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

FIFTH SECTION

DECISION

Application no. 36356/10
Veit AURNHAMMER
against Germany

The European Court of Human Rights (Fifth Section), sitting on 21 October 2014 as a Chamber composed of:

Mark Villiger, *President*,
Angelika Nußberger,
Boštjan M. Zupančič,
Ganna Yudkivska,
Vincent A. De Gaetano,
Helena Jäderblom,
Aleš Pejchal, *judges*,
and Claudia Westerdiek, *Section Registrar*,

Having regard to the above application lodged on 24 June 2010,

Having deliberated, decides as follows:

THE FACTS

1. The applicant, Mr Veit Aurnhammer, is a German national who was born in 1984 and is currently detained in Straubing, Germany. When lodging his application he was represented before the Court by Mr G. Althammer, a lawyer practising in Cham, Germany. The latter informed the Court on 1 August 2014 that he no longer represented the applicant.

A. The circumstances of the case

2. The facts of the case, as submitted by the applicant, may be summarised as follows.

1. Background to the case

(a) The applicant's placement in a psychiatric clinic

3. On 19 August 2004 the applicant was convicted by the Regensburg Juvenile District Court of causing bodily harm and damage to property because he had hit two ticket collectors in the face when they tried to prevent him from evading ticket controls and had damaged their clothes and glasses. He was further convicted of defamation and attempted coercion as he had insulted a prosecutor during one of his previous trials and had tried to intimidate her. Moreover, he was convicted of dangerous bodily injury because he had attacked with a knife the neck of a sleeping cellmate of whom he had previously felt humiliated and slightly injured him. Besides, the applicant was convicted of various offences of theft, minor fraud, and trespassing. Adding on another prison sentence imposed on the applicant in a previous judgment of 15 February 2000 for various offences of defamation, resisting bailiffs, bodily injury and theft, the court sentenced the applicant to an overall prison term of two years and six months in a juvenile prison.

4. Besides, the Court ordered the applicant's indefinite placement in a psychiatric hospital in accordance with Article 63 of the Criminal Code (see paragraphs 17 and 18 below).

5. At the time the applicant committed the relevant criminal offences he was between nineteen and twenty years old. The court decided to apply the juvenile criminal law instead of the criminal law rules applicable to adults because it found, in line with the report of the psychiatric expert Dr S., deputy medical director (*Oberarzt*) of the forensic psychiatry and psychotherapy department of Regensburg Psychiatric Clinic and with the additional psychological expert opinion of psychotherapist H., that the applicant's development as an adult was delayed, that he was still immature and had therefore to be treated as a juvenile and not as an adult. The court further found, in line with the psychiatric experts' opinions, that the applicant had committed the criminal offences of causing bodily harm and damage to property, dangerous bodily injury, defamation and attempted coercion while in a state of diminished criminal responsibility (Article 21 of the Criminal Code, see paragraph 19 below), as he suffered mainly from a "borderline personality disorder of an impulsive type with dissocial components" and also from "adult hyperactivity syndrome", which limited his ability to control his impulses. With regard to the other criminal offences he was convicted of, the court, in line with the psychiatric experts' opinion, regarded the applicant as fully liable.

(b) Initial proceedings to review the applicant's detention

6. On 2 November 2005, 27 September 2006 and 27 September 2007 the criminal courts reviewed the applicant's compulsory confinement in the

psychiatric clinic in accordance with Articles 67d and 67e of the Code of Criminal Procedure (see §§ 20/21 below) and found on all three occasions that the applicant's detention in a psychiatric clinic could not yet be suspended on probation. For the purposes of these review decisions, the in-house psychiatric doctors at Straubing Psychiatric Hospital issued medical opinions on 9 August 2005, 14 August 2006 and 2 July 2007.

7. On 9 October 2008 the District Court again decided that the applicant still suffered from the psychological disorder which had led to the criminal offences of which he had been convicted in 2004 and that he could be expected to commit further offences of a certain gravity if released. The decision was delivered after having heard the applicant on 26 September 2007 and again on 21 May 2008. It was based on the above-mentioned expert opinion of 2 July 2007 by the in-house psychiatric team at Straubing Psychiatric Hospital and on a newly commissioned external expert opinion of the psychiatric expert Prof. Dr O., head of the forensic psychiatry and psychotherapy department of the University of Regensburg at Regensburg Psychiatric Clinic, who had delivered his expert opinion on 19 February 2008, had supplemented it on 28 July 2008 and had personally been heard by the court on 21 May 2008.

8. In the medical report of 2 July 2007 the team of in-house psychiatric experts at Straubing Psychiatric Hospital had expressed the view that the applicant could be expected to commit further crimes if released because he showed no insight into his psychological disorder. The expert opinion had further expressed the suspicion that the applicant might in fact be schizophrenic.

9. In his expert opinion Prof. Dr O. had diagnosed the applicant with an "emotionally unstable personality disorder of the impulsive type" and possibly also with "adult hyperactivity syndrome". O. had further stated that, despite the fact that the personality of the applicant had matured considerably during his confinement, he could not at this stage be expected to abstain from committing any significant crimes if released. Although the applicant had obviously benefited from his placement in a psychiatric hospital and had not committed any criminal offences within the hospital, he was still not psychologically stable enough to be released. The biggest obstacle to his release was that the applicant still had very little insight into the fact that medical treatment was necessary now and in the future after a possible release. His compliance with his treatment had hence not yet been achieved. Furthermore, the applicant would need clearly structured sheltered accommodation if released. The preparations for such accommodation were not yet in place. The expert had further stated that, if the applicant could be further stabilised by psychotherapy, if his compliance with his treatment could be achieved in the future and if a place in adequately structured sheltered accommodation was prepared, the applicant could be released but

would need to be prepared over a period of six to twelve months for such release on probation.

10. Following an appeal by the applicant, the Regional Court upheld the decision of the District Court on 16 January 2009.

2. The proceedings at issue

(a) The decision of the Straubing District Court

11. On 8 October 2009 the District Court decided in accordance with Article 67d § 2 of the Criminal Code (see paragraph 19 below) that the applicant could not yet be released because, owing to his ongoing psychiatric illness, he could still be expected to commit crimes of a certain gravity if released. The Court based its decision on a newly commissioned expert opinion of the internal psychiatric team of Straubing Psychiatric Hospital of 7 July 2009 and the oral hearing of the deputy medical director treating the applicant of 30 September 2009.

12. The respective medical experts were still of the view that the applicant could be expected to commit further crimes if released, because he still lacked sufficient insight into his psychological disorder. There was still a suspicion that he might in fact be suffering from schizophrenia rather than from a borderline personality syndrome. But as he refused to cooperate fully with the doctors, a clear diagnosis that would allow a more specific treatment was difficult. The idea that the applicant was suffering from schizophrenia was therefore only a presumption which could not be confirmed or refuted. More rapid results from the applicant's treatment could only be achieved if he complied fully with the medical and psychotherapeutic treatment. As he still had a negative attitude towards the medication and the psychotherapists, sufficient progress to justify his release could not be achieved.

(b) The decision of the Regensburg Regional Court

13. On 23 December 2009 the Regional Court upheld the decision. It based its decision on the above-mentioned external medical opinion of Prof. Dr O. of 19 February and 21 May 2008 respectively and on the internal expert opinion of the psychiatric team of Straubing Psychiatric Hospital of 7 July 2009. The court held that there was still a clear diagnosis of "emotionally unstable personality disorder of the impulsive type" and possibly also of "adult hyperactivity syndrome". This diagnosis did not contradict the diagnosis of "borderline personality disorder of an impulsive type with dissocial components" established by S. at the time of the applicant's initial compulsory confinement. According to the Regional Court, Prof. Dr O. had made it clear before the court that that diagnosis just gave a more precise description of the mental disturbance from which the applicant had already been suffering when he committed the offences of

which he had been convicted and when he had been compulsorily admitted, but did not describe a new mental illness.

14. The court further held that the idea that the applicant in fact suffered from schizophrenia was only an unverified presumption. His situation had not changed since the external expert O. had given his opinion on 19 February and 21 May 2008. According to the statement of the in-house psychiatric doctor, the applicant had still not developed any insight into his psychological illness that would result in full cooperation with regard to his medication. At the same time no structured sheltered accommodation had yet been prepared into which he could be placed after his release. He was therefore still to be expected to commit further crimes of a certain gravity if released. Considering the criminal offences he had committed in the past and the risk that he might again commit similar offences such as causing bodily harm and aggravated bodily injury, his continued detention for more than five years by that time was not yet disproportionate.

(c) The decision of the Court of Appeal

15. A further appeal lodged by the applicant with the Court of Appeal was rejected on the ground that domestic law did not provide for such an appeal.

(d) The decision of the Federal Constitutional Court

16. A constitutional complaint and a request for restoration of the previous situation lodged by the applicant were of no avail. On 10 June 2010 the Federal Constitutional Court declined to admit the constitutional complaint for examination, without giving any reasons, and did not rule on the request for restoration of the previous situation (no. 2 BvR 1001/10).

B. Relevant domestic law

17. In accordance with Article 63 of the Criminal Code placement in a psychiatric hospital may be ordered in the case of offenders who have acted without criminal responsibility or in the case of offenders who have acted with diminished criminal responsibility in addition to their punishment. The measure must, however, be proportionate to the gravity of the offences committed by, or to be expected from, the defendants concerned, as well as to their dangerousness (Article 62 of the Criminal Code).

18. Article 63 of the Criminal Code provides that if someone commits an unlawful act without criminal responsibility or with diminished criminal responsibility, the court must order his placement in a psychiatric hospital without specifying a maximum duration, if a comprehensive evaluation of the defendant and his acts reveals that, as a result of his condition, he can be expected to commit serious unlawful acts and that he is therefore dangerous to the general public.

19. Criminal incapacity and diminished criminal responsibility are regulated by Articles 20 and 21 of the Criminal Code, which read as follows:

Article 20 Criminal incapacity on account of psychological disturbance

"Any person who at the time of the commission of the offence is incapable of understanding the unlawfulness of his or her actions or of acting in accordance with any such understanding on account of a pathological mental disorder, a profound consciousness disorder, mental deficiency or any other serious mental abnormality, shall be deemed to have acted without guilt."

Article 21 Diminished criminal responsibility

"If the capacity of the offender to understand the unlawfulness of his or her actions or to act in accordance with any such understanding is substantially diminished at the time of the commission of the offence for one of the reasons indicated in Article 20, the sentence may be mitigated in accordance with Article 49(1)."

20. Article 67d of the Criminal Code governs the duration of detention. In the version in force at the relevant time, it provided:

Article 67d Duration of detention

"(1) ...

(2) If no maximum period has been provided or the period has not yet expired, the court shall suspend the measure for a probationary period if it can be expected that the person subject to the measure will not commit any more unlawful acts if released. The order for suspension shall automatically lead to the person being subjected to supervision.

...

(6) If, after the enforcement of a hospital order has begun, the court finds that the conditions for the measure no longer exist or that the continued enforcement of the measure would be disproportionate, the court shall declare it terminated. Following release the person concerned shall automatically be placed under supervision. ..."

21. Article 67e of the Criminal Code provides for the review of a person's detention, including in a psychiatric hospital. The court may review at any time whether the continued execution of the detention order should be suspended and the person concerned placed on probation. It is obliged to do so within fixed time-limits (Article 67e, first paragraph). For persons detained in a psychiatric hospital, this time-limit is one year (Article 67e, second paragraph).

COMPLAINTS

22. The applicant complained under Article 5 of the Convention that his continuous confinement in a psychiatric clinic since 2004 was disproportionately long. Furthermore, he claimed that the proceedings

concerning the judicial review of his continued detention had been unfair, as the competent courts had not taken all relevant aspects into account, had not followed the recommendation of the external psychiatric expert to release him and as the expertise of the internal doctors of the medical clinic was wrong.

23. The applicant further complained under Article 2 and Article 8 of the Convention that his life and health were endangered by the side-effects of all the medication he had to take for the treatment of his psychological disorder. He was of the view that he needed to be transferred to a clinic specialising in internal medicine.

THE LAW

A. Alleged violation of Article 5 of the Convention

24. In his complaint under Article 5 of the Convention the applicant argued that his continued detention in a psychiatric hospital was unlawful. The domestic criminal courts should have released him on probation as the external psychiatric expert O. had stated that he could be released after a preparation period of six to twelve months, a period of time that had long since passed.

25. He further claimed that owing to his poor state of health he was too weak to commit any further crimes in the future. When ruling on his continued detention the criminal courts should have taken his physical condition into consideration but had failed to do so.

26. Furthermore, the criminal offences of which he had been convicted were a series of petty offences committed as an adolescent. As those offences were of such little severity, the fear that he might commit similar offences again in the future could not justify his continued detention after almost six years.

27. Moreover, the applicant claimed that the expert opinions of the doctors in the medical clinic had been wrong, and requested to be examined by an external psychiatric expert.

28. In essence the applicant's complaints under Article 5 have to be interpreted as complaints under Article 5 § 1 and Article 5 § 4 of the Convention, which in their relevant parts read as follows:

> "1. 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;

...

4. 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.

..."

29. The Court notes that the applicant was deprived of his liberty by virtue of the Regensburg Juvenile District Court's judgment of 19 August 2004 ordering his placement in a psychiatric hospital for an indefinite period. His detention could thus fall under Article 5 § 1 (a) as being detention "after conviction" by a "competent court", and/or under Article 5 § 1 (e) as constituting detention of a person of "unsound mind".

30. In view of the fact that the applicant's continued detention was primarily based on a finding by the domestic courts that he suffered from a mental disorder and was therefore of "unsound mind", the Court considers it appropriate to examine the complaint first under Article 5 § 1 (e) (see *X v. the United Kingdom*, 5 November 1981, § 39, Series A no. 46; *Puttrus v. Germany*, (dec.), no. 1241/06, 24 March 2009; and *Graf v. Germany*, (dec.), no. 53783/09, 18 October 2011).

1. Whether the applicant was of unsound mind

(a) Recapitulation of the relevant principles

31. In determining whether the applicant was of "unsound mind" within the meaning of Article 5 § 1 (e) , the Court reiterates that an individual cannot be deprived of his liberty as being of "unsound mind" unless the following three minimum conditions are satisfied: firstly, he must reliably be shown to be of unsound mind, that is, a true mental disorder must be established before a competent authority on the basis of objective medical expertise; secondly, the mental disorder must be of a kind or degree warranting compulsory confinement; thirdly, the validity of continued confinement depends upon the persistence of such a disorder (see, *inter alia*, *Winterwerp v. the Netherlands*, 24 October 1979, § 39, Series A no. 33, and *Shtukaturov v. Russia*, no. 44009/05, § 114, ECHR 2008).

32. 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, in particular on the merits of clinical diagnoses, 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 *Winterwerp*, cited above, § 40; *X v. the United Kingdom*, cited above, § 43; *Puttrus*, cited

above; *S. v. Germany*, no. 3300/10, § 81, 28 June 2012; and *Glien v. Germany*, no. 7345/12, § 74, 28 November 2013).

33. The relevant time at which a person must be reliably established to be of unsound mind, for the requirements of sub-paragraph (e) of Article 5 § 1, is the date of the adoption of the measure depriving that person of his liberty as a result of that condition (compare *Winterwerp*, cited above, § 42; *Luberti v. Italy*, 23 February 1984, § 28, Series A no. 75; *Puttrus*, cited above; and *Graf*, cited above).

34. The objective medical expertise on which a competent authority has to base its decision has to be sufficiently recent (see *Ruiz Rivera v. Switzerland*, no. 8300/06, § 60, 18 February 2014, and *Vogt v. Switzerland* (dec.), no. 45553/06, 3 June 2014, § 37, both with regard to Article 5 § 4).

35. The Court's well established case-law shows that the question whether medical expertise was sufficiently recent is not answered by the Court in a static way but depends on the specific circumstances of the case before it. Accordingly, in *Herz v. Germany* (no. 44672/98, § 50, 12 June 2003), the Court found that a medical expert's opinion that was one and a half years old was not sufficient by itself to justify the applicant's detention in a psychiatric clinic under Article 5 § 1 (e). The case concerned a detention order issued by a civil court ordering the applicant's confinement as a preventive measure because the applicant, who had not been convicted of any criminal offences in connection with his state of mind, was considered a danger to his divorced wife. The reason the Court did not accept that the detention was based on a one and a half years old expert's opinion was that the expert's opinion had been issued for different proceedings concerning another occasion in which the applicant was subject to preventive confinement and was not issued for the proceedings at issue. Furthermore, the question whether the applicant was in fact of unsound mind had been addressed by various other medical experts' statements after the medical opinion in question, but before the applicant's actual confinement. These other medical opinions arrived at the opposite conclusion. Nevertheless, the Court did not find a violation of Article 5 § 1 (e) of the Convention, as the detention had been ordered as a preventive measure in a situation of emergency which did not allow any delay, as it was nevertheless based on a medical expertise and as it only lasted six weeks.

36. In *Ruiz Rivera* (cited above, § 64) the Court found that, in a case where the applicant lacked a trusting relationship with the psychiatric doctor treating him and where the therapy he received had reached a deadlock, the domestic courts had not based their decision on sufficiently recent objective medical expertise (the last external expert opinion was more than three years old).

37. In *Dörr v. Germany* ((dec.), no. 2894/08, 3 January 2008), the Court was satisfied with an external medical opinion on the applicant's dangerousness that was six years old, in a case concerning the continuous preventive detention of the applicant under Article 5 § 1 (a). The Court found that the domestic courts' decision not to suspend the applicant's continuous detention was not unreasonable as the applicant had refused to undergo therapy since the last external expert's opinion had been issued, and the applicant's oral and written submissions to the court, as well as the statement of the prison psychologist who gave evidence to the court during the review proceedings, showed that the applicant's situation had not changed since the last external medical expert report.

(b) Application of these principles to the present case

(i) Whether the applicant suffered from a true mental disorder at the time of the review proceedings at issue

38. In examining whether it was established before the competent domestic courts on the basis of medical expertise that the applicant suffered from a true mental disorder, the Court notes that at the time when the applicant's detention was being reviewed, the Straubing District Court and the Regensburg Regional Court had regard to medical expertise, namely the medical opinion of the external expert Prof. Dr O. of 19 February 2008, his additional statement of 23 July 2008 and his oral evidence of 21 May 2008 in the earlier review proceedings, in addition to the written statement of 7 July 2009 by the psychiatric team that was treating the applicant and the oral medical opinion of the deputy medical director treating him.

39. Prof. Dr O. diagnosed the applicant as suffering from an "emotionally unstable personality disorder of the impulsive type" and possibly also from "adult hyperactivity syndrome". This diagnosis was not contested by the expert opinion of the Straubing psychiatric team, who merely stated that there was a chance that the applicant was actually suffering from schizophrenia. The experts made it clear that this assertion was not a founded diagnosis but a mere suspicion which had not yet been verified.

40. The Court further notes that the Regional Court found that Prof. Dr O.'s diagnosis merely gave a more precise description of the mental disorder from which the applicant had already been suffering when he committed the criminal offences that led to his initial confinement and which was subsequently diagnosed as "borderline personality disorder of an impulsive type with dissocial components" and "adult hyperactivity syndrome". This mental disturbance was regarded by the domestic courts as a severe personality disorder for the purposes of Article 21 of the Criminal Code which had resulted in the applicant's criminal responsibility having been diminished.

41. In view of the discretion the national authorities enjoy when deciding whether an individual should be detained as a person "of unsound mind", and in particular the national authorities' discretion with regard to the merits of clinical diagnoses, the Court is satisfied that at the time of the review proceedings at issue, a clear diagnosis of a true mental disorder in the applicant's case was established before the competent domestic courts on the basis of medical expertise.

(ii) Whether the medical expertise was objective, in particular whether it was sufficiently recent

42. In further examining whether the relevant medical expertise on which the review decisions of the District Court and the Regional Court were based was objective, in particular whether it was sufficiently recent, the Court notes that the expert opinion on which the decisions were based was prepared by Prof. Dr O., who was an independent external psychiatric expert. The applicant himself only claimed before this Court in a very general way that the medical opinions of the clinic doctors were wrong.

43. At the time of the review proceedings at issue this expert's opinion was only twenty months old (at the time of the District Court's decision) and twenty-two months old (at the time of the Regional Court's decision). His additional statement was less than fifteen and seventeen months old respectively at the relevant times. The written statement by the psychiatric team treating the applicant was only three and five months old respectively, and the oral statement from the deputy medical director treating the applicant was sought by the District Court nine days before its decision.

44. The Court further considers that the applicant's situation had not changed since the last external expert's opinion had been issued (compare *Dörr*, cited above). Prof. Dr O. had regarded it as a precondition for the start of the applicant's preparation for release that he develop a full insight into the necessity of his treatment and demonstrate full compliance with it. The statement of the in-house psychiatric team during the review proceedings at issue made clear that this was still not the case, as the applicant had not changed his attitude towards his treatment. This remained uncontested by the applicant. The Court therefore finds that the medical expertise on which the review decisions were based in the case at hand was sufficiently recent.

45. The Court also notes that Prof. Dr O.'s expert opinion had not been contested by other medical experts at the time of the Regional Court's decision (see, *a contrario*, *Herz*, cited above, § 50). As indicated above (paragraph 14), the written and oral statements by the Straubing psychiatric team of 7 July 2009 and 30 September 2009 merely suggested that the applicant might in fact be suffering from schizophrenia, but made it clear that this was not a founded diagnosis. Furthermore, the Straubing experts' opinion did not challenge the general view that the applicant was suffering from a true mental disorder which warranted compulsory confinement, and

also took the view that the applicant's mental disorder was of a kind that required his continued detention.

46. Finally, the Court is of the view that there is no indication that the applicant's relationship with the psychiatric team treating him was severely troubled. It is true that the statements of Prof. Dr O. and of the Straubing psychiatric team show that the applicant did not comply fully with the treatment, and the decision of the Regional Court shows that he refused further therapy by the in-house medical team of Straubing Psychiatric Hospital. However, there is nothing to show a breakdown of the relationship of trust with the psychiatric team or a deadlock situation (see, *a contrario*, *Ruiz Rivera* cited above, § 64).

47. The Court is therefore satisfied that the review decisions in issue were based on objective, in particular on sufficiently recent, medical expertise.

(iii) Whether the mental disorder was of a kind or degree warranting compulsory confinement

48. When examining whether the true mental disorder that was established was of a kind or degree warranting compulsory confinement, the Court further notes that the external and in-house medical experts, contrary to the applicant's submission, were of the view that the applicant's mental disorder warranted his continued confinement as he could still be expected to commit further offences of the same kind and at least equivalent seriousness as those that had been the reason for his initial confinement. In that connection the Court notes that the applicant's assertion that Prof. Dr O. had recommended his release after a period of six to twelve months in his expert opinion of 19 February 2008 was incorrect. In fact, the expert suggested that the applicant be released after a preparation period of six to twelve months, once his full compliance with his treatment had been secured. O. considered this not to be the case at the time he issued his medical opinion.

49. Furthermore, the Court does not agree with the applicant that the criminal offences he could be expected to commit if released may be considered as a series of petty offences typical among adolescents. The Court notes that the reason for the applicant's initial confinement was the fact that he had punched various people in the face in public, and especially that he had attacked a fellow prisoner with a knife while the victim was sleeping. The Court therefore accepts the domestic courts' findings that these acts must be regarded as a series of offences that present a serious danger to the public.

50. The Court further notes that the Regensburg Juvenile District Court, in its judgment of 19 August 2004, showed convincingly on the basis of medical expertise that the applicant had committed these offences because he suffered from a "borderline personality disorder of an impulsive type

with dissocial components" and from "adult hyperactivity syndrome". The domestic courts further showed that because of this state of mind he was unable to control his impulses and hence reacted in an inappropriate and violent way if he felt humiliated or agitated. The Court further notes that in the review proceedings the domestic courts showed convincingly, on the basis of medical expertise, that the applicant still suffered from the same mental disorder (diagnosed in the meantime as "emotionally unstable personality disorder of the impulsive type" and possibly also "adult hyperactivity syndrome", see above) which had been the reason for the offences described above. As the domestic courts, during the review proceedings in issue, showed on the basis of medical expertise that this mental disorder had not yet been successfully treated to an extent that would prevent the applicant from reacting in the same severe violent way as before his confinement, if confronted with situations comparable to those that led to his violent acts, the Court is also satisfied that the true mental disorder that was established was of a kind and degree that warranted the applicant's continued confinement at the time of the review decisions.

(iv) Whether the validity of the applicant's continued confinement depended on the persistence of his mental disorder.

51. Furthermore, in the proceedings at issue, the District Court and the Regional Court re-examined the need for the applicant's continued detention in the course of the periodic review prescribed by Article 67e of the Criminal Code (see § 21 above). This demonstrates that the validity of his continued confinement depended on the persistence of his mental disorder.

52. The Court therefore concludes that the applicant was of unsound mind within the meaning of Article 5 § 1 (e).

2. The lawfulness of the applicant's detention

(a) Recapitulation of the relevant principles

53. The Court reiterates that the lawfulness of detention depends on conformity with the procedural and the substantive rules of domestic law, the term "lawful" overlapping to a certain extent with the general requirement in Article 5 § 1 to observe a "procedure prescribed by law" (see *Winterwerp*, cited above, § 39, and *H.L. v. the United Kingdom*, no. 45508/99, § 114, ECHR 2004-IX). A necessary element of the "lawfulness" of the detention within the meaning of Article 5 § 1 (e) is the absence of arbitrariness. The detention of an individual is such a serious measure that it is only justified where other, less severe, measures have been considered and found to be insufficient to safeguard the individual or public interest which might require that the person concerned be detained. The deprivation of liberty must be shown to have been necessary in the

circumstances (see *Witold Litwa v. Poland*, no. 26629/95, § 78, ECHR 2000-III, and *Puttrus*, cited above).

(b) Application of these principles to the present case

54. The Court notes that the continuation of the applicant's detention in a psychiatric hospital was ordered by the Regensburg Juvenile District Court on 19 August 2004 under Article 63 of the Criminal Code for an indefinite duration, and was not subsequently terminated or suspended for a probationary period by the domestic courts in the proceedings at issue under Article 67e of the Criminal Code. It therefore finds that the applicant's detention was in conformity with the procedural and substantive rules of domestic law.

55. In determining whether the applicant's detention was in keeping with the purpose of Article 5 § 1 of protecting him from arbitrariness, the Court notes that although a certain maturing of the applicant's personality was observed by the expert Prof. Dr O. at the time of the review proceedings at issue, his mental condition had not changed sufficiently throughout his stay in the psychiatric hospital for it to be expected that he would not reoffend if released. The Court further observes that although the applicant was not expected to commit crimes of utmost seriousness if released, he was expected to commit crimes against the physical integrity of of potential victims. As his offences had shown in the past, minor reasons were sufficient in order to provoke unexpected violent behaviour of the applicant. The Court therefore accepts the domestic courts' finding that the applicant was not only expected to commit petty offences, but criminal offences that presented a serious danger to people's physical integrity and hence a serious danger to the public.

56. The Court further notes that the domestic courts considered milder measures such as the applicant's accommodation in a sheltered accommodation but found such measure to be insufficient as the applicant did not yet fully comply with the necessary medication and therapy and was expected to commit crimes against people's physical integrity if he left the clearly structured environment of the psychiatric clinic. The Court also observes, however, that the domestic courts had found the placement in a sheltered accommodation to be a reasonable milder measure in the future once the applicant showed full compliance. The Court is therefore satisfied that the domestic courts had sufficiently examined whether there were other equally suitable but less severe measures than the applicant's compulsory confinement in a psychiatric clinic.

57. The Court further notes that the domestic courts, notably the Regional Court in the proceedings at issue, took into consideration that the applicant had already been detained in a psychiatric hospital for more than five years. Considering the length of the applicant's confinement and the seriousness of the criminal offences he was expected to commit if released,

the domestic courts had thoroughly balanced the applicant's right to liberty against the public interest in security and came to the conclusion that at the relevant time the further detention of the applicant was not excessive. The Court therefore finds that there is no indication that the applicant's continued confinement was arbitrary.

58. Furthermore the Court finds that, contrary to the applicant's allegation that he was too sick to be further detained in a psychiatric hospital and that he was also too sick to commit any criminal offences, there is no indication in the medical expert opinions and the domestic court decisions to show that his general state of health rendered his continued confinement arbitrary.

59. Having regard to all the circumstances, the Court is satisfied that the applicant's continued detention which was subject to periodic judicial review cannot be considered arbitrary. Consequently, the deprivation of the applicant's liberty was justified under Article 5 § 1 (e) of the Convention.

60. Having reached that conclusion, the Court does not find it necessary to examine whether sub-paragraph (a) also applied in the instant case. The Court also finds no further issues under Article 5 § 4 of the Convention. It follows that this part of the application must be dismissed as manifestly ill-founded, pursuant to Article 35 §§ 3(a) and 4 of the Convention.

B. Alleged violation of Article 2 and Article 8 of the Convention

61. With regard to the applicant's further complaints under Articles 2 and 8 of the Convention, the Court notes that the applicant did not exhaust domestic remedies with regard to his allegation that his state of health was so poor that his life was endangered as there is no indication that he has lodged any complaints before the domestic courts with regard to this issue. The Court therefore dismisses this part of the application in accordance with Article 35 §§ 1 and 4 of the Convention.

For these reasons, the Court unanimously

Declares the application inadmissible.

Claudia Westerdiek
Registrar

Mark Villiger
President