamber all cases coming under sections 22 to 24 of the Mentally Ill Persons Act, the Rules of Order of the Utrecht Regional Court are incompatible with Article 288 (b) of the Code of Civil Procedure which makes the reference of a matter to a single-judge chamber dependent upon a specific decision in each individual case by a chamber of at least three judges (see paragraph 17 above).

The Government, relying on other provisions of Netherlands law, dispute this interpretation.

The Commission, for its part, expresses the opinion that "detention orders are not alien to the competence of a single-judge chamber" (paragraph 80 in fine of the report).

The Court notes that the solution adopted in the instant case by the Utrecht Regional Court was dictated by the latter's Rules of Order which had been approved by Royal Decree on the advice of the Hoge Raad (see paragraph 17 above). Whether the content of those Rules is in conformity with the Code of Civil Procedure raises a problematical question of Netherlands law which, in the absence of any case-law by the Hoge Raad, seemingly remains open to argument. In these circumstances, the Court has no sufficient reason for finding that the Utrecht Regional Court failed to act "in accordance with a procedure prescribed by law".

49. The second formal defect alleged by the applicant stems from the fact that the detention order of 16 December 1969 had expired before it was renewed on 7 January 1971 by the 's-Hertogenbosch Regional Court (see paragraph 27 above). The conclusion drawn by the applicant is twofold: firstly, his confinement became unlawful insofar as it continued beyond the term fixed; secondly, the order of 7 January 1971, being out of time, was not in conformity with the Act.

The Government reply by explaining that, where there has been a request by the public prosecutor for prolongation of the detention, the former order remains valid until the court has decided. Section 24 of the Mentally Ill Persons Act requires the request to be filed shortly before the lapse of the previous order but does not specify at all when the Regional Court is to give its ruling (see paragraph 18 above). In the particular instance, the public prosecutor filed his request on 14 December 1970, that is within the permitted period (see paragraph 27 above).

The Court accepts the general explanation furnished by the Government. Furthermore, as far as the specific facts are concerned, there is no question of the delay having involved an arbitrary deprivation of liberty: the interval of two weeks between the expiry of the earlier order and the making of the succeeding renewal order can in no way be regarded as unreasonable or excessive.

50. To sum up, the applicant was detained "in accordance with a procedure prescribed by law".

C. The alleged right to treatment

51. Mr. Winterwerp argues that Article 5 para. 1 (e) (art. 5-1-e) entails, for any individual confined as a "person of unsound mind", the right to appropriate treatment in order to ensure that he is not detained longer than absolutely necessary. As to his own situation, he complains that the meetings with his psychiatrist were too short and infrequent and that the medication administered to him was unduly made up of tranquillisers.

The Government categorically deny these allegations.

The Court considers, as does the Commission, that a mental patient's right to treatment appropriate to his condition cannot as such be derived from Article 5 para. 1 (e) (art. 5-1-e). Furthermore, the evidence contains no suggestion, as regards treatment, of a breach of any other provision in the Convention.

D. Conclusion

52. The Court therefore concludes that Article 5 para. 1 (art. 5-1) has not been violated.

II. ON THE ALLEGED VIOLATION OF ARTICLE 5 PARA. 4 (art. 5-4)

53. The applicant also relies on paragraph 4 of Article 5 (art. 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 is required to examine this complaint even though no infringement of paragraph 1 (art. 5-1) has been found (see the above-mentioned De Wilde, Ooms and Versyp judgment, pp. 39-40, para. 73).

A. As concerns the initial direction to detain made by the burgomaster and the subsequent orders issued by the District Court and the Regional Court

54. Mr. Winterwerp was initially detained, from 17 May until 24 June 1968, on the direction of the Amersfoort burgomaster. This direction to detain, made in pursuance of the emergency procedure in force at that time under section 14 of the Mentally Ill Persons Act, was valid for three weeks but the term of the detention was extended by the public prosecutor (see paragraph 23 above).

The applicant's subsequent confinement, on the other hand, was not the result of administrative action. Pursuant to sections 17, 23 and 24 of the Act, the provisional detention order of 24 June 1968 was issued by the Amersfoort District Court, the detention order of 23 December 1968 by the Utrecht Regional Court and the succeeding renewal orders by the Utrecht and 's-Hertogenbosch Regional Courts (see paragraphs 24 to 28 above).

55. In the above-mentioned De Wilde, Ooms and Versyp judgment of 18 June 1971 (p. 40, para. 76), the Court stated:

> "Where the decision depriving a person of his liberty is one taken by an administrative body, ... Article 5 para. 4 (art. 5-4) obliges the Contracting States to make available to the person detained a right of recourse to a court; but there is nothing to indicate that the same applies when the decision is made by a court at the close of judicial proceedings. In the latter case the supervision required by Article 5 para. 4 (art. 5-4) is incorporated in the decision; ..."

Citing its own case-law, the Commission puts forward the view that, as it stands, this conclusion by the Court cannot be sustained in the case of confinement of persons on the

ground of "unsound mind", at any rate when the confinement is for an indefinite period (see paragraph 95 of the report).

As is indicated earlier in the present judgment, the reasons initially warranting confinement of this kind may cease to exist (see paragraph 39 in fine above). Consequently, it would be contrary to the object and purpose of Article 5 (see paragraph 37 above) to interpret paragraph 4 thereof (art. 5-4), read in its context, as making this category of confinement immune from subsequent review of lawfulness merely provided that the initial decision issued from a court. The very nature of the deprivation of liberty under consideration would appear to require a review of lawfulness to be available at reasonable intervals. However, as the Commission states in paragraph 95 of its report, further examination of this question is superfluous without first establishing whether the relevant decisions affecting Mr. Winterwerp were in fact taken after "proceedings [before] a court" ("recours devant un tribunal") within the meaning of Article 5 para. 4 (art. 5-4).

56. Neither the burgomaster, who made the initial direction to detain, nor the public prosecutor, who prolonged its validity, can be regarded as possessing the characteristics of a "court". In contrast, there is no doubt that the District Court and the Regional Courts, which issued the various detention orders, are "courts" from an organisational point of view: they are "independent both of the executive and of the parties to the case" (see the above-mentioned De Wilde, Ooms and Versyp judgment, p. 41, para. 77).

57. Nevertheless, the intervention of such a body will satisfy Article 5 para. 4 (art. 5-4) only on condition that "the procedure followed has a judicial character and gives to the individual concerned guarantees appropriate to the kind of deprivation of liberty in question"; "in order to determine whether a proceeding provides adequate guarantees, regard must be had to the particular nature of the circumstances in which such proceeding takes place" (see the last-mentioned judgment, pp. 41 and 42, paras. 76 in fine and 78).

As the Government rightly stress, the "detention of persons of unsound mind" (Article 5 para. 1 (e)) (art. 5-1-e) constitutes a special category.

58. In the opinion of the Commission, for this category the absolute minimum for a judicial procedure is the right of the individual concerned to present his own case and to challenge the medical and social evidence adduced in support of his detention (see paragraph 102 of the report). According to the Delegates, the Netherlands law contravenes Article 5 para. 4 (art. 5-4) in granting the judge a discretion in these matters.

In substance, the applicant supports the reasoning of the Commission. He further contends that, in view of the special situation of persons of unsound mind, a right for them to be legally assisted is to be read into Article 5 para. 4 (art. 5-4).

59. According to the Government, Article 5 para. 4 (art. 5-4) does not compel a court to hear in person an individual whose mental condition is established on the basis of objective medical advice to be such that he is incapable of presenting statements of any relevance for the proceedings. The objective medical evidence lodged over the years with the Netherlands courts shows, so they argue that this was the case with Mr. Winterwerp.

In their submission, the system under the Mentally Ill Persons Act offers adequate guarantees. The review is carried out by an independent court which has full discretionary powers to investigate the merits of each individual case. Furthermore, the process of review is continuous: at least once a year a court decides on the necessity of maintaining the detention. The public prosecutor, who has a statutory duty to ensure that no one is unlawfully confined in a psychiatric hospital, plays an important rôle of supervision. Finally, the medical declarations and reports required at the various stages are subject to specific rules designed to provide safeguards for the patient.

60. The Court does not share the Government’s view.

The judicial proceedings referred to in Article 5 para. 4 (art. 5-4) need not, it is true, always be attended by the same guarantees as those required under Article 6 para. 1 (art. 6-1) for civil or criminal litigation (see the above-mentioned De Wilde, Ooms and Versyp judgment, p. 42, para. 78 in fine). Nonetheless, it is essential that the person concerned should have access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation, failing which he will not have been afforded "the fundamental guarantees of procedure applied in matters of deprivation of liberty" (see the last-mentioned judgment, p. 41, para. 76). Mental illness may entail restricting or modifying the manner of exercise of such a right (see, as regards Article 6 para. 1 (art. 6-1), the above-mentioned Golder judgment, p. 19, para. 39), but it cannot justify impairing the very essence of the right. Indeed, special procedural safeguards may prove called for in order to protect the interests of persons who, on account of their mental disabilities, are not fully capable of acting for themselves.

61. Under sections 17, 23 and 24 of the Mentally Ill Persons Act as in force at the relevant times, neither the District Court nor the Regional Court was obliged to hear the individual whose detention was being sought (see paragraphs 14, 17 and 18 above).

As to the particular facts, the applicant was never associated, either personally or through a representative, in the proceedings leading to the various detention orders made against him: he was never notified of the proceedings or of their outcome; neither was he heard by the courts or given the opportunity to argue his case.

In this fundamental respect, the guarantees demanded by Article 5 para. 4 (art. 5-4) of the Convention were lacking both in law and in practice. In spite of presenting some judicial features, the procedure followed by the District Court and the Regional Court for deciding the applications for his detention did not entitle Mr. Winterwerp "to take proceedings ... [before] a court", within the meaning of Article 5 para. 4 (art. 5-4) (see paragraph 57 above). Without in any way underestimating the value of the many guarantees provided under the Mentally Ill Persons Act, the Court finds that the said procedure did not meet the requirements of Article 5 para. 4 (art. 5-4).

B. As concerns the applicant's requests for discharge

62. The Government rightly insist on the need to take a comprehensive view of the whole system established under the Mentally Ill Persons Act. It therefore remains to determine whether the foregoing lacunae found by the Court are remedied in the procedure governing requests for discharge (section 29 of the Act; see paragraph 20 above).

63. While section 29 of the Act allows the person concerned to seek a review of his detention, his request for discharge is not necessarily decided on by a court. The request has to be addressed to the hospital authorities who transmit it, if they have received an unfavourable medical opinion, to the public prosecutor. The public prosecutor will in principle then refer the request to the Regional Court, but in certain cases he is not obliged to do so, in particular where it appears manifestly impossible to grant the request. The public prosecutor's decision can in no way be regarded as issuing from a court for the purposes of Article 5 para. 4 (art. 5-4) of the Convention. Admittedly, limitations as to the intervals between applications for release may, according to the circumstances, constitute legitimate restrictions on access to the courts by persons of unsound mind (see paragraph 60 above). However, each time the public prosecutor declines to communicate a request to the Regional Court on the ground that it appears evidently ill-founded he is not merely restricting but effectively denying the right to court proceedings as embodied in Article 5 para. 4 (art. 5-4).

The Regional Court, in those instances where the request has come before it for decision, is completely free in judging the desirability of hearing the detained person. A power of this

kind does not assure the fundamental guarantees of procedure to be applied in matters of deprivation of liberty (see paragraphs 60 and 61 above).

64. Mr. Winterwerp was in fact heard by the Regional Court in February 1969 when it examined his first request for release (see paragraph 30, first sub-paragraph, above). To this extent, he had been able to take proceedings before a court in order to test the lawfulness of his confinement.

In contrast, his subsequent requests in April 1971, July 1972 and February 1973 were not forwarded to the Regional Court since the public prosecutor rejected them as being devoid of any prospects of success (see paragraph 30, second and third sub-paragraphs, above). The public prosecutor heard Mr. Winterwerp each time and his decisions may well have been justified on the basis of the information at his disposal, but they cannot be qualified as decisions taken by a "court" within the meaning of Article 5 para. 4 (art. 5-4).

C. As concerns the applicant's alleged failure to seek legal representation

65. In paragraph 11 (b) of their memorial the Government state that a person who has "substantial and well-founded grounds for denying the lawfulness of his detention" is able under Netherlands legislation to have counsel present these grounds to the court. In their submission, Mr. Winterwerp had ample opportunity, especially during his various periods of leave from the hospital, to consult a lawyer of his own choosing. Since he apparently never elected to apply to the courts through a lawyer either at the moment of the periodic review of his confinement or as regards his requests for release, it cannot be said, so the Government argue, that he has been refused his right "to take proceedings" as guaranteed by Article 5 para. 4 (art. 5-4).

66. The Court does not agree with this line of reasoning. Having "substantial and well-founded grounds for denying the lawfulness of [the] detention" cannot be a pre-condition for access to the proceedings contemplated by Article 5 para. 4 (art. 5-4), since this is precisely the issue that the domestic court should decide. Furthermore, Article 5 para. 4 (art. 5-4) does not require that persons committed to care under the head of "unsound mind" should themselves take the initiative in obtaining legal representation before having recourse to a court.

The applicant cannot therefore be regarded as having failed to avail himself of the right set forth in Article 5 para. 4 (art. 5-4) simply because he never instructed a lawyer to represent him; in point of fact, he certainly did claim this right in that on four occasions he sought a review of the lawfulness of his confinement (see paragraph 64 above).

D. Conclusion

67. To sum up, the various decisions ordering or authorising Mr. Winterwerp's detention issued from bodies which either did not possess the characteristics of a "court" or, alternatively, failed to furnish the guarantees of judicial procedure required by Article 5 para. 4 (art. 5-4); neither did the applicant have access to a "court" or the benefit of such guarantees when his requests for discharge were examined, save in regard to his first request which was rejected by the Regional Court in February 1969. Mr. Winterwerp was accordingly the victim of a breach of Article 5 para. 4 (art. 5-4).

68. In the light of this conclusion, the Court does not deem it necessary to settle an issue raised in this case, namely whether the review of "lawfulness" provided for by Article 5 para. 4 (art. 5-4) covers not only the formal propriety of the procedure followed but also the substantive justification of the deprivation of liberty. An interpretation in this sense, although accepted by the Commission, the Netherlands Government and the applicant (see paragraphs

46, 62 and 88 to 91 of the Commission's report), was contested by the United Kingdom Government in their memorandum of 9 January 1979 (see paragraph 7 above). In any event, the Netherlands legislation does not limit the scope of the review.

III. ON THE ALLEGED VIOLATION OF ARTICLE 6 PARA. 1 (art. 6-1)

69. The applicant makes a third complaint described as "subsidiary to, though connected with," his other complaints. He submits that insofar as his detention automatically divested him of the capacity to administer his property, there had been a "determination of his civil rights and obligations" without the guarantees of a judicial procedure as laid down in Article 6 para. 1 (art. 6-1). The terms of Article 6 para. 1 (art. 6-1) provide:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice."

70. The Commission does not feel called on to express any view on this claim; it considers that the issue involved relates to "facts distinct" from those originally submitted for its examination and has not been the subject of any "detailed argument" before it (see paragraph 116 of the report).

This being so, it has to be ascertained whether the Court in its turn can rule on the alleged violation of Article 6 (art. 6).

71. In its judgment of 18 January 1978 in the case of Ireland v. the United Kingdom (Series A no. 25, p. 63, para. 157), the Court explained in the following terms the scope of its jurisdiction in contentious matters:

> "The Commission's decision declaring an application admissible determines the object of the case brought before the Court; it is only within the framework so traced that the Court ... may take cognisance of all questions of fact or of law arising in the course of the proceedings ..."

When accepting Mr. Winterwerp's application on 30 December 1975, the Commission specified that it had examined the application "with reference to Article 5 (art. 5) of the Convention" (see paragraph 33 above). While explaining why the Commission had not deemed it "necessary or desirable" to deal with the Article 6 (art. 6) complaint at the merits stage, the Delegates made it clear at the hearing that in the Commission's thinking there could well be an issue for consideration.

72. In the first place, the Court takes notice of the fact that at no stage before the Commission (see the above-mentioned De Wilde, Ooms and Versyp judgment, p. 30, para. 54), or for that matter before the Court itself, did the Government raise any preliminary objection on this point.

Moreover, although the complaint in question was not mentioned explicitly in Mr. Winterwerp's application to the Commission, it has an evident connection with the complaints he initially made. His grievances as stated during the admissibility proceedings, where he was not represented by a lawyer, were directed against his deprivation of liberty: he felt he was being arbitrarily detained and he objected that he had been neither allowed a hearing by a court nor informed of the decisions by which his confinement was several times prolonged (see paragraph 33 above). The new issue regarding Article 6 (art. 6), raised by Mr. Van Loon at the merits stage before the Commission, concerned a legal consequence that follows automatically from the fact of compulsory confinement in a psychiatric hospital (section 32 of the Mentally Ill Persons Act; see paragraph 21 above). It is thus intimately linked to the

matters that formed the subject of Mr. Winterwerp's original complaints declared admissible by the Commission (see, mutatis mutandis, the Delcourt judgment of 17 January 1970, Series A no. 11, p. 20, para. 40).

The Court thus has jurisdiction to decide the claim.

73. The Government doubt whether Article 6 para. 1 (art. 6-1) is applicable to the facts of the case. They incline to the view that what is in issue is a question of status rather than a civil rights and obligations as such.

The Court does not share this opinion. The capacity to deal personally with one's property involves the exercise of private rights and hence affects "civil rights and obligations" within the meaning of Article 6 para. 1 (art. 6-1) (see the König judgment of 28 June 1978, Series A no. 27, p. 32, para. 95). Divesting Mr. Winterwerp of that capacity amounted to a "determination" of such rights and obligations.

74. The applicant lost the capacity to administer his property on his confinement in a psychiatric hospital (see paragraph 32 above).

Clearly, in relation to the initial "emergency" detention directed by the burgomaster (see paragraphs 12 and 23 above), there had been no court hearing in compliance with Article 6 para. 1 (art. 6-1) of the Convention.

The subsequent periods of confinement were, it is true, authorised at regular intervals by the Amersfoort District Court and the Utrecht and 's-Hertogenbosch Regional Courts. However, the present judgment has already drawn attention to certain aspects of the procedure followed on these occasions and, notably, to the fact that neither in law nor in practice was Mr. Winterwerp afforded the opportunity of being heard, either in person or through a representative (see paragraph 61 above). What is more, that procedure was concerned solely with his deprivation of liberty. Consequently, it cannot be taken as having incorporated a "fair hearing", within the meaning of Article 6 para. 1 (art. 6-1), on the question of his civil capacity.

75. By way of general argument, the Government contend that there was no breach of Article 6 para. 1 (art. 6-1) since the provisions of the Mentally Ill Persons Act safeguard the civil rights of the detained person of unsound mind who, by the very reason of his proven mental condition, needs to be protected against his own inability to manage his affairs.

The Court does not agree with this line of reasoning. Whatever the justification for depriving a person of unsound mind of the capacity to administer his property, the guarantees laid down in Article 6 para. 1 (art. 6-1) must nevertheless be respected. While, as has been indicated above in connection with Article 5 para. 4 (art. 5-4) (see paragraphs 60 and 63), mental illness may render legitimate certain limitations upon the exercise of the "right to a court", it cannot warrant the total absence of that right as embodied in Article 6 para. 1 (art. 6-1) (see the above-mentioned Golder judgment, pp. 18 and 19, paras. 36, 38 and 39).

76. There has accordingly been a breach of Article 6 para. 1 (art. 6-1).

IV. ON THE APPLICATION OF ARTICLE 50 (art. 50)

77. At the hearing the applicant's lawyer suggested, by way of just satisfaction, a five-point scheme providing basically for after-care of his client under the supervision of the social psychiatric service, together with an assurance that full procedural guarantees would be provided as regards the annual renewal orders and requests for discharge. No claim was made for material damage and no pecuniary compensation was sought in respect of non-material damage.

The Commission's Delegates, without adding further detail, stated their view that this represented a fair scheme of arrangement for compensation under Article 50 (art. 50).

The Government, for their part, reserved their position.

78. Accordingly, although it was raised under Rule 47 bis of the Rules of Court, the question of the application of Article 50 (art. 50) of the Convention is not ready for decision. The Court is therefore obliged to reserve the question and to fix the further procedure, taking due account of the possibility of an agreement between the respondent State and the applicant (Rule 50 paras. 3 and 5 of the Rules of Court).

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. Holds that there has been no breach of Article 5 para. 1 (art. 5-1);

2. Holds that there has been breach of Article 5 para. 4 (art. 5-4);

3. Holds that it has jurisdiction to rule on the complaint under Article 6 para. 1 (art. 6-1);

4. Holds that there has been breach of Article 6 para. 1 (art. 6-1);

5. Holds that the question of the application of Article 50 (art. 50) is not ready for decision;

accordingly,

(a) reserves the whole of the said question;

(b) invites the Commission to submit to the Court, within two months from the delivery of this judgment, its observations on the said question and, in particular, to notify the Court of any settlement at which the Government and the applicant may have arrived;

(c) reserves the further procedure.

Done in English and French, the English text being authentic, at the Human Rights Building, Strasbourg, this twenty-fourth day of October, one thousand nine hundred and seventy-nine.

Helga Pedersen
President

Marc-André Eissen
Registrar

AXON v. GERMANY JUDGMENT

WINTERWERP v. THE NETHERLANDS JUGDMENT

WINTERWERP v. THE NETHERLANDS JUGDMENT