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

GRAND CHAMBER

CASE OF DENIS AND IRVINE v. BELGIUM

(Applications nos. 62819/17 and 63921/17)

JUDGMENT

Art 5 § 1 • Lawful arrest or detention • Refusal to discharge offenders with persisting mental disorders from compulsory confinement after new law reserving its use for most serious offences • Domestic courts' approach recognising validity of confinement measures imposed under previous law neither arbitrary nor manifestly unreasonable • All three *Winterwerp* conditions for a lawful detention of a person "of unsound mind" met • Art 5 not requiring authorities to take into account the nature of the acts committed by the individual concerned, when assessing the persistence of the mental disorders
Art 5 § 4 • Review of lawfulness of detention • Three-year probationary period requisite for discharge from compulsory confinement not decisive in view of the offenders' persisting mental disorders

STRASBOURG

1 June 2021

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

In the case of Denis and Irvine v. Belgium,

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

Robert Spano, *President,*
Ksenija Turković,
Paul Lemmens,
Síofra O'Leary,
Yonko Grozev,
Helen Keller,
Aleš Pejchal,
Krzysztof Wojtyczek,
Egidijus Kūris,
Mārtiņš Mits,
Georgios A. Serghides,
Lado Chanturia,
Gilberto Felici,
Arnfinn Bårdsen,
Darian Pavli,
Saadet Yüksel,
Peeter Roosma, *judges,*

and Johan Callewaert, *Deputy Grand Chamber Registrar,*

Having deliberated in private on 21 October 2020 and 31 March 2021,

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

INTRODUCTION

1. The case concerns the alleged unlawfulness of the applicants' continued compulsory confinement, given that the acts for which they had been placed in confinement could no longer give rise to a confinement measure under new legislation which entered into force during their detention. The applicants also complain that it was impossible for them to obtain immediate and final discharge. They rely on Article 5 §§ 1 and 4 and Article 13 of the Convention.

PROCEDURE

2. The case originated in two applications (nos. 62819/17 and 63921/17) 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 Jimmy Denis, and a British national, Mr Derek Irvine ("the applicants"), on 21 August 2017.

3. The applicants were represented by Mr P. Verpoorten, a lawyer practising in Herentals. The Belgian Government ("the Government") were

represented by their Agent, Ms I. Niedlispacher, of the Federal Justice Department.

4. The application was allocated to the Fourth Section of the Court (Rule 52 § 1 of the Rules of Court). On 12 February 2018 the Government were given notice of the complaints under Article 5 §§ 1 and 4 and Article 13 of the Convention, and the remainder of the applications were declared inadmissible pursuant to Rule 54 § 3. The parties exchanged submissions on the admissibility and merits of the applications.

5. On 8 October 2019 a Chamber of that Section, composed of Jon Fridrik Kjølbro, Faris Vehabović, Paul Lemmens, Iulia Antoanella Motoc, Carlo Ranzoni, Stéphanie Mourou-Vikström, Péter Paczolay, judges, and Andrea Tamietti, Deputy Section Registrar, decided, unanimously, to join the applications and declared them admissible. It further held, unanimously, that there had been no violation of either Article 5 § 1 or Article 5 § 4 of the Convention.

6. On 2 January 2020 the applicants requested that the case be referred to the Grand Chamber in accordance with Article 43 of the Convention. On 24 February 2020 the panel of the Grand Chamber granted that request.

7. The composition of the Grand Chamber was determined according to the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24. At the second deliberations, Peeter Roosma, substitute judge, replaced Ivana Jelić, who was unable to take part in the further consideration of the case (Rule 24 § 3).

8. The applicants and the Government each filed further written observations on the merits (Rule 59 § 1). The British Government did not avail themselves of their right to intervene in the proceedings (Article 36 § 1 of the Convention and Rule 44 § 3).

9. A hearing took place in the Human Rights Building, Strasbourg, on 21 October 2020 (Rule 59 § 3); on account of the public-health crisis resulting from the Covid-19 pandemic, it was held via video-conference. The webcast of the hearing was made public on the Court's Internet site on the following day.

There appeared before the Court:

(a) *for the Government*

Ms	I. NIEDLISPACHER,	*Agent*,
Mr	K. LEMMENS, lawyer,	*Counsel*,
Ms	J. LEFEBVRE, co-Agent,	*Adviser*;

(b) *for the applicants*

Mr	P. VERPOOTEN, lawyer,	*Counsel*.

The Court heard addresses by Mr Verpoorten, Ms Niedlispacher and Mr Lemmens and the replies given by Mr Verpoorten and Ms Lefebvre to questions put by the judges.

THE FACTS

10. The applicants were born in 1984 and 1964 respectively. At the time they lodged their applications, the first applicant was detained in the Bethaniënhuis Psychiatric Hospital in Zoersel and the second applicant was being held in the social protection unit of Turnhout Prison.

I. APPLICATION NO. 62819/17 (MR DENIS)

A. Background to the proceedings being challenged before the Court

11. By a judgment of the Turnhout Criminal Court of 18 June 2007 the first applicant was placed in compulsory confinement for acts classified as theft, 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 as amended by the Law of 1 July 1964 (the "Social Protection Act"; see paragraph 58 below), applicable at the material time.

12. In a report of 22 January 2007, prepared at the request of the Turnhout public prosecutor, psychiatrist A. had described the first applicant as having a psychotic personality and being dependent on alcohol and drugs. In the psychiatrist's opinion, the applicant was suffering from a severe mental disturbance making him incapable of controlling his actions, and he posed a danger to society and to himself, given his ongoing use of drugs and his psychotic disorders.

13. The first applicant was granted conditional discharge on several occasions, but his release licence was revoked each time on the grounds that he had failed to comply with the relevant conditions. His compulsory confinement in the social protection unit of Merksplas Prison was extended at regular intervals by the social protection bodies.

14. On 1 October 2016 new legislation, namely the Compulsory Confinement Act of 5 May 2014 (hereafter "the Compulsory Confinement Act"; see paragraphs 70 et seq. below), entered into force. This Act abrogated and replaced the Social Protection Act (see paragraph 11 above).

15. On 27 October 2016 the psychosocial department in Merksplas Prison issued a report, drawn up on the basis of interviews with the first applicant, his case file, observations from the department's staff, a social-welfare investigation conducted by the prison and an opinion from the psychiatrist. The report noted that the applicant no longer used drugs but that his psychotic problems were also triggered by stress. When his psychotic problems were in abeyance, the applicant's anti-social

characteristics came to the fore. However, he seemed to be functioning in a more stable manner. The likelihood that he would commit further punishable acts was considered rather low. After examining the applicant's criminal record, his progress since the initial placement in confinement, the proposed reclassification and the absence of contra-indications, the psychosocial department issued a favourable opinion on his conditional discharge, with reclassification as an in-patient in a psychiatric hospital.

16. On 15 November 2016 the Social Protection Division at the Antwerp Post-Sentencing Court (the "CPS") granted the applicant a conditional discharge, with reclassification as an in-patient.

17. On 27 December 2016 the first applicant was again arrested and returned to the social protection unit of Merksplas Prison for failure to comply with the conditions imposed on him.

B. The proceedings being challenged before the Court

18. On an unspecified date, in the context of the periodic review of his confinement, the first applicant made a request for final discharge. In his pleadings, he argued that his compulsory confinement was no longer lawful, given that the acts for which he had been placed in confinement could no longer give rise to a confinement measure under the Compulsory Confinement Act. He submitted that under Article 5 § 1 (e) of the Convention his detention was accordingly neither "lawful" nor taken "in accordance with a procedure prescribed by law". He requested the application of Article 2 of the Criminal Code and Article 7 of the Convention, enshrining the principle of retrospective application of the more lenient criminal law. In addition, in the first applicant's submission, the fact that the Compulsory Confinement Act no longer provided for the possibility of confinement for the offences that he had committed implied that his mental disorder was no longer sufficiently serious to justify the extension of the compulsory confinement measure. He ought therefore to be released definitively.

19. On 25 January 2017 the CPS dismissed the first applicant's request for final discharge. It also revoked his conditional discharge, ordered his immediate placement in the social protection unit of Merksplas Prison, refused the applications for day release and decided that the prison governor was to issue a new opinion by 18 July 2017 at the latest.

20. The CPS pointed out, firstly, that Article 7 of the Convention was not applicable to the first applicant's situation, since that provision concerned "penalties", while compulsory confinement was a preventive measure. The criminal court's judgment of 18 June 2007 (see paragraph 11 above) had ordered the applicant's placement in compulsory confinement and was not a criminal conviction. It followed that Article 2 of the Criminal Code was also not applicable. The judgment in question had become *res*

judicata and was therefore final. No appeal could be lodged against it. Even supposing that a criminal-law penalty had been lodged, it was not therefore possible to apply the more lenient criminal law retrospectively.

21. The CPS also indicated that it had jurisdiction to order final discharge under the Compulsory Confinement Act, which set out a number of conditions that had to be verified strictly. In particular, the individual concerned had to have successfully completed a minimum three-year period of conditional discharge, and his or her mental health had to have become sufficiently stable for there no longer to be reasonable grounds to fear that, whether or not on account of the mental disorder, potentially combined with other risk factors, he or she would again commit offences that harmed or threatened to harm the physical or mental integrity of another person. The Act did not provide any other legal basis for an individual's final discharge. The CPS could merely apply the law.

22. As a subsidiary consideration, the CPS noted that the legislature had not in any event wished to give retrospective effect to the "more lenient" law in relation to compulsory confinement orders issued on the basis of the previous Social Protection Act (1930). This was clear from the parliamentary drafting history. The Minister of Justice had merely suggested that those CPS which had jurisdiction in such cases were to review decisions on maintaining individuals in compulsory confinement with the necessary clemency (see paragraph 82 below). Thus, the CPS considered that, irrespective of whether the punishable acts which had justified the applicant's placement in compulsory confinement in 2007 could still be considered as grounds for compulsory confinement under the new Act, the applicant could not be granted final discharge, having regard to his current mental condition and the fact that he had not completed the period of conditional discharge provided for by law.

23. The first applicant appealed on points of law. In a first argument alleging a violation of Article 5 § 4 and Article 13 of the Convention, he submitted that those provisions required that any person whose detention was no longer lawful was entitled to have access to a court which could order his or her immediate release. By requiring an individual to carry out a three-year probationary period before becoming eligible for final discharge, the Compulsory Confinement Act was in breach of the above-mentioned provisions. The CPS judgment had thus breached those provisions in ruling that the applicant was unable at the relevant time to make a request for final discharge.

24. The first applicant raised a second argument, alleging a breach of Article 5 § 1 and Article 7 of the Convention, to the effect that the more favourable criminal law ought to be applied and that compulsory confinement measures, unlike penalties, were not imposed on a final basis, in that they ought always to be imposed lawfully and in accordance with a procedure prescribed by law, within the meaning of Article 5 § 1 (e). The

danger posed to society by the applicant could therefore not be based on offences which were no longer taken into consideration in imposing such confinement. In addition, the CPS judgment did not find that the applicant's mental illness had ever given rise to punishable acts which came within the scope of the Compulsory Confinement Act, or that the applicant represented a danger for society.

25. By a judgment of 21 February 2017 (no. P.17.0125.N), the Court of Cassation dismissed the first applicant's appeal on points of law.

26. With regard to the allegation of violations of Article 5 § 4 and Article 13 of the Convention, the Court of Cassation noted that, under section 66 of the Compulsory Confinement Act, final discharge was in principle subject to completion of a probationary period. This condition did not imply that an individual placed in compulsory confinement did not have access to a court or to an effective remedy as required by the Convention. This argument, derived from another legal premise, lacked legal merit.

27. With regard to the argument alleging a violation of Articles 5 § 1 and 7 of the Convention, the Court of Cassation considered that Article 7 of the Convention was applicable only to penalties, and not to preventive measures such as compulsory confinement. For the remainder, Article 5 § 1 of the Convention did not prevent a compulsory confinement order, imposed by a decision which had acquired legal force, from becoming final in its turn and subsequently giving rise to an execution phase, which was not governed by the same rules as those in force when imposing the order. It followed that Article 5 § 1 did not mean that a confinement measure, imposed in proceedings which had become final, was no longer lawfully or legally imposed because the legislation had changed during the execution phase. Thus, the only consequence of this provision was that a compulsory confinement measure could no longer be imposed in the future for the offence for which the applicant had already been placed in confinement. Assessment of a detainee's mental condition and the resulting danger to society was not made solely on the basis of the offence for which he or she had been placed in confinement, but also in the light of a range of risk factors which had been submitted to the CPS for consideration. In so far as this argument was based on another legal premise, it was lacking in legal merit. The Court of Cassation added that, in the absence of arguments by the applicant to this effect, the CPS was not required to give specific reasons as to why the confined individual might, on account of his or her mental state, recommit offences that harmed or threatened to harm the physical or mental integrity of another person.

28. On 18 July 2017 the CPS again ordered the first applicant's conditional discharge, subject to the condition that he was accepted as an in-patient by the Bethaniënhuis Psychiatric Hospital in Zoersel. In particular, it considered that, given that no new offences had been committed during his compulsory confinement and the relatively low risk of re-offending,

treatment in that hospital seemed to be appropriate to the seriousness of his problem and ensured the necessary level of safety. The first applicant was transferred there on 24 July 2017.

C. Developments in the situation since the application was lodged

29. On 23 November 2017 the CPS decided that the first applicant's therapeutic treatment should take place on an out-patient basis, with residence at his parents' home. The psychiatrist treating him had considered that he was ready for this step, and his reclassification had been duly prepared. The first applicant gave an undertaking to take his medication regularly and to continue his psychiatric therapy.

30. On 13 July 2018 the CPS suspended the first applicant's conditional discharge and ordered that he be placed immediately in the psychiatric wing of Antwerp Prison, on the grounds that he had been arrested by the police. The CPS considered that the reasons for the provisional arrest were so serious that it wished to discuss them with the first applicant before taking a decision on whether or not to maintain the conditional discharge. It would take a decision within a one-month period, during which the first applicant would remain in confinement.

31. On 31 July 2018 the CPS decided not to revoke the first applicant's conditional discharge, but to order that he re-enter the Zoersel Psychiatric Hospital from the following day. It noted, in particular, that the first applicant had re-entered that hospital voluntarily on 3 April 2018 and that an incident had occurred during the night of 25 to 26 June 2018, during which he had been aggressive and had damaged property.

32. On 5 December 2018 the CPS decided once again that the first applicant's therapeutic treatment would take place on an out-patient basis, with residence in his parents' home. It appeared, in particular from a report by the probation officer, that his mental state had stabilised sufficiently for this to be an option.

33. The first applicant's conditional discharge was again suspended by a CPS decision of 9 January 2019, on the grounds that he had been arrested by the police. The CPS considered that the reasons for the provisional arrest were so serious that it wished to discuss them with the first applicant before taking a decision on whether or not to continue the conditional discharge. It would take a decision within a one-month period, during which the first applicant would continue to be held in compulsory confinement.

34. On 6 February 2019 the CPS set aside the first applicant's conditional discharge on the grounds that he had been responsible for two serious incidents involving physical and verbal aggression and damage to a room in Zoersel Hospital. As the first applicant's return to that establishment was not possible in the foreseeable future, it was necessary to find another psychiatric hospital that was able to admit him. Since no

reclassification option in a secure establishment was available, the CPS ordered that the first applicant be placed in the social protection unit of Turnhout Prison, pending the availability of a place in a psychiatric hospital.

35. On 15 July 2019 the CPS ordered that the first applicant be placed in the social protection unit of Merksplas Prison, pending a placement in a medium-security prison.

36. An appeal on points of law lodged by the first applicant against that judgment was dismissed by the Court of Cassation on 14 August 2019 (P.19.0828.N). In particular, the argument alleging a violation of Article 5 § 1 of the Convention was dismissed on the grounds that it was clear from section 66 of the Compulsory Confinement Act that an assessment of the mental health condition of an individual in confinement, and the danger that he or she posed to society, was conducted not only in the light of the offence for which confinement had been imposed, but also with regard to a range of risk factors submitted for the CPS's analysis.

37. On 15 January 2020 the CPS confirmed that the first applicant was to remain in Merksplas Prison and his application for final discharge was rejected. The psychosocial department in Merksplas Prison had considered that there was a high likelihood of aggressive conduct and reoffending. There was also a real risk that he would resume drug use. The CPS held that the first applicant could not be released immediately, especially in view of his state of mental health as it then stood, the fact that he represented a real and serious danger to the integrity of others and that structured surveillance to avert this possibility remained necessary. It was clear that the first applicant ought to be placed as quickly as possible in an establishment which offered a therapeutic structure and sufficient guarantees for the safety of other persons. No places were currently available in this type of establishment, and there was no specific reclassification project. It was therefore necessary to order the first applicant's continued detention in Merksplas Prison, while waiting to find an appropriate therapy plan for him in a secure setting.

38. By a judgment of 18 February 2020 (P.20.0094.N), the Court of Cassation dismissed an appeal on points of law lodged by the first applicant. It noted, among other points, that inappropriate therapy could be unlawful for the purposes of Articles 5 § 1 (e) and 5 § 4 of the Convention, but that this fact did not justify the discharge of an individual from compulsory confinement if this would result in a danger to society.

39. On 20 May 2020 the Antwerp CPS ordered that the first applicant again be granted conditional discharge, in the St-Jan-Baptist psychiatric centre in Zelzate. He was transferred there on 12 June 2020.

40. On 18 June 2020 the Brussels Court of First Instance (Dutch-speaking Division) partly upheld the first applicant's claim under Articles 1382 and 1383 of the Civil Code for compensation in respect of damage sustained as a result of his deprivation of liberty in prison without

an adapted therapeutic context, in conditions which breached Articles 3 and 5 § 1 of the Convention. The court awarded the applicant 6,000 euros (EUR) in lump-sum compensation, with interest from the date of the judgment, and EUR 1,080 in respect of procedural costs.

II. APPLICATION NO. 63921/17 (MR IRVINE)

A. Background to the proceedings being challenged before the Court

41. On 14 November 2002 the committals division at the Turnhout Criminal Court ordered that the second applicant be placed in compulsory confinement pursuant to section 7 of the Social Protection Act for acts classified as attempted aggravated burglary.

42. In a report of 18 October 2002, prepared at the request of the investigating judge at the Antwerp Court of First Instance, psychiatrist D. had described the second applicant as suffering from a serious personality disorder and a psychotic disorder which made him incapable of controlling his actions.

43. On 27 June 2003, following contacts between the relevant Belgian and Scottish authorities, the applicant was granted conditional discharge. He was placed in a psychiatric hospital in Scotland.

44. After absconding from that institution, he was found wandering in Belgium on 1 December 2010 and arrested. On 11 January 2011 the Antwerp Social Protection Committee (the "CDS") ordered that he be returned to the social protection unit in Turnhout Prison.

45. As it proved impossible to have the second applicant placed in a Scottish institution, on 23 June 2016 the CDS ordered his placement, as a matter of priority, in a forensic psychiatry centre in Ghent or Antwerp. While waiting for a bed to become available, he was placed in the social protection unit of Turnhout Prison.

B. The proceedings being challenged before the Court

46. On an unspecified date the second applicant asked the CPS to rule on a number of practical arrangements for his compulsory confinement, given that he was still detained in Turnhout Prison. In his conclusions, relying on Articles 5 and 7 of the Convention, he also requested his final discharge, on the same grounds as the first applicant (see paragraph 18 above).

47. On 21 December 2016 the psychosocial department at Turnhout Prison issued a report, drawn up on the basis of an interview with the second applicant, observations from the department's staff, the case file and previous reports. The report found that it was necessary to place the applicant in a forensic psychiatry centre or a long-stay institution, since it did not appear possible to place him in a psychiatric hospital in Scotland,

despite the efforts made to that effect. The report was subsequently supplemented by an opinion from the psychiatrist attached to the psychosocial department, dated 22 December 2016, which described ongoing schizophrenic symptoms that were being treated by anti-psychotic intramuscular injections. The psychiatrist considered that the confinement measure should be maintained, and the applicant placed in a forensic psychiatry centre.

48. In a judgment of 25 January 2017, the CPS held that it was impossible to implement the CDS's decision of 23 June 2016 (see paragraph 45 above). It therefore set aside the priority aspect of the latter decision and decided that the second applicant's compulsory confinement was to continue in the social protection unit of Turnhout Prison, pending the availability of a place in a forensic psychiatric centre in Ghent or Antwerp. The CPS dismissed the arguments under Articles 5 and 7 of the Convention and the second applicant's request for final discharge, on the same grounds as those used in respect of the first applicant (see paragraphs 19 et seq. above).

49. The second applicant appealed on points of law, relying on the same arguments as the first applicant (see paragraphs 23 and 24 above).

50. By a judgment of 21 February 2017 (no. P.17.0124.N), the Court of Cassation dismissed the appeal on points of law on the same grounds as those it had used with regard to the first applicant (see paragraphs 25-27 above).

C. **Developments in the situation since the application was lodged**

51. On 22 February 2018 the CPS ordered that the second applicant be placed in the Antwerp forensic psychiatry centre under the emergency procedure. That decision was executed on an unspecified date.

52. On 30 March 2018 the CPS upheld the judgment of 22 February 2018 and set out the arrangements and conditions for a placement in the Antwerp forensic psychiatry centre.

53. On 28 June 2019 the Antwerp CPS confirmed the second applicant's continued detention in the Antwerp forensic psychiatry centre and the conditions for day-release. In spite of reasonably positive developments in the second applicant's conduct, the CPS found, on the basis of clinical factors, that the risk of violent reoffending was high in the event of an immediate return to society. The most serious risk was related to his failure to grasp that he was ill and that he was suffering from a psychiatric problem. A new opinion by the Antwerp forensic psychiatry centre was to be delivered by 28 June 2020 at the latest, in the context of the automatic periodic review of the compulsory confinement.

54. On 8 April 2019 the Antwerp Court of First Instance partly allowed the second applicant's claim, under Articles 1382 and 1383 of the Civil

Code, for compensation in respect of damage sustained as a result of his deprivation of liberty in prison in conditions that were incompatible with Articles 3 and 5 § 1 of the Convention. The court awarded him EUR 7,350 in compensation, with interest to be paid from 23 March 2015.

55. On 26 August 2020 the Antwerp CPS decided to postpone its examination of the file until 26 October 2020 pending a reply concerning the possibility of transferring the second applicant to the United Kingdom and appointing a temporary administrator.

RELEVANT DOMESTIC LEGAL FRAMEWORK AND PRACTICE

56. The domestic legal framework and practice in respect of compulsory confinement were set out in the *Rooman v. Belgium* judgment ([GC], no. 18052/11, §§ 75-104, 31 January 2019). To facilitate reading of the present judgment, this information has been reproduced and expanded below.

57. The applicants' initial compulsory confinement took place in application of the Law of 9 April 1930 on Social Protection in respect of Mental Defectives, Habitual Offenders and Perpetrators of certain Sexual Offences, 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 ("the Compulsory Confinement Act"), as amended by the Law of 4 May 2016 on Compulsory Confinement and Justice (Miscellaneous Provisions" (see also paragraph 90 below). The Compulsory Confinement Act entered into force on 1 October 2016.

I. SOCIAL PROTECTION ACT OF 9 APRIL 1930

58. 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 an act classified as a crime or serious offence and who were suffering from one of the conditions set out in section 1 of that Act, namely: "either from a mental disorder or from a severe mental disturbance or defect making [them] incapable of controlling [their] actions".

59. 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"; section 23 of the Social Protection Act).

60. 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).

61. 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).

62. 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.

63. 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 of the Social Protection Act).

64. 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).

65. The CDS monitored the detained individual's situation and could, of its own motion or at the request of the public prosecutor, the detained person or his or her lawyer, decide on final or conditional discharge, where the individua's mental health had sufficiently improved and the conditions for social reintegration 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).

66. Where conditional discharge was ordered, the detainee was subject to medical and legal 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).

67. 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).

68. 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 were applicable (section 19*bis* of the Social Protection Act).

69. 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).

II. THE COMPULSORY CONFINEMENT ACT OF 5 MAY 2014

A. General context

70. 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.

71. The Compulsory Confinement Act (Law of 5 May 2014), which repeals 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 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 reintegration 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).

72. The Compulsory Confinement 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 of this Act 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).

73. Placement 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)).

74. 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.

75. Under the new Act, 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.

76. Where the CPS orders a placement, it sets out in its judgment the date by which the director of the establishment or the head of the treatment team – depending on the establishment in which the detainee is resident – must submit an opinion. This period must not exceed one year from the date of the judgment (section 43).

77. A review hearing before the CPS must take place not later than two months after receipt of the opinion from the director of the establishment or the head of the treatment team and following an opinion from the public prosecutor's department (section 50).

78. An appeal on points of law may be lodged by the public prosecutor or by the detainee's lawyer against the CPS's decisions concerning the granting, refusal or setting aside of limited detention, electronic surveillance, conditional discharge, early discharge with a view to expulsion or extradition, and final discharge (section 78).

B. **Criteria justifying a compulsory confinement measure**

79. The relevant parts of section 9 of the Compulsory Confinement Act, as amended by the Law of 4 May 2016, reads as follows:

> "§ 1. Except in cases of crimes or serious offences committed for political motives or through the medium of the press, with the exception of press offences motivated by racism or xenophobia, the investigating judicial authorities and the trial courts may order the compulsory confinement of an individual:
>
> i. who has committed a crime or serious offence that has harmed or could have harmed the physical or mental integrity of another person, and
>
> ii. who, at the time of the order, is suffering from a mental disorder which destroys or seriously reduces his or her capacity for discernment or ability to control his or her actions, and
>
> iii. in respect of whom there is a danger that he or she will commit fresh acts as referred to in i. above on account of his or her mental disorder, possibly combined with other risk factors.
>
> The investigating judicial authorities or the trial courts shall assess, providing reasons, whether the acts harmed the physical or mental integrity of another person.
>
> ..."

80. With regard to the reasons for amending the criteria justifying a compulsory confinement measure as provided for by section 9 of the above-cited Act, the draft law on compulsory confinement (miscellaneous provisions) of 18 January 2016, examined by the House of Representatives (*Parliamentary Documents*, House of Representatives, 2015-2016, DOC 54-1590/001, p. 101), which became the above-cited Law of 4 May 2016, stated:

> "The first paragraph of section 9 has been redrafted with a view to refining the possibility of imposing compulsory confinement. The aim is to focus on those individuals for whom this preventive measure is genuinely necessary from the outset, for an indefinite period, and from whom society and the victims must be protected. ... This will make it possible to avoid improper use of the compulsory confinement measure."

81. According to the report on the first reading of the draft law by the Justice Committee of the House of Representatives (*Parliamentary Documents*, House of Representatives, 2015-20016, DOC 54-1590/006), the Minister of Justice explained that the introduction of a "threshold" in order to impose compulsory confinement was intended to focus the confinement measure on the target group which needed it, and to avoid a situation where compulsory confinement without limit of time could be imposed for relatively minor offences (page 4). In reply to questions posed by members of the Committee, the Minister of Justice indicated that compulsory confinement was a preventive measure rather than a penalty. It was a serious measure, in that it was open-ended and it could give rise to a deprivation of liberty. For that reason, it was disproportionate to authorise this measure for acts which did not reveal any real danger to society (page 37).

82. With regard to the transitional provisions (see paragraph 88 below), the Minister of Justice indicated that the provisions amending the scope of the Compulsory Confinement Act could not be considered as criminal-law provisions. In consequence, the principle of the retrospective application of the more lenient criminal law was not applied and the Compulsory Confinement Act did not, in principle, affect decisions in respect of persons suffering from mental disorders who had committed acts capable of giving rise to compulsory confinement under the Social Protection Act of 1930, but for whom compulsory confinement would no longer be possible under the new legislation. The relevant CPS should examine these decisions with the necessary clemency under section 135 of the Compulsory Confinement Act (page 46).

C. Provisions concerning the discharge of persons in compulsory confinement

83. The Compulsory Confinement Act provides that conditional discharge is one means of executing the compulsory confinement order, whereby the detainee is subject to the preventive measure imposed on him or her in the context of an in-patient or out-patient care path, subject to compliance with the conditions imposed during the probationary period (section 25). It may be granted at any point during compulsory confinement to the individual concerned, if there are no obstacles to discharge that cannot be addressed by imposing specific conditions and if the individual in question agrees to these conditions (section 26).

84. A detainee may be granted final discharge on expiry of a three-year probationary period, provided that the mental disorder in question has stabilised sufficiently for there no longer to be reasonable grounds to fear that, whether or not on account of his or her mental disorder, possibly combined with other risk factors, the individual concerned will again commit offences that harm or threaten to harm the physical or mental integrity of another person (section 66).

85. On becoming *res judicata* a judgment granting final discharge discontinues the compulsory confinement (section 72).

86. By two judgments, of 9 April 2019 (no. P.19.0273.N) and 11 June 2019 (no. P.19.0245.N) respectively, the Court of Cassation clarified the scope to be given to the manner of execution of confinement orders as provided for in the Law of 5 May 2014, in the light of Article 5 § 1 of the Convention. In particular, it stated that if it appeared that the mental disorder in question has stabilised sufficiently but that there are reasonable grounds to fear that the detainee will again commit the offences referred to in section 9 of the Act, the CPS cannot grant final discharge. If it appears that the detainee's condition has progressed to such an extent that there is no longer any question of a mental disorder, it is for the CPS to decide whether, having regard to the risk of reoffending and the aims of Article 5 § 1 (e) of the Convention, placement is still necessary and whether the above-mentioned risk cannot be averted by less restrictive means of executing the compulsory confinement, such as conditional discharge. In contrast, if it appears that the detainee's condition has progressed to such an extent that there is no longer any question of a mental disorder and there are no longer reasonable grounds to fear that the individual concerned will again commit the offences referred to in section 9 of the Law of 5 May 2014, the CPS must grant the individual in confinement final discharge, even if the three-year probationary period has not yet been completed. The Court of Cassation held that to interpret section 66 of the Compulsory Confinement Act otherwise, that is, as implying that an individual in compulsory confinement who satisfies the condition regarding stabilisation of his or her mental state could only be granted final discharge on expiry of this probationary period, would be contrary to Article 5 §§ 1 and 4 of the Convention.

D. Transitional provisions

87. Section 134 of the Compulsory Confinement Act states that its provisions are to apply to all pending cases, subject to the application of section 135 § 4.

88. In so far as relevant, section 135 provides:

> "§ 1. When the present Act enters into force, all the files of the individuals in compulsory confinement for whom the Social Protection Committees have

jurisdiction shall be entered *ex officio* and without payment in the general register of the relevant social protection division at the post-sentencing court.

...

§ 4. The director or person responsible for treatment shall draw up, in accordance with section 47, an opinion, no sooner than four months and no later than six months after the entry into force of the present Act.

If no opinion is issued six months after the entry into force of the present Act, the public prosecutor shall apply to the social protection division.

§ 5. The persons in compulsory confinement who, at the date of entry into force of the present Act, are placed in an institution which is not recognised by the competent authority or with which no agreement concerning the placement has been drawn up, may remain there after the entry into force of the present Act, unless the social protection division decides that they are to be placed in an institution which has received the relevant licence.

..."

89. Thus, the Compulsory Confinement Act does not contain any transitional measure derogating from the principle of the immediate application of the new legislation, as interpreted by the Court of Cassation. The latter has ruled that new legislation is in principle applicable to situations which arise after its entry into force and to the future effects of situations arising under the former legislation which appear or continue under the new legislation, to the extent that that application does not interfere with rights that are already irrevocably settled (Cass., 21 February 2014, C.13.0277.F, and Cass., 2 January 2017, C.15.0018.F). On the other hand, as a general rule, situations that became final under the previous legislation fall outside the scope of the new legislation, even if it is one of public policy (Cass., 9 September 2004, C.03.0492.F).

III. ALTERNATIVES TO COMPULSORY CONFINEMENT

90. When section 9 of the Compulsory Confinement Act was being amended (see paragraph 79 above), the following observations were made when the draft law was examined by the House of Representatives (*Parliamentary Documents*, House of Representatives, 2015-2016, DOC 54 1590/001, pp. 102-103):

"If the facts do not correspond to the situations [provided for by section 9 of the Law of 5 May 2014] and if at the time of assessing the facts the person is suffering from a mental disorder which seriously reduces his or her capacity for discernment or ability to control his or her actions, compulsory confinement is not an option. However, if these persons seriously endanger their health or safety or if they represent a serious threat to the life or integrity of others, the Law of 26 June 1990 on the protection of persons of unsound mind could be applied."

91. The Law of 26 June 1990 on the protection of persons of unsound mind provides for the possibility of imposing protection measures in the

form of non-voluntary hospitalisation of a mentally-ill patient who seriously endangers his or her health or safety or if he or she represents a serious threat to the life or integrity of others. These measures may only be imposed if there is no other treatment option but to resort to involuntary treatment (section 2). The measure is imposed by a magistrate (*juge de paix*) (section 1 § 2) for a maximum duration of 40 days (section 12), but it may be extended for a period that may not exceed two years (section 13).

92. The compulsory admission provided for by this Law is the only alternative to compulsory confinement in order to deprive persons suffering from mental disorders of their liberty in a binding manner. It may take the form of placing the patient under observation in a psychiatric unit, continued placement in a psychiatric unit, post-detox treatment or treatment in a family setting.

93. Other forms of intervention which do not entail deprivation of liberty are available to assist convicted persons who suffer from mental disorders and to avoid the risk of reoffending. Their use depends on the circumstances of the case and it is the courts alone which rule on whether they are appropriate in a given case.

THE LAW

I. SCOPE OF THE CASE BEFORE THE GRAND CHAMBER

94. The Government raised a preliminary objection concerning the scope of the case referred to the Grand Chamber, and the admissibility of certain of the complaints submitted by the applicants.

A. The preliminary objection raised by the Government

95. In their observations before the Grand Chamber and during the hearing, the Government pointed out that, before the domestic courts, the applicants had merely alleged that their compulsory confinement no longer had a legal basis and that they should therefore be immediately released. The issue of the assessment of the level of danger posed by the applicants and of the relevant factors for continuing their confinement was new and, in addition, different from that which had been discussed before the domestic courts.

96. The Government noted that the applicants had not argued in their application to the Court or in their appeals on points of law that their compulsory confinement was in breach of Article 5 § 1 of the Convention in that the disorders from which they suffered were no longer present. In their view, this was a new interpretation of the ground of appeal, to which they replied only subject to the argument being found admissible, leaving it to the Court to decide whether the domestic remedies had been exhausted.

They further noted that the Chamber had confirmed this approach in finding that, since the applicants had not contested that they still met the three conditions identified in the *Winterwerp v. the Netherlands* judgment (24 October 1979, § 39, Series A no. 33), it was not required to examine compliance with them. Accordingly, the Government submitted that the scope of the dispute before the Grand Chamber should be limited in consequence.

97. The applicants did not comment at the public hearing on the preliminary objection raised by the Government.

B. The Court's assessment

1. General principles laid down in the Court's case-law

98. The Court reiterates that the "case" referred to the Grand Chamber necessarily embraces all aspects of the application previously examined by the Chamber in its judgment. The "case" referred to the Grand Chamber is the application as it has been declared admissible, together with the complaints which have not been declared inadmissible (see *Ilias and Ahmed v. Hungary* [GC], no. 47287/15, §§ 171-172 and 177, 21 November 2019, and *S.M. v. Croatia* [GC], no. 60561/14, § 216, 25 June 2020).

99. Further, for the purposes of Article 32 of the Convention, the scope of a case "referred to" the Court in the exercise of the right of individual application is determined by the applicant's complaint or "claim" (see *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, § 109, 20 March 2018). A complaint consists of two elements: factual allegations and legal arguments (ibid., § 126, and *S.M. v. Croatia*, cited above, § 217).

100. By virtue of the *jura novit curia* principle the Court is not bound by the legal grounds adduced by the applicant under the Convention and the Protocols thereto and has the power to decide on the characterisation to be given in law to the facts of a complaint by examining it under Articles or provisions of the Convention that are different from those relied upon by the applicant (ibid.).

101. In contrast, the Court cannot rule beyond or outside what is alleged by the applicants. Thus, it cannot rule on the basis of facts not covered by the complaint, it being understood that while the Court has jurisdiction to review circumstances complained of in the light of the entirety of the Convention or to "view the facts in a different manner", it is nevertheless limited by the facts presented by the applicants in the light of national law. However, this does not prevent an applicant from clarifying or elaborating upon his or her initial submissions during the Convention proceedings. The Court has to take account not only of the original application but also of the additional documents intended to supplement the latter by eliminating any initial omissions or obscurities. Likewise, the Court may clarify those facts

ex officio (see *Radomilja and Others*, cited above, §§ 121-122 and 126, and *S.M. v. Croatia*, cited above, § 219).

2. Application of those principles in the present case

102. It is for the Court to determine whether and to what extent the supplementary considerations put forward by the applicants before the Grand Chamber are developments which clarify or elaborate upon their initial submissions or whether they constitute new complaints invoking facts different from those set out in their initial application.

(a) The complaints raised by the applicants before the Chamber

103. In their application form, the applicants submitted that, since the entry into force of the Compulsory Confinement Act 2014, there was no longer a legal basis for their detention and that it was therefore in breach of Article 5 § 1 (e) of the Convention. They referred to the difference between section 7 of the Social Protection Act (see paragraph 58 above) and section 9 of the Compulsory Confinement Act (see paragraph 79 above) with regard to the categories of offences which could give rise to compulsory confinement. In their view, the new legislation now ruled out any compulsory confinement following the commission of property offences, having regard to the absence of transitional provisions that were applicable to detainees in compulsory confinement who no longer met the conditions of that Act.

104. Under Articles 5 § 4 and 13 of the Convention, the applicants complained that it was legally impossible to secure their immediate and final discharge on account of the three-year probationary period imposed by section 66 of the Compulsory Confinement Act, although their detention was unlawful.

105. Their complaints as set out in the application form were communicated to the Government.

106. The applicants reiterated these complaints in their observations before the Chamber, adding that they had not committed acts reaching the threshold set out in section 9 of the Compulsory Confinement Act 2014 and that there could therefore be no question of "reoffending" with regard to such acts. Their continued confinement would therefore run counter to the text and purpose of the new legislation. Under Article 5 § 4, the applicants argued, more generally, that the remedy provided for in the Compulsory Confinement Act was ineffective.

107. In its judgment of 8 October 2019, the Chamber did not declare inadmissible any part of the complaints that had been communicated to the Government. Thus, "the case" as referred to the Grand Chamber encompasses all aspects of the applicants' complaints as submitted to, and

as examined by, the Chamber (see *Radomilja and Others*, cited above, § 104).

(b) **The applicant's additional allegations before the Grand Chamber**

108. In their submissions to the Grand Chamber concerning Article 5 § 1 of the Convention, and at the hearing, the applicants referred to the structural problem identified by the Court in the *W.D. v. Belgium* judgment (no. 73548/13, 6 September 2016) concerning the continued detention of individuals in compulsory confinement in prison psychiatric wings without the provision of appropriate treatment, alleging that they too had been affected by this structural problem. They also raised arguments concerning the lack of necessity and proportionality in their continued compulsory confinement following the entry into force of the 2014 Act, and submitted that they were not sufficiently dangerous to warrant the imposition of a confinement measure.

109. With regard to Article 5 § 4 of the Convention, the applicants alleged before the Grand Chamber that the domestic courts had not conducted a review of the requirements of Article 5 § 1 nor of whether the criteria of section 9 of the 2014 Act had been met. In their argument, the problem was that the Act made no provision for a penalty where the reasonable length of a confined individual's placement was exceeded.

(c) **Conclusion as to the scope of the case before the Grand Chamber**

110. The Court is mindful of the structural problem still faced by an appreciable number of persons in compulsory confinement in Belgium (see, on this point, *W.D. v. Belgium*, cited above, §§ 161-170, and *Rooman*, cited above, § 201). However, the additional submissions raised by the applicants for the first time before the Grand Chamber (see paragraphs 108 and 109 above) cannot be considered as concerning particular aspects of the initial complaints brought before the Chamber (see paragraph 103 above). They are complaints relating to distinct requirements arising from the provisions relied on. These considerations must accordingly be considered as new complaints which are not within the scope of the case as submitted to the Grand Chamber.

111. The Government's preliminary objection must accordingly be upheld. It follows that the Grand Chamber cannot take cognisance of these additional considerations in its examination of the present case. It will therefore limit its examination to those aspects of the complaints which were submitted to, and taken into account by, the Chamber.

112. In those circumstances, it is also unnecessary to verify whether these additional allegations were raised, if only in substance, before the domestic courts.

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

113. The applicants alleged that, since the entry into force of the Compulsory Confinement Act 2014, their continued compulsory confinement had no longer had a legal basis as required by Article 5 § 1 of the Convention, the relevant part of which provides:

> "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

114. The Chamber noted that in the absence of transitional measures in favour of persons whose confinement had been imposed under the previous legislation (the 1930 Social Protection Act) and who had committed acts which no longer gave rise to compulsory confinement under the new legislation, the Court of Cassation had held that the applicants' confinement ought to be continued on the basis of confinement orders which had acquired the force of *res judicata*. The Chamber found that this interpretation of the new legislation seemed to be compatible with the parliamentary drafting history and was neither arbitrary nor manifestly unreasonable. In consequence, it concluded that the applicants' detention continued to be based on the judicial decisions taken under the previous legislation. Noting further that the applicants had not disputed that they still met the three conditions set out in the *Winterwerp* judgment (cited above, § 39), the Chamber concluded that there had been no violation of Article 5 § 1 of the Convention.

B. The parties' observations

1. The applicants

115. The applicants did not dispute that they suffered from mental disorders and that their detention fell within the scope of Article 5 § 1 (e). They accepted their need of psychiatric treatment but submitted that the punishable acts that they had committed did not reach the threshold provided for in section 9 of the Compulsory Confinement Act and that there was therefore no longer a legal basis for their detention.

116. The applicants considered that the conditions laid down by section 9 of Compulsory Confinement Act had to be verified *ex nunc*: where the applicable law was amended, as in the present case, this inevitably affected the question of whether the requirements of Article 5 § 1 (e) were still met.

117. They stated that the Compulsory Confinement Act had been deliberately intended to prohibit a specific practice of the Belgian courts, which, as the Minister of Justice himself had admitted, made "improper use" of compulsory confinement with regard to persons who did not pose a genuine danger to society. Indeed, before the entry into force of the Compulsory Confinement Act, the Ghent Social Protection Commission (the "CDS") – unlike the Antwerp CDS which had jurisdiction in the present case – had granted unconditional discharge to all persons in compulsory confinement who had committed acts which did not fall within the scope of the new legislation. They submitted an example of a decision to that effect.

118. In the applicants' opinion, in a system such as that existing in Belgium, where there were two regimes for imposing measures in respect of persons suffering from mental disorders – one civil and the other criminal – the threshold for each regime had to be reached. The fact that the *Winterwerp* conditions were satisfied in the present case could not justify the "criminal" confinement regime being applied to individuals who did not reach the relevant threshold. The *Winterwerp* conditions were general rules which any detention of an individual of unsound mind had to follow, while section 9 of the Compulsory Confinement Act was the *lex specialis* which had to be complied with if detention was to be lawful within the meaning of Article 5 § 1 of the Convention.

2. The Government

119. The Government argued that the applicants had been placed in compulsory confinement in accordance with the legal procedure in force and that the relevant orders had acquired the force of *res judicata* and were final. The applicants' compulsory confinement had thus been in accordance with a procedure prescribed by law. Subsequent examination of the lawfulness of the compulsory confinement was an *ex tunc* assessment: the social protection divisions at the post-sentencing courts ("CPS"), which had replaced the CDS and were responsible for the execution of confinement orders, could not call into question the initial decision placing the individual concerned in confinement. It was clear from the parliamentary discussions and the Court of Cassation's case-law that the new Compulsory Confinement Act was not intended to affect confinement orders that had become final, thus best ensuring judicial stability. It could not therefore be argued that there was no longer a legal basis for the applicants' compulsory confinement. Moreover, in criminal matters the principle of the application

of the lighter penalty applied only to situations where the new legislation was enacted between the time that the acts were committed and the point that the judgment became final.

120. With regard to the *Winterwerp* criteria, which – in the Government's submission – were not within the scope of the case before the Grand Chamber (see paragraph 96 above), they submitted that in any event these were met in this case. Psychiatrists had confirmed the specific and serious mental disorders from which the two applicants were suffering. The CPS had carried out regular checks to establish whether these disorders persisted, as required by the law. These checks could thus be described as an *ex nunc* examination. In the present case, the domestic courts had found that the applicants' mental health did not allow for their discharge. The Government pointed out that the applicants did not contest the fact that they were suffering from serious mental disorders when they were placed in confinement, and that these disorders persisted.

121. In consequence, the Government did not see how an issue of arbitrary detention could arise: it had never been alleged that the authorities had acted in bad faith or in a misleading way, and the legal framework was clear and foreseeable.

C. The Court's assessment

122. The Court is called upon to determine whether the applicants' continued compulsory confinement fell within one of the permissible grounds for deprivation of liberty under sub-paragraphs (a) to (f) of Article 5 § 1 and whether it was "lawful" for the purposes of that provision.

1. *The general principles established in the Court's case-law on Article 5 § 1 of the Convention*

123. Article 5 of the Convention is, together with Articles 2, 3 and 4, in the first rank of the fundamental rights that protect the physical security of the individual, and as such its importance is paramount. Its key purpose is to prevent arbitrary or unjustified deprivations of liberty (see *Buzadji v. the Republic of Moldova* [GC], no. 23755/07, § 84, 5 July 2016, and *S., V. and A. v. Denmark* [GC], nos. 35553/12 and 2 Others, § 73, 22 October 2018).

124. Sub-paragraphs (a) to (f) of Article 5 § 1 of the Convention contain an exhaustive list of permissible grounds for deprivation of liberty, and no deprivation of liberty will be lawful unless it falls within one of those grounds. Only a narrow interpretation of the exhaustive list of permissible grounds for deprivation of liberty is consistent with the aim of Article 5, namely to ensure that no one is arbitrarily deprived of his liberty (see, for example, *Ilnseher v. Germany* [GC], nos. 10211/12 and 27505/14, § 126, 4 December 2018).

125. Any deprivation of liberty must, in addition to falling within one of the exceptions set out in sub-paragraphs (a) to (f) of Article 5 § 1, be "lawful". Where the 'lawfulness' of detention is in issue, including the question whether 'a procedure prescribed by law' has been followed, the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules thereof (see *Saadi v. the United Kingdom* [GC], no. 13229/03, § 67, ECHR 2008, and *Ilnseher*, cited above, § 135). A period of detention is, in principle, "lawful" if it is based on a court order (see *Jėčius v. Lithuania*, no. 34578/97, § 68, ECHR 2000-IX; *Nevmerjitski v. Ukraine*, no. 54825/00, § 116, ECHR 2005-II (extracts); and *Mooren v. Germany* [GC], no. 11364/03, § 74, 9 July 2009).

126. While it is normally in the first place for the national authorities, notably the courts, to interpret and apply domestic law, the position is different in relation to cases where failure to comply with such law entails a breach of the Convention. This applies, in particular, to cases in which Article 5 § 1 of the Convention is at stake and the Court must then exercise a certain power to review whether national law has been observed (see *Winterwerp*, cited above, §§ 45-46; *Benham v. the United Kingdom*, 10 June 1996, § 41, *Reports of Judgments and Decisions* 1996-III; and *Creangă v. Romania* [GC], no. 29226/03, § 101, 23 February 2012).

127. Compliance with national law is not, however, sufficient: the domestic law must itself be in conformity with the Convention, including the general principles expressed or implied therein (see *Simons v. Belgium* (dec.), no. 71407/10, 28 August 2012, and *Plesó v. Hungary*, no. 41242/08, § 59, 2 October 2012). The general principles implied by the Convention to which the Article 5 § 1 case-law refers include the principle of the rule of law (see *Buzadji*, cited above, § 84, and *S., V. and A. v. Denmark*, cited above, § 73) and, connected to the latter, that of legal certainty (see, among many other examples, *Baranowski v. Poland*, no. 28358/95, § 52, ECHR 2000-III) and the principle of proportionality (see, for example, *Enhorn v. Sweden*, no. 56529/00, § 36, ECHR 2005-I).

128. With regard to the principle of legal certainty, the expression "in accordance with a procedure prescribed by law" requires not only any arrest or detention to have a legal basis in domestic law but also relates to the quality of the law. Where deprivation of liberty is concerned, it is particularly important that the general principle of legal certainty be satisfied. It is therefore essential that the conditions for deprivation of liberty under domestic law be clearly defined and that the law itself be foreseeable in its application, so that it meets the standard of "lawfulness" set by the Convention (see *Khlaifia and Others v. Italy* [GC], no. 16483/12, §§ 91-92, 15 December 2016, and *Z.A. and Others v. Russia* [GC], nos. 61411/15 and 3 Others, § 161, 21 November 2019).

129. Article 5 § 1 requires in addition that any deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness (see, among many other examples, *Winterwerp*, cited above, §§ 37 and 45; *Saadi*, cited above, § 67; and *Ilnseher*, cited above, § 136).

130. The notion of arbitrariness in the respective contexts of sub-paragraphs (b), (d) and (e) also includes an assessment whether detention was necessary to achieve the stated aim (see *Witold Litwa v. Poland*, no. 26629/95, § 78, ECHR 2000-III, and *Saadi*, cited above, § 70). In other words, the deprivation of liberty must be shown to have been necessary in the circumstances (see *Ilnseher*, cited above, § 137, and the references cited therein). The detention of an individual is such a serious measure that it is justified only as a last resort where other, less severe measures have been considered and found to be insufficient to safeguard the individual or public interest which might require that the person concerned be detained (see *S., V. and A. v. Denmark*, cited above, § 77, and *Ilnseher*, cited above, § 137, with further references).

131. Thus, the condition that there be no arbitrariness further demands that both the order to detain and the execution of the detention must genuinely conform to the purpose of the restrictions permitted by the relevant sub-paragraph of Article 5 § 1 (see *Merabishvili v. Georgia* [GC], no. 72508/13, § 186, 28 November 2017, and *Rooman v. Belgium* [GC], no. 18052/11, § 190, 31 January 2019, with further references).

132. Though only sub-paragraphs (c) and (d) refer to the "purpose" ("*but*") 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 sub-paragraphs (see *Merabishvili*, cited above, § 299, and *Rooman*, cited above, § 191).

133. Lastly, it should be reiterated that it is not the Court's task to express a view on the appropriateness of the methods chosen by the legislature of a State to regulate a given field; its task is confined to determining whether the methods adopted and the effects they entail are in conformity with the Convention (see, *mutatis mutandis*, *Taxquet v. Belgium* [GC], no. 926/05, § 83, ECHR 2010, for similar considerations in the context of Article 6 § 1 of the Convention; *Magyar Helsinki Bizottság v. Hungary* [GC], no. 18030/11, § 184, 8 November 2016, and *Magyar Kétfarkú Kutya Párt v. Hungary* [GC], no. 201/17, § 95, 20 January 2020, for cases concerning Article 10 of the Convention; and *Gorzelik and Others v. Poland* [GC], no. 44158/98, § 67, ECHR 2004-I, in the context of Article 11).

2. The requirements with regard to the deprivation of liberty of persons of "unsound mind" within the meaning of Article 5 § 1 (e)

134. As regards the justification of a person's detention under sub-paragraph (e) of Article 5 § 1, the Court reiterates that the term "persons

of unsound mind" in that provision has to be given an autonomous meaning. It does not lend itself to precise definition since its meaning is continually evolving as research in psychiatry progresses (see *Ilnseher*, cited above, § 127).

135. 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 or she must reliably be shown to be of unsound mind, that is, a true mental disorder must be established before a competent authority on the basis of objective medical expertise; secondly, the mental disorder must be of a kind or degree warranting compulsory confinement; thirdly, the validity of continued confinement depends upon the persistence of such a disorder (see, among many other authorities, *Winterwerp*, cited above, § 39; *Stanev v. Bulgaria* [GC], no. 36760/06, § 145, ECHR 2012; *Ilnseher*, cited above, § 127; and *Rooman*, cited above, § 192).

136. In deciding whether an individual should be detained as a person "of unsound mind", the national authorities are to be recognised as having a certain discretion, since it is in the first place for the national authorities to evaluate the evidence adduced before them in a particular case; the Court's task is to review under the Convention the decisions of those authorities (see *Winterwerp*, cited above, § 40, and *Ilnseher*, cited above, § 128). That said, the permissible grounds for deprivation of liberty listed in Article 5 § 1 are to be interpreted narrowly. A mental condition has to be of a certain severity in order to be considered as a "true" mental disorder for the purposes of sub-paragraph (e) of Article 5 § 1 as it has to be so serious as to necessitate treatment in an institution for mental health patients (see *Ilnseher*, cited above, § 129).

137. The relevant time at which a person must be reliably established to be of unsound mind, for the requirements of sub-paragraph (e) of Article 5 § 1, is the date of the adoption of the measure depriving that person of his liberty as a result of that condition. However, as shown by the third minimum condition for the detention of a person for being of unsound mind to be justified, namely that the validity of continued confinement must depend on the persistence of the mental disorder, changes, if any, to the mental condition of the detainee following the adoption of the detention order must be taken into account (see *Ilnseher*, cited above, § 134).

3. *Application of those principles in the present case*

138. The Court will first clarify certain issues concerning the ground for the deprivation of liberty applicable in this case (a), and will then examine whether the applicants' deprivation of liberty was "lawful" within the meaning of Article 5 § 1 of the Convention (b).

(a) **The ground for the deprivation of liberty**

139. In examining whether the applicants' detention could be justified under any of the sub-paragraphs (a) to (f) of Article 5 § 1, the Court observes at the outset that, unlike the applicant in the above-cited *Ilnseher* case, the applicants in the present case have not been convicted. While it was admittedly found that they had physically committed the acts, punishable under criminal law, of which they were accused, the domestic courts had considered that the applicants were suffering from a mental condition which destroyed or seriously affected their discernment or their ability to control their actions within the meaning of section 7 of the Social Protection Act (see paragraph 58 above). They had accordingly ordered the applicants' placement in compulsory confinement which, under domestic law, was a "preventive measure" and not a penalty (see paragraph 27 above). It followed that the applicants were not convicted of an offence and no penalty was imposed on them.

140. Their detention could not, therefore, be justified under sub-paragraph (a) of Article 5 § 1 as detention "after conviction" (see, on this point, *Van Droogenbroeck v. Belgium*, 24 June 1982, § 35, Series A no. 50; *Del Río Prada v. Spain* [GC], no. 42750/09, §§ 123-124, ECHR 2013; and, *mutatis mutandis*, *Ilnseher*, cited above, §§ 144 and 146). Moreover, this point has not been disputed by the parties.

141. It is not in dispute between the parties that the applicants' deprivation of liberty fell within the scope of sub-paragraph (e) of Article 5 § 1 in so far as it relates to the detention of "persons of unsound mind". The Court agrees with this analysis, given that the applicants were found to lack criminal responsibility on account of the mental disorders from which they suffered, and that compulsory confinement is a security measure, the purpose of which is preventive rather than punitive.

142. That Court observes that in other cases against Belgium it has for this reason examined compulsory confinement orders imposed in the absence of a criminal conviction from the point of view of sub-paragraph (e) of Article 5 § 1 (see, for example, *Aerts v. Belgium*, 30 July 1998, § 45, *Reports* 1998-V; *De Donder and De Clippel v. Belgium*, no. 8595/06, § 105, 6 December 2011; *Claes v. Belgium*, no. 43418/09, § 110, 10 January 2013; *Van Zandbergen v. Belgium*, no. 4258/11, § 37, 2 February 2016; and *W.D. v. Belgium*, no. 73548/13, § 122, 6 September 2016; for cases examined under sub-paragraph (a) of Article 5 § 1 when the detention followed a criminal conviction, compare with *Van Droogenbroeck*, cited above, § 35, and *De Schepper v. Belgium*, no. 27428/07, § 39, 13 October 2009).

143. The Court will therefore examine whether, as alleged by the Government and contested by the applicants, the latter's compulsory confinement was lawful within the meaning of Article 5 § 1 (e).

(b) **The lawfulness of the deprivation of liberty**

144. The Court notes that the applicants were placed in compulsory confinement for acts classified as theft and attempted theft by decisions of 18 June 2007 and 14 November 2002 respectively, on the basis of section 7 of the Social Protection Act (see paragraphs 11 and 41 above).

145. No further appeal lies against those two decisions, either to a domestic court or to this Court. Nor have the parties contested that those decisions were taken "in accordance with a procedure prescribed by law" and that the applicants' detention was initially lawful within the meaning of Article 5 § 1 of the Convention.

146. The Court also infers that when the domestic courts ordered the applicants' placement in compulsory confinement, it was not contested that it had been reliably shown that they were of unsound mind and that their mental disorders were of a kind or degree warranting compulsory confinement, as required by the first two conditions of the *Winterwerp* case-law (cited above, § 39; see paragraph 135 above).

147. In contrast, the applicants allege that since the entry into force of the Compulsory Confinement Act on 1 October 2016, there has no longer been a valid legal basis for their detention.

148. The Court will first outline the legislative amendment in issue and the question raised before it (*i*), before observing the manner in which the domestic courts have applied the relevant provisions in the applicants' case (*ii*), and examining whether this approach is compatible with the requirements of Article 5 § 1 (e) of the Convention (*iii*), in order to draw a conclusion as to the lawfulness of the applicants' deprivation of liberty (*iv*).

(i) *The legislative amendment in issue and the question raised before the Court*

149. The Court notes that, under the legislation in force when the initial decisions were taken to place the applicants in compulsory confinement, a compulsory confinement measure could be ordered on the basis of section 7 of the Social Protection Act where an individual had committed an act classified as a criminal offence and if he or she was suffering from a mental disorder or from a severe mental disturbance or defect making him or her incapable of controlling his or her actions (see paragraph 58 above). The fact of committing any act classified as a criminal offence could thus give rise to the compulsory confinement of the individual concerned, without any conditions as to the seriousness of the acts committed.

150. Since the entry into force of the Compulsory Confinement Act, section 9 of that Act now provides that compulsory confinement can only be imposed where a crime or serious offence has been committed which harms or threatens to harm the physical or psychological integrity of another person (see paragraph 79 above). In addition, at the time that the confinement decision is taken, the individual concerned must be suffering

from a mental disorder which has destroyed or seriously reduced his or her capacity for discernment or ability to control his or her actions, and there must be grounds to fear that he or she will carry out further acts causing or threatening to cause harm to the physical or mental integrity of another person on account of the mental disorder, possibly combined with other risk factors.

151. In addition, the Court observes that although the Compulsory Confinement Act 2014 applies in principle to all pending cases (see paragraph 87 above), it does not set out a specific transitional measure for persons who were placed in confinement on the basis of the Social Protection Act 1930 and who committed acts which do not reach the new threshold required by section 9 of the Compulsory Confinement Act (see paragraph 89 above).

152. Thus, the Court notes, and the Government have conceded, that the acts of theft and attempted theft committed by the applicants in the present case could no longer, as things stand, constitute grounds for an individual's compulsory confinement under the 2014 Act, irrespective of his or her mental health.

153. The question which arises in the present case is therefore whether, since the entry into force of the above Act, the applicants' deprivation of liberty can still be considered lawful, given that this new legislation no longer provides for the possibility of placing an individual in compulsory confinement for the acts carried out by the applicants and which formed the basis for their detention. In short, it must be determined whether the introduction of a higher threshold in section 9 of the Compulsory Confinement Act 2014 affected the lawfulness of their detention, having regard to the requirements of Article 5 § 1 (e) of the Convention.

154. On this point, with regard to the applicants' allegation that, since the entry into force of the 2014 Act, they ought to be subject to non-voluntary hospitalisation pursuant to the Law of 26 June 1990 on the protection of persons of unsound mind (see paragraph 91 above) rather than a compulsory confinement measure, the Court considers that it is not required to rule on whether the applicants' situation ought to be governed by the civil regime of non-voluntary hospitalisation rather than that of the compulsory confinement regime governed by the 2014 Act. In the context of the present case, its task is solely to verify whether their deprivation of liberty is lawful and, in particular, having regard to the scope of the case before the Grand Chamber (see paragraphs 102 to 111 above), whether the applicants' continued detention after the entry into force of the Compulsory Confinement Act still has a valid legal basis.

(ii) *Application of the new legislation by the domestic courts in the present case*

155. When asked by the applicants to rule on whether the lawfulness of their compulsory confinement had been affected by the legislative

amendment in issue, the CPS and subsequently, at last instance, the Court of Cassation considered that this was not the case (see paragraphs 27 and 50 above). The Court of Cassation held that the decisions taken in 2007 and 2002 respectively in the applicants' cases had become *res judicata* and the compulsory confinement orders issued against them were final. In the opinion of the Court of Cassation, from that point Article 5 § 1 of the Convention did not prevent a compulsory confinement order from subsequently giving rise to an execution phase which was not governed by the same rules as those in force for the purpose of imposing the order. It concluded that Article 5 § 1 did not mean that a compulsory confinement measure which had become final was no longer lawfully or legally imposed because the legislation had changed during the execution stage. The only consequence of the new legislation was thus that this particular measure could no longer be imposed in the future for the act for which the individual concerned had already been placed in confinement. The Court of Cassation added that the assessment of a detainee's mental condition and the resulting danger to society was not made solely on the basis of the offence for which he or she had been placed in confinement, but also in the light of a range of risk factors which were submitted to the CPS for its assessment.

156. In so doing, and as is also clear from the summary of domestic law and the Government's observations (see paragraph 119 above), the Court of Cassation identified two successive phases of compulsory confinement, governed by different provisions and criteria.

157. The Belgian system of compulsory confinement envisages, firstly, judicial proceedings which result in the decision to place an individual in compulsory confinement. This phase was governed by section 7 of the Social Protection Act 1930 (see paragraph 58 above) and, since 1 October 2016 has been governed by section 9 of the Compulsory Confinement Act 2014 (see paragraph 79 above), which set out the criteria giving rise to a compulsory confinement measure.

158. The decision of the investigating authorities or the trial court which imposes compulsory confinement in accordance with these provisions remains valid throughout the compulsory confinement of the individual concerned so long as no final judgment granting his or her final discharge has been issued (see paragraph 85 above).

159. With regard to the applicants, the decisions ordering their placement in compulsory confinement were issued on 18 June 2007 and 14 November 2002 respectively, on the basis of section 7 of the Social Protection Act (see paragraphs 11 and 41 above).

160. Once the measure has been ordered, there then begins the second phase of compulsory confinement, during which the social protection divisions at the post-sentencing court ("the CPS"; see paragraphs 75 et seq. above), which are specialised courts, review the situation of persons in confinement at regular intervals. During this evaluation, the detainees may

also request changes to the practical arrangements for their confinement or request a discharge.

161. Different rules then apply, particularly with regard to the conditions for final discharge of an individual in compulsory confinement, as is the applicants' main request in the present case. Final discharge was previously governed by section 18 of the Social Protection Act and is now governed by section 66 of the Compulsory Confinement Act (see, respectively, paragraphs 65 and 84 above).

162. Under this latter provision, the nature of the punishable acts committed by the individual concerned which gave rise to his or her compulsory confinement is not, as such, taken into account during the periodic review of the confinement. Nevertheless, it requires that the CPS assess whether the mental disorder of the individual in compulsory confinement has stabilised sufficiently and whether there is a risk that the punishable acts in question will be committed again. Here, the CPS must have regard to a range of risk factors including, where appropriate, the acts for which the individual was initially placed in compulsory confinement (see paragraph 36 above).

163. In short, having regard to the domestic law as interpreted by the Court of Cassation in the present case, given that the applicants had not been granted final discharge, their deprivation of liberty continued to have a valid legal basis, that is, the compulsory confinement orders imposed in 2007 and 2002 respectively.

164. The Court notes that the interpretation adopted by the domestic courts in the present case corresponds to the legislature's intention as disclosed by the parliamentary proceedings prior to the enactment of the Law of 4 May 2016 amending the 2014 Act. These indicate that the Compulsory Confinement Act was not intended to affect decisions in respect of persons suffering from mental disorders who had committed punishable acts that were capable of giving rise to confinement under the Social Protection Act 1930 but for which compulsory confinement would no longer be possible under the new legislation (see paragraph 82 above).

165. The legislature thus chose to maintain the binding force of compulsory confinement decisions imposed under the Social Protection Act. It follows that, with regard to individuals placed in compulsory confinement on the basis of a decision which had acquired the force of *res judicata* prior to 1 October 2016, the effects of the Compulsory Confinement Act are limited to decisions on extending the compulsory confinement, the practical arrangements for its execution and on those individuals' possible discharge.

166. Reiterating that its task is not to express a view on the appropriateness of the methods chosen by the legislature (see paragraph **Error! Reference source not found.** above), the Court considers that the approach taken by the domestic courts in the present case is neither arbitrary nor manifestly unreasonable.

167. It remains to be determined whether it complies with the requirements of sub-paragraph (e) of Article 5 § 1 of the Convention.

(iii) Compatibility of the approach taken with Article 5 § 1 (e)

168. Article 5 § 1 (e) of the Convention does not specify the possible acts, punishable under criminal law, for which an individual may be detained as being "of unsound mind". Nor does that provision identify the commission of a previous offence as a precondition for detention (see *Ilnseher*, cited above, § 157). It merely requires that it has reliably been established that the individual is of unsound mind, that the disorder is of a kind or degree warranting compulsory confinement and that the disorder persists throughout the entire period of the confinement (see paragraph 135 above).

169. Thus, the Convention does not require the authorities, when assessing the persistence of the mental disorders, to take into account the nature of the acts committed by the individual concerned which gave rise to his or her compulsory confinement.

170. It is not contested that the first two conditions listed in paragraph 168 above were met in the present case (see also paragraph 146 above).

171. Turning to the third condition, namely the persistence of the disorder, without which the confinement cannot be continued, the Court notes that the applicants expressly state that they do not dispute that this condition is met and that they continue to suffer from the disorders in question (see paragraphs 115 and 118 above).

172. The Court nonetheless reiterates that it is the individual's current state of mental health which must be taken into consideration. In this respect, the assessment carried out by the domestic courts is necessarily changeable, since it must take into account any changes to the mental condition of the detainee following the adoption of the compulsory confinement order (see *Ilnseher*, cited above, § 134).

173. The Court observes that the third condition in the *Winterwerp* judgment (cited above, § 39) has been incorporated into domestic law by the introduction of an automatic periodic review (see paragraph 75 above), during which individuals in compulsory confinement are able, among other things, to argue that their mental-health condition has stabilised and that they no longer represent a danger to society, and to request various practical arrangements for the execution of the confinement order, including, as in the applicants' case, their final discharge.

174. Under section 66 of the Compulsory Confinement Act, final discharge can only be granted on completion of a three-year probationary period (see, on this point, the assessment with regard to Article 5 § 4 of the Convention below), provided that the mental disorder in question has stabilised sufficiently for there no longer to be reasonable grounds to fear

that, on account of his or her mental disorder, possibly combined with other risk factors, the individual concerned will again commit further punishable acts (see paragraph 84 above). Thus, only the current mental-health condition of the confined person and the current risk of reoffending, that is, at the time that the review is carried out, are taken into account in deciding whether the individual concerned can be released or whether the continued placement in compulsory confinement is justified.

175. It was in the light of those considerations that the CPS examined the applicants' requests for final discharge (see paragraph 21 above). Thus, they did not take account of the nature of the punishable acts which the applicants had committed, and which had given rise to the compulsory confinement measure. In contrast, they assessed whether the applicants' mental disorders had stabilised to a sufficient degree. In the light of the information available to them, they considered that they had not (see paragraphs 22 and 48 above).

176. In so doing, the CPS examined whether the mental disorders persisted, as required by sub-paragraph (e) of Article 5 § 1 of the Convention.

177. In any event, the Court notes that during the most recent periodic review of the applicants' situation, the CPS considered that there still existed a high risk that they would commit further violent crimes (see paragraphs 37 and 53 above).

(iv) *Conclusion as to the lawfulness of the detention*

178. Having regard to the scope of the dispute before the Grand Chamber (see paragraphs 102 to 111 above) and to the foregoing considerations, the Court concludes that the applicants' detention continues to have a valid legal basis and that their deprivation of liberty is lawful.

179. It follows that there has been no violation of Article 5 § 1 of the Convention.

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

180. The applicants also alleged a violation of Articles 5 § 4 and 13 of the Convention. They complained that it was impossible under the law to secure their immediate and final discharge.

181. Article 5 § 4 of the Convention provides a *lex specialis* in relation to the more general requirements of Article 13 (see *A. and Others v. the United Kingdom* [GC], no. 3455/05, § 202, ECHR 2009, and *Khlaifia and Others*, cited above, § 266). The complaint will therefore be examined under Article 5 § 4 of the Convention alone, which reads as follows:

"4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

A. The Chamber judgment

182. The Chamber noted that in the applicants' case the condition laid down by section 66 of the Compulsory Confinement Act, namely that of having served a three-year probationary period before being eligible for final discharge, had been only one additional ground among the various reasons given by the social protection bodies for refusing their immediate and final discharge. The Chamber further noted that the applicants had not argued, before the Court of Cassation or before the Court, that the psychiatric disorders which had justified their compulsory confinement were no longer present or that their mental-health conditions had improved sufficiently to allow for discharge. It accordingly held that there had been no violation of Article 5 § 4 of the Convention.

B. The parties' observations

1. The applicants

183. The applicants pointed out that the Social Protection Act 1930 had provided that an individual could be granted final discharge at any moment where his or her mental health had improved sufficiently and if the conditions for his or her social reinsertion were satisfied (see paragraph 65 above). In their opinion, this was compatible with the requirements of Article 5 § 4 of the Convention. This option was no longer available under section 66 of the Compulsory Confinement Act 2014: it was no longer possible to put an immediate end to a compulsory confinement measure in respect of an individual who no longer met the *Winterwerp* criteria. The text of the Act was thus incompatible with the requirements of Article 5 § 4. The applicants considered that this was what the Court of Cassation had acknowledged in its judgments of 9 April and 11 June 2019, delivered in other proceedings (see paragraph 86 above).

2. The Government

184. In the Government's view, in so far as the applicants' detention was not unlawful, there was no basis for the argument that they should be granted immediate and final discharge. In any event, the Government argued that the Compulsory Confinement Act provided for effective review of compulsory confinement through automatic periodic reviews and an urgent procedure (see paragraph 76 above). An appeal on points of law was possible against CPS decisions regarding the practical arrangements surrounding a confinement order and final discharge (see paragraph 78

above). In the present case, the applicants had been able to have the lawfulness of their compulsory confinement reviewed at regular intervals. Their arguments had been heard and discussed by the CPS and the Court of Cassation, which had held them to be ill-founded. The mere fact that the applicants' appeals had been unsuccessful could not negate the effectiveness of the review conducted by the domestic courts.

185. The Government emphasised that the conditions for a final discharge as set out in section 66 of the Compulsory Confinement Act had not been met in the applicants' case: they had not completed a three-year probationary period and they had not shown, or even alleged, that their mental disorders had stabilised sufficiently to allow for their release. The Government also emphasised the interpretation subsequently given by the Court of Cassation to the condition of a three-year probationary period. They concluded that the requirements of Article 5 § 4 had been satisfied.

C. The Court's assessment

1. General principles laid down in the Court's case-law

186. Article 5 § 4 entitles an arrested or detained person to institute proceedings bearing on the procedural and substantive conditions which are essential for the "lawfulness", in the sense of the Convention, of his or her deprivation of liberty. The notion of "lawfulness" under paragraph 4 of Article 5 has the same meaning as in paragraph 1, so that the arrested or detained person is entitled to a review of the "lawfulness" of his detention in the light not only of the requirements of domestic law but also of the Convention, the general principles embodied therein and the aim of the restrictions permitted by Article 5 § 1. Article 5 § 4 does not guarantee a right to judicial review of such breadth as to empower the court, on all aspects of the case including questions of pure expediency, to substitute its own discretion for that of the decision-making authority. The review should, however, be wide enough to bear on those conditions which are essential for the "lawful" detention of a person according to Article 5 § 1 (see *A. and Others v. the United Kingdom*, cited above, § 202, and *Khlaifia and Others*, cited above, § 128, with further references).

187. In guaranteeing to persons arrested or detained a right to institute proceedings, Article 5 § 4 also proclaims their right, following the institution of such proceedings, to a speedy judicial decision concerning the lawfulness of detention and ordering its termination if it proves unlawful (see *Mooren*, cited above, § 106; *Idalov v. Russia* [GC], no. 5826/03, § 154, 22 May 2012; *Khlaifia and Others*, cited above, § 131; and *Ilnseher*, cited above, § 251).

2. Application of those principles in the present case

188. The Court reiterates that it has found no violation of Article 5 § 1 of the Convention (see paragraph 179 above). However, the mere fact of finding no breach of the requirements of paragraph 1 of Article 5 does not mean that it is dispensed from carrying out a review of compliance with paragraph 4; the two paragraphs are separate provisions and observance of the former does not necessarily entail observance of the latter (see *Douiyeb v. the Netherlands* [GC], no. 31464/96, § 57, 4 August 1999, and *Mooren*, cited above, § 88).

189. The applicants submit that, in view of the unlawfulness of their detention, they ought to have been able to secure their immediate and unconditional discharge. However, the Compulsory Confinement Act does not provide for this possibility.

190. The Court indicates at the outset that, given its conclusion that the applicants' detention is lawful within the meaning of Article 5 § 1 of the Convention, Article 5 § 4 does not require in the present case that their immediate release should be ordered.

191. However, this provision guarantees that where "a person of unsound mind" is detained for an indefinite or lengthy period he or she is in principle entitled, at any rate where there is no automatic periodic review of a judicial character, to take proceedings "at reasonable intervals" before a court to put in issue the "lawfulness" – within the meaning of the Convention – of his or her detention (see *Stanev*, cited above, § 171).

192. The applicants do not allege that they have been deprived of this possibility in the present case. The Court notes that the applicants have benefited from annual automatic judicial review by the CPS, to which they have been able to submit requests concerning the practical arrangements for their compulsory confinement, including requests for discharge. They were subsequently able to submit their complaints against the CPS's judgments for examination by the Court of Cassation. In the applicants' case, less than one month elapsed between the CPS judgment and the judgment by the Court of Cassation. The applicants have presented no arguments in support of a conclusion that they did not have at their disposal a remedy before a judge ruling promptly on the lawfulness of their detention and on their applications for release.

193. The Court notes that the applicants complain only about the fact that it is impossible under the law to secure their immediate and final discharge on account of the three-year probationary period imposed by section 66 of the Compulsory Confinement Act. In this connection, it notes that this provision places two cumulative conditions for the final discharge of a person in compulsory confinement (see paragraph 84 above). This provision requires, firstly, the completion of a three-year probationary period and, secondly, that the mental disorder has stabilised sufficiently for there no longer to be reasonable grounds to fear that, regardless of his or her

mental disorder, possibly combined with other risk factors, the individual in compulsory confinement will commit further offences which harm or threaten to harm the physical or mental integrity of another person.

194. The statutory condition requiring the completion of a three-year probationary period thus seems in principle to thwart the right, enshrined in Article 5 § 4, to obtain a judicial decision ordering the termination of detention if it proves unlawful (see paragraph 187 above).

195. That being stated, the Court reiterates that its role is not to decide *in abstracto* whether a legislative provision is compatible with the Convention. It must limit itself to verifying whether the manner in which the law was applied in the particular circumstances of the case complied with the Convention (see *Paradiso and Campanelli v. Italy* [GC], no. 25358/12, § 180, 24 January 2017).

196. The Court observes, however, that in the present case the domestic courts refused to grant the applicants' request for final discharge on the grounds that neither of the two conditions laid down by section 66 of the Act had been met: their state of mental health had not improved sufficiently and they had not completed a three-year probationary period (see paragraphs 22 and 48 respectively above). The applicants did not dispute that their mental disorders persisted; nor did they claim that these disorders had stabilised sufficiently for them to represent no further danger to society (see paragraph 118 above). The condition of having completed a three-year probationary period was therefore not decisive, since it was only one of the grounds on which the CPS refused to grant their immediate and final discharge.

197. Furthermore, the Court welcomes the fact that in the meantime the Court of Cassation has interpreted the impugned provision in the light of Article 5 §§ 1 and 4 of the Convention, holding that an individual in compulsory confinement who is no longer mentally ill and who is no longer dangerous must be granted final discharge, even if the three-year probationary period has not yet been completed (see paragraph 86 above).

198. Having regard to the above considerations, the Court concludes that there has been no violation of Article 5 § 4 of the Convention.

FOR THESE REASONS, THE COURT,

1. *Upholds*, unanimously, the Government's preliminary objection concerning the scope of the case;

2. *Holds*, by fourteen votes to three, that there has been no violation of Article 5 § 1 of the Convention;

3. *Holds*, by fourteen votes to three, that there has been no violation of Article 5 § 4 of the Convention.

Done in English and French, and notified in writing on 1 June 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Johan Callewaert	Robert Spano
Deputy to the 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) Joint dissenting opinion of Judges Serghides and Felici;
(b) Dissenting opinion of Judge Pavli.

R.S.O.
J.C.

JOINT DISSENTING OPINION OF JUDGES SERGHIDES AND FELICI

(Translation)

1. The case concerns the alleged unlawfulness of the applicants' continued compulsory confinement after a legislative amendment which restricted the acts for which a confinement measure could be imposed. The applicants also complain that it was impossible for them to obtain immediate and final discharge.

2. With all due respect to the majority, we are unable to share their opinion that there has been no violation of Article 5 §§1 and 4 of the Convention in the present case.

3. Our starting point, like the majority's (see paragraphs 123-124 of the judgment) is that, together with Articles 2, 3 and 4, Article 5 of the Convention is in the first rank of the fundamental rights that protect the physical security of the individual, and as such its importance is paramount. Its key purpose is to prevent arbitrary or unjustified deprivations of liberty (see *Buzadji v. Republic of Moldova* [GC], no. 23755/07, § 84, 5 July 2016, and *S., V. and A. v. Denmark* [GC], no. 35553/12 and 2 others, § 73, 22 October 2018).

Sub-paragraphs (a) to (f) of Article 5 § 1 contain an exhaustive list of permissible grounds on which individuals may be deprived of their liberty and no deprivation of liberty will be lawful unless it falls within one of those grounds.

Only a narrow interpretation of the exhaustive list of permissible grounds for deprivation of liberty is consistent with the aim of Article 5, namely to ensure that no one is arbitrarily deprived of his or her liberty (see, for example, *Ilnseher v. Germany* [GC], nos. 10211/12 and 27505/14, § 126, 4 December 2018).

4. In the present case, the applicants submit that since the entry into force of the Compulsory Confinement Act 2014 there has no longer been a legal basis for their detention and that it is therefore in breach of Article 5 § 1 (e) of the Convention. They refer to the difference between section 7 of the Social Protection Act and section 9 of the Compulsory Confinement Act with regard to the categories of offences which can give rise to a compulsory confinement measure.

5. If the general principles set out above (§ 3) are to be applied in the present case, we are of the opinion that the most appropriate decision would be to find a violation of Article 5 § 1.

6. The majority, rightly in our view, accept the domestic courts' conclusions that the applicants' compulsory confinement, under domestic law, amounts to a "preventive measure" and not a penalty. It follows that

the applicants were not convicted of an offence and no penalty was imposed on them. Their detention could not therefore be justified under sub-paragraph (a) of Article 5 § 1 as detention "after conviction" (see paragraphs 139-140 of the judgment).

7. In consequence, it is necessary to stress that the applicants' detention fell within the scope of sub-paragraph (e) of Article 5 § 1 in so far as it relates to the detention of persons of unsound mind, for the following reasons: (i) they were held not to be criminally responsible for their actions on account of the mental disorders from which they were suffering; and (ii) the aim of the confinement measure was preventive (protection of society), rather than punitive.

8. Thus, while we subscribe to this analysis by the majority, we consider that they have not drawn all the ensuing consequences from it.

9. Under the Social Defence Act 1930, any offence could give rise to compulsory confinement. Since the entry into force of the Compulsory Confinement Act, the relevant act must now be an offence that harms or threatens to harm the physical or mental integrity of another person. The condition of having committed an offence labelled in this way is now supplemented by two further conditions, namely that the individual concerned must be suffering from a mental disorder which has destroyed or seriously reduced his or her capacity for discernment or ability to control his or her actions; and that there must be a danger of reoffending.

10. In the present cases, the Court of Cassation held that Article 5 § 1 of the Convention did not prevent a compulsory confinement order, imposed by a decision which had acquired legal force, from becoming final in its turn and subsequently giving rise to an execution phase, which was not governed by the same rules as those in force when imposing the order. It concluded from this that Article 5 § 1 did not mean that a compulsory confinement measure which had become final was no longer lawfully or legally imposed because the legislation had changed during the execution stage. Thus, the only consequence of the new legislation was that this particular measure could no longer be imposed in the future for the act for which the applicant had already been placed in confinement. The majority consider that the approach taken by the domestic courts corresponds to the intention of the legislature which enacted the Compulsory Confinement Act and chose to maintain the binding force of compulsory confinement decisions imposed under the Social Protection Act, and that it is accordingly neither arbitrary nor manifestly unreasonable (see paragraph 166 of the judgment).

11. In our opinion, however, such reasoning is applicable solely to a criminal conviction, in respect of which the law as applicable at the time of the acts in question irrevocably determines the penalty. It could therefore have been envisaged had the applicants' detention fallen within the scope of sub-paragraph (a) of Article 5 § 1, which is not the case here. In contrast, this reasoning is hardly acceptable with regard to a preventive measure of

unlimited duration such as compulsory confinement which, by its nature, calls for regular review.

12. Indeed, compulsory confinement can only be validly maintained where there persists a mental disorder of a kind or degree warranting compulsory confinement, in addition to any other conditions imposed by the applicable national law. It is for this reason that sub-paragraph (e) of Article 5 § 1 requires regular review of the lawfulness and thus the necessity of the confinement. It follows that, in essence, the "necessity" – and thus also the lawfulness – of such a measure must be assessed *ex nunc*, and not *ex tunc*. The confinement of individuals suffering from mental disorders who have been declared criminally insane follows a logic that is totally different from a criminal conviction. We thus perceive a certain contradiction in the reasoning of the majority, which, on the one hand, indicates that compulsory confinement falls outside the criminal sphere but, on the other hand, applies criminal-type reasoning with regard to the imposition and execution of the measure.

13. Nevertheless, in our opinion, there is no longer a legal basis for the applicants' detention. In this connection, it should be pointed out that, in accordance with the Court's case-law, the lawfulness of detention under Article 5 § 1 of the Convention is required in respect of both the ordering and the execution of the measure entailing deprivation of liberty (see *Engel and Others v. the Netherlands*, 8 June 1976, § 68 in fine, Series A no. 22; *Winterwerp v. the Netherlands*, 24 October 1979, § 39, Series A no. 33; and, in the same vein, *Rooman v. Belgium* [GC], no. 18052/11, § 191, 31 January 2019). Thus, it is not enough that the applicants' initial compulsory confinement was decided "in accordance with a procedure prescribed by law"; the execution of this measure must also comply with domestic law and with the purpose of Article 5, which is to protect every individual from arbitrariness.

14. However, the domestic law as amended by section 9 of the Compulsory Confinement Act has added two supplementary conditions to that laid down by the previous Social Protection Act in order for compulsory confinement to be valid: in addition to a mental disorder, the legislation now requires that the individual concerned must have committed a crime or serious offence that has harmed or threatened the physical or mental integrity of another person, and that there is a danger of reoffending. Thus, in Belgian law, these conditions must be satisfied cumulatively.

15. Like the other conditions, the new condition regarding the nature of the offence is accordingly one of the "procedures prescribed by law" required under Article 5. As indicated above in the context of sub-paragraph (e) of Article 5 § 1, compliance with all of these conditions must be assessed *ex nunc*. It would be unreasonable and highly artificial to accept that one part of the conditions set out in Article 5 § 1 (e) is to be assessed *ex nunc* and another part *ex tunc*.

16. Having regard to these considerations, we had no option but to conclude that the domestic courts, which did not apply *ex nunc* the new condition introduced by section 9 of the Compulsory Confinement Act in the present case, clearly failed to comply with the "procedures prescribed by law" as required under Article 5. In consequence, we consider, unlike the majority, that there has been a violation of Article 5 § 1 (e) of the Convention.

17. Furthermore, the majority are mistaken in relying on the absence of transitional measures in the new legislation, since, by nature, in the area governed by Article 5 § 1 (e) this Act was immediately applicable. Indeed, the Minister of Justice had stated before the House of Representatives that the CPS were required to review decisions that had become final with the necessary "clemency".

18. In our opinion, any other conclusion would lead to arbitrary results. We cannot see how it is possible to defend a situation where it is considered, on the one hand, that compulsory confinement will in future not be justified for persons who commit acts such as those committed by the applicants in this case, but that, at the same time, it is unnecessary to assess whether the confinement of persons detained before the entry into force of the new law is still justified, again in the light of the same considerations which led to the enactment of that law.

19. In conclusion, we are unable to concur with the majority's finding that two individuals suffering from mental disorders which have destroyed or seriously reduced their capacity for discernment and who committed acts that did not harm the integrity of another person may or may not be subjected to a measure as serious as compulsory confinement without limit of time solely on the basis of whether they were judged before or after the entry into force of the Compulsory Confinement Act 2014.

20. Under Article 5 § 4, the applicants clearly complained in their application form that they could not secure immediate discharge.

21. According to the Court's case-law, the notion of "lawfulness" under Article 5 § 4 has the same meaning as in Article 5 § 1 (see, in particular, *A. and Others v. the United Kingdom* [GC], no. 3455/05, § 202, ECHR 2009). Thus, the conditions to be met under Article 5 § 4 necessarily reflect those which apply under Article 5 § 1. How can one imagine that the determination of the lawfulness of detention (Article 5 § 4) is not based on the same criteria as those which permitted this detention *ab initio* (Article 5 § 1)?

22. As stressed above, however, the conditions for lawfulness under Article 5 § 1 are cumulative, which means that the detention will be illegal until such time as all these conditions have been met. This requires the existence not only of a metal disorder but also of an adequate legal basis – to be assessed *ex nunc*. It is only where all these conditions are fulfilled that compulsory confinement can be lawful under Article 5 § 1. Accordingly,

where one of these conditions is not met, even when the mental disorder persists, the compulsory confinement would no longer be lawful, entailing an obligation under Article 5 § 4 to end it, failing which it would be arbitrary. We consider that maintaining a compulsory confinement measure in the absence of one of the conditions which constituted its initial lawfulness is completely illegal and thus contrary to Article 5 § 4, as in the present case.

23. Having regard to the foregoing, we cannot agree with the majority's decision not to mention the need for the Belgian authorities to bring to an end an arbitrary situation which is the direct consequence of the finding of a violation of Article 5 § 1. In the present case, there has also been a violation of Article 5 § 4 of the Convention.

24. This broad reading of Article 5, the only one which secures effective protection of the right guaranteed therein and which is in line with the approach taken by the Court with regard to interpretation of the Convention's provisions, has, however, not been followed by the majority; on the contrary, they have opted for a restrictive interpretation of the rights in issue. When called upon to choose between two possible interpretations of a single Convention provision, the Court, having regard to the aim and the purpose of the provision, and thus following a teleological interpretation and the principle of effectiveness, has refused the restrictive interpretation and has given a more extensive interpretation of the provision (see *Wemhoff v. Germany*, no. 2122/64, 27 June 1968, which concerned Article 5 § 3 of the Convention, and *Delcourt v. Belgium*, no. 2689/65, 17 January 1970, a judgment dealing with the right to a fair hearing, and in which the Court decided that in a democratic society, within the meaning of the Convention, the right to fair administration of justice held such a prominent place that a restrictive interpretation of Article 6 § 1 would not correspond to the aim and the purpose of that provision).

25. In conclusion, and in the light of the foregoing considerations, we reiterate that we are completely unable to subscribe to the position taken by the majority and emphasise that there has been a violation of Article 5 §§ 1 and 4 in the present case.

DISSENTING OPINION OF JUDGE PAVLI

1. I regret that I am unable to agree with the Grand Chamber majority's finding that there has been no violation of the applicants' rights under either Article 5 § 1 or Article 5 § 4 of the Convention. For the reasons provided below, I consider that both Convention provisions have been violated in this case.

2. The current controversy stems from a significant change in the Belgian legal regime governing the compulsory confinement of persons with mental disabilities who have committed acts classified as criminal offences, through the enactment of a new law in May 2014 which replaced legislation dating back to 1930. The introduction of the Compulsory Confinement Act sought to facilitate the social reintegration of persons subject to compulsory confinement within the penitentiary system, which is the most restrictive form of involuntary commitment in the Belgian system.

A. The Introduction of a "Dangerousness Threshold" in the 2014 Act

3. One of the key reforms introduced by the 2014 Act involved a tightening of the criteria for justifying both the original imposition and the continued maintenance of compulsory confinement measures by setting a baseline level of social dangerousness. Whereas prior legislation allowed the confinement of a person suffering from a mental disorder who had been charged with any offence, irrespective of its gravity, the 2014 Act requires, among other criteria, that the person should have committed "a crime or serious offence that has harmed or could have harmed the physical or mental integrity of another person" (see paragraph 79 of the judgment).

4. In defending the proposed changes during the parliamentary procedure, the Minister of Justice indicated that the proposed "threshold" of dangerousness was meant to avoid the imposition of a "serious" and "open-ended" form of deprivation of liberty for "relatively minor offences"; and that it would be disproportionate to do so for "acts which did not reveal any real danger to society" (see paragraph 81 of the judgment). This raised obvious questions as to the legal position of those persons already subject to compulsory confinement who had *never* committed any offences reaching the new threshold of dangerousness. The 2014 Act did not include any transitional provisions aimed at addressing the situation of confined persons in this class; instead, the Minister of Justice indicated that the relevant authorities should examine their continued confinement, in due course, "with the necessary clemency" (see paragraph 82 of the judgment).

5. It is therefore not surprising that the current applicants have taken issue with the transitional regime of the 2014 Act: clemency is a laudable virtue in governance and other domains, but it has little to offer in terms of the legality of indefinite detention. Mr Denis and Mr Irvine have never been

charged with any crimes against "the physical or mental integrity of another person"; they have been subject to compulsory confinement since 2007 and 2002, respectively, for acts classified as offences against property. They have argued, both domestically and before this Court, that their continued confinement after the entry into force of the 2014 Act lacked a legal basis and was rendered arbitrary by the lack of sufficiently clear transitional provisions in that Act (see paragraphs 103-106 of the judgment). They invoked the acknowledgment by Belgian officials that domestic courts had made "improper use" of the pre-2014 legislation by committing, under criminal law, persons who did not pose a genuine danger to society (see paragraph 117 of the judgment). However, the authorities did not consider that it was necessary to take any immediate measures to rectify past mistakes or abuses, other than by way of discretionary clemency at some future time. That is a compelling argument, in my view, to which neither the respondent Government nor the Grand Chamber judgment has provided a satisfactory answer.

B. The Transitional Regime Governing Continued Compulsory Confinement

6. The Government have argued that there was, in fact, a transitional regime in place that met the requirements of Article 5 § 1 (e) of the Convention in relation to the applicants' continued detention. I am unable to agree with that position: the 2014 Act did set forth a transitional *procedure*, but provided no substantive guidance or a sufficiently speedy process for reviewing how the new threshold of dangerousness was to be applied to the applicants' situation. As a result, the decisions of the national authorities under the 2014 Act extending the applicants' confinement in the penitentiary system suffered from a significant lack of foreseeability and arbitrariness.

7. To begin with, the new threshold of dangerousness under the 2014 Act applies both to a fresh decision to authorise compulsory confinement and to any subsequent decisions to maintain the same measure or, conversely, order the committed person's discharge. According to section 66 of the Act, a detainee may obtain final discharge provided that his mental disorder has stabilised sufficiently for there no longer to be reasonable grounds to fear that the detainee "will *again* commit offences" against another person's physical or mental integrity (see paragraph 84 of the judgment). But how is that standard to be applied to a detainee who has *never* committed any offences reaching such a level of gravity? There was no clear answer to that question in the Act, its legislative history or the oral submissions made by Government counsel at the Grand Chamber hearing, in response to specific questions on this point.

8. There is no convincing answer in today's judgment either: the majority finds that the nature of the original act committed by the detainee is "not, as such, taken into account during the periodic review of the confinement" but concedes that nevertheless "the [social protection division] must have regard to a range of risk factors including, where appropriate, the acts for which the individual was initially placed in compulsory confinement" (see paragraph 162 of the judgment). It concludes, however, that only "the current mental-health condition of the confined person and the current risk of reoffending" are taken into account in making decisions on continued confinement (see paragraph 174 of the judgment). With respect, I find this bifurcated line of reasoning hard to reconcile not only with the plain language of section 66, but also the interpretation of the same provision adopted by the Belgian Court of Cassation in the case of the first applicant, finding that the decision ought to be taken *inter alia* "in the light of the offence for which confinement had been imposed" (see paragraph 36 of the judgment). Furthermore, the section 66 review does not require an assessment of *any* "risk of reoffending", but a risk of "reoffending" reaching a certain level of dangerousness that corresponds to the offence originally committed. It is not clear to me how a detainee who has never committed a crime against another person's integrity can be deemed to present a risk of "reoffending" (that is, committing again) a crime of the same gravity.

9. The difficulties of applying section 66 to the situation of the current applicants, in the absence of any proper guidance by the legislature, are also manifest in my view in the decisions adopted by the national authorities in their specific cases. I find nothing in those decisions that would suggest that the social protection divisions or the courts have found a way to reconcile or mitigate the inherent vagueness and lack of foreseeability in the application of section 66 of the 2014 Act to the situation of the current applicants (and others detainees in the same category).

10. Preventive detention for an indefinite period is one of the harshest restrictions of personal liberty contemplated by the Convention, whose necessity as a measure of last resort must be clearly established (see paragraph 130 of the judgment and the cases cited therein). Seen from this perspective, the Belgian 2014 Act was based on a *presumption* that only persons with mental disabilities presenting a certain baseline level of social dangerousness should be subjected to the harshest form of involuntary commitment available in that jurisdiction. Consistent with such a presumption, an Article 5-compliant transitional regime would have required, in my view, a process whereby a review of the legality of the continued commitment of persons in the applicants' situation would be carried out (i) in a speedy fashion upon the entry into force of the 2014 Act; (ii) with a view to assessing whether, following their original confinement for lesser offences, they had nevertheless committed or attempted offences

against another person's integrity or showed a clear propensity to do, not based on mere conjecture; and (iii) which would be capable of ordering their immediate discharge from the penitentiary system if those conditions were not met.

11. The transitional arrangements provided for in section 135 of the Act (see paragraph 88 of the judgment) do not come close to meeting such requirements. First, they did not address in any specific way the situation of those detainees who had never committed a threshold offence. Secondly, they provide for the issuing of an opinion by the director or person responsible for treatment within six months of the 2014 Act's entry into force, but without any substantive guidance for the application of section 66 to those in the applicants' situation. Thirdly, no final discharge was possible before the expiration of the automatic, three-year probationary period, at least prior to the interpretation adopted by the Court of Cassation in its April and June 2019 decisions (see paragraphs 84 and 86 of the judgment).

12. It is our established case-law that where any form of deprivation of liberty is concerned, it is particularly important that the general principle of legal certainty be satisfied. It is therefore essential that the conditions for deprivation of liberty under domestic law be clearly defined and that the law itself be foreseeable in its application, so that it meets the standard of "lawfulness" set by the Convention (see paragraph 128 of the judgment and cases cited therein). I consider that sections 66 and 135 of the Belgian Compulsory Confinement Act (2014), as applied in the current applicants' case, did not meet these standards. As a result, the applicants' continued detention under that Act was in violation of Article 5 § 1 (e) of the Convention.

13. The majority's finding of no violation in this respect rests on the arguments that Article 5 § 1 (e) does not require that a person "of unsound mind" ought to have committed a previous offence in order to be lawfully detained (see paragraph 168 of the judgment); and that, if such an offence has in fact given rise to the original confinement, the national authorities are not required to take account of its nature in assessing the legality of the person's ongoing confinement based on a persisting mental disorder (see paragraph 169 of the judgment). These arguments are beside the point, in my view: we judge the legality and potential arbitrariness of a detention based on the domestic legal regime that has been actually used, in the specific case(s) before us, to deprive an applicant of his or her liberty; and the two above-mentioned factors are in fact conditions for the legality of the applicants' continued detention under *that* specific national regime. Another crucial factor under that same regime is a risk of recommitting an offence *meeting a certain level of gravity* (cf. the conclusion in paragraph 175 of the judgment). As I have argued, the lack of clarity in the application of that latter standard creates a degree of arbitrariness that cannot be cured by the

abstract application of the *Winterwerp* criteria, removed from the actual detention regime applied in these cases.

C. "Without Losing Sight of the General Context"

14. There is yet another important consideration that receives only a brief mention in the judgment: the structural problems affecting "an appreciable number of persons" subject to compulsory confinement in Belgium who find themselves in the psychiatric wings of prisons (see paragraph 110 of the judgment and the cases cited therein). These problems concern primarily the lack of proper psychiatric treatment and long-term detention, sometimes for decades, under conditions of serious therapeutic neglect – a situation that raises not only questions of the legality of detention, but also potentially of inhuman and degrading treatment of these detainees within the meaning of Article 3 of the Convention. As recently as April 2021, a Chamber judgment in the case of *Venken and Others v. Belgium* (no. 46130/14 and 4 others, § 125, 6 April 2021, not yet final) found that a significant number of detainees in the prison wings (several hundred, to be precise) continue to find themselves under "inappropriate conditions" of detention. While a considerable number of places has been created in recent years in the so-called "external circuit" of the compulsory confinement regime – primarily through the creation of two forensic psychiatry centres that offer adequate treatment – a significant number of detainees in the prison psychiatric wings are either not eligible or unable to secure a spot in the external centres (ibid).

15. This situation had important implications for the current applicants at the time of their applications for discharge: they had a strong Convention interest not merely in regaining their freedom, or at least a greater measure thereof outside the criminal confinement regime, but also in being removed from a penitentiary system where their Article 3 and 5 rights were under threat of persistent violation. I am in agreement with the majority position that, in formal terms, the applicants were late in bringing their Convention claims based on inadequate treatment, which had therefore to be considered inadmissible (see paragraph 110 of the judgment). In a broader sense, however, nothing prevents the Court from taking note of its own recent judicial findings regarding the structural problems in the Belgian confinement regime. This is an overarching consideration that, in my view, should have led the Grand Chamber to apply much closer scrutiny to the flaws of the transitional regime under the 2014 Act.

16. The structural problems may also provide some insight into the rather inexplicable choice of the Belgian authorities not to put in place a proper transitional regime for a class of detainees that, by their own admission, no longer belonged in criminal confinement. Without wishing to engage in too much speculation, it seems reasonable to assume that the

scarcity of places offering adequate treatment outside the prison wings may have argued against the immediate discharge of a potentially sizeable number of detainees who might have required treatment under a less restrictive regime. While one can sympathise with the practical challenges of such a transition, matters of mere convenience cannot justify the arbitrary detention of individuals. Furthermore, it is relevant that the entry into force of the 2014 Act was delayed for a significant period, presumably to allow time to prepare for implementation of the reforms. In a broader sense, the Belgian authorities have been aware of the structural problems in their compulsory confinement system, as identified by this Court and other international monitoring bodies, for a good number of years, if not decades (see *W.D. v. Belgium*, no. 73548/13, §§ 71-77, 6 September 2016).

D. Alleged Violation of Article 5 § 4 of the Convention

17. The applicants have argued, under this heading, that the mandatory three-year probationary period envisaged in section 66 of the 2014 Act, which is to be applied even in those cases where continued confinement no longer meets the *Winterwerp* criteria, is inconsistent with Article 5 § 4 of the Convention on its face (see paragraph 183 of the judgment). They submit that the Belgian Court of Cassation reached effectively the same conclusion in two judgments that post-dated that same court's decisions in their respective cases. The Government argued that the matter of the three-year probationary period is irrelevant in the applicants' case as their continued detention was lawful under the *Winterwerp* criteria in any event (see paragraph 185 of the judgment) – a position which the Grand Chamber majority upholds in essence.

18. Being of the view that the applicants' continued confinement following the entry into force of the 2014 Act was unlawful and arbitrary due to a fatal lack of clarity in the new domestic provisions governing such detention, I cannot but find that their rights under Article 5 § 4 of the Convention were also violated. This was a structural problem that could not have been remedied on a case-by-case basis, given that the domestic courts had no proper guidance as to the very standards that they were to apply in determining whether the applicants' continued detention was lawful under the 2014 Act, particularly, with regard to the assessment of the level of dangerousness they presented at the time of the relevant decisions. Thus, the domestic authorities' conclusions that the applicants did in fact present the requisite level of dangerousness cannot be said to be consistent with the requirements of Article 5 § 4, considering that the notion of "lawfulness of detention" under that provision has the same meaning as in paragraph 1 of Article 5. Furthermore, the mandatory statutory period of probation deprived the national courts, at the relevant time, of the authority to order the applicants' immediate discharge had a proper review of legality shown

that they no longer met the domestic and/or Convention criteria for continued compulsory confinement. There has therefore been an additional violation of their rights under Article 5 § 4 of the Convention.