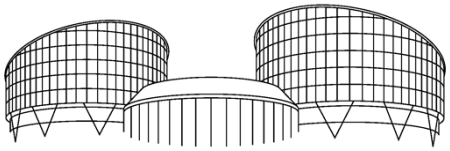

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF ROOMAN v. BELGIUM

(Application no. 18052/11)

JUDGMENT

STRASBOURG

31 January 2019

This judgment is final but it may be subject to editorial revision.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Rooman v. Belgium,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Guido Raimondi, *President,*
Angelika Nußberger,
Linos-Alexandre Sicilianos,
Ganna Yudkivska,
Vincent A. De Gaetano,
Kristina Pardalos,
Helen Keller,
Paul Lemmens,
Ksenija Turković,
Dmitry Dedov,
Iulia Antoanella Motoc,
Branko Lubarda,
Carlo Ranzoni,
Georgios A. Serghides,
Marko Bošnjak,
Jovan Ilievski,
Lado Chanturia, *judges,*

and Françoise Elens-Passos, *Deputy Registrar*,

Having deliberated in private on 6 June 2018 and 29 November 2018,

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

PROCEDURE

1. The case originated in an application (no. 18052/11) against the Kingdom of Belgium lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Belgian national, Mr René Rooman ("the applicant"), on 1 March 2011.

2. The applicant was represented by Mr V. Hissel and Ms B. Versie, lawyers practising in Liège. The Belgian Government ("the Government") were represented by their Agent, Mrs I. Niedlispacher, of the Federal Justice Department.

3. The applicant alleged, in particular, that as a result of the failure to provide psychiatric and psychological treatment in the facility in which he was detained, his compulsory confinement entailed a violation of Articles 3 and 5 § 1 of the Convention.

4. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court). A Chamber of that Section, composed

of Robert Spano, *President,* Ledi Bianku, Işıl Karakaş, Nebojša Vučinić, Paul Lemmens, Valeriu Griţco, Jon Fridrik Kjølbro, *judges*, and also of Stanley Naismith, Section Registrar, delivered a judgment on 18 July 2017. It unanimously declared the application admissible and held that there had been a violation of Article 3 of the Convention. It held, by six votes to one, that there had been no violation of Article 5 § 1 of the Convention. The partly dissenting opinion of Judge Karakaş was annexed to the judgment. On 16 October 2017 the applicant requested that the case be referred to the Grand Chamber in accordance with Article 43 of the Convention. On 11 December 2017 a panel of the Grand Chamber granted that request.

5. The composition of the Grand Chamber was determined in accordance with the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24. During the second deliberations, Kristina Pardalos, whose term of office expired in the course of the proceedings, continued to deal with the case (Article 23 § 3 of the Convention and Rule 23 § 4). In addition, Ksenija Turković and Lado Chanturia, substitute judges, replaced Helena Jäderblom and Tim Eicke, who were unable to take part in the further consideration of the case (Rule 24 § 3).

6. The applicant and the Government both filed further written observations (Rule 59 § 1).

7. A hearing took place in public in the Human Rights Building, Strasbourg, on 6 June 2018 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*
Ms Isabelle NIEDLISPACHER, Federal Justice Department, *Agent*,
Ms Christelle NOIRET, Attachée, Directorate for Legal Support to the Prison Administration, *Adviser*;

(b) *for the applicant*
Mr Victor HISSEL and
Ms Béatrice VERSIE, *Counsel.*

The Court heard addresses by Ms Versie and Mr Hissel, and Ms Niedlispacher, and their replies to questions put by the judges, and Ms Noiret's replies to questions put by the judges.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

8. The applicant, who belongs to the German-speaking minority in Belgium, was born in 1957. He is detained in the Paifve social-protection facility (*établissement de défense sociale*, or "EDS").

A. The applicant's initial placement in compulsory confinement

9. In 1997 the applicant was convicted of indecent assault of a minor aged under 16, rape of a minor aged under ten, theft, destruction and damage, and possession of prohibited firearms by the Liège Court of Appeal and the Eupen Criminal Court. The prison terms were due to expire on 20 February 2004.

10. While in prison the applicant committed other offences, in respect of which fresh proceedings were brought, in particular for threats, harassment and making false accusations against members of the judiciary. In consequence, on 16 June 2003 the Committals Division (*chambre du conseil*) of the Liège Court of First Instance ordered that he be placed in a psychiatric institution, pursuant to section 7 of the Law of 9 April 1930 on Social Protection in respect of Mental Defectives, Habitual Offenders and Perpetrators of certain Sexual Offences (the "Social Protection Act"), applicable at the material time, and on the basis, *inter alia*, of a neuropsychiatric report by Dr L., dated 15 December 2001, and a report by psychologist H., dated 20 August 2002.

11. On 1 August 2003 the Indictment Division of the Liège Court of Appeal upheld that decision. The applicant did not appeal on points of law.

12. On 15 January 2004, based on, among other information, a psychiatric report by Dr V. dated 23 September 2003, the Minister of Justice also ruled that the applicant was to be placed in compulsory confinement, pursuant to section 21 of the Social Protection Act, in continuation of the sentences imposed in 1997.

13. On 21 January 2004, further to a decision of 16 October 2003 by the Social Protection Board for the Lantin Prison psychiatric wing (*commission de défense sociale*, or "CDS"), the applicant entered the Paifve EDS, located in the French-speaking region of Belgium.

14. An expert psychiatric report drawn up by Dr Ri. on 5 September 2005 stated, in particular, as follows:

> "... there is no doubt that Mr Rooman requires treatment which focuses initially on his paranoiac psychosis. Here, therapy must be undertaken simultaneously at psychopharmacological and psychotherapeutic level. ... Long-term therapy over several years is required. The psychotherapy must be carried out by therapists specialising in the treatment of chronic psychosis, with, in the present case, support

meetings and psycho-educational and pedagogical aspects. It is essential in this context that the therapies are administered in parallel; that is, that the psychotropic drugs help to prepare the patient for the psychotherapy and that, in turn, the psychological sessions enable the patient to respond to the psychotropic drugs.

... The therapy should therefore begin in a secure institution; treatment might then be possible in the closed unit of a long-stay institution, before envisaging treatment in an open unit. Confirmation that [the applicant] has achieved the required level in order to vary the [place of] therapy must be given by a psychiatric expert.

... With regard to practical implementation of the therapy, the language raises a significant problem. The psychopharmacological and psychotherapeutic treatment must take place in German. ..."

B. The first application for conditional discharge and the request for day release, submitted to the CDS

15. On an unspecified date the applicant made an initial application for conditional discharge.

16. On 27 January 2006 the CDS postponed its examination of the request for conditional discharge until March 2006, holding that it was necessary to identify an institution that could admit the applicant and provide him with therapy in German, the only language that he understood and spoke.

17. On 9 June 2006 the CDS examined the application. At the hearing, the director of the Paifve EDS acknowledged that the institution was unable to provide the therapeutic care recommended by the experts who had already been consulted, given that no German-speaking doctor, therapist, psychologist, welfare officer or custodial staff member was employed in the institution.

18. In consequence, the CDS issued the following conclusions:

"It is undisputed that the detainee speaks only German, and that the medical, welfare and prison staff in the institution in which he is detained are unable to provide him with any therapeutic or welfare assistance; that he has been abandoned to his fate without any treatment since his arrival in Paifve (on 21 January 2004), although some individuals have, on a voluntary basis, made considerable efforts to explain to him his situation, which he experiences as an injustice;

In the present case, the two-fold legal aim of the compulsory confinement, namely protection of society and of the patient's health, can only be achieved if the deprivation of liberty is accompanied by the treatment necessitated by the detainee's mental health; since this dual condition is not fulfilled, [Mr] Rooman's detention is unlawful; ..."

19. The CDS postponed its examination of the application for conditional discharge until a hearing to be held in September 2006, pending the appointment of German-speaking employees to the Paifve EDS.

20. In accordance with an order by the chairperson of the CDS of 24 September 2006, the applicant was transferred to Verviers Prison so that

its German-language psychosocial team could assess his mental health and ascertain whether he posed a danger to the public. On 30 October 2006 the CDS confirmed this order and postponed the case to a later date.

21. On 26 January 2007 the CDS dismissed the application for conditional discharge. A report of 24 January 2007, drawn up by the German-language psychosocial team in Verviers Prison, indicated that the applicant had a psychotic personality and paranoid character traits (high self-esteem; lack of respect for others, whom he used only for his own purposes; a feeling of omnipotence; lack of self-criticism; use of threatening remarks), and that he was refusing any treatment. Furthermore, the CDS noted that there was no institution in Belgium which could meet the security and language requirements arising from the applicant's specific profile, and that the only German-language hospital which could be considered was an open hospital, and had thus to be ruled out in view of the applicant's mental health.

22. On 14 April 2008 the applicant applied for day release. On 5 June 2008 the CDS noted that it had proved impossible to provide any treatment and that the search for a German-language institution had proved fruitless. Accordingly, it ordered the Eupen remand prison to prepare a plan for conditional discharge, and ordered a new expert report to assess the level of danger posed by the applicant. It adjourned examination of the request *sine die*.

C. The proceedings concerning the second application to the CDS for conditional discharge

23. Having received a new application from the applicant for conditional discharge, the CDS issued a decision on 5 May 2009, finding as follows:

> "There has been no progress in Mr Rooman's situation; progress cannot occur until he is in a setting where he can be understood in his own language, like any citizen of this country. A single member of the prison staff, a nurse [A.W.], is temporarily providing him with social contact, whereas a psychiatrist and/or a psychologist should be made available to him.
>
> For years, the prison authorities have failed to put forward any kind of solution to this problem, of which its services are fully aware. Worse, as those authorities are unable to provide him with the necessary treatment, they seem to have resigned themselves to a role that extends no further than an unfair repressive detention.
>
> The medical reports and [Dr Ro.'s] expert report [of 21 January 2009] indicate that Rooman, who continues to present a danger to society, cannot be discharged without support and preparation in an institutional setting, something that cannot currently be provided in Belgium, but is available abroad."

24. In view of those findings, the CDS invited the Eupen remand prison to prepare, together with the applicant, a plan for conditional discharge, and

requested that the authorities rapidly take the necessary measures to improve the applicant's situation.

25. On 13 October 2009 the CDS found as follows:

> "In the years since this file was opened (October 2003), the persons involved in this case have been thwarted by the fact that the individual in compulsory confinement speaks and understands only one language, and that the authorities have no German-speaking staff available for him, with the exception of one nurse [A.W.] (who is apparently due to retire in the near future);
>
> In September 2005 Doctor [Ri.], expert, wrote that changes to the detainee's regime 'are possible only in parallel with successful treatment, assessed by predefined steps. The treatment must begin in a secure establishment, then in a closed institution...' Given that treatment in Germany is impossible, it was to begin in Paifve with German-speaking psychiatrists and therapists;
>
> Since that time the detainee's situation has not changed: he converses and leaves the building only with the sole German-speaking member of staff, and a treatment programme has not even been put in place. No satisfactory follow-up has been given to the requests by the [Social Protection] Board for an end to be put to this unlawful situation for Mr Rooman, who is deprived of his freedom in order, on the one hand, to protect society from possible dangerous conduct by him, and on the other, to provide him with the treatment necessary for his reinsertion; ...
>
> In the light of the authorities' failure, the question now before the Board is whether there exists, outside the social-protection facility, a unit or persons who could provide home-based therapy for Mr Rooman; ..."

26. In consequence, and pointing out that German was one of the national languages of Belgium and that the applicant was thus entitled to speak, be understood and receive treatment in that language, the CDS asked the Eupen remand prison to search in and around Verviers and Eupen for either a mental health unit, or a doctor or clinic, which could provide home-based therapy for the applicant in his mother tongue. It reserved its decision on the application for conditional discharge.

27. On 12 January 2010 the applicant submitted pleadings in support of his application for discharge. He criticised the failure to provide him with therapeutic care and complained about the effect on his health of the absence of any prospect of improvement in his situation. As his main submission, he requested his immediate discharge on the grounds of the illegality of his deprivation of liberty. Alternatively, he asked that the CDS impose an obligation on the relevant authorities to take all necessary measures so that he would receive, in his mother tongue, the treatment required by his mental-health condition.

28. In an interlocutory decision of 13 January 2010, the CDS noted that the applicant's situation had not changed and that the reply from the Eupen judicial assistance unit gave no grounds for hoping that he could receive appropriate treatment, in a secure establishment or elsewhere, in the foreseeable future. It considered that it was necessary to attempt one last plea to the Minister of Justice, whose intervention had previously yielded

some fruit, even if this had been insufficient to resolve the problem. The CDS accordingly ordered that an "official report" on the applicant's situation be sent to the Minister of Justice.

29. On 29 April 2010 the CDS noted that the Minister of Justice had not responded to its submission and that the applicant's situation had worsened, since he was no longer assisted by the German-speaking nurse A.W., who had left the Paifve EDS. It found as follows:

> "It follows from the report [from the psychosocial department] of 30 March 2010 that, except for occasional meetings with a welfare officer "who speaks German", the detainee has no social contact in his language and that he has had no opportunity for several months to converse and to gain a fresh perspective in the outside world; the doctor and psychologist who signed this report do not seem particularly convinced of progress in the 'ongoing measures (taken) by the department to enable a German-psychologist to intervene occasionally to provide care for the German-speaking patients in the EDS';
>
> Mr Rooman's situation is deadlocked: an ill individual, he is detained in a prison medical institution where no one is able to provide the treatment to which he is entitled; the Minister and his departments are turning a deaf ear, with no concern for the despair to which this manifestly unjust attitude may lead;
>
> In spite of the unlawfulness of Mr Rooman's detention, his health condition means that discharge cannot be envisaged unless it is accompanied by therapy and practical support;
>
> The [Social Protection] Board has no powers, firstly, to restore the detainee's basic rights, namely, the rights to liberty, health care and respect for his humanity; and secondly, to compel the Minister to put an end to this situation, which his administration has been fully aware of for more than six years."

30. The CDS decided, while "remaining open to any proposals", to leave the applicant's situation unchanged; in other words, it rejected his application for discharge.

31. The applicant appealed against that decision to the Higher Social Protection Board (*Commission supérieure de défense sociale* or "the CSDS").

32. In parallel, he made an urgent application to the President of the Liège Court of First Instance, asking that his detention be declared unlawful and requesting his immediate discharge, or, in the alternative, that a decision be issued ordering the Belgian State to provide him with the medical care required by his situation.

33. By an order of 12 May 2010, the president of the court held that he did not have jurisdiction to hear this application, on the grounds that the CDS was the legally competent body to decide on the applicant's discharge or his continued compulsory confinement.

34. On 27 May 2010 the CSDS upheld the decision of 29 April 2010 by which the CDS had held that the applicant was to remain in compulsory confinement. Unlike the CDS, it held that the applicant's detention was perfectly legal, given that he had been lawfully placed in compulsory

confinement and that he did not meet the necessary conditions for definitive or conditional discharge. It noted that, under section 18 of the Social Protection Act, discharge could only be ordered if the detainee's mental condition had improved sufficiently and if the conditions for his reintegration into society were satisfied. It considered, however, that this was not the situation here. It also found that the mere fact that the applicant spoke only German did not mean that the authorities had not taken all the necessary steps to provide him with the treatment required by his condition.

35. The applicant appealed on points of law, alleging a violation of Articles 3 and 5 of the Convention.

36. On 8 September 2010 the Court of Cassation dismissed the appeal on points of law. In response to the argument alleging a violation of Article 5 § 1 of the Convention, it held that legal reasons had been given for the CSDS's decision and that it had been justified in law. It argued as follows:

> "As compulsory confinement is primarily a security measure, the therapeutic action necessitated by such detention is not legally required in order for the deprivation of liberty to be lawful, even if a secondary aim, after that of protecting society, is to provide the detained person with the necessary treatment.
>
> Under section 14(2) of the Act, the social protection boards have the power, rather than the duty, to order, in a decision giving specific reasons, placement in an appropriate institution, corresponding to the relevant security measures and treatment required. It follows that execution of the compulsory confinement measure does not become unlawful solely because it is implemented in one of the institutions created by the government for that purpose, rather than in another institution specifically designated for the treatment it may provide."

37. The Court of Cassation declared inadmissible the argument alleging a violation of Article 3 of the Convention, on the grounds that examining it would require a factual verification of the conditions in which the applicant was detained and such an examination fell outside the scope of its jurisdiction. For the remainder, it considered that the CSDS had replied to the applicant's complaint in stating that the fact that he spoke only German did not mean that the relevant authorities had not taken all the necessary steps to provide him with the required treatment.

D. The third application to the CDS for discharge

38. On 13 November 2013 the applicant again applied for discharge.

39. A report by the psychosocial department of the Paifve EDS, dated 13 January 2014, reiterated that the applicant had a poor command of the French language, speaking only a few words of French which were insufficient to enable him to conduct a conversation; in consequence, he had very little contact with the other patients and members of staff. The report also indicated that the applicant had met a German-speaking psychologist

on a single occasion, in June 2010; his behaviour had improved, he was less aggressive and intolerant than before, and he had recently been moved from the cell wing to the community wing; in addition, he had never expressed a wish to meet members of the psychosocial team on a regular basis. The report concluded that the applicant should remain in the Paifve EDS, citing among other reasons his "untreated mental health problems".

40. On 24 January 2014 the CDS issued its decision. It noted, firstly, the content of the reports by Dr Ri., dated 5 September 2005, and Dr Ro., dated 21 January 2009, finding that it was necessary for the applicant to receive psychopharmacological and psychotherapeutic treatment in a secure establishment, then in a closed institution, before his admission to an open facility could be envisaged. It noted that, since those reports were drawn up, the various attempts to resolve the language problem had not succeeded in securing a significant improvement in the applicant's health: his rare outings accompanied by a German-speaking member of the prison staff had been abandoned, since this employee was no longer available and had not been replaced; attempts to find a German-language institution, doctor or therapist had met with failure; no follow-up seemed to have been given to the commitment that a minimum number of German-speaking staff were to be recruited, and the applicant had, of his own accord, declined the assistance of the German-speaking welfare officer with whom he had occasionally met. Nonetheless, the CDS rejected the application for conditional discharge, finding that the conditions for discharge, namely an improvement in the applicant's mental state and guarantees for his social rehabilitation, were not met. With regard to the absence of treatment in German, complained of by the applicant, it held:

> "The detainee claims that he is not receiving the appropriate treatment for his mental health condition in German, his mother tongue, without however describing or even referring to the treatment allegedly denied to him, and that he would agree to accept or participate in. The mere fact that he only speaks German does not mean that the Paifve social-protection facility has not taken all the necessary steps to provide him with the treatment his condition requires.
>
> While, as [the applicant] points out in his submissions, it is for the relevant authorities to take all the necessary measures for his health, it is not, however, within the [Social Protection] Board's powers to discharge a detainee who claims to be the victim of shortcomings on the part of the authorities...
>
> Nor does the Board have jurisdiction to issue orders to the authorities or to third parties, [or] to reprimand them for their actions or shortcomings ..."

41. On 3 April 2014 the CSDS upheld the CDS's decision. It held, *inter alia*, as follows:

> "Contrary to what he alleges in his pleadings, the detainee receives all the treatment required by his condition from competent and qualified staff in the Paifve EDS, and his specific medical needs are fully taken into account. In spite of the treatment given, the detainee's mental condition has not yet improved sufficiently, on account of his paranoid and psychopathic character traits, his lack of self-criticism and his constant

demands. The detainee is thus clearly wrong in attributing the lack of improvement in his mental condition to the language issue alone.

The continued compulsory confinement in an EDS suited to his medical condition of an individual who would represent a danger to the public in the event of discharge, when his mental condition has not sufficiently improved and the conditions for his social rehabilitation are not met, is not unlawful and does not amount to a violation of the provisions of the [Convention]."

42. On 25 June 2014 the Court of Cassation quashed the decision by the CSDS on the grounds that it had not addressed the applicant's argument that he was not receiving care appropriate to his situation, in view of the fact that he spoke and understood only German and that no German-speaking staff members were available in the facility where he was being held. The case was sent back to the CSDS with a differently constituted panel.

43. On 22 July 2014 the CSDS issued an interlocutory order, requesting the CDS to appoint a group of German-speaking experts to update the psychiatric report of 21 January 2009. It invited the director of the Paifve EDS institution to take all the necessary measures to ensure that the requisite care was made available to the applicant, by at least providing the services of a German-speaking psychiatrist and psychologist. It ordered that the case be reopened and scheduled a hearing for 17 October 2014.

44. In a decision of that date, the CSDS took note of the fact that the applicant had been treated by a German-speaking psychologist since 11 July 2014 and by a German-speaking psychiatrist since 16 September 2014. It ordered that a panel of experts be appointed; assisted by a German interpreter, it was to update Dr Ro.'s report of 21 January 2009.

45. The updated report, prepared by three experts who had each examined the applicant separately, was submitted on 27 March 2015. The experts concluded that the paranoia-like delusional disorder persisted, that the psychotic aspect of the applicant's personality was also still present, and that his neuropsychological condition was practically identical to what it had been in 2009 when Dr Ro. had drawn up his report.

46. By a decision of 20 May 2015, the CSDS dismissed the request for final or conditional discharge, considering that the applicant's state of health had not improved sufficiently and that the conditions for his reintegration into society were not met. It also specified that it had not been established that this lack of improvement in the applicant's situation was due solely to the fact that he had not had an opportunity to be in contact with German-speaking individuals, particularly in view of the treatment provided by medical staff since 11 July 2014.

47. The applicant lodged an appeal on points of law against that decision, which the Court of Cassation dismissed in a judgment of 28 October 2015. The Court of Cassation restated the CSDS's conclusions and specified that, having regard to the reasons given by it, it was not

necessary to examine the applicant's submissions alleging a violation of Articles 3 and 5 of the Convention.

E. The proceedings before the Brussels urgent-applications judge

48. In the meantime, on 28 March 2014 the applicant had brought proceedings against the Belgian State before the President of the French-language Brussels Court of First Instance, as the judge responsible for hearing urgent applications in accordance with Article 584 of the Judicial Code. He requested his discharge or, in the alternative, that the authorities be ordered to take the measures required by his state of health.

49. By an interlocutory order of 4 July 2014, the president of the court asked the director of the Paifve EDS and Dr B. from that EDS's psychosocial unit to inform him, firstly, about the treatment available in that EDS and, secondly, about the treatment that had in fact been provided to the applicant.

50. In their respective replies, dated 28 August 2014, the director of the Paifve EDS and Dr B. indicated that the applicant now had access to consultations with a German-speaking psychologist and that the authorities had made contact with a German-speaking psychiatrist who had agreed to meet the applicant. Dr B. stated, in particular:

> "Psychiatry is a branch of medicine which deals with mental disorders, and its *modus operandi* entails, first and foremost, a specific dialogue between a patient and his or her therapist, the doctor. This implies the use of language; it also implies, of course, that there is mutual understanding; it implies that the two sides have access to a common language, enabling them to communicate and allowing the psychiatrist to assess accurately all the nuances of the patient's condition and its development.
>
> From this perspective, however, we have constantly emphasised that [the applicant] is essentially German-speaking. Admittedly, he occasionally comes out with a few simple words in French, but, clearly, the years spent in Paifve have not persuaded him to learn to use French more fluently so as to communicate more meaningfully with those caring for him. Alternatively, as certain examinations seem to indicate, he is so cognitively disadvantaged that he cannot achieve this.
>
> ... One can of course always hope that in [the applicant's] case, permanent support and appropriate treatment in the German language could improve his personality disorder somewhat, but, to repeat, I am more of the opinion that with this type of paranoid personality disorder, paranoia with anti-social traits, positive progress is unlikely."

51. In an order of 10 October 2014, the president of the court noted that, until September 2014, the applicant had had no access to a psychiatrist who could communicate with him in German. He had had access to an external German-speaking psychologist between May and November 2010. The president noted that the consultations with that psychologist had ended, not because the applicant no longer wished to attend them, as alleged by the State in its pleadings, but because of the Belgian State's late payment of the

psychologist's fees and expenses, and that the consultations had resumed in July 2014. He noted that, until April 2010, the applicant had benefitted from the presence and care of a German-speaking nurse, who had in the meantime left the Paifve EDS, but that since August 2014 the same nurse had been authorised to accompany the applicant on outings. Lastly, he noted that the applicant had met a German-speaking welfare officer, but had declined the latter's services in February 2014.

52. With regard to the main request, the president held that he did not have jurisdiction to order the applicant's discharge, holding that only the social protection bodies had power to do so. Ruling on the subsidiary request, the president noted that the applicant had not had access to the mental-health treatment required by his condition, and considered that, *prima facie*, there had been a breach of his right of access to health care and that he had sustained inhuman and degrading treatment within the meaning of Article 3 of the Convention. In consequence, he ordered the Belgian State to appoint a German-speaking psychiatrist and medical auxiliary to treat the applicant, subject to a penalty in the event of non-compliance, and to initiate the treatment routinely provided to French-speaking persons in compulsory confinement who suffered from a similar mental illness to the applicant.

53. No appeal was lodged against that order. According to the applicant's representative, the Belgian State appointed a German-speaking psychiatrist and psychologist, who visited the applicant several times. However, those visits appear to have stopped towards the end of 2015.

F. The claim for damages

54. In the meantime, on 2 May 2014 the applicant had filed a negligence claim against the Belgian State on the basis of Article 1382 of the Civil Code.

55. By a judgment of 9 September 2016, the French-language Brussels Court of First Instance held that the failure to provide the applicant with psychological treatment in his mother tongue between 2010 and 2014 had been negligent. It held, in particular:

> "It is undeniable that the psychiatric and psychological treatment which must be provided to [the applicant] must be provided to him in German, the only language in which he is fluent and, moreover, one of the three national languages in Belgium.
>
> However, between 2010 and 2014 [the applicant] received no medico-psychological treatment in his own language.
>
> Whatever the quality – which is, indeed, undisputed – of the care provided to detainees in the Paifve [EDS], it is totally inappropriate for [the applicant's] mental-health condition purely and simply on account of the fact that it is not given in German.
>
> In spite of the official and repeated denunciations of this situation by the Social Protection Board to the Belgian State since 2010, the latter has taken no measures to

correct it. In addition, it has produced no evidence of the slightest step taken by it to that end.

This failure to act amounts to negligence within the meaning of Article 1382 of the Civil Code.

...

Moreover, and as [the applicant] also submits, Articles 3 and 5 [of the Convention] require the Belgian State to take the necessary measures to provide him with access to the basic care necessitated by his mental health.

...

In the present case, the applicant's vulnerability on account of the very nature of his psychological disorder and the absence of any real possibility of contact in his language have necessarily exacerbated his feelings of distress and anxiety.

It is immaterial that, in any event, the [applicant's] state of mental health does not permit his discharge. The mere fact of having been detained for an indefinite period without appropriate treatment amounts in the present case to a violation of Articles 3 and 5 [of the Convention].

Contrary to the submissions of the Belgian State, the fact that [the applicant] is not always receptive to psychological, medical and social therapy does not permit minimisation of the Belgian State's negligent attitude towards an individual suffering from a mental disorder, and whose discernment is, by assumption, uncertain.

Equally, at the risk of disregarding the lived experience of the person suffering from a mental disorder, [the applicant's] stable conduct within the institution does not suffice to establish that he received appropriate treatment for his condition."

56. Finding that this absence of treatment had caused the applicant mental suffering, the court ordered the State to pay him 75,000 euros (EUR), an amount assessed *ex aequo et bono*, in compensation for the period from January 2010 to October 2014. It is unclear from the case file on what date this judgment was served on the parties.

57. On 24 January 2018 the applicant lodged an application with the Brussels Court of Appeal requesting legal aid in order to appeal against the judgment of the French-language Brussels Court of First Instance. By an order of 26 January 2018, the Brussels Court of Appeal granted that request.

58. For its part, the Belgian State appealed against the same judgment on 19 February 2018, arguing that the applicant's complaints were inadmissible and/or ill-founded. A preliminary hearing was held before the Brussels Court of Appeal on 22 March 2018.

59. At the date of adoption of the present judgment those proceedings were still pending.

G. The application for discharge submitted to the Social Protection Division

60. In their observations to the Grand Chamber, the parties produced documents showing that fresh proceedings had been brought for the

applicant's discharge, under the new Law of 5 May 2014 on compulsory confinement ("the Compulsory Confinement Act", see paragraphs 91-97 below). In this context, on 12 January 2017 a team from the psychological and welfare service of the Paifve EDS, which included a psychiatrist, a psychologist and a welfare officer, drew up a multi-disciplinary psychiatric and psycho-social report on the applicant's situation. It stated that the information set out in its report had been drawn from various psychiatric examinations conducted during the applicant's period in compulsory confinement, and that in view of the language barrier, it had been impossible to obtain other information or compare the information from previous expert reports with the applicant's statements at the time the report was being prepared. It then confirmed that the patient spoke only German and that he knew only a few words of French, which were not sufficient to enable him to hold a conversation, with the result that he had limited contact with the other patients and with members of staff. The team which produced the report added that this language barrier had restricted and complicated the clinical observation, and that, in view of this shortcoming in the assessment, it was unable to provide a sufficiently informed psychiatric opinion on the application for discharge. Nonetheless, in spite of this difficulty in providing an objective assessment of the applicant's dangerousness, the likelihood of his reoffending, and his capacity for autonomy, it considered it possible to state that grey areas still remained. It indicated, in particular, that the applicant continued to display an obsession with vengeance, as highlighted in the 2015 expert report, and that the risk of his harassing the victims could not be ruled out. It therefore gave an unfavourable opinion in respect of the applicant's application for discharge.

61. On 5 May 2017 the director of the Paifve EDS prepared a separate report in which she indicated that the applicant continued to require an institutional setting, given his pathology and the fact that he remained dangerous in that he was still likely to commit offences or harass the victims. She considered that, in order for "the conditions for conditional discharge to be satisfied, and given Mr Rooman's personality, the only safe option was [conditional] discharge to an institution [a structured facility]". She also expressed the view, in light of the existing situation, that the applicant should not be discharged.

62. Basing its decision on the arguments contained in these two reports, on 29 May 2017 the public prosecutor at the Liège Post-Sentencing Court (TAP) issued an opinion in favour of maintaining the applicant in compulsory confinement and opposing the request for conditional discharge.

63. On 28 July 2017 the Social Protection Division (CPS) at the Liège TAP, sitting in a different composition, which now had jurisdiction under the new 2014 Compulsory Confinement Act (see paragraph 97 below) to rule on whether to extend compulsory confinement and, if appropriate, to

order the applicant's discharge, issued an interlocutory decision. It ordered that the proceedings be reopened, so that the parties could submit relevant information on whether the situation which had led the European Court of Human Rights to find a violation of Article 3 in the Chamber judgment of 18 July 2017 persisted. Pending receipt of that information, the CPS adjourned its examination of the case. It also summoned the Director General of Prisons to a hearing fixed for November 2017.

64. On 16 November 2017 the CPS held a hearing, in private, at the Paifve EDS, at which the applicant was present; he was assisted by his lawyers and an interpreter.

In its judgment, delivered on 27 December 2017, the CPS found as follows:

> "... According to the information submitted to the Division, [the applicant] can now contact a German-speaking psychologist (3 visits since August 2017). If he so wishes, he can also request a visit from a German-speaking psychiatrist. He has one outing a month, accompanied by a German-speaking nurse. Contact with German-speaking psychological and welfare assistants has been organised. A German interpreter will be called upon whenever necessary (CAP, disciplinary hearings, expert reports). Clinical consultations have been scheduled in order to assess the treatment plan and to adapt it as necessary (one meeting has already taken place, another is scheduled).
>
> ... It is established that [the applicant's] detention, during those periods when he was not being treated by German-speaking medical staff, was in breach of Article 3 of the [Convention].
>
> It was demonstrated in the hearings on 16 November 2017 that that violation has now ceased, as the Paifve EDS and the prison authorities have done what was necessary to ensure that German-speaking care providers are available, both in terms of his psychological and psychiatric treatment and with regard to welfare assistance and supervised outings. An interpreter is also called upon whenever required. ...
>
> ... while accepting [the applicant's] argument that the failure to provide treatment in his mother tongue broke the link between the compulsory confinement and the illness at its origin, so that the detention became unlawful ..., it should again be noted that the unlawful nature of the detention ended following the measures currently put in place.
>
> [The applicant's] current detention is justified by his mental health, and the conditions of his detention make it possible to provide him with treatment while at the same time ensuring his safety and that of others.
>
> ... there remain obstacles to [the applicant's] discharge, namely:
>
> - the lack of prospects for social reintegration, given his mental disorder ...
>
> - the risk that offences will be committed ...
>
> - the risk that he will harass the victims, and his attitude towards the victims of the offences which resulted in his compulsory confinement ..."

65. On those grounds, the CPS dismissed the main request for final discharge and held that it was also inappropriate to grant conditional discharge. With regard to the subsidiary request for treatment in German, it added that this had become devoid of purpose. It ordered an eight-month

observation period, at the close of which the director of the Paifve EDS would be required to provide a fresh opinion on the applicant's situation.

66. By a judgment of 28 February 2018 the Court of Cassation dismissed an appeal on points of law lodged by the applicant against the CPS's judgment of 27 December 2017.

H. Chronological summary of the treatment provided to the applicant, attached to the Government's observations submitted to the Grand Chamber

67. In support of the observations submitted in the proceedings before the Grand Chamber, the Government attached a chronological summary of the treatment administered to the applicant since he was placed in compulsory confinement in the Paifve EDS in 2004. They also provided factual clarifications at the public hearing on 6 June 2018.

68. With regard to psychiatric treatment, the document submitted by the Government indicates that the applicant was treated by various French-speaking psychiatrists. The frequency of the consultations is not specified. From 2004 to 1 February 2014, a German-speaking nurse assisted the psychiatrists during those meetings by providing interpretation. Between March 2008 and August 2009 the applicant was monitored by a psychiatrist who spoke elementary German. On 20 May 2015 the applicant met with Dr V., a German-speaking psychiatrist. This meeting did not give rise to regular meetings. The psychiatrist noted that the applicant had expressed no particular requests or asked for psychiatric assistance. She had nonetheless agreed to return if necessary. She had reiterated her availability on 23 March 2016, then at the end of 2017, in a telephone conversation with the in-house psychiatrist at the Paifve EDS. At the public hearing before the Court, the Government stated that the applicant, who was deemed to be capable of forming his own views, did not wish to enter into regular contact with the psychiatrist.

69. With regard to psychological treatment in German, the applicant had attended nine meetings with a psychologist in 2010, and nine other meetings in 2014-2015. Between 18 August 2017 and 12 March 2018, the date on which the Government's observations were submitted, the applicant had had monthly meetings with this psychologist, the most recent, according to the information provided to the Court at the public hearing on 6 June 2018, being on 20 March and 27 April 2018. For his part, the applicant stated that he had had no further meetings since March, and submitted that the last meeting had taken place in February 2018.

70. With regard to welfare assistance, the Government stated that since 1 October 2006 the applicant had received welfare assistance from a German-speaker, except for the periods from May to September 2014 (on account of maternity leave), and from 1 April to 1 November 2017 (on

account of a change in post). Since November 2017, the German-speaking welfare assistant had returned to her post in the Paifve EDS and continued to meet the applicant several times a month. She had essentially dealt with the applicant's requests for administrative help, or for practical help in his contacts with the outside world, especially with his lawyer.

71. With regard to psychiatric nursing care, the document submitted by the Government indicated that, from his arrival at the Paifve EDS, the applicant had been assisted regularly by a German-speaking male nurse. In addition to his somatic nursing skills, this nurse had specialised psychiatric care skills and had been able to spend time with the applicant, mainly to support him and help him deal with his stress. According to the Government, this nurse's listening skills had enabled him to assess the applicant's state of mind and report his observations to the psychiatrist. The nurse had been transferred to the prison on 1 February 2014 and retired on 1 December 2016. After that date, he had continued to meet the applicant in order to maintain contact with him and accompany him on outings, the last of these having taken place on 24 April 2017.

72. Moreover, the applicant was able to see a general practitioner once a month. Since 30 November 2017, an interpreter had been called in to translate at these meetings.

73. On 25 November 2017 a multidisciplinary meeting of the care team had taken place, in the presence of the applicant and an interpreter. At the public hearing, the Government stated, without submitting any document in support of this assertion, that a coordination meeting of the various actors involved in the applicant's treatment both inside and outside the Paifve EDS had been held, in the applicant's presence. At that meeting, the team had, in particular, sought the applicant's permission for the external German-speaking psychologist to transmit to the in-house psychosocial team information obtained in her monthly meetings with him, as well as her conclusions regarding developments in his state of health, given that the psychosocial team was responsible for preparing an assessment of the degree of danger posed by him and of the prospects for his rehabilitation. The applicant had refused to consent to this transmission of information.

74. Lastly, the applicant had been authorised to leave the institution on day-release, accompanied by the nurse. The number of these daytrips had progressively increased from one in 2007 to six in 2017. Since 2015 the applicant had made regular visits to Germany. In 2016 he had resumed contact with his family. It appears from other information in the file that the applicant has a brother with whom he has renewed contact in the past few years.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The legislative framework on compulsory confinement

1. The Social Protection Act in respect of Mental Defectives, Habitual Offenders and Perpetrators of certain Sexual Offences (9 April 1930)

75. The applicant's initial placement in the Paifve EDS was ordered in application of the Social Protection Act in respect of Mental Defectives, Habitual Offenders and Perpetrators of certain Sexual Offences of 9 April 1930 as amended by the law of 1 July 1964 ("the Social Protection Act"), now repealed and replaced by the Law of 5 May 2014 on compulsory confinement, in force since 1 October 2016 ("the Compulsory Confinement Act", see paragraphs 91-97 below). When the Compulsory Confinement Act was adopted, transitional provisions were enacted allowing for the system established by the Social Protection Act to be applied until such time as the new legislation entered into force.

76. Under section 7 of the Social Protection Act, the investigating judicial authorities and the trial courts could order the compulsory confinement of individuals who had been charged with a serious crime and were suffering from one of the conditions set out in section 1 of that Act, that is: "either from a mental disorder or from a severe mental disturbance or defect making [them] incapable of controlling [their] actions". In addition, where an individual convicted of a crime or serious offence was recognised in the course of imprisonment as suffering from a mental disorder or from a severe mental disturbance or defect making them incapable of controlling [their] actions, he or she could be placed in compulsory confinement by a decision of the Minister of Justice, issued upon the advice of a Social Protection Board (*Commission de défense sociale* or "CDS").

77. The CDS were set up in order to take charge of compulsory confinement. They were composed of a serving or retired judge, who presided, and also a lawyer and a doctor (section 12 of the Social Protection Act).

78. The CDS decided on the place of compulsory confinement. It was chosen from the institutions designated by the Government for that purpose. However, the CDS could, for therapeutic reasons and by means of a decision giving specific reasons, order the individual to be placed and held in another institution where an appropriate level of security and treatment could be guaranteed (section 14 of the Social Protection Act).

79. In practice, if the CDS decided that the compulsory confinement should take the form of a placement, the detained individual could be placed in a social protection institution, a social protection facility attached to a

prison and specifically designated for persons in compulsory confinement, or in an establishment outside the usual system (see paragraphs 106-114 below).

80. By a judgment of 17 September 2009 (no. 142/2009), the Constitutional Court, in response to a request for a preliminary ruling, ruled on whether the Social Protection Act was compatible with Articles 10 and 11 of the Belgian Constitution taken together with Article 5 § 1 of the Convention, in that it did not provide that the CDS could oblige an "appropriate facility" as referred to in section 14 (2) of the Act to admit an individual in compulsory confinement, which could potentially make it impossible to guarantee that decisions on this individual's placement in a suitable psychiatric establishment were executed within a reasonable period. It held as follows:

> "B.7.3. Where the competent court has held that a detained person must be placed in an appropriate facility, it is for the relevant authorities to ensure that this person can be admitted there (ECHR, *Johnson v. the United Kingdom*, 24 October 1997; *Brand v. the Netherlands*, 11 May 2004; *Morsink v. the Netherlands*, 11 May 2004). Although, when the facility designated by the Social Protection Board cannot admit the detained person, a reasonable balance must be sought between the interests of the authorities and those of the individual concerned, this balance is upset where the individual is left indefinitely in a facility that the competent court has found to be ill-adapted to his or her rehabilitation.
>
> B.7.4. This violation of the right [to liberty and security] does not however arise from the legislative provision about which the [Constitutional] Court has been questioned. It arises from the insufficient number of places available in the facilities in which the measure ordered by the referring court could be executed.
>
> B.8. This situation concerns the application of the law. Its sanction is a matter for the tribunals of fact and therefore lies outside the jurisdiction of the [Constitutional] Court, so that the preliminary question must be answered in the negative."

81. The CDS could, of its own motion or at the request of the Minister of Justice, the public prosecutor, the detainee or the latter's lawyer, order that the detainee be transferred to another institution. Where an application from the detainee or his lawyer was rejected, they could resubmit it after six months. The CDS could also permit the detainee to be transferred to a semi-custodial regime, in accordance with conditions and rules that were to be laid down by the Minister of Justice (section 15).

82. Before ruling under the above-mentioned sections 14 and 15, the CDS could request an opinion from a doctor of its choice, from inside or outside the public administration. The detained person could also be examined by a doctor of his or her choice and submit the latter's opinion. This doctor was entitled to read the detainee's file. The public prosecutor, the director or doctor of the social protection or appropriate facility, the detainee and his or her lawyer were heard. The file was made available to the detainee's lawyer for four days. Detained persons were represented by their lawyer if it was considered harmful for them to be present while

medical and psychiatric questions concerning their state of health were discussed (section 16 of the Social Protection Act). In an emergency, the chairperson of the CDS or the Minister of Justice could order a detained person's transfer (section 17 of the Social Protection Act).

83. The CDS monitored the detained individual's situation and could decide on final or conditional discharge, where his or her mental health had sufficiently improved and the conditions for social re-integration were met. To this end, the CDS could, of its own motion or at the request of the detained person or his or her lawyer, instruct the department responsible for prisons to draw up a brief information report or prepare a social welfare report. An application for discharge could be submitted every six months (section 18 of the Social Protection Act).

84. Where conditional discharge was ordered, the detainee was subject to medical and social supervision, the duration and conditions of which were specified in the order. Where the released detainee's conduct or mental condition revealed a danger to society, for example in the event of failure to comply with the conditions imposed, he or she could be returned to compulsory confinement in a psychiatric wing on an application by the public prosecutor (section 20 of the Social Protection Act).

85. The CDS's decisions were open to appeal before the Higher Social Protection Board (*Commission supérieure de défense sociale*, or "CSDS") within 15 days of the date of notification. The CSDS was composed of a serving or retired judge from the Court of Cassation or a court of appeal, who chaired the Board, a lawyer and the medical director of the Prison Psychological Service (*Service d'anthropologie pénitentiaire*) (section 13 of the Social Protection Act).

86. The CSDS gave its decision within one month of receiving an application. The detainee and his or her lawyer were heard, and the above-mentioned provisions of section 16 (paragraph 82 above) were applicable (section 19*bis* of the Social Protection Act).

87. In a judgment of 10 December 2013 (P.13.1539.N), the Court of Cassation stated that the social protection bodies were "the national bodies ... capable of providing effective legal assistance to the person in compulsory confinement and to protect him or her against a violation of Article 5 § 1 of the Convention". It clarified that these entities "ha[d] full discretion to assess whether the institution in which the detainee [had] been placed [was] adapted to his or her mental illness".

88. In this context, persons placed in compulsory confinement were able to complain about an absence of treatment, criticise their conditions of detention and request a transfer to non-prison facilities. Where an institution refused to accept them, however, neither the CDS nor the CSDS had powers to order that a place suited to the requesting detainee be made available.

89. An appeal on points of law to the Court of Cassation could be made by a detainee's lawyer against the CSDS's decisions confirming decisions

to dismiss a detainee's application for discharge or declaring well-founded the public prosecutor's objection to a discharge order (section 19*ter* of the Social Protection Act).

90. In contrast, no appeal on points of law could be made against decisions refusing to transfer a detainee to an "appropriate place", since these were considered to be matters relating to execution of the compulsory confinement order (see, among other judgments, Cass., 2 June 2009, P.09.0586.N and P.09.0735.N). However, in its above-cited judgment of 10 December 2013 (P.13.1539.N), the Court of Cassation held that, since – pursuant to the Social Protection Act – reasons had to be given for the social protection bodies' decisions, the CSDS had been in breach of its duty to provide reasoning when, in response to an individual in compulsory confinement who complained that he was being held in prison in conditions of detention which were inappropriate for his mental illness, it had merely stated that he was, on the contrary, being held in conditions that were adapted to his mental illness pending placement in an appropriate facility.

2. The Compulsory Confinement Act of 5 May 2014

91. In the context of the execution of leading judgments delivered in a series of cases brought against Belgium concerning the detention of perpetrators of acts classified as crimes or serious offences who suffer from psychiatric disorders and are detained in the psychiatric wings of prisons (see *L.B. v. Belgium*, no. 22831/08, 2 October 2012; *Claes v. Belgium*, no. 43418/09, 10 January 2013; *Dufoort v. Belgium*, no. 43653/09, 10 January 2013; and *Swennen v. Belgium*, no. 53448/10, 10 January 2013), the Belgian authorities, motivated by a wish to achieve optimal reintegration into society, have taken general measures to improve the situation of detainees. In this context, amendments have been made to the legislative framework on placement in specialised psychiatric establishments.

92. The Compulsory Confinement Act (Law of 5 May 2014), which replaces the Social Protection Act of 9 April 1930, provides for several areas of progress, intended to place emphasis on the care package for individuals in compulsory confinement. It defines with greater precision the concepts used and strengthens the procedural guarantees. As foreseen by a Law of 4 May 2016, it entered into force on 1 October 2016. It defines compulsory confinement as a security measure, intended both to protect society and to ensure that the detained individual receives the treatment required by his or her condition, with a view to re-integration into society. Account being had to public safety and the health condition of the detainee, this individual must be offered the necessary treatment in order to live his or her life in a manner compatible with human dignity. This treatment must enable the detainee to reintegrate into society as successfully as possible and is administered – where this is indicated and practicable – as part of a care path, in order to be adapted to the individual (section 2 of the 2014 Act).

93. As in the previous legal framework, the new Act enables the investigating judicial authorities and the trial courts to order an individual's compulsory confinement, except in cases of crimes or serious offences committed for political motives or through the medium of the press (section 9(1)). In contrast, it restricts the scope of compulsory confinement, by stipulating that only crimes and serious offences which have or could have resulted in physical harm or psychological injury to another person, may henceforth give rise to a compulsory confinement order (report by the Justice Committee, House of Representatives, Doc 54-1590/006, pp. 36-37).

94. The new Act provides that a psychiatric expert report or forensic psychological report must be drawn up prior to any compulsory confinement measure (section 5(1)). The experts must comply with professional standards. The expert reports must be prepared by a panel or with the assistance of other specialists in behavioural sciences (section 5(2)). The experts are required to submit a detailed report, drawn up on the basis of a standard format (section 5(4)). There must be a possibility to request a report by another expert (section 8(1)). Another new feature in the Law is that the individual concerned by a report may be assisted not only by his or her lawyer, but also by a doctor or psychologist of his or her own choosing (section 7).

95. Compulsory confinement remains the central measure under this system. It must take place in a social protection institution or unit or a forensic psychiatry centre in the case of "high risk" detainees, or in a facility recognised by the relevant authority, run by a private institution, a community, a region or a local authority, for detainees who represent a "low or moderate risk" (section 19, in conjunction with section 3(4)(b), (c) and (d)).

96. An external institution which has signed a cooperation agreement – specifying, in particular, its capacity, the profile of detainees admitted and the procedure to be followed for admittance (section 3 (5)) – cannot refuse to accept a patient (section 19). Case-by-case approval is not required, provided that the criteria in the placement agreement are met.

97. Under the new Law, the sole bodies with responsibility for managing and monitoring compulsory confinement are the social protection divisions (*chambre de protection sociale* - "the CPS"), which have been set up within the courts responsible for the execution of sentences (section 3(6)). These divisions are composed of a judge (in the chair), a specialist adviser on reintegration into society and a specialist adviser on clinical psychology (Article 78 of the Judicial Code). They decide on the placement and transfer of detainees. They also rule on day-release, short-term leave of absence, limited detention, electronic, surveillance, conditional discharge, early discharge with a view to expulsion or extradition, and, at last instance, final discharge. They have wide discretion, the aim being to draw up an individualised confinement path for the detainee, adapted to his or her

mental disorder and risk level, while complying with the rules applicable to the relevant placement facility. The detainee's final discharge can only occur after a renewable two-year period of conditional discharge, and provided that the mental disorder has improved sufficiently and the detainee shows no further sign that he or she poses a danger to the public (section 66 of the Compulsory Confinement Act of 5 May 2014).

3. The Judicial Code

98. Independently of the specific protection mechanism applied by the bodies responsible for compulsory confinement (see paragraphs 76-90 and 97 above), the Judicial Code allows anyone to challenge decisions taken in their respect before the ordinary courts.

99. Anyone who considers that he or she has been the victim of a violation of a subjective right is thus entitled to apply to the court of first instance alleging a violation of the law, including of any treaty provision which has direct effect in Belgian law. The judge may order an end to the violation, possibly subject to a penalty for non-compliance, and, as appropriate, award compensation.

100. Pursuant to Article 584 of the Judicial Code, the president of the court of first instance, as the judge responsible for hearing urgent applications, may give a ruling, if the urgency is established, in respect of all matters except those which the law excludes from the jurisdiction of the courts of justice.

101. Under Article 1051 of the Judicial Code, the time-limit for submitting an appeal against a judgment of the first-instance court is one month from the date of service of the judgment or its notification to the parties.

4. The Civil Code

102. The State is subject to the ordinary rules on liability in tort. Article 1382 of the Civil Code of 1807 provides that any act committed by a person that causes damage to another shall render the person through whose fault the damage was caused liable to make reparation for it. Under Article 1383, everyone is liable for the damage they have caused, not only by their own acts, but also by their negligence or carelessness.

103. Furthermore, in a judgment of 26 April 2018 (no. 50/2018), the Constitutional Court held that Article 2251 of the Civil Code, which provides that the statutory limitation period for bringing an action runs in respect of all persons, including individuals placed in compulsory confinement who have not been deprived of legal capacity or placed under guardianship, was not contrary to the provisions of the Constitution on equality and non-discrimination.

5. The Belgian Constitution of 17 February 1994

104. Article 4 of the Constitution provides that Belgium comprises four language regions: the French-language region, the Dutch-language region, the bilingual region of Brussels-Capital and the German-language region. Each region has its own territory and its own official language, except for the region of Brussels-Capital, which has two official languages, French and Dutch. The German-language region is made up of nine communes. It has a population of about 77,000 inhabitants, which represents 0.68% of the Belgian population.

B. Facilities for persons in compulsory confinement

105. In the *W.D. v. Belgium* judgment (no. 73548/13, §§ 56-69, 6 September 2016), the Court set out the types of facilities available to persons placed in compulsory confinement in Belgium. The description of those facilities is presented and updated in the following paragraphs.

1. High-security psychiatric institutions

106. There are six high-security psychiatric institutions in Belgium.

107. In Wallonia, detainees can be housed in one of three social protection facilities specifically provided by the authorities to accommodate persons placed in compulsory confinement. The Paifve facility, which is subordinate to the Ministry of Justice, can house 208 detainees. Located as it is in a unilingual area, there is no statutory requirement for it to recruit bilingual French/German-speaking members of staff. The two other facilities are run by the Walloon Region and the inter-municipal "Ambroise Paré University Hospital Centre" respectively. They are the "Les Marronniers" secure psychiatric hospital in Tournai, which can house 376 detainees; and the "Chêne aux Haies" psychiatric hospital in Mons, with thirty beds for female detainees. According to the Ministry of Justice, replying to a parliamentary question on 16 October 2017, in November 2017 there were two German-speaking patients in compulsory confinement in this region of Belgium, both of them in Paifve. The first was the applicant, who was unable to communicate in French. The second was considered to understand French sufficiently to be able to receive the treatment he required.

108. In Flanders, since 2009 Merksplas Prison has contained a secure treatment unit, the "De Haven" unit, which can house sixty people, for patients with mild to moderate intellectual disabilities and individuals suffering from an autistic disorder. In addition, two high-security forensic psychiatry centres, subordinate to the Ministries of Justice and of Public Health, were opened in Ghent in 2015 (with a capacity of 264 places), and in Antwerp in 2017 (with a capacity of 182 places).

109. In the context of execution of the above-cited leading judgments (see paragraph 91 above), the Government have indicated that they adopted a "Confinement Masterplan" in 2016, aiming to remove all mentally disturbed offenders from prison (see paragraphs 111-114 below) and to provide them with appropriate care, by creating 860 new places by the year 2022. 620 of those places would be allocated as follows: 250 in a new forensic psychiatric centre in Wavre (Wallonia), 250 in a new forensic psychiatric centre in Paifve (which would replace the existing facility) and 120 in a new "long-stay" high-security facility in Alost (Flanders).

2. Traditional psychiatric institutions

110. There are also traditional psychiatric hospitals, in the form of either subsidised private hospitals or public establishments. Some of them are classified as "medium security" and can admit patients who, because they are a danger to society, may be regarded as having serious behavioural problems and/or as being very aggressive, and hence requiring special security measures. Other institutions are classified as "low security" and cater for patients who are not considered dangerous to society and whose psychiatric disorders are comparable to those of most patients in a general psychiatric hospital.

3. Psychiatric wings of prisons

111. Eleven prisons have psychiatric wings. A distinction must be made between the social protection units and the psychiatric wings.

112. The social protection units, attached to the Merksplas, Turnhout and Bruges Prisons, have been specifically created to accommodate persons in compulsory confinement; they are separated from inmates imprisoned under the ordinary criminal law. These units house individuals requiring medium to long-term treatment.

113. The psychiatric wings, which are attached to the Antwerp, Ghent, Louvain, Forest, Jamioulx, Lantin, Mons and Namur Prisons, accommodate persons who have recently been placed in compulsory confinement pending a decision by the CPS (or, previously, by the CDS) on their placement, or who are awaiting transfer to the placement facility as decided by the CPS (or, previously, the CDS). They also accommodate suspects who have been placed under observation or ordinary prisoners who require psychiatric assistance.

114. In April 2016 there were about 4,230 persons who had been placed in compulsory confinement in Belgium, of whom 807 were imprisoned. In June 2018 the number of persons subject to compulsory confinement orders who were being held in a prison was 531.

C. The 2016 annual report by the Paifve Supervisory Board

115. The Paifve Supervisory Board, an entity subordinate to the government department responsible for the supervision of prison facilities, produced a report on the Paifve EDS in November 2016. The relevant passages of the report read as follows:

> "It would appear that the prison authorities intend to close down the Paifve facility within a time frame that is, unfortunately, not specified. Paifve must therefore continue to survive at the whim of budgetary decision for a transitional period that could, alas, last for several years. In these conditions, it is to be feared that the Ministry of Justice no longer wishes to invest the minimum necessary to continue to ensure high-standard medical care and quality of life in this institution. The Supervisory Body therefore sounds the alarm: more than ever, it is essential to ensure that Paifve does not suffer the fate of an institution in which no interest is taken, which could then quickly become a facility governed by despair among both patients and staff, with ultimately very harmful potential consequences. Pending a final decision on the closure of the establishment, we recommend that rapid steps be taken to remedy the shortcomings found, in order to guarantee a level of treatment that is qualitatively commensurate with the possibilities that our society must be able to provide.
>
> **Areas for improvement in Paifve**
>
> **1. Lack of continuity in the treatment provided**
>
> Referring to the opinion of the National Council of the *Ordre des médecins* (Medical Association) at its meeting of 12 May 2007, it is clear that involuntary psychiatric treatment can only be provided in a medical and nursing context which guarantees adequate professional supervision of patients. To mention only the nursing staff, Paifve – which accommodates 208 patients – employs only 10 nurses (2 of whom are paid by the not-for-profit association ISOSL), and they amount to an equivalent of more or less seven full-time staff. This state of affairs means that there are no nurses on site during the night and thus no qualified staff to provide emergency care outside office hours! There is no duty system outside office hours for psychiatric doctors and general medical practitioners. At night and on public holidays, the five custodial staff members on site have no option but to call the generalist doctor on duty for the district. In most cases, the duty doctor refuses to attend the facility and recourse must be made to the emergency services (*le service 100*). The Paifve EDS, which is nonetheless considered a treatment facility, is thus in a situation in which continuity of care poses a problem. Involuntary psychiatric treatment in Paifve is not being provided in the conditions laid down by the National Council of the *Ordre des médecins*. Given that Paifve does not have its own duty team, either for nursing or for medical staff, the facility is exacerbating the situation by failing to require that the custodial staff have first-aid skills, attested to by the relevant certificate. (First-aid training is provided at the Marneffe training centre, but it is limited to a certain number of custodial staff from all prison establishments). One solution would be to ensure that Paifve has its own on-site training team, in line with the spirit of the law governing the provision of first-aid training in private companies.
>
> This lack of medical and nursing treatment at certain times has the potential consequence of imposing decisions to administer higher doses of psychotropic drugs than in normal conditions, since safety takes *de facto* priority over ongoing treatment. Another consequence is the absence of medical staff (doctors) when administering a

compulsory injection, an act which is potentially traumatising both for the detainee and for the nursing and custodial staff. The presence of the prescribing doctor can often facilitate better acceptance of involuntary treatment.

...

3. Clear lack of psychiatric doctors [compared] with a traditional psychiatric institution

The public-health norms for a psychiatric hospital stipulate one full-time member of staff (24 h/week) for 60 residents. Paifve, where 208 detainees are cared for, should therefore have 3 full-time staff, or a minimum of 72 hours' presence of a psychiatrist per week. However, if we add up the current time worked by the psychiatrists, the total of their cumulated working hours is far from this figure. According to one of the two psychiatrists in post, two additional psychiatrists are necessary.

The impact of this lack of psychiatric and psychological treatment is all the greater for those patients who are detained for sexual offences.

It is regrettable that the Paifve EDS does not have a department specialising in sexual deviance, given that a high proportion of the patients have been placed in compulsory confinement for deviant conduct that is in some cases very serious. This situation results in despair on the part of patients, who feel completely neglected in spite of a desire to recover. Furthermore, care provision by an external service (specialised consultations do exist in Liège: for example, the Sygma not-for-profit association) is made very difficult by several factors, namely the fact that a request for an external consultation must be submitted to the Social Protection Board since, unfortunately, such a consultation is not considered as a medical appointment but as an outing like any other. Other factors also serve to make therapeutic visits difficult, such as the shortage of custodial staff and educators to accompany the detainee."

III. RELEVANT INTERNATIONAL LAW AND PRACTICE

A. The United Nations Convention on the Rights of Persons with Disabilities (CRPD), adopted by the United Nations General Assembly on 13 December 2006 (A/RES/61/106)

116. This Convention entered into force on 3 May 2008. It was signed and ratified by Belgium on 30 March 2007 and 2 July 2009 respectively. The relevant parts of the Convention provide:

Article 14
Liberty and security of person

"1. States Parties shall ensure that persons with disabilities, on an equal basis with others:

(*a*) Enjoy the right to liberty and security of person;

(*b*) Are not deprived of their liberty unlawfully or arbitrarily, and that any deprivation of liberty is in conformity with the law, and that the existence of a disability shall in no case justify a deprivation of liberty.

2. States Parties shall ensure that if persons with disabilities are deprived of their liberty through any process, they are, on an equal basis with others, entitled to

guarantees in accordance with international human rights law and shall be treated in compliance with the objectives and principles of the present Convention, including by provision of reasonable accommodation."

Article 15
Freedom from torture or cruel, inhuman or degrading treatment or punishment

"1. No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, no one shall be subjected without his or her free consent to medical or scientific experimentation.

2. States Parties shall take all effective legislative, administrative, judicial or other measures to prevent persons with disabilities, on an equal basis with others, from being subjected to torture or cruel, inhuman or degrading treatment or punishment."

117. In September 2015 the UN Committee on the Rights of Persons with Disabilities drew up Guidelines on the right to liberty and security of persons with disabilities (A/72/55, Annex), on the basis of its case-law with regard to Article 14 of the CRPD. The relevant parts of these Guidelines read as follows:

"II. The right to liberty and security of persons with disabilities

3. The Committee reaffirms that liberty and security of the person is one of the most precious rights to which everyone is entitled. In particular, all persons with disabilities, and especially persons with intellectual disabilities and psychosocial disabilities are entitled to liberty pursuant to article 14 of the Convention.

4. Article 14 of the Convention is, in essence, a non-discrimination provision. It specifies the scope of the right to liberty and security of the person in relation to persons with disabilities, prohibiting all discrimination based on disability in its exercise. Thereby, article 14 relates directly to the purpose of the Convention, which is to ensure the full and equal enjoyment of all human rights and fundamental freedoms by all persons with disabilities and to promote respect of their inherent dignity. ...

III. The absolute prohibition of detention on the basis of impairment

6. There are still practices in which States parties allow for the deprivation of liberty on the grounds of actual or perceived impairment. In this regard the Committee has established that article 14 does not permit any exceptions whereby persons may be detained on the grounds of their actual or perceived impairment. However, legislation of several States parties, including mental health laws, still provide instances in which persons may be detained on the grounds of their actual or perceived impairment, provided there are other reasons for their detention, including that they are deemed dangerous to themselves or others. This practice is incompatible with article 14; it is discriminatory in nature and amounts to arbitrary deprivation of liberty.

7. During the negotiations of the Ad Hoc Committee leading up to the adoption of the Convention there were extensive discussions on the need to include a qualifier, such as "solely" or "exclusively", in the prohibition of deprivation of liberty due to the existence of an actual or perceived impairment in the draft text of article 14(1)(b). States opposed it, arguing that it could lead to misinterpretation and allow deprivation of liberty on the basis of their actual or perceived impairment in conjunction with other conditions, like danger to self or others. Furthermore, discussions were held on whether to include a provision for periodic review of the deprivation of liberty in the

text of draft article 14(2). Civil society also opposed the use of qualifiers and the periodic review approach. Consequently, article 14(1)(b) prohibits the deprivation of liberty on the basis of actual or perceived impairment even if additional factors or criteria are also used to justify the deprivation of liberty. The issue was settled in the seventh meeting of the Ad Hoc Committee. ...

9. Enjoyment of the right to liberty and security of the person is central to the implementation of article 19 on the right to live independently and be included in the community. This Committee has stressed this relationship with article 19. It has expressed its concern about the institutionalization of persons with disabilities and the lack of support services in the community, and it has recommended implementing support services and effective deinstitutionalization strategies in consultation with organizations of persons with disabilities. In addition, it has called for the allocation of more financial resources to ensure sufficient community-based services.

IV. Involuntary or non-consensual commitment in mental health institutions

10. Involuntary commitment of persons with disabilities on health care grounds contradicts the absolute ban on deprivation of liberty on the basis of impairments (article 14(1)(b)) and the principle of free and informed consent of the person concerned for health care (article 25). The Committee has repeatedly stated that States parties should repeal provisions which allow for involuntary commitment of persons with disabilities in mental health institutions based on actual or perceived impairments. Involuntary commitment in mental health facilities carries with it the denial of the person's legal capacity to decide about care, treatment, and admission to a hospital or institution, and therefore violates article 12 in conjunction with article 14.

...

VII. Deprivation of liberty on the basis of perceived dangerousness of persons with disabilities, alleged need for care or treatment, or any other reasons

13. Throughout all the reviews of State party reports, the Committee has established that it is contrary to article 14 to allow for the detention of persons with disabilities based on the perceived danger of persons to themselves or to others. The involuntary detention of persons with disabilities based on risk or dangerousness, alleged need of care or treatment or other reasons tied to impairment or health diagnosis is contrary to the right to liberty, and amounts to arbitrary deprivation of liberty.

14. Persons with intellectual or psychosocial impairments are frequently considered dangerous to themselves and others when they do not consent to and/or resist medical or therapeutic treatment. All persons, including those with disabilities, have a duty to do no harm. Legal systems based on the rule of law have criminal and other laws in place to deal with the breach of this obligation. Persons with disabilities are frequently denied equal protection under these laws by being diverted to a separate track of law, including through mental health laws. These laws and procedures commonly have a lower standard when it comes to human rights protection, particularly the right to due process and fair trial, and are incompatible with article 13 in conjunction with article 14 of the Convention.

15. The freedom to make one's own choices, established as a principle in article 3(a) of the Convention includes the freedom to take risks and make mistakes on an equal basis with others. In its General Comment No. 1, the Committee stated that decisions about medical and psychiatric treatment must be based on the free and informed consent of the person concerned and respect the person's autonomy, will and preferences [para. 21 and 42]. Deprivation of liberty on the basis of actual or

perceived impairment or health conditions in mental health institutions which deprives persons with disabilities of their legal capacity also amounts to a violation of article 12 of the Convention."

B. Recommendation REC (2004) 10 of the Committee of Ministers to member states concerning the protection of the human rights and dignity of persons with mental disorders and explanatory memorandum (adopted on 22 September 2004)

118. The relevant parts of this Recommendation read as follows:

Article 1 – Object

"1. This Recommendation aims to enhance the protection of the dignity, human rights and fundamental freedoms of persons with mental disorder, in particular those who are subject to involuntary placement or involuntary treatment.

..."

Article 2 – Scope and definitions

"…

3. For the purpose of this recommendation, the term:

…

- 'personal advocate' means a person helping to promote the interests of a person with mental disorder and who can provide moral support to that person in situations in which the person feels vulnerable;

- 'representative' means a person provided for by law to represent the interests of, and take decisions on behalf of, a person who does not have the capacity to consent; …".

Article 7 – Protection of vulnerable persons with mental disorders

"1. Member states should ensure that there are mechanisms to protect vulnerable persons with mental disorders, in particular those who do not have the capacity to consent or who may not be able to resist infringements of their human rights. ... "

Article 10 – Health service provision

"Member states should, taking into account available resources, take measures:

i. to provide a range of services of appropriate quality to meet the mental health needs of persons with mental disorder, taking into account the differing needs of different groups of such persons, and to ensure equitable access to such services; ..."

Article 12 – General principles of treatment for mental disorder

"1. Persons with mental disorder should receive treatment and care provided by adequately qualified staff and based on an appropriate individually prescribed treatment plan. Whenever possible the treatment plan should be prepared in consultation with the person concerned and his or her opinion should be taken into account. The plan should be regularly reviewed and, if necessary, revised. ..."

Article 17 – Criteria for involuntary placement

"1. A person may be subject to involuntary placement only if all the following conditions are met:

i. the person has a mental disorder;

ii. the person's condition represents a significant risk of serious harm to his or her health or to other persons;

iii the placement includes a therapeutic purpose;

iv. no less restrictive means of providing appropriate care are available;

v. the opinion of the person concerned has been taken into consideration. ..."

Article 19 – Principles concerning involuntary treatment

"1. Involuntary treatment should:

i. address specific clinical signs and symptoms;

ii. be proportionate to the person's state of health;

iii. form part of a written treatment plan;

iv. be documented;

v. where appropriate, aim to enable the use of treatment acceptable to the person as soon as possible.

2. In addition to the requirements of Article 12.1 above, the treatment plan should:

i. whenever possible be prepared in consultation with the person concerned and the person's personal advocate or representative, if any;

ii. be reviewed at appropriate intervals and, if necessary, revised, whenever possible in consultation with the person concerned and his or her personal advocate or representative, if any.

3. Member states should ensure that involuntary treatment only takes place in an appropriate environment."

119. The relevant extracts of the explanatory memorandum to this Recommendation read as follows:

Article 7 – Protection of vulnerable persons with mental disorders

"55. People may be regarded as being vulnerable due to cognitive, situational, institutional, deferential, medical, economic, and social factors or to a combination of those factors:

...

- Persons with situational vulnerability may normally have capacity to make a decision, but are deprived of their ability to exercise their capacity by the relevant situation (for example during an emergency or due to lack of fluency in the language being used to give information and request consent).

...

56. Thus persons with mental disorder may be vulnerable even if they have capacity to consent. However, those who do not have such capacity may be particularly vulnerable. ...”

Article 10 – Health service provision

“69. The first indent of this Article builds on the principle set out in Article 3 of the Convention on Human Rights and Biomedicine, which specifies that ‘Parties, taking into account health needs and available resources, shall take appropriate measures with a view to providing, within their jurisdiction, equitable access to health care of appropriate quality.’

70. The requirement of equitable access also applies to the provision of medicines and other forms of treatment. ... [A]ny treatment should be delivered in accordance with professional obligations and standards. Hence, there should be appropriate provision of services to monitor the effects of treatment. ...

76. A very small minority of persons with mental disorder commit serious criminal offences. For the protection of the community, facilities need to be available to meet the health needs of such persons whilst providing an appropriate degree of security to protect society. However, the principle of least restriction set out in Article 8 is also relevant to this group of people with mental disorder. Therefore, a range of facilities providing high, medium, and low levels of security are necessary in order that such persons can be placed in facilities which are appropriate to their health needs and the need to protect the safety of others according to their progress during their treatment. In some cases, a person who is not involved with the criminal justice system may be assessed as representing a significant risk of serious harm to others. In accordance with indent i. of this Article, facilities with appropriate levels of security to meet the needs of this group should also be available. ...”

Article 12 – General principles of treatment for mental disorder

“89. This Article sets out the general principles of treatment that are applicable to all patients with mental disorder. The term “treatment”, which is defined in Article 2, has a broad scope. Article 19 sets out additional principles applicable to involuntary treatment. ...

90. Paragraph one emphasises the importance of an appropriate individualised treatment plan. When a person has a mild mental disorder that is treated by a primary care physician, that plan may be simple and prepared in discussion between the doctor and the patient. ...

91. When a person is placed in a facility for treatment of his or her mental disorder the treatment plan will be more complex. The treatment plan may also address behaviour arising as a consequence of the patient’s mental disorder. Additional requirements for involuntary treatment plans are provided in Article 19.2. The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) has highlighted, in the context of involuntary placement, elements that they consider a treatment plan should contain. Such elements are also relevant to voluntary placements; therefore a treatment plan should contain a wide range of therapeutic and rehabilitative activities, including where appropriate:

- Pharmacotherapy;
- Occupational therapy;
- Group therapy;

- Individual psychotherapy;

- Rehabilitative activities relevant to daily living, for example concerning personal hygiene, shopping, cooking and use of public services;

- Art and drama;

- Music and sports.

...

93. Wherever possible, the treatment plan should be prepared in consultation with the person concerned. The aim is to enable the person to make informed decisions about his or her treatment plan in partnership with the clinical team. ..."

Article 17 – Criteria for involuntary placement

"...

132. The third indent requires that a placement include a therapeutic purpose. It must not be for political, moral, economic or social reasons or for custodial purposes only. If the purpose of a placement is solely custodianship this should not take place in a psychiatric facility. However, the fact that a placement may have additional purposes, such as the protection of others, is not excluded by this indent.

133. Further, a "therapeutic purpose" should not be equated with invasive medical treatment. In a therapeutic situation, the person may be offered a range of measures, such as group therapy or rehabilitation ... that may potentially benefit their condition. However, a person subject to involuntary placement is not compelled to accept such offers. On the other hand, if no therapeutic offers were made to a person that would be evidence of the lack of a therapeutic purpose to a placement. Similarly, lack of therapeutic success should not be equated with lack of therapeutic purpose. For example, if a range of methods of treatment have been tried without success, a therapeutic purpose still exists if the person is receiving therapeutic offers, even if the available treatments may not be able to completely cure the person's condition.

134. It is therefore good practice that when a person is subject to involuntary placement a treatment plan is established as soon as possible with the person concerned and the person's personal advocate or representative, if any. ..."

C. The Report of 8 March 2018 on the visit to Belgium by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (the CPT) from 27 March to 6 April 2017

120. During its seventh periodic visit to Belgium, from 27 March to 6 April 2017, the CPT delegation focused, in particular, on the situation of individuals placed in compulsory confinement in forensic psychiatry centres or in prisons. It carried out a follow-up visit to the Paifve EDS, to which it had paid a full visit in 1997 and a short visit in 2016 against a background of strike action. In its report, the CPT made the following observations:

"EXECUTIVE SUMMARY

...The ... psychiatric structures visited, whether the psychiatric annexes of prisons or the Paifve EDS, suffer from well-known systemic problems: functioning and philosophy of prison-type care, acute shortage of medical and socio-educative staff, and an insufficient number of custodial staff, who have not received specialised training.

The delegation was able to observe the almost total absence of activities, whether therapeutic or occupational, in these structures. Patients could thus remain locked up for 22 to 23 hours per day on account of a chronic shortage of custodial staff, accompanying staff, educators, etc. The treatment of patients was very piecemeal, limited to pharmacological treatment and basic care. Highly problematic and unsatisfactory management of psychiatric emergencies was also observed. The situation of those detained in prisons, and in the Paifve EDS, calls for immediate measures. To this end, the CPT recommends that the FPD of Public Health be involved more fully in the provision of treatment.

...

C. Care of persons interned in a forensic psychiatry centre or prison

...

104. The law on internment of 5 May 2014 had entered into force a few months prior to the visit, on 1 October 2016. This new legislation introduces significant changes, in particular as regards the nature of the psychiatric assessment of persons subject to an internment measure, the types of offences that can give rise to internment, the procedure for enforcing the measure and the process for reviewing it. Under the law, the former Social Protection Commissions which used to make internment decisions were to be replaced by Social Protection Chambers, which are permanent bodies. The law also establishes the right of internees to receive care and seeks to promote their reintegration. The new legislation is intended to put an end to the use of psychiatric annexes and dedicated sections for internees in prisons, including during the observation phase for assessment purposes. To this end, it provides for the creation of a "secure clinical observation centre established by the Crown".

105. In order to expand the range of care available to internees in dedicated psychiatric facilities, a specific programme, the Internment Masterplan, had been drawn up and its implementation was now under way.

The inauguration of Belgium's very first forensic psychiatry centre (CPL) in Ghent in 2014 is an important sign of the direction in which the Belgian authorities are moving. A second CPL opened its doors in Antwerp (with 182 beds) a few months after the visit. Likewise, hospital-based provision has expanded, with the creation of new units for long stays (60 places) and additional places (26) for women. At the start of the visit, the delegation was told that it was planned to add a further 160 to 170 hospital beds by the end of 2017.

106. According to the authorities, these efforts should bring the number of internees in prisons down to below 300 in 2018 (compared with around 500 at the time of the 2017 periodic visit and 900 at the time of the previous periodic visit in 2013). This figure is expected to fall further over the next few years as more CPLs open in Wavre and Paifve and as additional hospital beds are created, albeit at a later stage. With the social protection establishment (EDS) in Paifve also due to close (see paragraph 111),

the expectation is that, in a few years, no internees will come under the responsibility of the FPD of Justice alone.

107. The CPT welcomes the efforts made by the Belgian authorities in their quest to provide suitable care for persons subject to an internment measure. For, as the CPT has repeatedly stressed, Belgium's prisons have never really had the resources to enable them to deliver quality care. The CPT wishes to be regularly updated on the implementation of the Internment Masterplan and changes in the number of internees placed in prisons.

Pending full implementation of the Masterplan, the CPT recommends that the FPD of Public Health become more involved in the care of persons interned in prisons, whether in the Paifve EDS or in psychiatric annexes and dedicated sections for internees in prisons. It should be possible to arrange this as part of the planned transfer of powers and responsibilities with regard to all health care in prisons...

111. The *Paifve EDS*, visited for the third time by the CPT, is the only penitentiary structure in Belgium dedicated exclusively to the care of persons subject to internment measures (adult men only). Its capacity, namely 208 places, which had increased significantly after the 1997 visit, had remained unchanged since 2016. The establishment was full at the time of the visit. The patients in the EDS had been placed there by social protection chambers under the jurisdiction of the Brussels, Liège and Mons courts of appeal. They were suffering from psychosis (65%), personality disorders (10%) and intellectual impairments or learning disabilities (25%). The average length of stay in the EDS was seven years. One patient, who had been admitted in 1977, was still there in 2017.

Under the Internment Masterplan, the EDS as such is set to close over the next few years. In its place, a new CPL with capacity for 250 patients is to be built on a site adjoining the current facility, which will be converted into a prison. The authorities do not regard the current EDS model as having sufficient merit to be preserved or replicated. In numerous respects, indeed, and despite its special status as a facility for internees, the EDS suffers from many of the operational weaknesses identified in psychiatric annexes in prisons. ..."

THE LAW

I. SCOPE OF THE CASE

121. In addition to his complaints under Articles 3 and 5 § 1, the applicant alleged in his submissions to the Grand Chamber that he had had no effective legal remedy, in that the domestic courts had either held that they did not have jurisdiction to rule on his applications for discharge, or had refused to find that his detention was unlawful and had ordered that he remain in compulsory confinement. He considered that this amounted to a breach of Article 5 § 4 of the Convention.

122. It is the Court's long-standing case-law that the scope of a case referred to the Grand Chamber under Article 43 of the Convention is determined by the Chamber's decision on admissibility (see, among many

other authorities, *Garib v. the Netherlands* [GC], no. 43494/09, § 100, 6 November 2017, with further references).

123. The Court notes that the complaint under Article 5 § 4 is a new complaint, raised for the first time before the Grand Chamber. It is thus not included in the Chamber's decision with regard to admissibility. It follows that the Court cannot examine it at this stage.

II. WHETHER THE APPLICANT WAS A VICTIM

A. The Chamber judgment

124. Having regard to the favourable outcome obtained by the applicant at first instance in the proceedings on the action for damages brought by him (see paragraph 55 above), the Chamber examined whether the applicant could still claim to be the victim of a possible violation of the Convention. It concluded that he could, for the reasons set out in paragraphs 65 to 70 of its judgment.

B. The parties' submissions

125. Questioned by the Grand Chamber on whether the applicant had victim status, the parties set out their arguments on this point, particularly in the light of the treatment measures adopted after the Chamber judgment of 18 July 2017.

126. The applicant considered, in particular, that the Chamber's findings remained valid. He added two further elements. Firstly, the efforts made to provide him with treatment were only temporary and amounted to statements of intent by the authorities. The rare periods when it had theoretically been possible to administer the treatment did not change the fact that he had been a victim during the much longer periods when he was effectively denied treatment. Secondly, the Belgian State had lodged an appeal against the Brussels Court of First Instance's decision of 9 September 2016 awarding him compensation, with the result that that decision could no longer have judicial effect.

127. For their part, the Government stated that it was appropriate to consider that the applicant could no longer claim to be the victim of a violation of Articles 3 and 5 of the Convention. They argued, in particular, that the applicant's situation had developed favourably, as evidenced by the domestic court decisions delivered subsequent to the Chamber judgment of 18 July 2017. They did not dispute that it had been established by the domestic authorities that the applicant's conditions of detention during the periods in which he had not been cared for by German-speaking medical staff had been in breach of Article 3 of the Convention; however, they

claimed that this violation had ended with the presence, since August 2017, of German-speaking professionals who provided psychological and psychiatric treatment and welfare assistance, and with the intervention of an interpreter on every occasion that this was necessary. They added that although it was not final, the Brussels Court of First Instance's judgment of 9 September 2016 had awarded compensation to the applicant. As to the allegations under Article 5, even supposing that the Grand Chamber found that the applicant's detention was unlawful, it should also be considered that this unlawfulness had come to an end following the introduction of the measures in question.

C. The Grand Chamber's assessment

128. The Court reiterates that it falls first to the national authorities to redress any violation of the Convention and that in assessing whether an applicant can claim to be a genuine victim of an alleged violation, account should be taken not only of the formal position at the time when the application was lodged with the Court but of all the circumstances of the case in question, including any developments prior to the date of the examination of the case by the Court (see *Tănase v. Moldova* [GC], no. 7/08, § 105, ECHR 2010).

129. A decision or measure favourable to the applicant is not, in principle, sufficient to deprive him of his status as a "victim" for the purposes of Article 34 of the Convention unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for the breach of the Convention (see *Scordino v. Italy (no. 1)* [GC], no. 36813/97, §§ 179-80, ECHR 2006-V, and *Gäfgen v. Germany* [GC], no. 22978/05, § 115, ECHR 2010). Only where both these conditions have been satisfied does the subsidiary nature of the protective mechanism of the Convention preclude examination of the application.

130. In the present case, the Court notes firstly that, by an order of 10 October 2014, the president of the French-language Brussels Court of First Instance held that the Belgian State was to appoint a German-speaking psychiatrist and medical auxiliary, subject to a penalty in the event of non-compliance, and to provide the applicant with the treatment routinely provided to French-speaking detainees suffering from a similar mental disorder (see paragraph 52 above). It further notes that the same court awarded the applicant financial compensation, having noted in its judgment of 9 September 2016 that the failure to provide treatment commensurate to the applicant's mental condition amounted to negligence. It had added that the mere fact of having been detained for an indeterminate period without appropriate treatment amounted to a violation of Articles 3 and 5 § 1 of the Convention (see paragraphs 55 and 56 above). The finding of a breach of Article 3 was repeated in the CPS's judgment of 27 December 2017 with

regard to the periods prior to August 2017 when no treatment in the German language was available (see paragraph 64 above).

131. The Court therefore considers that in the present case the domestic courts have explicitly recognised that there was a violation of Article 3 in respect of the period before August 2017, and that there was a violation of Article 5 in respect of the period until 9 September 2016. With regard to the remainder of the period in issue, there has been no explicit acknowledgement of a violation of the Convention.

132. As to whether there has been "appropriate" and "sufficient" redress, the Court notes that it is true that, following communication of the application and then the Chamber judgment, the national courts adopted decisions favourable to the applicant, by ordering that German-speaking professionals be made available and by awarding him, at first instance, financial compensation. However, the Court cannot ignore the fact that this availability took tangible form for only a few months in 2010, then in 2014-2015, and at the end of 2017-beginning of 2018, nor that the situation giving rise to the application dates back to the beginning of the applicant's compulsory confinement and had been noted by the CDS as early as 2006 (see, *mutatis mutandis*, *Y.Y. v. Turkey*, no. 14793/08, §§ 52-55, ECHR 2015 (extracts)). In addition, the financial compensation awarded covers only the period from January 2010 to October 2014. It cannot therefore be considered as complete, especially since the first-instance judgment of 9 September 2016 is not final, an appeal has been lodged against it, and the proceedings were still pending before the Brussels Court of Appeal on the date of adoption of the present judgment (see paragraphs 58-59 above).

133. In consequence, the Court concludes that the applicant has not lost his victim status in respect of the alleged violations of Articles 3 and 5, within the meaning of Article 34 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

134. The applicant complained that his compulsory confinement without psychological and psychiatric treatment in the social protection facility in which he had been placed, and the total lack of any prospects of improvement in his situation on account of this absence of treatment, amounted to inhuman and degrading treatment prohibited by Article 3 of the Convention, which reads:

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

A. The Chamber judgment

135. In its judgment, the Chamber reasoned as follows (paragraphs 91-93):

"91. ... taking into account the fact that German is one of the three official languages in Belgium, the Court finds that the national authorities did not provide adequate treatment for the applicant's health condition. The fact that he was continuously detained in the Paifve EDS for thirteen years without appropriate medical support or any realistic prospect of change thus subjected him to particularly acute hardship, causing him distress of an intensity exceeding the unavoidable level of suffering inherent in detention.

92. Whatever obstacles the applicant may have created by his own conduct – as pointed out by the Government – the Court considers that this did not dispense the State from fulfilling its obligations towards him.

93. In those circumstances, and as the president of the French-language Brussels Court of First Instance and that court itself also noted in the order of 10 October 2014 and the judgment of 9 September 2016 respectively ..., the Court concludes that the applicant was subjected to degrading treatment on account of his continued detention ... in the period from his admission to the Paifve EDS on 21 January 2004 until now, with the exception of two periods when he had access to a German-speaking psychologist, from May to November 2010 and from July 2014 to the end of 2015."

B. The parties' submissions

1. The applicant

136. Before the Grand Chamber, the applicant alleged that there was nothing to justify departing from the Chamber's assessment that he had been subjected to degrading treatment. He added that the authorities' failure to provide him with adequate therapeutic care for his mental health concerned the entirety of his period in compulsory confinement and was still continuing on the day of the hearing before the Court. He also submitted that the treatment offered to him had been ineffective even during the period in which he had had access to German-speaking staff, that is, from May to November 2010, from July 2014 to the end of 2015, and following the Chamber judgment. Lastly, he claimed that the therapeutic measures envisaged for him after 18 July 2017 were merely a statement of intent by the authorities and had not become a tangible reality.

137. The applicant did not complain that the Paifve facility as such was unsuited to his mental health condition and his profile. He alleged that he, as an individual, did not receive any treatment on the grounds that the institution in which he was detained, located as it was in the French-speaking region of Belgium, did not employ any medical personnel who spoke German, one of the official languages in Belgium and the only language in which he could communicate with ease. He considered that, as a result, and in the absence of any prospect of an improvement in his situation, his mental health had deteriorated. In his view, the measures taken for his care after August 2017 amounted only to expressions of intent and were not therefore effective (see paragraphs 126 and 136 above).

2. The Government

138. The Government did not dispute the lack of German-speaking medical personnel within the Paifve facility, nor the difficulty in providing therapeutic support for the applicant's mental-health problems. However, they submitted that there was no causal link between these two elements, and that the difficulties in treating the applicant were due to the form of illness from which he suffered and his lack of cooperation with the care team. Before the Grand Chamber, they argued that, since his admission to the Paifve EDS, the applicant had received treatment corresponding to his needs and adapted to his condition. Moreover, he had not been deprived of all form of communication, since he had regular meetings with a German-speaking nurse and welfare officer. Relying on the findings of the CSDS and the Court of Cassation (see paragraphs 34-37 above), they argued that the language problem on no account meant that the necessary treatment had not been administered. In this connection, they emphasised that the CDS itself, in its decision of 24 January 2014, had reached the same conclusion. In fact, the applicant refused to collaborate with the care team. Moreover, he had failed to indicate what treatment had not been offered or administered to him. The applicant had not made any request for psychological care, complained to his doctors or requested psychotropic medication. It was apparent, especially from the psychiatric reports, that there was no causal link between the lack of German-speaking staff in the Paifve EDS and the fact that there had been no progress in the applicant's mental health.

139. The Government added that following the Chamber judgment, that is, since August 2017, fresh efforts had been made to provide the applicant with individualised medical treatment in German.

140. Furthermore, the applicant had adduced no evidence of deterioration in his health. On the contrary, his condition was very stable.

C. The Grand Chamber's assessment

1. Recapitulation of the relevant principles

141. As the Court has repeatedly stated, Article 3 of the Convention enshrines one of the most fundamental values of democratic society (see *Bouyid v. Belgium* [GC], no 23380/09, § 81, ECHR 2015). It prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the circumstances and the victim's behaviour. In order for treatment to fall within the scope of that provision it must attain a minimum level of severity. The assessment of this minimum is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim. Treatment is considered to be "degrading" when it

arouses in the victim feelings of fear, anguish or inferiority capable of breaking his or her moral and physical resistance, or when it is such as to drive the victim to act against his or her will or conscience. Although the question whether the purpose of the treatment is to humiliate or debase the victim is a factor to be taken into account, the absence of any such purpose cannot conclusively rule out a finding of violation of Article 3 (see *Stanev v. Bulgaria* [GC], no. 36760/06, §§ 201-03, ECHR 2012, with further references).

142. Measures depriving persons of their liberty inevitably involve an element of suffering and humiliation.

143. That being stated, Article 3 requires the State to ensure that all prisoners are detained in conditions which are compatible with respect for their human dignity, that the manner of their detention does not subject them to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in such a measure and that, given the practical demands of imprisonment, their health and well-being are adequately secured by, among other things, providing them with the requisite medical assistance (see *Stanev*, cited above, § 204). The Court has emphasised that persons in custody are in a vulnerable position and that the authorities are under a duty to protect them (see *Enache v. Romania,* no. 10662/06, § 49, 1 April 2014; *M.C. v. Poland*, no. 23692/09, § 88, 3 March 2015; and *A.Ş. v. Turkey*, no. 58271/10, § 66, 13 September 2016).

144. The Convention does not contain any provision relating specifically to the situation of persons deprived of their liberty, let alone where they are ill, but it cannot be ruled out that the detention of a person who is ill may raise issues under Article 3 (see *Matencio v. France*, no. 58749/00, § 76, 15 January 2004). In particular, the Court has held that the suffering which flows from naturally occurring illness, whether physical or mental, may in itself be covered by Article 3, where it is, or risks being, exacerbated by conditions of detention for which the authorities can be held responsible (see, in particular, *Hüseyin Yıldırım v. Turkey*, no. 2778/02, § 73, 3 May 2007, and *Gülay Çetin v. Turkey*, no. 44084/10, § 101, 5 March 2013). Hence, the detention of a person who is ill in inappropriate physical and medical conditions may in principle amount to treatment contrary to Article 3 (see *Kudła v. Poland* [GC], no. 30210/96, § 94, ECHR 2000-XI; *Rivière v. France*, no. 33834/03, § 74, 11 July 2006; and *Claes*, cited above, §§ 94-97).

145. In determining whether the detention of an ill person is compatible with Article 3 of the Convention, the Court takes into consideration the individual's health and the effect of the manner of execution of his or her detention on it (see, among other authorities, *Matencio*, cited above, §§ 76-77, and *Gülay Çetin*, cited above, §§ 102 and 105). It has held that the conditions of detention must under no circumstances arouse in the person deprived of his liberty feelings of fear, anguish and inferiority capable of

humiliating and debasing him and possibly breaking his physical and moral resistance (see *Selmouni v. France* [GC], no. 25803/94, § 99, ECHR 1999-V). On this point, it has recognised that detainees with mental disorders are more vulnerable than ordinary detainees, and that certain requirements of prison life pose a greater risk that their health will suffer, exacerbating the risk that they suffer from a feeling of inferiority, and are necessarily a source of stress and anxiety. It considers that such a situation calls for an increased vigilance in reviewing whether the Convention has been complied with (see *Sławomir Musiał v. Poland,* no. 28300/06, § 96, 20 January 2009; see also *Claes*, cited above, § 101). In addition to their vulnerability, the assessment of the situation of these particular individuals has to take into consideration, in certain cases, the vulnerability of those persons and, in some cases, their inability to complain coherently or at all about how they are being affected by any particular treatment (see, for example, *Herczegfalvy v. Austria*, 24 September 1992, § 82, Series A no. 244; *Aerts v. Belgium*, 30 July 1998, § 66, *Reports of Judgments and Decisions* 1998-V; and *Murray v. the Netherlands* [GC], no. 10511/10, § 106, 26 April 2016).

146. The Court also takes account of the adequacy of the medical assistance and care provided in detention (see *Stanev*, cited above, § 204; *Rivière,* cited above, § 63; and *Sławomir Musiał*, cited above, §§ 85-88). A lack of appropriate medical care for persons in custody is therefore capable of engaging a State's responsibility under Article 3 (see *Naoumenko v. Ukraine*, no. 42023/98, § 112, 10 February 2004, and *Murray*, cited above, § 105). In addition, it is not enough for such detainees to be examined and a diagnosis made; instead, it is essential that proper treatment for the problem diagnosed should also be provided (see *Claes*, cited above, §§ 94-97, and *Murray*, cited above, § 106), by qualified staff (see *Keenan v. the United Kingdom*, no. 27229/95, §§ 115-16, ECHR 2001-III, and *Gülay Çetin*, cited above, § 112).

147. In this connection, the "adequacy" of medical assistance remains the most difficult element to determine. The Court reiterates that the mere fact that a detainee has been seen by a doctor and prescribed a certain form of treatment cannot automatically lead to the conclusion that the medical assistance was adequate. The authorities must also ensure that a comprehensive record is kept concerning the detainee's state of health and his or her treatment while in detention, that diagnosis and care are prompt and accurate, and that where necessitated by the nature of a medical condition supervision is regular and systematic and involves a comprehensive therapeutic strategy aimed at adequately treating the detainee's health problems or preventing their aggravation, rather than addressing them on a symptomatic basis. The authorities must also show that the necessary conditions were created for the prescribed treatment to be actually followed through. Furthermore, medical treatment provided within

prison facilities must be appropriate, that is, at a level comparable to that which the State authorities have committed themselves to provide to the population as a whole. Nevertheless, this does not mean that every detainee must be guaranteed the same level of medical treatment that is available in the best health establishments outside prison facilities (see *Blokhin v. Russia* [GC], no. 47152/06, § 137, 23 March 2016, with further references).

148. Where the treatment cannot be provided in the place of detention, it must be possible to transfer the detainee to hospital or to a specialised unit (see *Raffray Taddei v. France*, no. 36435/07, §§ 58-59, 21 December 2010; see also, conversely, *Kudła*, cited above, §§ 82-100, and *Cocaign v. France*, no. 32010/07, 3 November 2011).

2. Application of these principles to the present case

149. The Court observes, firstly, that the existence of the mental-health problems at the origin of the applicant's compulsory confinement has not been disputed. He was placed in compulsory confinement on the basis of several medical reports certifying that he had a narcissistic and paranoid personality and that he suffered from a severe mental disorder making him incapable of controlling his actions. It is for this reason that the applicant has been detained on a continuous basis in the Paifve EDS since 21 January 2004.

150. Further, in contrast to other applicants who raised similar complaints in previous cases against Belgium (see, for example, *Claes*, cited above, and *Lankester v. Belgium*, no. 22283/10, 9 January 2014), the applicant does not complain that the Paifve facility is inappropriate for persons placed in compulsory confinement, but alleges that, as a result of a language problem, he was not receiving the treatment that ought to have been provided to him (see paragraph 137 above).

151. The Court notes at the outset that the possibility for a patient to be treated by staff who speak his or her language, even where it is an official language of the State, is not an established ingredient of the right enshrined in Article 3, or in any other Convention provision, particularly with regard to the provision of appropriate care to individuals who have been deprived of their liberty. Taking into account the language difficulties encountered by the medical authorities, the Court must examine whether, in parallel with other factors, necessary and reasonable steps were taken to guarantee communication that would facilitate the effective administration of appropriate treatment. In the area of psychiatric treatment in relation to Article 3, the purely linguistic element could prove to be decisive as to the availability or the administration of appropriate treatment, but only where other factors do not make it possible to offset the lack of communication and, in particular, subject to cooperation by the individual concerned (see, *mutatis mutandis*, *Dhoest v. Belgium*, no. 10448/83, Commission report of

14 May 1987, Decisions and Reports (DR), § 124, a case in which the applicant spoke Dutch, one of the official languages of the State, and was placed in a social-protection facility in the French-speaking region of Belgium).

152. The Court will now examine the applicant's complaint in two stages, taking account of the therapeutic package which, according to the Government, has been in place since August 2017.

(a) The treatment situation from the beginning of 2004 to August 2017

153. The Court notes that the Government's argument to the effect that the applicant received care corresponding to his needs is not factually correct. On the contrary, all the evidence in the case file would indicate a failure to provide therapeutic treatment resulting from the fact that it was impossible for the medical staff and the applicant to communicate. Thus, contrary to the Government's affirmations in their observations before the Grand Chamber, namely that the applicant had been provided with sufficient psychiatric treatment (see paragraphs 68 and 138 above), it appears clearly from the case file that both the psychiatrists who were in contact with the applicant and the judicial authorities acknowledged the lack of treatment. They made it sufficiently clear from September 2005 onwards that the applicant was in particular need of long-term psycho-pharmacological and psycho-therapeutic treatment, to be administered in German, the only language that he spoke and understood (see paragraph 14 above). The language barrier was the sole factor limiting the applicant's effective access to the treatment that was normally available (see paragraphs 18, 23, 25, 29, 40, 51 and 55 above). The Court further notes that attempts were made from 2006 onwards to find therapeutic support, in German, outside the Paifve facility (see paragraphs 16, 21-22 and 25-26 above). On several occasions the applicant's applications for discharge were postponed by the CDS on account of the difficulty in beginning therapy as a result of the language problem (see paragraphs 16, 19, 22 and 26 above). The report of 27 March 2015 stated that the applicant's neuropsychological condition was practically identical to what it had been in 2009 (see paragraph 44 above). In its report of 12 January 2017, the Paifve EDS's psychosocial team stated that this language barrier had prevented clinical observation aimed at assessing the applicant's dangerousness (see paragraph 60 above). Lastly, the CPS acknowledged that there had been a violation of Article 3 during those periods when he was not being treated by German-speaking medical staff (see paragraph 64 above).

154. The Court notes that the applicant was admittedly able to meet qualified German-speaking staff during the period in question. However, as emphasised by the CDS itself, that contact, whether with the experts at Verviers Prison or with the German-speaking nurse and welfare officer in

Paifve, was not in a therapeutic context (see paragraphs 20, 21 and 25-29 above). Only the contact with an external German-speaking psychologist between May and November 2010 (see paragraph 51 above) corresponds to the treatment referred to by the Government; however, viewed in relation to the overall duration of the applicant's deprivation of liberty, these consultations cannot be regarded as a real provision of treatment, especially since they came to an end as a result of the State's failure to pay the relevant fees and expenses. In addition, there is nothing in the case file to suggest that psychiatric treatment or individualised care was provided during this period, particularly in the light of the indefinite duration of the applicant's placement.

155. Moreover, with regard to the Government's statement that the applicant had failed to produce any real evidence to substantiate his allegations or to indicate what treatment had not been provided or offered to him (see paragraph 138 above), the Court notes that the applicant complained to the social-protection bodies about the failure to provide treatment and about the impact on his health of the lack of any prospect of a change in his situation (see paragraph 27 above). The Court has already repeatedly rejected such a formalistic approach and emphasised that the assessment of whether the treatment or punishment concerned is incompatible with the standards of Article 3 has, in the case of mentally ill persons, to take into consideration their vulnerability and their inability, in some cases, to complain coherently or at all about how they are being affected by any particular treatment (see *Claes*, cited above, § 93; *Murray*, cited above, § 106; and *W.D.*, cited above, § 105).

156. The Court notes that the social protection bodies took measures to find a solution to the problem raised in the applicant's particular case (see paragraphs 24 and 26 above). However, those sporadic efforts were thwarted by the authorities' failure to take appropriate measures to bring about a change in the situation with regard to communication. It was not until the CSDS's decision and the order by the president of the French-language Brussels Court of First Instance in 2014 that practical measures, which had nonetheless been recommended for years, were taken, such as the provision of a German-speaking psychologist (see paragraphs 43 and 51 above). However, it appears that this arrangement ceased towards the end of 2015 (see paragraph 53 above), and only resumed in August 2017 (see paragraph 64 above). It is clear that the delay in putting in place measures that would facilitate communication with the applicant had the effect of depriving him of the treatment required by his health condition. Moreover, the Government have not argued that other elements in the applicant's medical care compensated for the absence of communication in German, and the Court is unable to identify any measure to that effect in the case file. In particular, it considers that the contact with the welfare assistant and the meetings with the nurse cannot be considered as a compensatory

measure for that purpose: the role played by these individuals, while important in terms of providing support to the applicant, did not take place in the context of psychotherapeutic treatment. In the Court's view, the only methods envisaged by the authorities to remedy the problem of communication with the applicant consisted in seeking out either care staff who themselves spoke German, or another facility, and both of these approaches were unsuccessful (see paragraph 40 above). Indeed, the authorities themselves noted that neither of these two solutions was achievable, since, on the one hand, they considered that no German-speaking staff were available, and, on the other, the applicant's dangerousness ruled out his placement in a less secure German-speaking facility. Thus, it seems that throughout this entire period the authorities responsible for the applicant were content with the excuse that there were no German-speaking specialists in the Paifve facility to justify the fact that he was not receiving appropriate treatment.

157. The Court considers that these elements are sufficient to demonstrate that the national authorities failed to provide treatment for the applicant's health condition. His continued detention in the Paifve EDS without a realistic hope of change and without appropriate medical support for a period of about thirteen years must accordingly – in spite of the few consultations organised over a few short periods throughout this entire period – be viewed as particularly acute hardship, causing him distress of an intensity exceeding the unavoidable level of suffering inherent in detention.

158. Whatever the obstacles, mentioned by the Government, which the applicant might himself have created through his behaviour, the Court considers that these did not dispense the State from its obligations towards the applicant over such a lengthy period of deprivation of liberty. Furthermore, the Court cannot overlook the worrying findings reached more generally by the Paifve Supervisory Board and the CPT, both of which found profound shortcomings in the care system in the Paifve EDS (see paragraphs 115 and 120 above).

159. The Court therefore concludes that there was a violation of Article 3 of the Convention in respect of the period from the beginning of 2004 to August 2017.

(b) The treatment situation since August 2017

160. With regard to the development of the situation from August 2017 onwards, the Court takes note of several elements.

161. To begin with, regarding the monthly meetings with a German-speaking psychologist (see paragraphs 67 and 74 above), the Court notes that the parties have submitted different factual accounts. At the hearing before the Grand Chamber, the applicant's representatives stated that the last meeting with this psychologist had taken place in February 2018 and that in any event these meetings did not take place in a therapeutic context.

The Government disputed those statements. Neither party submitted written evidence in support of their allegations on this point. Even supposing that the applicant did not meet with the psychologist between March and May 2018 the Court considers that the interval of ten months between the start of implementation of the new measures in August 2017 and the hearing before the Court of 6 June 2018 is not sufficient to allow the conclusion that the psychological treatment undertaken was not appropriate in the applicant's case.

162. Furthermore, a German-speaking psychiatrist has apparently been contacted and has expressed her willingness to provide treatment at any time. Arrangements have been made to ensure the presence of an interpreter for the monthly meetings with a general practitioner and for all the other treatment measures where this is considered necessary. Lastly, a multidisciplinary meeting of the care team, attended by the applicant and an interpreter, was held on 25 November 2017. These measures may be considered as corresponding, in principle, to the concept of "appropriate treatment" (see paragraph 146 above).

163. Concerning psychiatric care in particular, it would admittedly appear that a German-speaking psychiatrist was merely made available, and the lack of more advanced initiatives by the authorities to propose a therapeutic schedule may be considered regrettable. However, neither the material in the case file nor the applicant's statements indicate that he asked to take advantage of the proposed psychiatric consultation and that the medical authorities refused to give effect to such a request.

164. The Court is mindful of the fact that the applicant is a vulnerable individual on account of his health condition and his detention, that his cooperation is only one factor to be taken into account in assessing the effectiveness of the required treatment and that the duty to provide suitable care on the basis of individualised treatment lies primarily with the relevant authorities. Nonetheless, he enjoyed, all through the proceedings, effective legal assistance and his allegations have been made both before the Court and in the multiple domestic proceedings in which he has requested, over many years, access to German-speaking health professionals. Thus, in the particular circumstances of this case, the applicant, assisted by a lawyer throughout the domestic proceedings, could have shown himself open to the attempts by the Belgian authorities to respond to the Chamber's finding of a violation by proposing therapeutic measures in his language.

165. It therefore appears to the Court that the applicant has clearly understood the need to submit to psychiatric treatment in order to secure his release, and he has argued before the Grand Chamber that he is open to treatment provided that it is administered in German; at the same time, however, he has not explained in what way the proposed treatment is not effective, but has merely stated that the psychiatrist has only made herself "available". In the absence of specific allegations in this regard, the Court

therefore considers that the applicant has not cooperated sufficiently and has not been receptive to the proposed treatment. In this connection, it considers it appropriate to reiterate that the applicant is admittedly entitled to refuse to accept the treatment proposed to him, as is also made clear in Recommendation Rec(2004)10 of the Committee of Ministers of the Council of Europe to the member States concerning the protection of human rights and the dignity of persons with mental disorders (see paragraph 119 above; see, in particular, the explanatory memorandum concerning Article 17, point 133), but that, by refusing to cooperate, he risks reducing the prospects of an improvement in his health and, in consequence, of discharge, since he will only be able to benefit from such a decision if the assessments show that he no longer poses a danger to society.

166. Thus, although the authorities can be criticised for a considerable delay in taking measures to ensure that the applicant was provided with adequate treatment, a delay which has led the Court to find a violation of Article 3 for the period from the beginning of 2004 to August 2017 (see paragraphs 153-159 above), it seems that they have nonetheless shown a real willingness to remedy the situation since the Chamber judgment, by undertaking tangible measures. In this context, the applicant's lack of receptivity to the proposed arrangements for psychiatric treatment cannot be imputed to the authorities, regard being had also to the fact that the short period which has elapsed since this change makes it impossible to evaluate the impact of these arrangements. The Court therefore concludes that, although there exist certain organisational shortcomings in the proposed package of measures, the threshold of severity required to bring Article 3 into play has not been reached in respect of the applicant's allegations concerning the period subsequent to August 2017.

167. In the light of all these considerations, the Court finds that there has been no violation of Article 3 under this head.

168. It wishes to stress, however, that this finding does not release the Government from their obligation to continue to take all the necessary steps in order to put in place, without delay, the indicated medical support, on the basis of individualised and appropriate therapeutic care (see, *mutatis mutandis*, *De Schepper v. Belgium*, no. 27428/07, § 48, 13 October 2009).

IV. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

169. The applicant also alleged that his detention was not lawful in that he was not receiving the psychological and psychiatric treatment necessitated by his mental condition. He relied on Article 5 § 1 of the Convention, the relevant parts of which provide:

"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:

...

(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;

..."

A. The Chamber judgment

170. In this regard, the Chamber held:

"102. [The Court] ... notes that, in contrast to the leading cases ... the applicant is detained in a social-protection institution that is in principle appropriate to his mental health condition and his degree of dangerousness...

103. The Court has also found, under Article 3 of the Convention, that he has not been provided with appropriate care in that institution and has been held in unsuitable conditions for thirteen years, in breach of Article 3 ... That being stated, the Court also reiterates its established case-law to the effect that, as long as a person's detention as a mental health patient takes place in a hospital, clinic or other appropriate institution, the adequacy of the treatment or regime is not a matter for examination under Article 5 § 1 (e) of the Convention (see *Winterwerp v. the Netherlands*, 24 October 1979, § 51, Series A no. 33; *Ashingdane*, cited above, § 44; and *Stanev*, cited above, § 147). In the present case, there has at all times been a link between the reason for the applicant's detention and his mental illness. The failure to provide appropriate care, for reasons unconnected with the actual nature of the institution in which the applicant was held, did not break that link and did not render his detention unlawful (see *Ashingdane*, cited above, § 49).

104. In conclusion, there has been no violation of Article 5 § 1."

B. The parties' submissions

1. The applicant

171. The applicant considered that the Court was called upon to resolve a "serious question" with regard to the consistency of its case-law, posed, in his view, by a discrepancy between the Chamber judgment adopted in his case and the judgment delivered in the *Lorenz v. Austria* case (no. 11537/11, judgment of 20 July 2017). In particular, he claimed that the finding adopted in the present case was at odds not only with that in the *Lorenz* case, but also with previous case-law to the effect that detention that was ordered and extended because of an alleged risk of reoffending was incompatible with Article 5 § 1 if, as part of that detention, the individual concerned did not receive any treatment or undergo psychiatric assessments to determine and reduce his dangerousness (he referred to *Ostermünchner v. Germany*, no. 36035/04, § 74, 22 March 2012; *H.W. v. Germany*, no. 17167/11, § 112, 19 September 2013; and *Klinkenbuß v. Germany*,

no. 53157/11, § 47, 25 February 2016). He submitted that, as interpreted by the Court in these judgments, Article 5 § 1 (e) placed an obligation on the authorities to put in place a regime and/or treatment for the effective administration of appropriate medical care, intended in particular to improve the psychiatric health of the person concerned, reduce his or her dangerousness to society, and give tangible form to a hope of release. He noted that without such an obligation, he would undoubtedly find himself in an inextricable situation, doomed to remain in compulsory confinement until his dying day.

172. With regard to his individual situation, the applicant complained of a total absence of treatment, as evidenced by several psychiatric reports, and a resultant deterioration in his mental health. In his view, the deprivation of liberty to which he was subjected could be justified only by the fact of receiving therapy, and yet he was not receiving any treatment on account of a language barrier.

173. With regard to the treatment described by the Government, the applicant specified that he had met the German-speaking welfare officer on only two or three occasions, and that she had stopped meeting him because she did not receive payment for this. As for the Dutch-language nurse who spoke German, he had left the Paifve EDS in 2012. The applicant added that, in any event, he needed to see a German-speaking psychologist and psychiatrist, as the CSDS had acknowledged in its decision of 22 July 2014.

174. The applicant also submitted that it was incorrect to state that he had refused treatment: in reality, he had never been offered therapeutic treatment or meetings, as confirmed by the CSDS's findings in its decision of 22 July 2014. The individuals he had met in Verviers Prison in 2007 were only responsible for preparing an expert report, and there had thus been no therapeutic dimension to these meetings. The authorities had been aware of the applicant's situation since the start of his compulsory confinement, and yet they had never done anything to remedy it.

175. Thus, the applicant considered that the Paifve facility was not fulfilling its duty towards him, since no one was able to provide him with treatment in German, the only language he understood and spoke and which was, furthermore, one of the three official languages in Belgium. He concluded that the Paifve EDS was not therefore an "appropriate institution", contrary to the Chamber's finding.

176. The applicant argued that, in the light of the Court's case-law, his situation ought to be regarded as "unlawful" detention for the purposes of Article 5 § 1 (e). His compulsory confinement ought to have the dual purpose of putting in place therapeutic treatment to reduce his dangerousness and of permitting his reintegration into society. Compulsory confinement had necessarily to be accompanied by appropriate treatment; in the absence of such treatment, the health condition of the individual in

compulsory confinement could never improve, nor, in consequence, could he or she apply for discharge under Belgian law.

177. The applicant argued that, contrary to the conclusions in the decision by the CPS at the court responsible for the execution of sentences of 27 December 2017 and in the Court of Cassation's judgment of 28 February 2018 (see paragraphs 64 and 65 above), the fact that the authorities had expressed an intention to provide him with appropriate treatment did not suffice to compensate for the shortcomings in treatment throughout his detention since the beginning of 2004, which had been noted on several occasions by the relevant authorities. At the hearing on 6 June 2018, the applicant's lawyers had stated that, contrary to the Government's submissions (see paragraph 69 above), the monthly meetings with the psychologist had not taken place since February 2018 and the applicant had had no news from her since that time. No proposals for treatment had been presented or explained to the applicant, and given his mental health, it was for the Belgian State to provide him with the necessary care rather than to impose on him responsibility for organising that care. In fulfilling the obligations arising under Article 5 § 1 (e), it was not sufficient simply to make a psychiatrist available to the applicant and suggest to him that he contact her when he wished.

178. Lastly, there was nothing in the case file to support the assertion that, in practice, the applicant's dangerous behaviour had persisted and that his continued placement in compulsory confinement was justified. On the contrary, the various reports by the Paifve EDS's psychological and welfare service had noted his good conduct; he had never had problems with the staff or the other detainees and had never been the subject of a report or disciplinary proceedings. He worked calmly in the Paifve EDS and had made progress in terms of social interaction and conviviality. The applicant had also confirmed to his lawyer on 25 July 2014 that he was willing to meet persons who were qualified to assess and help him.

179. In conclusion, the Belgian State had not fulfilled its obligation under Article 5 § 1 (e) to the applicant, who had been left since the beginning of his compulsory confinement in the Paifve EDS, where his case had been ignored in such a way that the necessary link between the purpose of the compulsory confinement and the grounds for the long-term deprivation of liberty had been severed.

2. The Government

180. The Government stated that the Paifve EDS was an institution specialising in treating persons in compulsory confinement, including those suffering from the applicant's pathology, and that he had never challenged the actual quality of the care provided in it. The applicant was not being treated with any particular medicinal drug, as it was acknowledged that there was no pharmacological treatment for his condition. In contrast, the

medical professionals stressed the need for a structured environment such as that in Paifve, in order to avoid any upsets or risk of psychological decompensation. Furthermore, the appropriate nature of the Paifve EDS was demonstrated by the fact that the applicant's health had remained stable, and by the beneficial effect on his behaviour of the structure provided in it.

181. Relying on Dr B.'s findings of 28 August 2014, the Government emphasised that the fact that treatment had been provided essentially in French did not mean that the link between the reasons for the applicant's compulsory confinement and his illness had been severed, given that a positive outcome had been unrealistic (see paragraph 50 above). The German-speaking nurse had provided dedicated support to the applicant throughout his compulsory confinement, even after the former's retirement, and this therapeutic relationship had been facilitated by the Belgian State.

182. In this connection, the Government recognised that Article 5 required that compulsory confinement serve a therapeutic purpose in addition to that of the protection of society. However, they argued that the obligation to provide care contained in that provision was not an obligation to produce a particular result, since other factors, such as the nature of the disorders and the cooperation of the individuals concerned, had to be taken into account. They invited the Court to consider the present case in the same manner as the *De Schepper* case, in which it had concluded that the Belgian authorities had not failed to comply with their obligation to provide suitable treatment, since the efforts made by them had proved unsuccessful on account of the evolution in the applicant's condition and the fact that it was impossible for the institutions approached to treat him (they referred to *De Schepper*, cited above, § 48). In this connection, they stressed that the problem at the origin of the present case stemmed from the fact that the applicant was a German speaker and had a "high-risk" profile, and that no German-speaking institution in Belgium was able to accept individuals with that profile.

183. In the light of those considerations, the Government invited the Court to distinguish between the present case and that of *Lorenz*, referred to by the applicant (see paragraph 171 above).

184. With regard to the issue of continued compulsory confinement, the Government submitted that the numerous expert assessments carried out had unanimously concluded that the lack of progress in the applicant's situation did not permit his release. Nonetheless, they specified that the prospect of discharge had never been ruled out, provided that the applicant could propose a suitable project and there was no contraindication to his release. In this connection, they added that the applicant was not cooperating with the health services, which was making it impossible to conduct an expert assessment to determine the prospects for his reintegration. For example, he had refused to permit the German-speaking psychologist from outside the Paifve EDS, with whom he had been meeting

regularly since August 2017, to transmit information to the psychosocial team responsible for carrying out this assessment (see paragraph 73 above).

185. The Government added that, in any event, even assuming that the absence of treatment in German had severed the link between the compulsory confinement and the illness at its origin, which had not been the case here, there was still reason to consider, as the CPS at the Liège Court responsible for the execution of sentences had done in its judgment of 27 December 2017, that the deprivation of liberty was no longer unlawful, since measures for treatment in German had been put in place since August 2017. In their view, the measures put in place (see paragraphs 67 to 74 above) could be considered sufficient. They stated that the monthly meetings with the German-speaking psychologist, initiated in August 2017, had not ceased, contrary to the allegations made before the Grand Chamber by the applicant's representatives. They also stated that since no known psychotropic medicine was indicated for the applicant's pathology, it was not absolutely necessary for a psychiatrist to be involved in his case. They specified, however, that if the applicant so wished, he could meet the German-speaking psychiatrist, who was "at his disposal".

186. In those circumstances, the Government invited the Court to take into consideration the fact that the applicant was refusing to cooperate, both with regard to meeting this German-speaking psychiatrist and to authorising the results of the psychological treatment to be integrated into the work of the psychosocial team (see paragraph 73 above). The relevant authorities were making considerable efforts to progress with the project to improve the applicant's health and ensure his reintegration, but they found themselves in a stalemate as a result of the applicant's refusal to grant consent; they could not impose medical obligations on him, as he was considered to be capable of discernment.

C. The Grand Chamber's assessment

1. Preliminary remarks and the approach taken

187. The applicant, who has been held in compulsory confinement in a social protection facility since January 2004, has submitted his complaints – concerning the fact that he did not receive psychological or psychiatric treatment in that facility as a result of a language problem – under both Article 3 and Article 5 of the Convention. The Grand Chamber, like the Chamber, has found a violation of Article 3 on account of the lack of adequate treatment for the applicant's condition for the period between January 2004 and August 2017 (see paragraphs 135 and 159 above). With regard to Article 5, however, the Chamber held that there had been no violation, and found that the link between the reason for the compulsory

confinement and the applicant's mental illness had never been severed (see paragraph 170 above).

188. In the context of its examination of the complaint under Article 5, the question before the Grand Chamber is twofold. Firstly, it is required to clarify whether Article 5 § 1 (e), in parallel to its role in ensuring the protection of society, contains a therapeutic aspect in order for the purpose of compulsory confinement to be fulfilled. In other words, it must determine whether or not the authorities are under an obligation to provide psychiatric and psychological treatment to an individual in compulsory confinement, and, if so, to define the scope of the Court's review of the suitability of the treatment in question. Equally, the Grand Chamber is called upon to clarify the relationship between Articles 3 and 5 as regards its scrutiny of compliance with those provisions in the event that both complaints concern the absence of appropriate medical treatment and could thus be regarded as practically identical.

189. In so doing, the Court will consider below, firstly, the applicable case-law principles under Article 5 § 1 (e), and how these have developed over time as the Court has examined the cases submitted for its review. It will then clarify these principles in order to specify the content of the authorities' obligations under this provision. It will also describe the interaction between Articles 3 and 5 in a situation such as that in the present case. Lastly, it will examine the circumstances pertaining to the applicant's complaint under Article 5, having particular regard to those principles as clarified by it.

2. The applicable principles

(a) The general principles with regard to the deprivation of liberty of persons of unsound mind

190. It is well-established in the Court's case-law that in order to comply with Article 5 § 1, the detention in issue must first of all be "lawful", including the observance of a procedure prescribed by law. In addition to being in conformity with domestic law, that provision requires that any deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness. For arbitrariness to be excluded, conformity with the purpose of the restrictions permitted by the relevant sub-paragraph of Article 5 § 1 is required in respect of both the ordering and the execution of the measures involving deprivation of liberty (see *Winterwerp v. the Netherlands*, 24 October 1979, § 39, Series A no. 33; *Bouamar v. Belgium*, 29 February 1988, § 50, Series A no. 129; *O'Hara v. the United Kingdom*, no. 37555/97, § 34, ECHR 2001-X; *Saadi v. the United Kingdom* [GC], no. 13229/03, §§ 67 and 69, ECHR 2008; and *Merabishvili* v. Georgia [GC], no. 72508/13, § 186, 28 November 2017. In addition, there must be some relationship between

the ground relied on for the permitted deprivation of liberty and the place and conditions of detention (see *Stanev*, cited above, § 147).

191. Though only sub-paragraphs (c) and (d), in their English version, refer to the "purpose" of the types of deprivation of liberty which they cover, it is clear from their wording and the overall structure of Article 5 § 1 that this requirement is implicit in all the sub-paragraphs (see *Merabishvili*, cited above, § 299).

192. As regards the deprivation of liberty of persons suffering from mental disorders, an individual cannot be considered to be of "unsound mind" and deprived of his liberty unless the following three minimum conditions are satisfied: firstly, he must reliably be shown to be of unsound mind; 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 *Winterwerp*, cited above, § 39, and *Stanev*, cited above, § 145, with the cases cited therein).

193. With regard to the second of the above conditions, concerning in particular the detention of a mentally disordered person, this indicates that detention may be necessary not only where the person needs therapy, medication or other clinical treatment to cure or alleviate his condition, but also where the person needs control and supervision to prevent him, for example, causing harm to himself or other persons (see *Hutchison Reid v. the United Kingdom*, no. 50272/99, § 52, ECHR 2003-IV, and *Stanev*, cited above, § 146). As pointed out above, a certain link must exist between the ground relied on for the detention and the conditions in which it takes place (see *Stanev*, cited above, § 147, and paragraph 190 above). It follows that the "detention" of a person as a mental-health patient will be "lawful" for the purposes of Article 5 § 1 (e) only if effected in a hospital, clinic or other appropriate institution authorised for that purpose (see *Ashingdane*, cited above, § 44; *Pankiewicz v. Poland*, no. 34151/04, §§ 42-45, 12 February 2008; and *Stanev*, cited above, § 147). Furthermore, the Court has had occasion to state that this rule applies even where the illness or condition is not curable or where the person concerned is not amenable to treatment (see *Hutchison Reid*, cited above, §§ 52 and 55). Subject to the foregoing, Article 5 § 1 (e) is not in principle concerned with suitable treatment or conditions (see *Ashingdane*, cited above, § 44; *Hutchison Reid*, cited above, § 49; and *Stanev*, cited above, § 147).

(b) Interpretation of the concept of "appropriateness" of facilities designated to house persons suffering from mental illness

194. That being said, the Court would emphasise that, in its case-law, the conditions in which a person suffering from a mental disorder receives treatment are not without significance in assessing the lawfulness of his or her detention. In this respect, it has developed its analysis since its first decisions in this area, cited above (especially those delivered in the

above-cited *Winterwerp* and *Ashingdane* cases), by attaching increasing weight to the need to provide appropriate treatment to persons who have been deprived of their liberty for the purpose of relieving their illness or reducing their dangerousness.

195. In the *Winterwerp* case, which gave rise to the above-cited leading judgment, both the Commission and the Court considered that a mental patient's right to treatment appropriate to his condition could not as such be derived from Article 5 § 1 (see *Winterwerp*, cited above, § 51). The Commission specifically stated that it was true that compulsory admission to a psychiatric hospital should fulfil a dual function, therapeutic and social, but that the Convention dealt only with the social function of protection in authorising the deprivation of liberty of a person of unsound mind under certain conditions (see *Winterwerp v. the Netherlands*, no. 6301/73, Commission Report of 15 December 1977, (DR), § 84; see also *Ashingdane v. the United Kingdom*, no. 8225/78, Commission Report of 12 May 1983, § 77, and *Dhoest*, Report, cited above, § 145). In the above-cited *Ashingdane* case, the Court held that although the regime in a normal hospital was more liberal and, in view of the improvement in the applicant's mental state, more conducive to his ultimate recovery, the place and conditions of the applicant's detention in a special secure hospital did not cease to be those capable of accompanying "the lawful detention of a person of unsound mind", in spite of his prolonged detention there. His right to liberty and security of person had not therefore been limited to a greater extent than that provided for under Article 5 § 1 (e). It also held that, although the cause of the delay in his transfer (from a high security hospital to one with a more liberal environment) had to do with labour relations rather than therapeutic, it was clear that the delay had not been in conscious disregard of the applicant's mental welfare and the authorities had made efforts to find a solution as soon as possible. The evidence in the case file suggested that the authorities had probably taken the only practicable course of action (see *Ashingdane,* cited above, §§ 47 and 48).

196. The approach to the interpretation of Article 5 § 1 (e) had developed significantly by the *Aerts* judgment. In that judgment, the Court found a violation of Article 5 § 1, on the grounds that the applicant had not received regular medical attention or benefitted from a therapeutic environment in the psychiatric wing of the prison in which he was detained. It considered that the proper relationship between the aim of the detention and the conditions in which it took place was therefore deficient, as a result, in particular, of the lack of treatment required by the condition that had given rise to the applicant's compulsory confinement (see *Aerts*, cited above, § 49).

197. The Court has subsequently had occasion to specify that, generally speaking, it seems prima facie unacceptable not to detain a mentally ill person in a suitable therapeutic environment, even if the illness is

considered incurable. The person concerned could derive benefit from the hospital environment, while his or her symptoms could become worse outside a supportive structure (see *Hutchison Reid*, cited above, §§ 52 and 55).

198. The Court has accepted that the mere fact that an individual was not placed in an appropriate facility did not automatically render his or her detention unlawful under Article 5 § 1 of the Convention. A certain delay in admission to a clinic or hospital is acceptable if it is related to a disparity between the available and required capacity of mental institutions. However, a significant delay in admission to such institutions and thus in treatment of the person concerned will obviously affect the prospects of the treatment's success, and may entail a breach of Article 5 (see *Morsink v. the Netherlands*, no. 48865/99, §§ 66-69, 11 May 2004; *Brand v. the Netherlands*, no. 49902/99, §§ 62-66, 11 May 2004; see also *Pankiewicz*, cited above, § 45, where the Court held that a delay of two months and twenty-five days was excessive, given the harmful effects on the applicant's health of his compulsory confinement in an ordinary detention centre).

199. Moreover, the Court has held, in the context of "retroactive" preventive detention, that a person's conditions of detention can change in the course of his or her deprivation of liberty, even though it is based on one and the same detention order. The detention of a person of unsound mind on the basis of the same detention order may, in the Court's view, become lawful and thus comply with Article 5 § 1 once that person is transferred to a suitable institution. Under this interpretation of the term "lawfulness", there is indeed an intrinsic link between the lawfulness of a deprivation of liberty and its conditions of execution. This stance is further comparable to the approach taken in the assessment of the compliance of conditions of detention with Article 3, where a change in the conditions of detention is also determinative for assessing compliance with the prohibition on degrading treatment. It follows that the point in time, or period, for assessing whether a person was detained in a suitable institution for mental-health patients is the period of detention at issue in the proceedings before the Court, and not the time when the detention order was made (see *Ilnseher v. Germany* [GC], nos. 10211/12 and 27505/14, §§ 139 and 141, 4 December 2018).

200. Thus, where it has examined cases concerning the detention of perpetrators of criminal acts who suffer from mental disorders, in assessing the appropriateness of the institution in question the Court has not taken account so much of the facility's primary aim, but rather the specific conditions of the detention and the possibility for the individuals concerned to receive suitable treatment therein (see *Bergmann v. Germany*, no. 23279/14, § 124, 7 January 2016; *W.P. v. Germany*, no. 55594/13, §§ 65-66, 6 October 2016; *Lorenz*, cited above, §§ 61 and 64; and

Kadusic v. Switzerland, no. 43977/13, §§ 56 and 59, 9 January 2018). Furthermore, although psychiatric hospitals are by definition appropriate institutions for the detention of mentally ill individuals, the Court has stressed the need to accompany any such placement by efficient and consistent therapy measures, in order not to deprive the individuals in question of a prospect of release (see *Frank v. Germany* (dec.), no. 32705/06, 28 September 2010).

201. In several cases against Belgium, the Court concluded that the psychiatric wings of Belgian prisons were not appropriate places for the lengthy detention of mentally ill persons within the meaning of Article 5 § 1 (e) of the Convention, in that the detainees did not receive appropriate care and treatment for their condition and were thus deprived of any realistic prospect of rehabilitation. It considered that this situation had the effect of severing the link between the purpose of detention and conditions in which it took place. It held that the violations found in those cases resulted from a structural problem arising essentially from a shortage of places in external psychiatric facilities or the refusal by those facilities to admit individuals regarded as undesirable (see the four leading judgments of *L.B.*, *Claes*, *Dufoort*, and *Swennen,* cited above; eight judgments of 9 January 2014 - *Van Meroye v. Belgium*, no. 330/09; *Oukili v. Belgium*, no. 43663/09, *Caryn v. Belgium*, no. 43687/09; *Moreels v. Belgium*, no. 43717/09; *Gelaude v. Belgium*, no. 43733/09; *Saadouni v. Belgium*, no. 50658/09; *Plaisier v. Belgium*, no. 28785/11; and *Lankester*, cited above; and more recently the pilot judgment in the *W.D.* case, cited above).

202. In assessing whether the applicant has been provided with appropriate psychiatric care, the Court takes into account the opinions of health professionals and the decisions reached by the domestic authorities in the individual case, as well as more general findings at national and international level on the unsuitability of prison psychiatric wings for the detention of persons with mental health problems (see, for example, *L.B.*, § 96, and *Claes*, § 98, cited above; see also *Hadžić and Suljić v. Bosnia and Herzegovina*, nos. 39446/06 and 33849/08, § 41, 7 June 2011, where the Court held, on the basis of the findings by the Constitutional Court and the CPT, that the psychiatric annex of a prison was not an appropriate institution for the detention of mental health patients, and, *mutatis mutandis*, *O.H.*, cited above, § 88, where the Court took into consideration the views of the Federal Constitutional Court on the appropriate institutions for persons placed in preventive detention).

203. In the context of the concept of "appropriate treatment" for the purposes of Article 5, the Court verifies, on the basis of the information available in the case file, whether an individualised and specialised approach has been adopted for the treatment of the psychological disorders in question. It considers that information indicating that applicants had access to health professionals and to medication may show that they were

not clearly abandoned, but that this does not suffice to allow it to assess the therapeutic arrangements that have been put in place (see *Oukili*, cited above, § 50; *Moreels*, cited above, § 52; and *Plaisier*, cited above, § 50; for examples of findings of "appropriate care", see also, *mutatis mutandis*, *Bergmann*, cited above, §§ 125-28, concerning a preventive detention centre, and *Papillo v. Switzerland*, no. 43368/08, § 48, 27 January 2015, concerning an ordinary prison). Moreover, although the persistent attitude of a person deprived of his or her liberty may contribute to preventing a change in their detention regime, this does not dispense the authorities from taking the appropriate initiatives with a view to providing this person with treatment that is suitable for his or her condition and that would help him or her to regain liberty (see *De Schepper*, cited above, § 48; *mutatis mutandis*, *O.H.*, cited above, § 89; and *Swennen*, cited above, § 80).

204. Lastly, the Court has also stated that when dealing with mentally ill offenders, the authorities are under an obligation to work towards the goal of preparing the persons concerned for their release, for example by providing incentives for further therapy, such as transfer to an institution where they can actually receive the necessary treatment, or by granting certain privileges if the situation permits (see *Lorenz*, cited above, § 61).

(c) Refining the case-law principles and clarification of the meaning of the obligation on the authorities to provide treatment

205. The Court considers, having regard to the parties' observations (see paragraphs 171-186 above) and to the current case-law (see paragraphs 190-204 above), that it is appropriate to clarify and refine the principles in its case-law in order to be able to take account of the particular circumstances in which an individual is placed in compulsory confinement. It considers that, in the light of the developments in its case-law and the current international standards which attach significant weight to the need to provide treatment for the mental health of persons in compulsory confinement (see paragraphs 116-119 above), it is necessary to acknowledge expressly, in addition to the function of social protection, the therapeutic aspect of the aim referred to in Article 5 § 1 (e), and thus to recognise explicitly that there exists an obligation on the authorities to ensure appropriate and individualised therapy, based on the specific features of the compulsory confinement, such as the conditions of the detention regime, the treatment proposed or the duration of the detention. On the other hand, the Court considers that Article 5, as currently interpreted, does not contain a prohibition on detention on the basis of impairment, in contrast to what is proposed by the UN Committee on the Rights of Persons with Disabilities in points 6-9 of its 2015 Guidelines concerning Article 14 of the CRPD (see paragraph 117 above).

206. When examining the first applications brought before it on this matter, the Court, as noted above, considered the issue of principle as to

whether and, if so, to what extent the expression "lawful detention of a person of unsound mind" could be construed as including a reference not simply to the actual deprivation of liberty of mental health patients but also to matters relating to execution of the detention, such as the place, environment and conditions of detention. It has considered that the "detention" of a person as a mental health patient will be "lawful" for the purposes of Article 5 § 1 (e) only if effected in a hospital, clinic or other appropriate institution authorised for that purpose, but that the suitable treatment or regime is not, in principle, covered by this provision. It has concluded that the existence of a right for a mental patient to receive treatment appropriate to his or condition cannot as such be derived from it (see paragraphs 193 and 195 above). In these initial cases, however, it expressed a proviso with regard to this analysis by using the term "in principle". This wording shows that the Court did not rule out the possibility that specific situations might exist in which the aim of the measure in respect of which the Convention authorises the restriction of the right to liberty, namely the protection of society and the administration of treatment, is no longer being genuinely pursued, and in which the link between the stated aim and the conditions of detention is therefore severed.

207. The Court has thus gradually, through its case-law, expanded the scope of Article 5 § 1 (e) (see paragraphs 196-204 above). In this area there has been, not a departure from the case-law, but a gradual development, over time, of an interpretation of the meaning to be given to the obligations contained in this provision.

208. Analysis of the Court's case-law, particularly as developed over the past fifteen years, shows clearly that it should now be considered that there exists a close link between the "lawfulness" of the detention of persons suffering from mental disorders and the appropriateness of the treatment provided for their mental condition. While this requirement was not yet set out in the first judgments delivered in this area (see *Winterwerp*, § 51, and *Ashingdane*, §§ 47 and 48, cited above), from which it appeared that the therapeutic function of compulsory confinement was not as such guaranteed under Article 5, the current case-law clearly indicates that the administration of suitable therapy has become a requirement in the context of the wider concept of the "lawfulness" of the deprivation of liberty. Any detention of mentally ill persons must have a therapeutic purpose, aimed specifically, and in so far as possible, at curing or alleviating their mental-health condition, including, where appropriate, bringing about a reduction in or control over their dangerousness. The Court has stressed that, irrespective of the facility in which those persons are placed, they are entitled to be provided with a suitable medical environment accompanied by real therapeutic measures, with a view to preparing them for their eventual release (see paragraphs 199 and 201 above).

209. As to the scope of the treatment provided, the Court considers that the level of care required for this category of detainees must go beyond basic care. Mere access to health professionals, consultations and the provision of medication cannot suffice for a treatment to be considered appropriate and thus satisfactory under Article 5. However, the Court's role is not to analyse the content of the treatment that is offered and administered. What is important is that the Court is able to verify whether an individualised programme has been put in place, taking account of the specific details of the detainee's mental health with a view to preparing him or her for possible future reintegration into society (see paragraph 203 above). In this area, the Court affords the authorities a certain latitude with regard both to the form and the content of the therapeutic care or of the medical programme in question.

210. Further, the assessment of whether a specific facility is "appropriate" must include an examination of the specific conditions of detention prevailing in it, and particularly of the treatment provided to individuals suffering from psychological disorders. Thus, the cases examined in the case-law illustrate that it is possible that an institution which is *a priori* inappropriate, such as a prison structure, may nevertheless be considered satisfactory if it provides adequate care (see paragraph 203 above), and conversely, that a specialised psychiatric institution which, by definition, ought to be appropriate may prove incapable of providing the necessary treatment (see paragraph 199 above). These examples make it possible to conclude that appropriate and individualised treatment is an essential part of the notion of "appropriate institution". This conclusion stems from the now inevitable finding that the deprivation of liberty contemplated by Article 5 § 1 (e) has a dual function: on the one hand, the social function of protection, and on the other a therapeutic function that is related to the individual interest of the person of unsound mind in receiving an appropriate and individualised form of therapy or course of treatment. The need to ensure the first function should not, *a priori*, justify the absence of measures aimed at discharging the second. It follows that, under Article 5 § 1 (e), a decision refusing to release an individual in compulsory confinement may become incompatible with the initial objective of preventive detention contained in the conviction judgment if the person concerned is detained due to the risk that he or she may reoffend, but at the same time is deprived of the measures – such as appropriate therapy – that are necessary in order to demonstrate that he or she is no longer dangerous (see *Lorenz*, cited above, § 58; see also, *mutatis mutandis*, with regard to Article 5 § 1 (a), *Ostermünchner*, cited above, § 74; *H.W.*, cited above, § 112; and *Klinkenbuß*, cited above, § 47).

211. Lastly, the Court considers that potential negative consequences for the prospects of change in an applicant's personal situation would not necessarily lead to a finding of a breach of Article 5 § 1, provided that the

authorities have taken sufficient steps to overcome any problem that was hampering the applicant's treatment.

(d) Interaction in the analysis of complaints based on an alleged absence of "appropriate treatment" submitted under both Article 3 and Article 5 § 1

212. In three of the above-mentioned Belgian cases (see paragraph 201 above), the applicants had formulated complaints under both Article 3 and Article 5 § 1, alleging an absence of treatment that was adapted to their health, and the Court found a violation of Article 3 on the basis that the conditions of detention without such medical care amounted to degrading treatment (see *Claes*, cited above, § 100; *Lankester*, cited above, § 68; and *W.D.*, cited above, § 116). In examining the complaints under Article 5 § 1, the Court drew a parallel with its analysis of the allegations in terms of the two provisions of the Convention. It concluded that the compulsory confinement of the applicants for long periods, in an environment that was inappropriate in terms of medical treatment for the purposes of Article 3, had also had the consequence of severing the link between the purpose of the detention and the conditions in which it should take place (see *Claes*, cited above, § 120; *Lankester*, cited above, §§ 93-95; and *W.D.*, cited above, §§ 132-34). Furthermore, in a series of cases against Germany, the Court found that separate wings of prisons did not amount to appropriate institutions for the purposes of Article 5 § 1 (e), in view of the lack of the necessary medical and therapeutic environment. The Court reached that conclusion after assessing, in particular, the conditions of detention in those prison wings and noting the lack of treatment that was appropriate for the prisoners' mental health, without, however, complaints having been submitted to it under Article 3 (see, for example, *O.H. v. Germany*, no. 4646/08, §88-91, 24 November 2011; *B. v. Germany*, no. 61272/09, §§ 82-84, 19 April 2012; *S. v. Germany*, no. 3300/10, §§ 97-99, 28 June 2012; and *Glien v. Germany*, no. 7345/12, §§ 93-96, 28 November 2013).

213. In this context, the Court considers that, in verifying the provision of medical therapy, the intensity of the Court's scrutiny may differ depending on whether the allegations are submitted under Article 3 or Article 5 § 1. The question of a continued link between the purpose of detention and the conditions in which it is carried out, and the question of whether those conditions attain a particular threshold of gravity, are of differing intensity. This implies that there may be situations in which a care path may correspond to the requirements of Article 3 but be insufficient with regard to the need to maintain the purpose of the compulsory confinement, and thus lead to a finding that there has been a violation of Article 5 § 1. In consequence, a finding that there has been no violation of Article 3 does not automatically lead to a finding that there has been no violation of Article 5 § 1, although a finding of a violation of Article 3 on

account of a lack of appropriate treatment may also result in a finding that there has been a violation of Article 5 § 1 on the same grounds.

214. This interaction in the assessment of complaints which are similar but are examined under one or other provision arises naturally from the very essence of the protected rights. The assessment of a threshold for Article 3, guaranteeing an absolute right, to come into play is relative, and depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and state of health of the victim (see paragraph 141 above). With regard to Article 5 § 1 (e), the deprivation of liberty is ordered, *inter alia*, on account of the existence of a mental disorder. In order to ensure that the link between this deprivation of liberty and the conditions of execution of this measure is preserved, the Court assesses the appropriateness of the institution, including its capacity to provide the patient with the treatment that he or she requires (see paragraphs 194-204 above).

3. Application of these principles to the present case

215. It should first of all be noted that the applicant's situation resembles those set out in the four leading judgments (*L.B.*, *Claes*, *Dufoort*, and *Swennen,* cited above), in the *W.D.* judgment and in the eight other judgments against Belgium cited above (see paragraph 201 above). It differs in a single aspect, namely the fact that the applicant is not detained in the psychiatric wing of a prison, but has been placed in compulsory confinement in a social protection facility. The applicants in the above-cited cases were waiting to be transferred to this type of social protection facility or to other structures that were, on the face of it, suited to their psychiatric health. However, the decisive issue in those cases was whether the persons concerned had been placed in an environment allowing for the administration of adequate treatment, suited to their state of health and individualised in each case to the extent required to provide them with realistic prospects of release. The Court considers that the question which arises in the present case is a comparable one. It will therefore examine the present case in the light of the above-cited case-law, as clarified, and in the context disclosed by the above-mentioned Belgian cases. It notes, however, that the applicant's situation does not arise from the structural problem identified in the above-cited Belgian cases and which formed the subject-matter of the *W.D.* pilot judgment, also cited above.

216. In the present case, the applicant in fact complains about an absence of treatment and psychiatric therapy that are adapted to his situation, arguing that the main obstacle to their provision is the language barrier. He is German-speaking, and the Paifve EDS in which he is confined did not offer psychiatric treatment administered by German-speaking doctors. In this respect, his complaint under Article 5 contains similarities to that under Article 3, in that it also concerns a failure to provide treatment.

The Court will therefore refer in its examination of this complaint to its analysis above of the complaint under Article 3.

217. The Court notes first that it is undisputed in the present case that the applicant's placement in the Paifve EDS amounts to a deprivation of liberty and that Article 5 is applicable.

218. That measure, implemented since 21 January 2004, is based on the decision to impose compulsory confinement issued by the Committals Division of the Court of First Instance on 16 June 2003 and upheld by the Liège Court of Appeal on 1 August 2003, and on a decision of the Minister of Justice dated 15 January 2004. These decisions were based on the applicant's dangerousness and mental disorders; he had been convicted of theft and sexual violence and further proceedings had also been brought against him for offences committed while in prison (see paragraphs 9, 10, 12 and 13 above). The applicant has been held in compulsory confinement on a continuous basis, given that his applications for discharge were all rejected and his placement has been extended (see paragraphs 21, 30-37, 46 and 65 above).

219. It is not in dispute between the parties that the applicant's detention is a measure covered by Article 5 § 1 (e) of the Convention. The Court notes that the compulsory confinement order was adopted by the Committals Division of the Court of First Instance, on the basis of the legislation on social protection, a few months before the end of the prison term to which the applicant had been sentenced by the Liège Court of Appeal and the Eupen Criminal Court. As specified in the ministerial decision, this compulsory confinement replaced continued serving of the prison terms to which he had been sentenced (see paragraphs 10 and 12 above). In consequence, the applicant's placement in the Paifve EDS falls under Article 5 § 1 (e) of the Convention (see, among other authorities, *L.B.*, cited above, § 89). In addition, the Court notes that this deprivation of liberty amounts to a continuous situation, since the applicant has been held in compulsory confinement since 15 January 2004.

220. The Court further notes that it is also not in dispute that the applicant's compulsory confinement was decided "in accordance with a procedure prescribed by law" within the meaning of Article 5 § 1 of the Convention.

221. Regarding the lawfulness of the confinement measure, the Court observes that, at first sight, the three conditions set out in the *Winterwerp* case-law (see paragraph 192 above) have been met in the present case. The applicant suffers from disorders related to paranoid psychosis, as has been medically attested since 2001. The medical reports drawn up throughout the period of compulsory confinement indicate a psychotic and paranoid personality, representing a danger to society (see paragraph 149 above). The most recent assessment of the applicant's health, dated 12 January 2017, confirmed the need to maintain the applicant in

compulsory confinement in view, among other factors, of his dangerousness and the risk that he would reoffend (see paragraphs 12, 14, 21, 23 and 39 above). Furthermore, no evidence has been adduced that could call into question the domestic authorities' conclusions as to his dangerousness.

222. That being stated, the Court considers, in the light of the clarified case-law principles in relation to Article 5 § 1 (e), that the assessment of lawfulness also requires an examination of whether, throughout the period of compulsory confinement, the purpose for which it was imposed has persisted. More specifically, it is essential to verify whether a link has been maintained between the initial aim of detaining the applicant and the appropriateness of the treatment provided to him: only if this condition is fulfilled can the deprivation of liberty be considered lawful. In the present case, having regard to the applicant's allegations that he has not received appropriate medical treatment, the Court will examine the appropriateness of the institution in question and, in this context, the constituent elements of the treatment offered to the applicant. It will ascertain whether the care provided was such as to bring about an improvement in the applicant's health and a reduction in the degree of danger posed by him, and to promote the prospects of release.

223. The Government submitted that, given his profile, the applicant was detained in an appropriate institution and that, in spite of the language barrier impeding communication between him and the care staff in Paifve, he had always been provided with adequate treatment since his placement in 2004.

224. The Court considers that it is not its role to rule *in abstracto* on the capacity of the Paifve EDS to ensure a quality environment for the persons detained therein. The appropriateness of that institution must be examined in the light of the particular circumstances of the present case. The Paifve EDS is a high-security unit dedicated exclusively to treating persons of unsound mind; it employs psychiatric and psychological medical staff, and has, by definition, the task of ensuring supervision of the patients' mental health. Nonetheless, it is also an institution that has been subject to criticism, expressed by the Paifve Supervisory Board in November 2016, in relation to alleged shortcomings in its provision of medical care (see paragraph 115 above). That analysis was recently confirmed by the CPT, which expressed sharp criticism in its report of March 2018 with regard, *inter alia*, to the lack of adequate therapeutic treatment. According to the CPT, the identified shortcomings are similar to those in the psychiatric wings of prisons which had been examined in the above-cited Belgian cases (see paragraph 120 above).

225. The Court cannot speculate as to whether this criticised aspect of the general manner in which patients were treated in the Paifve EDS could have had an impact in the specific case of the applicant, who has not complained about the treatment administered in general in this facility.

226. In any event, the applicant's tangible complaints in his specific case are that the authorities delayed and continue to delay in taking the adequate measures that are required by his situation – that is, providing him with access to psychiatric and psychological treatment –, on the pretext that there are no care professionals available who could communicate in German. In addressing the question of the appropriateness of the Paifve EDS in this case, it is appropriate to verify whether the Belgian authorities made all reasonable efforts to ensure suitable and tailor-made therapeutic treatment for the applicant, whom they consider to pose a high risk (see *De Schepper*, cited above, § 48).

227. As with the complaint alleging a violation of Article 3, the Court considers that the impugned situation must be divided into two distinct periods, having regard to recent events and to the allegations made by the applicant in this connection in his submissions to the Grand Chamber.

(a) The applicant's deprivation of liberty from the beginning of 2004 until August 2017

228. The Court cannot agree with the Government's analysis that, notwithstanding the language problem, the applicant benefitted from the treatment available in the Paifve EDS. It refers to the reasoning that has led it to find a violation of Article 3 on the grounds that the applicant did not receive treatment adapted to his health condition throughout those thirteen years of detention (see paragraphs 149-159 above). It is also clear that the failure to provide treatment in the present case results from a language problem (see paragraphs 153-156 above).

229. It is not for the Court to rule in a general manner on the types of solutions which could have been considered sufficient to respond to the applicant's particular linguistic need in order to enable him to receive treatment that was consistent with his mental-health condition. The domestic authorities enjoy a certain margin of appreciation in this area, allowing them to choose the arrangements for communication.

230. The Court considers it necessary to specify further that Article 5 § 1 (e) does not guarantee to an individual in compulsory confinement the right to receive treatment in his or her own language (see also paragraph 151 above). It notes in the present case that although German has the status of an official language in Belgium, it is not often spoken in the region in which the Paifve EDS is located, namely the French-language region. Furthermore, the applicable legislation does not require this type of institution to employ staff members who are bilingual in French and German (see paragraph 107 above). However, the Court cannot but note that the applicant's right to speak, to be understood and to receive treatment in this language was expressly acknowledged by the CDS in a decision of 13 October 2009 (see paragraph 26 above). In those circumstances, it expresses its surprise at the Government's allegation that it was impossible

to secure treatment for the applicant in this language. It is true that the CDS noted on 26 January 2007 that there was no institution in Belgium which could meet the applicant's linguistic need and simultaneously respond to the degree of danger posed by him (see paragraphs 21 and 22 above), and the Court does not challenge that finding – which, moreover, it is still valid, in that the applicant's situation has remained unchanged throughout his detention and given the manner in which the network of psychiatric treatment is organised (see paragraphs 29, 60 and 106-114 above). It would also appear from the case file that efforts were made to explore the possibility of treatment in Germany (see paragraph 25 above). However, there is no information in the file about the results of these efforts.

231. The Court is also not indifferent to the fact that, in spite of these organisational constraints, the CDS emphasised the pressing need for treatment in German throughout the proceedings brought by the applicant over the years and recommended that German-speaking psychiatrists and therapists be seconded (see paragraphs 18, 23, 25, 26 and 28 above).

232. However, the Court cannot but conclude that these recommendations and conclusions remained to all intents and purposes a dead letter. Thus, on 13 January 2010 the CDS stated that there was no hope of obtaining appropriate treatment for the applicant, whether in a secure facility or elsewhere. On 29 April 2010 it noted that the Minister of Justice had failed to respond to its requests that he intervene and make an "official report" on the applicant's situation (see paragraphs 28 and 29 above). Lastly, the CDS seemed to resign itself in 2014 to the idea that the absence of therapy in German was not decisive for positive change and held that it did not have jurisdiction to issue orders to the authorities or to reprimand them for actions or shortcomings in their dealings with the applicant (see paragraphs 40 and 41 above).

233. It was only in September 2014 that it proved possible to provide treatment involving communication in German. However, it appears that this was not extended beyond the end of 2015 (see paragraphs 44, 51, 53 and 55 above).

234. The Government have attributed the lack of progress in the applicant's state of health and the failure in his treatment programme to the applicant's own attitude and the type of illness from which he suffers; in their view, the failure to provide treatment in German was not the decisive factor.

235. The Court will not speculate on what results might have been obtained from treatment had it been administered over the period in issue, in German, as recommended in the psychiatric report of 2005 (see paragraph 14 above). It must limit itself to noting the absence of such treatment.

236. With regard to the applicant's attitude, the Court is not convinced that the applicant's conduct was such as to prevent any progress in his

situation. Although, admittedly, he refused any treatment in 2007 (see paragraph 21 above), it should be noted that, since his second application for conditional discharge in 2009, he has expressed a wish to engage in measures aimed at bringing about an improvement in his condition. Thus, he asked that the relevant authorities be required to provide him with treatment in his own language (see paragraphs 23 and 27 above). The Court considers that this request was reasonable and appropriate, given the acknowledged language problem in this case, and seems to correspond prima facie to "appropriate treatment" in the applicant's case, having regard to the multiple recommendations to this effect by psychiatrists, and to the applicant's personality disorders and his poor understanding of the problems that they posed (see, *mutatis mutandis*, *W.D.*, cited above, § 131). Accordingly, taking account of the applicant's requests for treatment and discharge, it was for the authorities to find a way to overcome the deadlock arising from the communication issue between him and his health-care providers (see, *mutatis mutandis*, *Lorenz*, cited above, § 64).

237. In this regard, the Court is concerned by the fact that, in the circumstances of the present case, the authorities responsible for the applicant's case disregarded, if not ignored, the clear role played in the area of mental health by dialogue between a patient and his or her therapist, in a language that is common to them both. This role was emphasised in the psychiatric report of 2014 (see paragraph 50 above), and the applicant's linguistic needs were clearly identified in the decisions reached by the national authorities. As the authorities did not give the applicant an opportunity to receive such treatment, the Court has difficulties in accepting the argument that there was no prospect of a positive change in his condition, especially as the Government themselves had not completely excluded the possibility of such a development (see paragraph 184 above). It also notes that the obligation to provide treatment is just as important in situations where the condition of the individuals concerned may be considered incurable (see paragraph 197 above).

238. In addition, the Court notes the growing importance which international instruments for the protection of people with mental disorders are now attaching to the need for persons placed in compulsory confinement to be able to benefit from personalised and appropriate treatment to fulfil the therapeutic aim of detention. In this connection the Court refers to the United Nations Convention on the Rights of Persons with Disabilities of 13 December 2006 and to Recommendation REC (2004) 10 of the Committee of Ministers of the Council of Europe concerning the protection of the human rights and dignity of persons with mental disorders. It accepts that it is natural to expect that persons in compulsory confinement should, in so far as possible, receive all necessary information on the individualised treatment proposals being offered to them. Thus, the Court notes, in particular, that the explanatory memorandum to this Recommendation, in its

comments on Article 7, draws attention to the language factor as a means of communicating information related to treatment. Failure to take account of this aspect could place the individuals concerned in a situation of vulnerability (see paragraphs 116-118 above).

239. The Court also notes that since 1 October 2016 the new Compulsory Confinement Act has imposed an obligation to offer persons in compulsory confinement a care path.

240. Moreover, the Court cannot accept the Government's claim that the situation in the present case is similar to that in the *De Schepper* case (judgment cited above). Mr De Schepper had also been found to be in a condition of "persistent dangerousness". However, on the advice of specialists the authorities had begun a course of preliminary therapy in prison, with a view to his admission to a specialised institution which could then provide the necessary treatment. The grounds for not admitting him to such an institution were the lack of progress in his condition, despite the preliminary therapy, and the fact that it was therapeutically impossible for the institutions approached to treat him at the time the request was made. In contrast, in the present case, although there is no institution in Belgium corresponding to the applicant's degree of dangerousness in which therapy could be provided to him in German, it must be noted that, with the exception of a short period between September 2014 and the end of 2015, no treatment has been put in place to reduce this level of dangerousness in the facility chosen for him, on the pretext that the facility has no German-speaking members of staff.

241. This leads to the inevitable conclusion that, in spite of the repeated findings by the medical and social protection authorities to the effect that it was essential for the applicant to receive psychiatric treatment in German in order for him to have a chance of progressing and reintegrating into society, no measures were taken to introduce such treatment. It can only be observed that the failure to provide individualised therapy, adapted to the applicant's condition, over a period of about thirteen years amounted to significant negligence, which impeded the applicant's potential for positive change, assuming it existed (see, *mutatis mutandis*, *O.H.*, cited above, § 89). The Court considers, in view, firstly, of the indefinite nature of the length of the confinement measure and, secondly, of the applicant's state of health and the requests that he made to obtain appropriate psychiatric and psychological treatment that would allow him a hope of release, that the measures taken by the authorities were inadequate in terms of providing therapeutic treatment (see paragraph 226 above). The Government have not adduced sufficient arguments to justify the delay in putting treatment in place before 2014, nor for the interruption in treatment at the end of 2015. The Belgian authorities took sporadic steps to remedy the applicant's situation, but these efforts were not an integral part of any therapeutic care or treatment path. In addition, the failure to provide the applicant with

treatment appears all the more unjustifiable in that he was capable of communicating in a language that is one of the official languages of Belgium: overcoming a problem related to the use of that language does not therefore seem unrealistic.

242. In conclusion, in the particular circumstances of the case, the lack of treatment suited to the applicant's state of health and the absence of effective action by the authorities from the beginning of 2004 to August 2017 in order to guarantee such treatment had the effect of severing the link between the aim of the detention of liberty and the conditions in which it took place in the Paifve EDS, an institution that cannot therefore be regarded as appropriate.

243. There has accordingly been a violation of Article 5 § 1 on account of the manner in which the compulsory confinement order was executed from the beginning of 2004 until August 2017.

(b) The applicant's deprivation of liberty since August 2017

244. The Court considers that, with regard to this second period, the assessment of compliance with Article 5 must be carried out in the light of the changes which have occurred in the applicant's situation, as described in the context of Article 3. Having regard to the principles reiterated and clarified above, it is of the opinion that the main question which arises is whether the treatment package offered to the applicant amounts to an individualised and specialised therapeutic approach for treatment of the psychological disorders from which he suffers (see paragraphs 205-210 above).

245. The Court refers to its analysis under Article 3 of the parties' submissions concerning the treatment period which began in August 2017 (see paragraphs 160-166 above). It reiterates that the information in the case file indicates that the authorities have shown a willingness to achieve progress in the applicant's situation by putting in place a structure for psychiatric, psychological and welfare treatment in a linguistic context that corresponds to his communication abilities, and that this situation complies with the requirements of Article 3 (see paragraph 167 above).

246. The Court is prepared to accept the Government's argument that, given that the applicant has been held to be capable of reaching his own decisions, the domestic law prohibits a therapeutic measure being imposed on him against his will. The explanatory memorandum to Article 17 of Recommendation Rec (2004) 10 of the Committee of Ministers also sets out the right of persons in compulsory confinement not to accept offers of treatment (see paragraph 119 above). However, it is also acknowledged that the applicant presents psychological disorders, which have given rise to his compulsory confinement, and that accordingly, by definition, his discernment is weakened. The Court considers that these circumstances may make the applicant vulnerable, even if he has capacity to grant or withhold

consent to his treatment (*ibid.*; see, in particular, the explanatory memorandum concerning Article 7, point 56, of the Recommendation). Bearing this aspect in mind, the authorities are still obliged to attempt to include the applicant, as much as possible, in an individualised medical care package capable of bringing about an improvement in his health. On this point, the Court refers to Article 12 of the same Recommendation, which advises that an appropriate individually prescribed treatment plan be drawn up, whenever possible after consultation with the person concerned (see paragraph 118 above). That being stated, it must also be accepted that the applicant's personal advocate or his legal representative, where appropriate, has an active role to play in assisting him to exercise his rights to consent and benefit from a treatment plan (see the explanatory memorandum to the Recommendation, particularly with regard to Article 17, point 134, at paragraph 119 above).

247. The Court attaches weight to the refusal by the applicant – who was legally represented before both it and the domestic authorities – to accept collaboration between the external psychologist and the team tasked with assessing his prospects of reintegration, given that this refusal inevitably created a serious obstacle for the relevant authorities with responsibility for his situation.

248. Throughout his placement in the Paifve EDS, the applicant has complained about the absence of treatment in German, and not about the treatment as such offered in that facility. It was therefore for the authorities to provide him with an individualised treatment programme, taking account, in particular, of the particular elements arising from the difficulties in communication between him and the care team. However, this cannot imply imposing medical treatment on the applicant, who is capable of giving consent, but rather proposing a range of therapeutic and rehabilitation measures which are appropriate to his individual situation. In the present case, the Court notes that a series of activities in German, intended to guarantee treatment corresponding to the disorders from which the applicant suffers, has been proposed to him since August 2017. These include making available a German-speaking psychiatrist, psychologist and welfare officer. It considers that these proposals represent a response by the authorities to the applicant's specific request. In the Court's view, the steps taken are such as to facilitate communication and the construction of a relationship of trust. They can therefore be considered as prima facie sufficient for appropriate treatment, having regard also to the short period under examination. The applicant, assisted by his representatives, has thus not been left without a choice of treatment, so that it cannot be concluded that his placement did not pursue a therapeutic aim during this period (see the explanatory memorandum to Recommendation REC (2004) 10 of the Committee of Ministers, particularly with regard to Article 17, point 133, at paragraph 119 above).

249. The applicant would appear to maintain his previous claims alleging a lack of treatment, but without taking up the possibilities that are currently being offered to him. The Court notes in this regard that a personal advocate or a legal representative of an individual in compulsory confinement can play a constructive role in drawing up the treatment plan (*ibid.*, point 134). However, it does not appear from the case file that the applicant cooperated with the medical staff in drawing up a care path. In such a situation, and in the absence of information – such as, for example, a refusal by the German-speaking psychiatrist to meet the applicant and to draw up with him a therapeutic project in line with his needs – indicating that the treatment proposed by the Paifve EDS is not effective, and having regard to the applicant's refusal to authorise communications from the external German-speaking psychologist to the in-house psychosocial team, it is difficult to conclude at this stage that the State has not introduced the necessary measures to guarantee appropriate treatment for the applicant. On the contrary, reiterating that it is not its role to assess the content of the particular treatment proposed and having regard to the margin of appreciation enjoyed by the States in this area (see paragraph 209 above), the Court is of the view that the therapeutic structure put in place, which includes both medical and welfare aspects with a view to preparing, in the language spoken by him, the applicant's reintegration into society, indicates that sufficient measures have, at this stage, been taken by the authorities. For the same reasons, it finds that the authorities have put considerable efforts, in so far as possible and in accordance with Article 12 of Recommendation REC (2004) 10 of the Committee of Ministers of the Council of Europe, into consulting with the applicant in drawing up the treatment plan and obtaining his opinion (see paragraphs 118 and 246 above).

250. It thus appears that, in accordance with the requirement to provide appropriate therapeutic care, the authorities have adopted a multidisciplinary and – on the face of it – coherent approach, making efforts to emphasise cooperation between the various players, and seeking to ensure that the applicant's "care path" is tailor-made to his specific communication needs and pathology.

251. In the light of the foregoing and taking particular account of the attitude shown by the applicant, assisted by his representatives, with regard to all of the treatment offered, the Court concludes that the State's obligation as to means has been fulfilled.

252. Thus, having particular regard to the significant efforts made by the authorities to provide the applicant with access to treatment which is, on the face of it, coherent and adapted to his situation, to the short period during which they have had an opportunity to implement these treatment measures, and to the fact that the applicant is not always receptive to them, the Court is able to conclude that the medical treatment now available corresponds to the

therapeutic aim of the applicant's compulsory confinement. It follows, in the Court's view, that for this period of the applicant's compulsory confinement in the Paifve EDS, there exists a link between the purpose of the deprivation of liberty and the conditions in which it took place.

253. Accordingly, there has been no violation of Article 5 § 1 of the Convention with regard to the period after August 2017.

4. Conclusion

254. The Court concludes that the applicant's deprivation of liberty from the beginning of 2004 to August 2017 did not take place, as required by Article 5 § 1, in an appropriate institution that was capable of providing him with suitable treatment for his health condition.

255. In contrast, it appears to the Court that the relevant authorities have drawn the conclusions from the Chamber judgment of 18 July 2017 and have put in place a comprehensive treatment package, leading it to conclude that there has been no violation of this provision in respect of the period since August 2017.

However, it considers it appropriate to emphasise that the authorities must ensure, having due regard to the applicant's vulnerability and his diminished ability to take decisions, notwithstanding the fact that under domestic law he is formally considered capable of reaching his own decisions, that all the necessary initiatives are taken, in the medium and long term, to secure effective care, including psychiatric and psychological treatment and welfare assistance in accordance with the requirements of Article 5 § 1 (e) of the Convention, so as to provide him with the prospect of release.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

256. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

1. The Chamber's findings

257. Before the Chamber, the applicant claimed 800,000 euros (EUR) in respect of the pecuniary and non-pecuniary damage he had allegedly sustained. He also claimed a single lump sum of EUR 100,000 for the costs and expenses incurred before the domestic courts and before the Court.

258. The Chamber dismissed the claim for compensation in respect of pecuniary damage as regards the violation of Article 3 of the Convention, holding that there was no causal link between the violation found and the alleged damage. However, it awarded the applicant EUR 15,000 in respect of the non-pecuniary damage caused by the violation of Article 3. As regards costs and expenses, it dismissed the applicant's claims, noting that he had not submitted any invoice or any fee note or expenses claim which would confirm that the costs were real, or any breakdown of fees on the basis of the proceedings and the time spent on them.

2. The parties' submissions before the Grand Chamber

259. The applicant continued to claim EUR 800,000 in respect of the pecuniary and non-pecuniary damage that he considered he had sustained. He argued that, had he been at liberty, he could have been employed. In his view, this loss of earnings was to be assessed together with the non-pecuniary damage allegedly sustained as a result of an unjust and unwarranted deprivation of liberty. Thus, the applicant considered that the damages payable to him ought to be calculated on the basis of compensation for each day of detention since the order issued by the Committals Division on 16 June 2003. On the basis of EUR 200 per day of detention, he calculated a total amount of EUR 800,000 at the date of submitting his observations to the Chamber on 29 July 2014. However, he left it to the discretion of the Court to determine the daily sum and the total amount. Lastly, he asked that the Court explicitly state that the damage sustained would continue until his effective release.

260. The Government noted that, in calculating damages, the applicant had used the Belgian compensation system intended for cases of unwarranted detention. They considered that this comparison was irrelevant in the present case, since the decision to place the applicant in compulsory confinement had been lawful. Referring to the Court's case-law in the matter, they argued that the sum to be awarded should not exceed EUR 15,000.

3. The Grand Chamber's assessment

261. The Court considers that it has not been shown in the present case that there exists a causal link between the violation found of Articles 3 and 5 of the Convention and the pecuniary damage alleged by the applicant. It therefore rejects his claims under this head.

262. However, it finds that the applicant undoubtedly sustained damage of a non-pecuniary nature on account of his continued compulsory confinement without appropriate treatment for his health condition, in violation of Articles 3 and 5 § 1 of the Convention. Ruling in equity as

required under Article 41, the Court awards him EUR 32,500 in respect of non-pecuniary damage.

B. Costs and expenses

263. As he had before the Chamber, the applicant claimed, without submitting any supporting documents, a single lump sum of EUR 100,000 in respect of the costs and expenses incurred before the domestic courts and before the Court.

264. The Government considered that this claim ought to be rejected. On the one hand, they emphasised that the applicant had received legal aid for his defence in the domestic proceedings and that those proceedings had therefore been without charge for him, including with regard to lawyers' fees. Equally, they argued that the applicant had not provided evidence that the fees in question had been actually incurred; moreover, some of those fees concerned proceedings that were still pending, the outcome of which was still unknown.

265. The Court notes that, as was the case in the proceedings before the Chamber, the applicant has not submitted any invoice or any fee note or expenses claim which would establish that the costs claimed for the proceedings before the Grand Chamber are real, nor has he provided any breakdown of fees on the basis of the proceedings and the time spent on them. The Court therefore rejects his claim.

C. Default interest

266. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT,

1. *Holds*, unanimously, that the applicant can claim to be a "victim" for the purposes of Article 34 of the Convention;

2. *Holds*, by sixteen votes to one, that from the beginning of 2004 until August 2017, there was a violation of Article 3 of the Convention;

3. *Holds*, by fourteen votes to three, that from August 2017 until now, there has been no violation of Article 3 of the Convention;

4. *Holds*, unanimously, that from the beginning of 2004 until August 2017, there was a violation of Article 5 of the Convention;

5. *Holds*, by ten votes to seven, that from August 2017 to date, there has been no violation of Article 5 of the Convention;

6. *Holds*, by fifteen votes to two,
(a) that the respondent State is to pay the applicant, within three months, EUR 32,500 (thirty-two thousand, five hundred euros) in respect of non-pecuniary damage, plus any tax that may be chargeable on that amount;
(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period, plus three percentage points;

7. *Dismisses*, unanimously, the remainder of the applicant's claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 31 January 2019.

Françoise Elens-Passos	Guido Raimondi
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:
(a) partly concurring and partly dissenting opinion of judge Lemmens;
(b) partly dissenting opinion of judge Nußberger;
(c) joint partly dissenting opinion of judges Turković, Dedov, Motoc, Ranzoni, Bošnjak and Chanturia;
(d) partly dissenting opinion of judge Serghides.

G.R.
F.E.P

PARTLY CONCURRING AND PARTLY DISSENTING OPINION OF JUDGE LEMMENS

(Translation)

1. I agree with the majority in all respects, except with regard to the just satisfaction that is to be awarded to the applicant.

In this opinion, I should like firstly to explain, briefly, why I have changed my mind about the complaint alleging a violation of Article 5 § 1 of the Convention: within the Chamber, I voted to find no violation of that provision, while I have voted with the Grand Chamber to find that there was a violation in respect of the period from the beginning of 2004 until August 2017.

I should then like to explain why I voted against the decision to grant the applicant the sum of 32,500 euros in respect of non-pecuniary damage.

ARTICLE 5 § 1 (e) OF THE CONVENTION

2. In assessing the lawfulness of the detention under Article 5 § 1 (e) of the Convention, the Chamber focused on whether or not the institution in which the applicant was detained was appropriate. It held that the Paifve social-protection facility was an institution that was in principle suited to admitting individuals who had been placed in compulsory confinement (see paragraph 102 of the Chamber judgment) and that, in consequence, the applicant's detention in that institution could be considered justified under Article 5 § 1 (e).

The Grand Chamber follows a markedly different reasoning. It did not merely examine whether the social-protection facility in itself is a suitable institution. Having drawn attention to fact that the Court's case-law has developed over the years (see paragraphs 196-204 of the present judgment), it clarifies the applicable principles. In particular, it specifically recognises that, where a person suffering from mental disorders is deprived of his or her liberty, that measure has not only a social function of protection, but also entails a therapeutic function (see paragraphs 205 and 210 of the judgment). It then holds that it follows from this second function that an individual in compulsory confinement is entitled to be provided with a suitable medical environment accompanied by real therapeutic measures (see paragraph 208 of the judgment), and that, in the absence of therapy, any possibility of release becomes illusory (see paragraph 210 of the judgment).

The Court has already reached similar conclusions in a recent Grand Chamber judgment (see *Ilnseher v. Germany* [GC], nos. 10211/12 and 27505/14, §§ 165 and 168, 4 December 2018). I fully subscribe to this development of the principles. It is for this reason that I agree with the interpretation to the effect that "appropriate and individualised treatment is

an essential part of the notion of 'appropriate institution'" (see paragraph 210 of the present judgment).

3. I should also like to emphasise that the discussions before the Grand Chamber were somewhat wider in scope than those before the Chamber.

Although the Chamber essentially took as its starting point the finding that the applicant was unable to receive treatment in a language that he understood (see, in particular, the applicant's arguments in paragraph 97 of the Chamber judgment), the Grand Chamber based its reasoning on the finding that he did not receive individualised therapy. The fact that the relevant authorities had been unable to offer him treatment in German was thus no longer assessed as the only problem in issue, but rather as a problem which hid another, more fundamental, issue.

4. The Grand Chamber's re-examination of the present case enabled matters to be clarified and the application to be considered in a wider context. As is frequently the case, the judgment delivered by the Chamber provided an opportunity to reflect on the very principles which are at stake and on their application in this specific case.

In those circumstances, I had no difficulty in adopting a position different to that which I took during the Chamber's examination of the case.

ARTICLE 41 OF THE CONVENTION

5. Having found a violation of Articles 3 and 5 § 1 of the Convention, the majority award the applicant the sum of EUR 32,500 in respect of non-pecuniary damage.

In so doing, the Grand Chamber departs from the precedent followed by the Court in the Chamber judgments concerning the compulsory confinement in Belgium of individuals suffering from mental disorders. In those cases where it found only a violation of Article 5 § 1 of the Convention, the Court considered that it was appropriate to award the sum of EUR 15,000, irrespective of the duration of the deprivation of liberty that was incompatible with the Convention[1]. In cases where it found a violation

[1] See *L.B. v. Belgium*, no. 22831/08, § 113, 2 October 2012; *Swennen v. Belgium*, no. 53448/10, § 90, 10 January 2013; *Van Meroye v. Belgium*, no. 330/09, § 114, 9 January 2014; *Oukili v. Belgium*, no. 43663/09, § 74, 9 January 2014; *Caryn v. Belgium*, no. 43687/09, § 52, 9 January 2014; *Moreels v. Belgium*, no. 43717/09, § 77, 9 January 2014; *Gelaude v. Belgium*, no. 43733/09, § 72, 9 January 2014; *Saadouni v. Belgium*, no. 50658/09, § 83, 9 January 2014; *Plaisier v. Belgium*, no. 28785/11, § 64, 9 January 2014; *Smits and Others v. Belgium* (Committee), nos. 49484/11 and Others, § 81, 3 February 2015; *Vander Velde and Soussi v. Belgium* (Committee), nos. 49861/12 and 49870/12, § 60, 3 February 2015.
Compare *De Donder and De Clippel v. Belgium*, no. 8595/06, § 111, 6 December 2011, where the Chamber had granted EUR 25,000, and *Dufoort v. Belgium*, no. 43653/09, § 116, 10 January 2013, where it awarded only EUR 5,000, the amount that had been claimed by the applicant.

of Articles 3 and 5 § 1 (as in the present case), it granted the sum of EUR 16,000[2].

The applicant is not in a more serious situation than the applicants in these other cases. On the contrary, he is being held in a social-protection facility, while the other applicants were held in the psychiatric wing of a prison.

I consider that the present judgment awards the applicant an amount which is excessive compared to the sums granted to these other applicants. In my opinion, it would have been preferable to maintain equality between victims in comparable situations.

[2] See *Claes v. Belgium*, no. 43418/09, § 140, 10 January 2013; *Lankester v. Belgium*, no. 22283/10, § 104, 9 January 2014; and *W.D. v. Belgium*, no. 73548/13, § 178, 6 September 2016.

PARTLY DISSENTING OPINION OF JUDGE NUSSBERGER

1. The present case poses a specific human-rights problem in quite a unique context. The applicant is detained because of a severe mental disorder which renders him incapable of controlling his actions. A member of a linguistic minority, he requests psychiatric treatment in the only language that he is able to understand, namely in German, an official language in Belgium, where, however, it is spoken by only 76,000 people out of 10.5 million inhabitants.[1] Although similar problems will arise in only those few States Parties to the Convention which have more than one official language (such as Switzerland or Luxembourg), the consequences of the Grand Chamber's interpretation of the State's obligations *vis-à-vis* detainees with mental disorders and their respective rights on the basis of Articles 3 and 5 of the Convention are significant. The Grand Chamber takes two important steps in developing its case-law in the present judgment. First, it interprets the denial of psychiatric treatment in the language spoken by the applicant as a violation of Article 3, without, however, accepting the existence of a corresponding right. Second, it develops further the concept of the "lawfulness" of deprivation of liberty under Article 5 and includes the right to suitable treatment.

2. While I concur with the refined interpretation of Article 5 § 1 (e) of the Convention, I criticize the majority's finding that there has been a violation of Article 3, since – despite the majority's assurances – this creates a (new) right to psychiatric treatment in a specific language, irrespective of available resources. In my view, the high threshold of Article 3 is not met. For this reason, I have voted in favour of finding a violation of Article 5 of the Convention in respect of the period from the beginning of 2004 until August 2017, but against finding a violation of Article 3 of the Convention in respect of that same period.

3. Before explaining my position I should like to emphasize that, in my view, the gist of the case is that a member of a linguistic minority has been discriminated against. While those speaking the majority languages are treated adequately and are provided with the necessary therapy to help them reintegrate into society, such treatment is denied to the applicant. Therefore it would have been more convincing to find a violation of Article 5 in conjunction with Article 14 of the Convention.[2] It is obvious that the applicant was treated differently from those belonging to one of the linguistic majorities in Belgium. And it is also obvious that there cannot be

[1] See DG.be, Die deutschsprachige Gemeinschaft, http://www.dg.be/desktopdefault.aspx/tabid-2788/5431_read-34851/ (07/01/2019, 12:10 h).
[2] See, as a similar case, *Rangelov v. Germany*, no. 5123/07, 22 March 2012.

any justification for such a difference in treatment, all the more so as the minority language is an official language of the respondent State.

4. However, this path was not chosen, either by the applicant or by the Chamber or the Grand Chamber. In consequence, the discrimination aspect cannot be adequately addressed.

5. The majority's approach seems to be contradictory from the outset. On the one hand it denies the existence of a right to psychiatric treatment in a particular language: "... the possibility for a patient to be treated by staff who speak his or her language, even where it is an official language of the State, is not an established ingredient of the right enshrined in Article 3, or in any other Convention provision, particularly with regard to the provision of appropriate care to individuals who have been deprived of their liberty" (see paragraph 151 of the judgment[3]). On the other hand, it finds a violation of Article 3 of the Convention, arguing that the "language barrier was the sole factor limiting the applicant's effective access to the treatment that was normally available" (see paragraph 153). But if a violation of Article 3 is found because a certain treatment is not provided, how can it be argued that a right to such a treatment does not exist?[4]

6. The Convention contains only a few explicit rights linked to the use of a particular language. On the basis of Article 5 § 2, "everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him." The right to a fair trial includes the right "to have free assistance of an interpreter if he cannot understand or speak the language used in court" (Article 6 § 3 (e)). Requesting a right to psychiatric treatment in a language one can understand goes far beyond what is required by these two provisions. Communication for medical purposes in a particular language has to be established on a long-term rather than on a one-off basis. It will therefore necessarily involve considerable resources.

7. Nevertheless, it is true that the right of mentally-ill detainees to psychiatric treatment would be "theoretical and illusory" – to use the Court's famous formula – if language barriers were not taken into account. Thus, the majority acknowledges that "[i]n the area of psychiatric treatment in relation to Article 3, the purely linguistic element could appear to be decisive as to the availability or the administration of appropriate treatment ...." (see paragraph 151). While this statement is cautious ("could appear") and "other factors" are mentioned that would "make it possible to offset the lack of communication ..." (ibid.), it is not explained which other factors might be relevant and under what conditions the linguistic element would not be decisive.

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[3] The Grand Chamber also denies that such a right could be deduced from Article 5 § 1 (e) of the Convention (see paragraph 230 of the judgment).

[4] The argumentation in relation to Article 5 of the Convention is different, as Article 5 does not guarantee an absolute right directly linked to human dignity.

8. In my view, therefore, the majority's lip service to the idea that no such right exists is not helpful. Rather, it is necessary to outline clearly the preconditions and limits of such a right under Article 3 of the Convention.

9. Article 3 is an absolute right, protecting human dignity. There are two lines of case-law with regard to the situation of prisoners: on the one hand, the case-law on "humane prison conditions",[5] and on the other the case-law on the "right to hope".[6] The right to adequate psychiatric treatment is linked to both. It can be seen as an element of humane prison conditions insofar as it is necessary for adequately securing a detainee's health and well-being. At the same time, it may be a precondition for release. Denying a mentally-ill detainee adequate treatment could thus be regarded as similar to a sentence of life imprisonment without the possibility of parole.

10. Until now the Court has, however, assessed the adequacy of the conditions of detention of mentally-ill prisoners – with only a few exceptions[7] – under Article 5 of the Convention.[8] In my view, this case-law was adequate. Article 3 should therefore come into play only under really exceptional circumstances. There must be some clearly identifiable element of inhuman and degrading treatment that is not necessarily present in a violation of Article 5 of the Convention, otherwise the differences between the protection offered under those two provisions are blurred.

11. In the present case there is no such additional element. The only problem is that the medical personnel do not have the requisite language skills. The lack of therapy in the "right" language alone – when the therapeutic environment as such is adequate[9] – cannot, in my view, be sufficient to find a violation of Article 3 (in addition to a violation of Article 5). The (high) threshold of Article 3 is not met in a case where the authorities tried time and again to find a solution to a problem, but were confronted with difficulties beyond their control. This was not a "no-hope scenario", nor was treatment administered that would merit the description "degrading".[10]

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[5] See *Mursic v. Croatia* [GC], no. 7334/13, §§ 96-101, 20 October 2016.

[6] See *Vinter and Others v. the United Kingdom* [GC], nos. 66069/09, 130/10 and 3896/10, §§ 107-113, 9 July 2013.

[7] See *Claes v. Belgium*, no. 43418/09, 10 January 2013; *Lankester v. Belgium*, no. 22283/10, 9 January 2014; and *W.D. v. Belgium*, no. 73548/13, 6 September 2016, where a violation of both Articles 3 and 5 was found.

[8] See *O.H. v. Germany*, no. 4646/08, §88-91, 24 November 2011; *B. v. Germany*, no. 61272/09, §§ 82-84, 19 April 2012; *S. v. Germany*, no. 3300/10, §§ 97-99, 28 June 2012, and *Glien v. Germany*, no. 7345/12, §§ 93-96, 28 November 2013. In those cases the applicants did not even complain under Article 3. See also the very recent case of *Ilnseher v. Germany* [GC], nos. 10211/12 and 27505/14, 4 December 2018.

[9] See the difference in this respect between the present case and the above-cited cases of *Claes*, *Lankester* and *W.D.*

[10] Treatment has been considered "degrading" when it was such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance or driving them to act against their will

12. The present case is specific, in that German is one of the official languages in Belgium, and the authorities themselves therefore acknowledged an obligation to provide treatment in German. The status of a language (as an official or a protected minority language) cannot, however, be a factor to be taken into account in the context of an absolute right such as Article 3; what counts is the suffering of the person concerned.[11] If the applicant spoke Swahili or Pashto, the solution would have to be the same.

13. Finding a violation of Article 3 in the present case is thus "dangerous" in two respects. A narrow interpretation – restricting the right to those speaking an official language of the State concerned – would hardly be compatible with the absolute character of Article 3 and could be seen as undermining it. A broad interpretation would, on the contrary, create a new right for mentally-ill detainees to be treated in a language they are able to understand. Such a right might remain only "on paper" so long as the member States lack adequate medical personnel and resources to implement it.

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or conscience" (see *Stanev v. Bulgaria* [GC], no. 36760/06, § 203, ECHR 2012).

[11] Nevertheless, the Chamber judgment explicitly refers to this factor: "… *taking into account the fact that German is one of the three official languages in Belgium*, the Court finds that the national authorities did not provide adequate treatment for the applicant's health conditions" (see paragraph 91 of the Chamber judgment, cited in paragraph 135 of the present judgment). The problem of qualifying an absolute standard does not arise under Article 5 of the Convention. The analysis under this provision is not based on human suffering, but on the question of a continued link between the purpose of detention and the conditions in which it is carried out (see paragraphs 212 et seq.).

JOINT PARTLY DISSENTING OPINION OF JUDGES TURKOVIĆ, DEDOV, MOTOC, RANZONI, BOŠNJAK AND CHANTURIA

(Translation)

I. Introduction

1. We agree with the finding of a violation of Article 3 of the Convention in respect of the period from the beginning of 2004 until August 2017 (Judges Dedov and Chanturia having voted to find a violation of Article 3 also in respect of the subsequent period) and likewise with the finding of a violation of Article 5 in respect of the applicant's deprivation of liberty from the beginning of 2004 until August 2017. Our disagreement with the majority concerns the finding that there has been no violation of Article 5 of the Convention in respect of the period from August 2017 onwards (see point 5 of the operative provisions).

2. The facts of the present case may be summarised as follows. In 1997 the applicant, who belongs to the German-speaking minority in Belgium, was convicted of theft and of sexual assault. The prison sentences were due to end on 20 February 2004. On the basis, *inter alia*, of a psychiatric report and of compulsory confinement orders citing the applicant's dangerousness and mental disorders, he was admitted on 21 January 2004 to the Paifve social-protection facility (the "Paifve EDS"), situated in the French-speaking region of Belgium. However, the ensuing period was marked by a total failure to provide therapeutic care, on the pretext that a lack of German-speaking specialists made it impossible for the medical staff and the applicant to communicate. In particular, no psychiatric treatment was provided to the applicant. It was only from August 2017, following the Chamber judgment in this case, that the authorities took certain measures aimed at enabling the applicant to benefit from various forms of treatment.

3. We agree with the applicable principles set out in the Grand Chamber judgment, in particular the general principles with regard to the deprivation of liberty of persons of unsound mind (see paragraphs 190-193), the interpretation of the concept of the "appropriateness" of facilities designated to house persons suffering from mental illness (see paragraphs 194-204) as well as the refining of the case-law principles and, with certain reservations, the clarification of the meaning of the obligation on the authorities to provide treatment (see paragraphs 205-211).

4. These principles have been correctly applied in the present case with regard to the deprivation of liberty imposed on the applicant until August 2017 (see paragraphs 215-243). In relation to this period, the majority has concluded, rightly, that "in spite of the repeated findings by the medical and social protection authorities to the effect that it was essential for the applicant to receive psychiatric treatment in German in order for him

to have a chance of progressing and reintegrating into society, no measures were taken to introduce such treatment… The Belgian authorities took sporadic steps to remedy the applicant's situation, but these efforts were not an integral part of any therapeutic care or treatment path" (see paragraph 241). In consequence, between 2004 and August 2017 the link between the aim of the applicant's deprivation of liberty and the conditions in which it took place in the Paifve EDS was severed, and we are in agreement on this point.

5. In contrast, we do not agree with conclusion reached by the majority in paragraph 255. We consider that the measures undertaken by the relevant authorities since August 2017 have not been sufficient, and that the authorities have not put in place a comprehensive treatment plan that would enable the Court to conclude that there has been no violation of Article 5 in respect of this period. We would justify our opinion as follows.

II. Assessment under Article 5 § 1 of the period beginning in August 2017

6. Following the judgment delivered by the Chamber in the present case on 18 July 2017, the authorities, according to a chronological summary of treatment submitted by the Government, allegedly took the following measures (see paragraphs 67-74):

- at the end of 2017, in a telephone conversation with the in-house psychiatrist at the Paifve EDS, a German-speaking external psychiatrist reiterated her "availability"; however, she never subsequently visited the Paifve facility to meet the applicant in person, and he has never been offered a therapeutic schedule;
- until April 2018 the applicant had monthly meetings with an external German-speaking psychologist;
- in November 2017 a German-speaking welfare assistant returned to her post within the Paifve EDS and she then met with the applicant several times per month;
- a German-speaking psychiatric nurse met with the applicant; no frequency has been indicated;
- the applicant has been able to see a general practitioner once a month;
- on 25 November 2017 a multidisciplinary meeting of the care team took place, in the presence of the applicant and an interpreter.

7. However, the psychiatric assessment of 5 September 2005 (see paragraph 14 of the judgment) states as follows:

> "... [The applicant] requires treatment which focuses initially on his paranoiac psychosis. Here, therapy must be undertaken simultaneously at psychopharmacological and psychotherapeutic level. ... Long-term therapy over several years is required. The psychotherapy must be carried out by therapists specialising in the treatment of chronic psychosis, with, in the present case, support

> meetings and psycho-educational and pedagogical aspects. It is essential in this context that the therapies are administered in parallel; that is, that the psychotropic drugs help to prepare the patient for the psychotherapy and that, in turn, the psychological sessions enable the patient to respond to the psychotropic drugs.
>
> ... The therapy should therefore begin in a secure institution; treatment might then be possible in the closed unit of a long-stay institution, before envisaging treatment in an open unit. Confirmation that [the applicant] has achieved the required level in order to vary the [place of] therapy must be given by a psychiatric expert."

8. The validity of this expert report with regard to the situation in 2017 was never refuted, and the authorities did not order a new report. In consequence, the requirements for the applicant's treatment as set out in the 2005 report have remained pertinent through his deprivation of liberty. Moreover, several other medical reports over the years have confirmed that he requires psychotherapeutic treatment.

9. It must be observed that, even since August 2017, the authorities have not taken action at psychopharmacological and psychotherapeutic level as recommended by this report, they have not treated the applicant with psychotropic drugs that would make it possible to prepare him for psychotherapy and they have not provided him with psycho-educational support. Furthermore, and this strikes us as fundamental, no individualised care plan has to date been drawn up and implemented. The authorities have admittedly put in place certain measures since August 2017, but they have not drawn up a genuine treatment plan. The measures put in place create the impression of a sort of "patchwork", rather than an overall assessment of the applicant's situation and needs. There has been no coherent multidisciplinary approach entailing the preparation and implementation of a specific and individualised care path.

10. In the *Blokhin v. Russia* judgment ([GC], no. 47152/06, § 137, 23 March 2016; see also paragraph 146 of the present judgment) the Court, under Article 3 of the Convention, held as follows (emphasis added):

> "In this connection, the "adequacy" of medical assistance remains the most difficult element to determine. The Court reiterates that the mere fact that a detainee is seen by a doctor and prescribed a certain form of treatment cannot automatically lead to the conclusion that the medical assistance was adequate … The authorities must also ensure that a comprehensive record is kept concerning the detainee's state of health and his or her treatment while in detention ..., that diagnosis and care are prompt and accurate..., and that where necessitated by the nature of a medical condition supervision is regular and systematic and involves a **comprehensive therapeutic strategy** aimed at adequately treating the detainee's health problems or preventing their aggravation, rather than addressing them on a symptomatic basis .... The authorities must also show that the necessary conditions were created for the prescribed treatment to be actually followed through ..."

11. Furthermore, in its judgment in the case of *Murray v. the Netherlands* ([GC], no. 10511/10, § 106, 26 April 2016), the Court held (emphasis added):

> "[it] is not enough for such detainees to be examined and a diagnosis made; instead, it is essential that **proper treatment for the problem diagnosed** and suitable medical supervision should also be provided."

12. In principle, these requirements are valid also in assessing, under Article 5 of the Convention, the treatment of a mentally-ill person who has been deprived of his or her liberty. This is exactly what the majority states, for example, in paragraphs 208-209:

> "208. … the current case-law clearly indicates that the administration of suitable therapy has become a requirement in the context of the wider concept of the "lawfulness" of the deprivation of liberty. Any detention of mentally ill persons must have a therapeutic purpose, aimed specifically, and in so far as possible, at curing or alleviating their mental-health condition, including, where appropriate, bringing about a reduction in or control over their dangerousness. The Court has stressed that, irrespective of the facility in which those persons are placed, they are entitled to be provided with a suitable medical environment accompanied by real therapeutic measures, with a view to preparing them for their eventual release …
>
> 209. As to the scope of the treatment provided, the Court considers that the level of care required for this category of detainees must go beyond basic care. Mere access to health professionals, consultations and the provision of medication cannot suffice for a treatment to be considered appropriate and thus satisfactory under Article 5."

13. We fully agree with these considerations, but unfortunately the majority has not applied them in the present case. It has tacitly abandoned the obligation on the authorities to draw up and implement a comprehensive therapeutic strategy or, in other words, a therapeutic treatment plan that is adapted to the situation and specific needs of a patient who has been deprived of his or her liberty.

14. The need to implement a treatment plan of this sort corresponds, *inter alia*, to Recommendation Rec (2004) 10 of the Committee of Ministers of the Council of Europe to member States concerning the protection of the human rights and dignity of persons with mental disorders (see paragraph 118 of the judgment). Although we are aware that this Recommendation belongs to what is referred to as "soft law" and that it is not for the Court to transform this kind of law into "hard law" (that is, into binding law), we consider it useful to refer to Article 12 § 1 of that Recommendation, which takes a similar stance to the Court' case-law. This paragraph reads as follows (emphasis added):

> "Persons with mental disorder should receive treatment and care provided by adequately qualified staff and **based on an appropriate individually prescribed treatment plan** …"

15. The explanatory memorandum to this Recommendation sets out, with regard to Article 12, the requirements for such a treatment plan (see paragraph 119 of the judgment):

> "When a person is placed in a facility for treatment of his or her mental disorder the treatment plan will be more complex. ... The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) has

highlighted, in the context of involuntary placement, elements that they consider a treatment plan should contain. Such elements are also relevant to voluntary placements; therefore a treatment plan should contain a wide range of therapeutic and rehabilitative activities, including where appropriate:

- Pharmacotherapy;
- Occupational therapy;
- Group therapy;
- Individual psychotherapy;
- Rehabilitative activities relevant to daily living, for example concerning personal hygiene, shopping, cooking and use of public services;
- Art and drama;
- Music and sports."

16. Although the majority also refers to this Recommendation and to the need to draw up a treatment plan (see paragraphs 246 and 249), it considerably dilutes this concept and, in consequence, reduces the obligations on the authorities, by using more flexible and less specific terms, such as "appropriate and individualised therapy" (see paragraph 205), "whether an individualised programme has been put in place" (see paragraph 209), "individualised treatment proposals" (see paragraph 238), "therapeutic care" (see paragraph 241), "treatment path" (see paragraphs 241, 249 and 250) or "therapeutic project" (se paragraph 249). This by no means corresponds to a genuine treatment plan or an overall therapeutic strategy that is adapted to the situation and the needs of a patient in compulsory confinement.

17. Moreover, even supposing that "therapy" is in principle sufficient, irrespective of whether it is part of a "therapeutic plan", in the present case the authorities have not even met this obligation. The majority shows this itself through its partly contradictory findings in the judgment. For example, having concluded that there was no violation of Article 3 in respect of the period beginning in August 2017, it emphasises that the Government was not released from their obligation "to take all the necessary steps in order to put in place, without delay, the indicated medical support, on the basis of individualised and appropriate therapeutic care" (see paragraph 168). This is tantamount to stating that such "therapeutic care" has not yet been provided. Equally, having concluded that there has been no violation of Article 5 in respect of the period beginning in August 2017, the majority "considers it appropriate to emphasise that the authorities must ensure, having due regard to the applicant's vulnerability and his diminished ability to take decisions, and notwithstanding the fact that his capacity to reach his own decisions is formally recognised under domestic law, that all the necessary initiatives are taken, in the medium and long term, **to secure effective care, including psychiatric and psychological treatment and welfare assistance**" (see

paragraph 255; emphasis added). This can only be interpreted as meaning that, to date, this "effective" care for the applicant has not occurred.

18. In those circumstances, where the authorities have not ensured that the applicant receives treatment that is compatible with the psychiatric expert's report, without a comprehensive strategy being introduced at psychopharmacological and psychotherapeutic level, without the necessary psychological education and without an individualised care plan, the State cannot be said to have fulfilled its obligations. The level of treatment was totally non-existent prior to August 2017, but did not subsequently extend further than basic care. In this respect, the majority does not even apply the principles that it reiterated itself, and that to which it drew attention in paragraph 209 of the judgment, namely that "[m]ere access to health professionals, consultations and the provision of medication cannot suffice for a treatment to be considered appropriate and thus satisfactory under Article 5".

19. In this context, the majority emphasises the fact that the applicant has not cooperated with the medical staff "in drawing up a care path" (see paragraph 249). In our opinion, however, the obligation to draw up such a therapeutic care path, one that was appropriate and adapted to the patient's situation and needs – in short, a treatment plan – lies with the authorities and not with the person who is suffering from mental illness and has been deprived of his liberty. Admittedly, it would be desirable were the patient to contribute to the exercise and cooperate with the authorities, but where this is not the case, the obligation nonetheless remains on the authorities to draw up a genuine treatment package and to encourage the patient to follow such an individualised medical programme (see, in this connection, the case-law cited in paragraphs 203-4 of the judgment). The patient's lack of cooperation does not absolve them from taking the appropriate initiatives with a view to securing to him treatment that is adapted to his condition and that is capable of helping him to secure release. We consider it unacceptable that they can avoid their responsibilities merely by referring to the lack of cooperation on the part of a person suffering from mental disorders, in a situation where this individual, as a specific result of his mental condition, does not have the wherewithal to react appropriately. In this context, it is necessary to take account of the applicant's vulnerability and the fragility of his decision-making skills, especially as he has already been deprived of his liberty for 21 years, 13 of which have been spent in a psychiatric institution without receiving any therapeutic treatment.

20. In the present case, the authorities have not taken sufficient measures to ensure that the applicant receives treatment that is appropriate and that is such as to enable him to regain his freedom. On the contrary, they have merely "proposed" various forms of treatment and, with regard to psycho-therapeutic treatment, have suggested that he himself make contact with an external psychiatrist when he so wishes. The initiative for

organising psychiatric consultations has been left entirely with the applicant, and the case file does not contain a schedule for regular meetings, planned in advance from the specific perspective of on-going therapy (see the expert report cited in point 7 above) and psychiatric monitoring of how his situation is developing. The authorities have barely taken any measures other than to inform the applicant about the availability of an external psychiatrist; they have not, for example made efforts to include him in structured psychiatric therapy. Nor does it appear that the aims of the proposed measures have been explained to him.

21. However, as the majority correctly notes in paragraph 209 of the judgment, mere access to health professionals does not suffice for a given treatment to be considered satisfactory under Article 5. Beyond that, the question arises whether "mere access" of this sort can even be described as "treatment".

22. The assessment of the period beginning in August 2017 reveals yet another problem. Although the majority notes in paragraph 209 of the judgment that the Court's role – and here we are in agreement – is not to analyse the content of the treatment that is offered and administered, this is nonetheless what it subsequently does. It states, for example, that the steps taken were "prima facie sufficient for appropriate treatment" (see paragraph 248), that "the therapeutic structure put in place, which includes both medical and welfare aspects with a view to preparing, in the language spoken by him, the applicant's reintegration into society, indicates that sufficient measures have, at this stage, been taken by the authorities" (see paragraph 249) or even that "the authorities have adopted a multidisciplinary and – on the face of it – coherent approach" (see paragraph 250). We consider that such an analysis oversteps the limits of the Court's assessment of the facts of the case, particularly under Article 5 § 1 (e) of the Convention.

23. If, as we suggest, the Court required under this provision that where the member States deprive a person of unsound mind of his or her liberty, they must ensure that there exists a "treatment plan" such as that described above, it could then limit itself to verifying whether such a plan exists and its general implementation. It would not be the Court's task to assess whether the treatment and of each of its steps was suitable, and it could forego a review of the medical and psycho-therapeutic measures put in place. It would thus leave this substantive assessment to the national authorities which are specialised in this area, by granting them the necessary margin of appreciation. This would correspond to the subsidiary nature of its role.

III. Conclusion

24. Mere access to a psychiatrist who is not a member of the psychiatric facility, and to more or less regular consultations with certain other health-care and welfare professionals, without drawing up and implementing a treatment plan that is adapted to the situation and specific needs of the patient, who suffers from mental illness and is deprived of his liberty, cannot be considered sufficient under Article 5 of the Convention. Although the authorities have taken some measures since August 2017 and have shown a certain willingness to ensure progress in the applicant's situation, these efforts have been very limited. Unlike the majority, we are unable to conclude that the medical care available corresponded to the therapeutic aim of the compulsory confinement. The link between this aim of the deprivation of liberty and the conditions in which it took place in the Paifve EDS has thus not been re-established since August 2017. In consequence, we consider that there has also been a violation of Article 5 § 1 in this respect.

25. Irrespective of this analysis, we should like to stress, as the majority does in paragraph 255 of the judgment, how important it is that the authorities take all the necessary initiatives, with immediate effect, to secure genuine treatment for the applicant, including psychiatric care, psychological treatment and welfare support, in accordance with the psychiatric expert report and the requirements of Article 5 § 1 (e) of the Convention, so as to provide him with at least the prospect of a future release.

PARTLY DISSENTING OPINION OF JUDGE SERGHIDES

1. The present case concerns complaints under Articles 3 and 5 of the Convention by an applicant who suffers from a serious mental disorder rendering him incapable of controlling his actions and who has been detained since 2004 in a specialist faculty with no German-speaking staff, whereas he himself can only speak German (one of the three official languages of Belgium).

2. I voted in favour of all the points of the operative part of the judgment except for points 3 and 5.

3. Finding no violation of Articles 3 and 5 in the judgment for the period from August 2017 to date presupposes that the facts which occurred in August 2017 broke the chain of continuity which had led the Court to find a continuous violation from the beginning of 2004 until August 2017.

4. In my humble view, this change, that is, an improvement or development in the applicant's treatment by the national authorities in 2017, which was, in the majority's view, sufficient to break the chain of continuity – a point with which I agree – should be noted and welcomed by the Court, but it should go no further than that; in other words, it should not go as far as to find "no violation" of Articles 3 and 5 of the Convention. This is so because, at the very moment the Court finds that there was a break in the chain of continuity of the applicant's situation or treatment, it lacks jurisdiction *rationae temporis* to continue examining the merits of the case in relation to the period subsequent to that break.

5. The Court does have jurisdiction to consider whether there was a break in continuity pending its examination of the case simply because, if it were to find that there was no break, then its jurisdiction would be preserved on the basis of the continuous nature of the violation, which would in turn become an aggravating factor in the assessment of just satisfaction. On the other hand, if the Court were to find (as it does in the present judgment) that there was a break in continuity, then the Court's jurisdiction would automatically cease to exist. After the break, there is nothing to vest the Court with jurisdiction to decide whether there was a "violation" or "non-violation" regarding subsequent, non-pertinent, facts. This is so because, under Articles 34 and 35 of the Convention, an applicant's "victim status" must be based on facts preceding the filing of his or her application before the Court unless the alleged violation constitutes a continuing situation.

6. The approach I propose is, I believe, in line with the principle of effectiveness and the principle of good faith, which are inherent in the Convention and should also be taken into account in interpreting a treaty provision as stipulated in Article 31 § 1 of the Vienna Convention on the Law of Treaties (VCLT) of 1969. In my view, the suggested interpretative

approach imparts to the relevant Convention provisions the maximum scope and weight that is deducible from their textual meaning and their object and purpose. It is also based on good faith, since, on the one hand, it accepts the concept of a "continuing violation", which can be an unfortunate reality, and, on the other, treats the consequences of a break in such continuity for the Court's jurisdiction with reasonableness and fairness, which are basic elements of good faith.[1]

That is why I propose that the Court's jurisdiction ends automatically when it finds that there has been a break in the continuity of a situation.

7. It is to be noted that in *Varnava and Others v. Turkey* [GC], (nos. 16064/90 and 8 others, ECHR 2009), the Court dealt with the issue of continuous violations and the procedural obligations on a State, preceding its acceptance of the right of individual application and continuing thereafter. However, the situation in the present case is somewhat different, in that it concerns the following two issues: (a) whether the Court can take into account a violation which continues after an application has been filed; and (b) whether the Court has jurisdiction to conclude that there has been "no violation" after establishing that there had been a break in continuity pending its examination of the case. What is important, however, is that in the above-cited *Varnava* case the Court also based its judgment on the principle of effectiveness.[2]

8. This approach is also supported by the judgment in *Stanev v. Bulgaria* [GC] (no. 36760/06, 17 January 2012), where the Grand Chamber stated as follows:

> "212. In conclusion, while *noting* the improvements apparently made to the Pastra social care home since late 2009, the Court considers that, taken as a whole, the living

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[1] For these elements of good faith, see, *inter alia,* J. F. O'Connor, *Good Faith in International Law,* Aldershot, 1991, at pp. 42, 110, 124; and Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties,* Leiden-Boston, 2009, at pp. 425-26,

[2] In *Varnava,* cited above, the Grand Chamber, under the "general principles" in dealing with a preliminary objection from the respondent State regarding the six-month rule under Article 35 § 1 of the Convention, held that it "cannot emphasise enough that the Convention is a system for the protection of human rights and that it is of crucial importance that it is interpreted and applied in a manner that renders these rights practical and effective, not theoretical and illusory" (ibid., § 160). It continued: "[t]his concerns not only the interpretation of substantive provisions of the Convention, but also procedural provisions; it impacts on the obligations imposed on respondent Governments, but also has effects on the position of applicants" (ibid.). The Court ultimately dismissed the respondent State's preliminary objection and eventually found, *inter alia*, a continuing procedural violation of Article 2 of the Convention on account of the failure by the respondent State to conduct an effective investigation into the fate of nine Greek Cypriots who had been missing since the Turkish military operations in northern Cyprus in 1974, despite the fact that Turkey accepted the right of individual application before the then European Human Rights Commission only in 1987 and the jurisdiction of the old Court in 1990.

conditions to which the applicant was exposed during a period of approximately seven years amounted to degrading treatment.

213. There has therefore been a violation of Article 3 of the Convention."

(emphasis added)

When the Court in the above-mentioned case refers to a seven-year period during which there had been a violation, it is referring to the period from 2002 to 2009, before the improvements were made (see *Stanev*, § 207). When the Court finds a violation in § 213 of its *Stanev* judgment, it does so in relation to this period only. The Court does not proceed to delve into the merits of the case following that change in circumstances.

9. In the present case the Court should have proceeded in the same way as it did in *Stanev*. Thus, in my view, it should only acknowledge that improvements have occurred and note or welcome them.