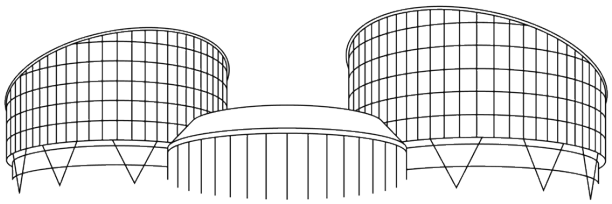

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

DIVISION DE LA RECHERCHE
RESEARCH DIVISION

Articles 3 and 5 § 1(e) Treatment of persons of unsound mind and lawfulness of detention under Article 5 of the Convention

COUNCIL OF EUROPE
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STUDY OF THE ECHR CASE-LAW
ARTICLES 3 AND 5 § 1(E)

SUMMARY

This report mainly examines how the place and conditions of detention affect the lawfulness of the detention of mentally ill individuals under Article 5 of the Convention. In particular, it explores the link between the purpose of detention and the conditions of medical treatment in detention facilities in assessing whether the latter can be regarded as "appropriate institutions" for the detention of persons of unsound mind.

The report also outlines the key principles concerning the States' obligation under Article 3 to provide detainees with adequate medical care and seeks to determine whether linguistic obstacles have played any role in the provision of adequate medical care to detainees.

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INTRODUCTION

1. This report will first outline the key principles concerning the States' obligation to provide detainees with adequate medical care, regardless of any financial, logistical or institutional difficulties. It will also seek to determine whether, in the cases brought before the Court, linguistic obstacles have played any role in the provision of adequate medical care to detainees.

2. The major part of the report is devoted to examining the questions whether and, if so, how the place and conditions of detention affect the lawfulness of detention under Article 5 of the Convention. In particular, it explores the link between the purpose of detention and the conditions of medical treatment in detention facilities in order to determine whether the latter can be regarded as "appropriate institutions" for the detention of persons of unsound mind.

I. MEDICAL CARE OF DETAINEES UNDER ARTICLE 3 OF THE CONVENTION

3. It has been clearly established in the Court's case-law that Article 3 of the Convention requires States to ensure that the health and well-being of persons deprived of their liberty are adequately secured by, among other things, providing them with the requisite medical assistance. A lack of appropriate medical care may thus amount to treatment contrary to Article 3 of the Convention.[1]

4. In determining the "adequacy" of medical assistance, the Court reserves sufficient flexibility in a particular case, deciding on the basis of a number of criteria developed in its case-law.[2]

5. In the case of mentally ill prisoners, the assessment of whether the particular conditions of detention are compatible with the standards of Article 3 must take into consideration the vulnerability of those persons and, in some cases, their inability to complain coherently or at all about how they

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[1]. See, among numerous authorities, *Rivière v. France*, no. 33834/03, § 74, 11 July 2006; *Raffray Taddei v. France*, no. 36435/07, § 51, 21 December 2010; and, more recently, *Blokhin v. Russia* [GC], no. 47152/06, § 136, ECHR 2016.

[2]. See *Blokhin v. Russia* [GC], cited above, § 137; *Bamouhammad v. Belgium*, no. 47687/13, §§ 120-123, 17 November 2015; and *Aleksanyan v. Russia*, no. 46468/06, §§ 137-140, 22 December 2008.

are being affected by any particular treatment.[3] The feeling of inferiority and powerlessness which is typical of persons suffering from a mental disorder calls for increased vigilance in reviewing whether the Convention has been complied with.[4]

6. It is not enough for such detainees to be examined and a diagnosis made; it is essential that proper treatment and suitable medical supervision by qualified staff should also be provided.[5] Where necessitated by the nature of a medical condition, such supervision must involve a comprehensive therapeutic strategy aimed at adequately treating the detainee's health problems or preventing their aggravation.[6]

7. Detaining mentally ill persons in establishments that are not suitable for their condition raises a serious issue under the Convention, in particular where no specialist treatment or medical supervision appropriate to their condition is available.[7] More recently, the Court has also noted the importance of appropriate treatment of the mentally ill in maintaining the prospect of their reintegration into society.[8]

8. Where the lack of adequate medical care has exceeded the threshold of severity under Article 3 of the Convention, the Court is not prepared to accept any excuses or justifications advanced by the respondent Government relating to a lack of resources. Respect for the dignity of detainees must be ensured regardless of financial or logistical difficulties[9], including maintenance works[10], a shortage of places in suitable facilities[11] or other such reasons.

9. As regards, in particular, linguistic obstacles in the provision of appropriate care, it appears that such barriers have rarely featured as a factor in Article 3 cases. By contrast, linguistic difficulties have been taken into account when assessing the effectiveness of the remedies available to

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3. See *Keenan v. the United Kingdom*, no. 27229/95, § 111, ECHR 2001-III.
4. See *Dybeku v. Albania*, no. 41153/06, § 47, 18 December 2007, and *Sławomir Musiał v. Poland*, no. 28300/06, § 94, 20 January 2009.
5. See *Murray v. the Netherlands* [GC], no. 10511/10, § 107, ECHR 2016; *Poghosyan v. Georgia*, no. 9870/07, § 49, 24 February 2009; and *Bamouhammad v. Belgium*, cited above, § 122.
6. See *Blokhin v. Russia* [GC], cited above, § 137.
7. See, for example, *Sławomir Musiał v. Poland*, cited above, §§ 94 and 96; *Rivière v. France*, cited above, § 75; and *G. v. France*, no. 27244/09, §§ 47-48, 23 February 2012.
8. See *W.D. v. Belgium*, no. 73548/13, § 113, 6 September 2016, where the Court held:

> « … l'obligation découlant de la Convention ne s'arrête pas à celle de protéger la société contre les dangers que peuvent représenter les personnes délinquantes souffrant de troubles mentaux mais impose également de dispenser à ces personnes une thérapie adaptée visant à les aider à se réinsérer le mieux possible dans la société .»

9. See *Poghosyan v. Georgia*, cited above, § 48, and *Dybeku v. Albania*, cited above, § 50.
10. See *Mamedova v. Russia*, no. 7064/05, § 63, 1 June 2006.
11. See *Claes v. Belgium*, no. 43418/09, § 99, 10 January 2013.

asylum-seekers in relation to their Article 3 complaint.[12] More generally, the Court has observed that:

> "141. … linguistic freedom as such is not amongst the rights and freedoms governed by the Convention, and [that] with the exception of the specific rights stated in Articles 5 § 2 and 6 § 3 (a) and (e), the Convention *per se* does not guarantee the right to use a particular language in communications with public authorities or the right to receive information in a language of one's choice…"[13]

10. However, the possibility of communicating with public authorities in an official language should be made available to those residing in a State. In the Court's view:

> "… by making a language its official language, the State undertakes in principle to guarantee its citizens the right to use that language both to impart and to receive information without hindrance, not only in their private lives, but also in their dealings with the public authorities. … In other words, implicit in the notion of an official language is the existence of certain subjective rights for the speakers of that language."[14]

11. A rare case in which the use of an official language in the context of treatment in a mental institution was in issue is *Dhoest v. Belgium* (no. 10448/83, Commission's report of 14 May 1987). The applicant, a Flemish-speaker, had been placed in a social-protection facility at Tournai, situated in the French-language region of Wallonia. His complaint under Article 3 of the Convention about his conditions of detention included an allegation that he was unable to communicate with the French-speaking doctors, which rendered any treatment useless. However, the Commission found this allegation unsubstantiated on the evidence and held that there had been no violation of Article 3:

> "124. Although **proper psychiatric treatment must indeed be difficult if it takes place in a foreign language,** the Commission accepts that both the applicant's knowledge of French and the availability of Dutch-speaking staff would have made treatment possible if the applicant had cooperated.
>
> In the present case the total lack of cooperation by the applicant made any form of treatment extremely difficult. The Commission notes that the psychiatric treatment basically failed as a result of the applicant's hostile attitude towards the authorities, including the medical staff. **The linguistic element therefore seems not to have been decisive for the availability of proper psychiatric treatment**.
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> 129. Having regard to all the circumstances of the applicant's detention and in particular to his hostility towards any form of treatment as well as his persistent refusal to cooperate or to comply with the rules of the institution, the Commission

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12. See, for example, *I.M. v. France*, no. 9152/09, §§ 145 and 151, 2 February 2012, and *Sharifi and Others v. Italy and Greece*, § 168, no. 16643/09, 21 October 2014.
13. See *Bazjaks v. Latvia*, no. 71572/01, § 141, 19 October 2010.
14. See *Mentzen v. Latvia* (dec.), no. 71074/01, ECHR 2004-XII.

concludes that the applicant's conditions of detention did not attain the seriousness of treatment envisaged by Article 3 of the Convention."

12. Although this case shows the importance of receiving psychiatric care in a language that one understands, there do not appear to be any cases where a language barrier has blocked treatment to a degree disclosing a breach of Article 3.

II. APPROPRIATE FACILITIES FOR DETENTION AND ISSUES OF TREATMENT UNDER ARTICLE 5 OF THE CONVENTION

A. General principles

13. Any deprivation of liberty under Article 5 § 1 of the Convention must be "lawful" and "in accordance with a procedure prescribed by law". In addition to compliance with national law, Article 5 § 1 requires that any detention should be in keeping with the purpose of protecting the individual from arbitrariness. This presupposes that both the order to detain and the execution of the detention must genuinely conform with the purpose of the restrictions permitted by the relevant sub-paragraph of Article 5 § 1. There must, in addition, be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention.[15]

14. Although the "purpose" of detention is explicitly mentioned only in sub-paragraphs (c) and (d) of Article 5 § 1, this requirement is implicit in all the sub-paragraphs.[16]

15. In the context of Article 5 § 1(e), the purpose of the detention of mentally disordered persons relates to the need to provide therapy, medication or other clinical treatment to cure or alleviate their condition(s), or where they require control and supervision to prevent them causing harm to themselves or other persons.[17] Therefore, the "detention" of a person as a mental-health patient will be "lawful" for the purposes of Article 5 § 1(e) only if effected in a hospital, clinic or other appropriate institution.[18] The

[15]. See *Saadi v. the United Kingdom* [GC], no. 13229/03, §§ 67 and 69, ECHR 2008, and *Merabishvili v. Georgia* [GC], no. 72508/13, § 186, ECHR 2017 (extracts).
[16]. See *Merabishvili v. Georgia* [GC], cited above, § 299.
[17]. See *Hutchison Reid v. the United Kingdom*, no. 50272/99, § 52, ECHR 2003-IV, and *Stanev v. Bulgaria* [GC], no. 36760/06, § 146, ECHR 2012.
[18]. This applies even when the mental illness or condition is not amenable to treatment. See *Hutchison Reid,* cited above, §§ 52 and 55.

Court has also held that Article 5 § 1(e) is not in principle concerned with suitable treatment or conditions.[19]

16. Nevertheless, the conditions of treatment of a person of unsound mind are not irrelevant to the lawfulness of his or her detention. Here, the Court's case-law has undergone some development since the early cases, with increasing weight being attached to the need to provide appropriate care and facilities to detainees with a view to alleviating their illness or reducing their dangerousness.

B. Early cases

17. The question whether Article 5 § 1(e) of the Convention includes the right to treatment was raised as early as in the landmark *Winterwerp* case, in which the applicant, who had been committed to a psychiatric hospital, claimed a breach of that provision in that the authorities had allegedly failed to provide him with effective medical treatment that would have allowed for an improvement in his mental condition and thus for a shortened period of detention. In particular, he complained that the meetings with his psychiatrists were infrequent and too brief and that the medication administered to him consisted only of tranquillisers. The Commission, however, considered that:

> "…a patient's right to medical treatment appropriate to his condition does not, as such, derive from [Art 5 (1)(e)]. It is true that compulsory admission to a psychiatric hospital should fulfil **a dual function, therapeutic and social; but the Convention deals only with the social function of protection** in authorising the deprivation of liberty of a person of unsound mind under certain conditions ..."[20]

18. The Commission's opinion was subsequently endorsed by the Court, which likewise considered that "a mental patient's right to treatment appropriate to his condition cannot as such be derived from Article 5 § 1(e)."[21]

19. In *Ashingdane v. the United Kingdom*, the Commission reaffirmed its view that Article 5 § 1(e) is concerned with the question of the actual deprivation of liberty of mental health patients and not their treatment.[22] The applicant complained about his prolonged detention in a special security hospital after he had been declared fit to be transferred to a normal

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19. See *Ashingdane v. the United Kingdom*, 28 May 1985, § 44, Series A no. 93, and *Stanev v. Bulgaria* [GC], cited above, § 147.
20. See *Winterwerp v. the Netherlands*, no. 6301/73, Report of the Commission of 15 December 1977, § 84.
21. See *Winterwerp v. the Netherlands*, 24 October 1979, § 51, Series A no. 33.
22. See *Ashingdane v. the United Kingdom,* no. 8225/78, Report of the Commission of 12 May 1983, § 77. See also *Dhoest v. Belgium*, no. 10448/83, Commission's report of 14 May 1987, § 145.

psychiatric hospital where the conditions of detention were more appropriate and conducive to his eventual release. The Commission considered that the applicant's treatment had not been neglected in the special security hospital and that his compulsory detention had been required throughout.

20. Four members of the Commission dissented, reasoning as follows:

> "It is our view that the specific purpose of the deprivation of liberty envisaged by Art 5(1)(e) is two-fold: (a) the protection of society and the person of unsound mind; and (b) the rehabilitation of the patient for life in society. The question whether a person of unsound mind has a right to treatment under Art 5(1)(e) must surely be one of degree depending on the facts of the case. Whilst a patient may not be entitled to treatment of a controversial or highly sophisticated nature, the basic requirements of his treatment cannot be wholly ignored in the face of unanimous medical opinion. The right answer must lie somewhere between these two extremes.
>
> The substantive (and not just formal) lawfulness of the detention of a person of unsound mind is inseparable from the conditions of his treatment. Therefore the appropriate treatment, in which the appropriate hospital, together with the medical justification clearly play a major role, seems to be an important element legitimising further detention, at least in the same hospital. Significantly in the present case …, the medical experts agreed that Broadmoor Hospital was having a detrimental effect on the applicant's health and rehabilitation as of March 1979."

21. In line with the Commission's conclusion, the Court, for its part, also considered that although the regime in the ordinary hospital was more liberal and more conducive to the applicant's ultimate recovery, the place and conditions of his detention did not cease to be those capable of accompanying "the lawful detention of a person of unsound mind". The applicant's right to liberty and security of person was thus not limited to a greater extent than that provided for under Article 5 § 1(e). Furthermore, although the cause of the delay in his transfer had been industrial rather than therapeutic, the delay had not been in conscious disregard of his mental welfare and efforts were made to find a solution as soon as possible.[23]

22. The dissenting judge queried whether the designation of the given institution as an "appropriate institution" by the responsible authorities in accordance with the domestic law sufficed to allow the detention to be considered as "lawful" within the meaning of Article 5 § 1. The purpose of committing psychiatric patients to institutions was to treat them as well as to protect others. The authorities had thus a duty to look for the means most likely to bring about a cure.

C. Prison structures as inappropriate facilities

23. The first case in which the Court found a violation of Article 5 § 1 on account of the conditions of detention of a mentally ill detainee was

[23]. See *Ashingdane v. the United Kingdom*, cited above, §§ 47 and 48.

Aerts v. Belgium.[24] In contrast to the cases reviewed above, where the applicants had been held in a psychiatric institution, the applicant in *Aerts* was kept for seven months in the psychiatric wing of an ordinary prison because the social-protection centre designated by the relevant mental-health board had no available places. The general conditions of detention in that prison were unsatisfactory and not conducive to the effective treatment of the inmates. Although no breach of Article 3 was found, the Court considered that the lack of treatment rendered the applicant's detention unlawful under Article 5:

> "49. The [various reports] show sufficiently clearly that the Lantin psychiatric wing could not be regarded as an institution appropriate for the detention of persons of unsound mind, the latter not receiving either **regular medical attention or a therapeutic environment**. On 2 August 1993 ... the Mental Health Board expressed the view that the situation was harmful to the applicant, who was not receiving the treatment required by the condition that had given rise to his detention. Moreover, the Government did not deny that the applicant's treatment in Lantin had **been unsatisfactory from a therapeutic point of view**. The proper relationship between t**he aim of the detention and the conditions in which it took place was therefore deficient.**"[25]

24. In a subsequent case, the Court considered that generally, in the context of Article 5, "*it would be* prima facie *unacceptable not to detain a mentally ill person in a suitable therapeutic environment*."[26]

25. A certain delay in admission to a clinic or hospital is acceptable if it is related to a disparity between the available and required capacity of psychiatric institutions. However, a significant delay in admission to such institutions and thus the treatment of the person concerned will obviously affect the prospects of the treatment's success, entailing a breach of Article 5.[27]

26. In a series of Belgian cases, the Court confirmed that psychiatric wings of prisons in that country were not appropriate places for the lengthy detention of mentally ill persons within the meaning of Article 5 § 1(e) of the Convention, as the detainees did not receive appropriate care and treatment for their condition and were thus deprived of any realistic prospect of rehabilitation. The link required by Article 5 § 1(e) between the

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[24]. Judgment of 30 July 1998, Reports of Judgments and Decisions 1998-V.

[25]. See also *Proshkin v. Russia*, no. 28869/03, 7 February 2012, for similar reasoning.

[26]. See *Hutchison Reid v. the United Kingdom*, cited above, § 55. Although the applicant's condition in that case was not curable, he still derived benefit from the hospital environment, his symptoms becoming worse outside its supportive structure.

[27]. See *Morsink v. the Netherlands*, no. 48865/99, §§ 67-69, 11 May 2004, and *Brand v. the Netherlands*, no. 49902/99, §§ 64-66, 11 May 2004. In the latter case, the Court found a delay of six months to be unacceptable. See also *Pankiewicz v. Poland*, no. 34151/04, 12 February 2008, where even a delay of two months and twenty-five days was considered excessive, given the established harmful effects on his health of the applicant's detention in the regular detention centre.

purpose of detention and the conditions in which it was carried out had therefore been broken. The violations resulted from a structural problem, arising essentially from a shortage of places in external psychiatric facilities or the latter's refusal to admit individuals regarded as undesirable.[28]

27. In establishing that the provision of psychiatric care was lacking, the Court relied on the opinions of health professionals and domestic authorities in the individual cases, as well as on the more general findings at both national and international levels regarding the unsuitability of psychiatric wings for the detention of persons with mental-health problems.[29] Moreover, the domestic authorities had themselves acknowledged that keeping mentally ill detainees in a psychiatric wing was intended to be only a temporary state of affairs. They were, however, obliged to continue using this form of detention in the absence of an alternative solution.[30]

28. These cases also reveal the Court's approach to the notion of "**appropriate care**" for Article 5 purposes. The Government had argued that the applicants had had access to health professionals, benefitting from regular consultations with psychiatrists and psychologists and receiving medication. In the Court's finding, these measures showed only that the applicants had not been left completely without care, but they fell short of the therapeutic measures required for the treatment of the applicants' mental condition. For example, in *Oukili v. Belgium* (no. 43663/09, 9 January 2014), the Court stated as follows:

> « 49. Le Gouvernement soutient qu'au sein de l'aile psychiatrique de Merksplas, le requérant a toujours été entouré de soins adéquats.
>
> 50. La Cour relève que les seules informations figurant dans le dossier concernent **le nombre de consultations** en psychiatrie dont le requérant a bénéficié entre 2007 et 2011 et qui s'élève à quatre-vingt-douze ainsi que son placement pour quelques mois en 2010 en unité de crise où il aurait bénéficié de soins intensifs …. **Il n'est toutefois nulle part question d'une prise en charge thérapeutique individuelle et spécialisée dans le traitement des troubles dont souffre le requérant**. Aux yeux de la Cour, si les informations précitées attestent que le **requérant n'a manifestement**

[28]. See the four leading judgments of *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. See also 8 judgments, all delivered on 9 January 2014 - *Van Meroye* v. Belgium, no. 330/09; *Oukili v. Belgium*, no. 43663/09; *Caryn v. Belgium*, no. 43687/09; *Moreels v. Belgium,* no. 43717/09; *Gelaude v. Belgium,* no. 43733/09; *Saadouni v. Belgium,* no. 50658/09; *Plaisier v. Belgium*, no. 28785/11; and *Lankester v. Belgium*, no. 22283/10; and, more recently, the pilot judgment in *W.D. v. Belgium,* no. 73548/13, 6 September 2016.

[29]. See, for example, *L.B. v. Belgium*, §§ 95-96 and 101; *Claes v. Belgium*, § 98; and *Swennen v. Belgium*, § 8, all cited above. See further *Hadžić and Suljić v. Bosnia and Herzegovina*, nos. 39446/06 and 33849/08, § 41, 7 June 2011, where the Court also found that the psychiatric annex of a prison was not an appropriate institution for the detention of mental-health patients on the basis of the findings of the Constitutional Court and the CPT.

[30]. See *W.D. v. Belgium*, cited above, § 132, with further references.

> **pas été laissé** sans aucune forme de soins**, elles ne sont pas suffisantes pour lui permettre d'évaluer la mesure de la prise en charge thérapeutique du requérant** (voir, *mutatis mutandis*, *Dufoort*, précité, § 83). »[31]

29. In *Swennen v. Belgium* (no. 53448/10, 10 January 2013), the Court also considered that appropriate care should include individual therapy:

> « 80. La Cour rappelle, à ce sujet, que si l'attitude persistante d'une personne privée de liberté peut contribuer à faire obstacle à une modification de son régime de détention, cela ne dispense pas les autorités de prendre les initiatives appropriées en vue d'assurer à cette personne un traitement adapté à son état et de nature à l'aider à retrouver sa liberté …. En l'espèce, la Cour n'est pas convaincue que le requérant ait fait preuve d'une attitude visant à empêcher toute évolution de sa situation. Au contraire, elle relève que, dans le cadre de la procédure en référé …, il a clairement formulé ses desiderata en vue de faire évoluer sa situation. Il demandait que l'Etat soit condamné, dans l'attente de son transfert, **à une prise en charge thérapeutique individualisée au sein de la prison à raison de deux heures deux fois par semaine**. Il a également, à plusieurs reprises, spécifié que sa demande de traitement ambulatoire avait pour objet de consulter un sexologue …. Ces demandes ne sont pas, aux yeux de la Cour, manifestement déraisonnables et apparaissent *prima facie* **correspondre à des « soins adaptés** » dans le cas d'un personne souffrant de troubles de la personnalité en plus d'être pédophile et d'avoir une conscience très faible de ses troubles. »

30. As regards the **relationship between Article 3 and Article 5**, it is noteworthy that in three Belgian cases where the prolonged lack of appropriate medical care amounted to a breach of Article 3,[32] the Court also found a violation of Article 5, in the light of its findings under the former provision. In *Claes* the Court concluded:

> « 120. …le requérant s'est trouvé confiné depuis 1994, avec une interruption de vingt-deux mois, dans des conditions inappropriées que la Cour considère contraires à l'article 3 (paragraphe 100). Cette situation a également, de l'avis de la Cour, eu pour effet de rompre le lien requis par l'article 5 § 1 e) entre le but de la détention et les conditions dans lesquelles elle a lieu. »

31. In a number of German cases the Court has similarly found that separate prison wings, designed for persons in preventive detention, were not appropriate institutions for the detention of mental-health patients, since they lacked the necessary medical and therapeutic environment. The Court arrived at this conclusion after examining the conditions of detention in those prison units and noting the lack of treatment corresponding to the

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[31]. For similar reasoning, see *Moreels v. Belgium*, § 52, and *Plaisier v. Belgium*, § 50, both cited above.

[32]. See *Claes v. Belgium, Lankester v. Belgium* and *W.D. v. Belgium*, all cited above. A finding of no violation of Article 3 does not rule out a breach of Article 5, as demonstrated by the *Aerts* case.

detainees' mental condition. For example, in *O.H. v. Germany* (no. 4646/08, 24 November 2011), it stated as follows;

> "88. Having regard to the applicant's conditions of detention in Straubing Prison (see paragraphs 27-32 above), the Court is not convinced that the applicant has been offered the therapeutic environment appropriate for a person detained as being of unsound mind. This has indeed been confirmed by the Straubing prison authorities themselves and, in particular, by the medical director of the psychiatric department of Straubing Prison. Since 1999 and notably also in the proceedings here at issue, he has maintained that the applicant's condition, which he considered as a mental illness, could be adequately treated only in a psychiatric hospital, and not in the psychiatric department of Straubing Prison – where the applicant has not received treatment since 2002 ….
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> 89. The Court does not overlook the fact that the domestic courts, in the proceedings at issue, considered that the applicant should not be transferred to a psychiatric hospital – where persons considered as mentally ill under German law were placed at the relevant time – notably because he refused treatment in such an institution. However, the applicant's conduct or attitude does not exempt the domestic authorities from providing persons **detained (solely) as mental health patients with a medical and therapeutic environment appropriate for their condition.** The Court cannot but subscribe in this context to the reasoning of the Federal Constitutional Court in its judgment of 4 May 2011 in respect of the suitable institutions for persons in preventive detention. That court stressed that both the German Constitution and the Convention required **a high level of individualised and intensified offer of therapy and care by a team of multi-disciplinary staff to persons in preventive detention. It further found that detainees had to be offered an individualised therapy if the standard therapies available in the institution did not have prospects of success** ….
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> 90. …It is … aware that long-term detainees suffering from disorders such as the applicant, who appears unable to make any effort to improve the prospects of his own release, must be a **considerable challenge to the staff working with them**. It takes the view that the applicant nevertheless had to be provided with a **therapeutic environment appropriate for his mental condition.**
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> 91. Having regard to the foregoing, the Court considers that in the circumstances of the present case, the applicant has not been detained in an institution suitable for the detention of mental health patients."[33]

D. Prison structures as appropriate facilities

32. However, not all structures associated with prison are necessarily unsuitable institutions for the detention of individuals with mental disorders. What matters for the purposes of Article 5 is not so much the title of the institution but rather the specific conditions of detention and the possibility of treatment. In *Bergmann v. Germany* (no. 23279/14, 7 January 2016), the

[33]. For similar reasoning and findings, see *B. v. Germany*, no. 61272/09, §§ 82-84, 19 April 2012; *S. v. Germany*, no. 3300/10, §§ 97-99, 28 June 2012; and *Glien v. Germany*, no. 7345/12, §§ 93-96, 28 November 2013.

applicant - a mental-health patient - was detained in the newly constructed preventive detention centre which was located on the premises of Rosdorf Prison. In finding that that the centre was an appropriate institution under Article 5 § 1(e), the Court reasoned as follows:

> "124. In order to determine whether the applicant's place of detention can be said to have been suitable for a mental-health patient, the Court **must assess the specific conditions of detention** in the Rosdorf preventive detention centre. ...
>
> 125. Regarding the staffing situation in the Rosdorf centre for persons in preventive detention, the Court observes that … the prison staff comprised one psychiatrist, four psychologists, five social workers and twenty-five members of the general prison service for a total of thirty detainees at the time. It considers that **this staffing situation, which was similar to that in a psychiatric hospital run in the same *Land*, put the authorities in a position to address the applicant's mental disorder**.
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> 126. As to the **particular care offered to the applicant** in view of his mental disorder, the Court observes that the Regional Court, in line with the repeated finding by expert W., considered it essential that the applicant be offered treatment to reduce his sadistic fantasies and his libido, and thus his dangerousness. In line with that finding, the court … ordered the Rosdorf centre authorities to offer the applicant such treatment within three months …. It was further documented in the Rosdorf centre's treatment plan for the applicant … that the latter had regularly and repeatedly been offered such treatment. …
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> 127. The Court further observes that it transpires from the Rosdorf centre's treatment plan that the applicant was successfully encouraged to participate in group therapy aimed at preventing detainees from relapsing into excessive alcohol consumption from July 2013 until August 2014. He was also granted leave from detention under escort a number of times and regularly participated in group sessions in which detainees discussed their experiences during leave from detention at the relevant time. Moreover, at least at the beginning of the period at issue, the applicant had fortnightly motivation meetings with a psychologist and took part in weekly residential group meetings, but subsequently chose to stop attending those meetings.
>
> 128. Having assessed the applicant's particular conditions of detention in the Rosdorf preventive detention centre and, in particular, the treatment offered to him with a view to addressing his mental disorder, the Court considers that there was a substantial change in the medical and therapeutic care which was offered to the applicant after his transfer to that centre. The Court is satisfied that the applicant was offered the therapeutic environment appropriate for a person detained as a mental-health patient and was thus detained in an institution suitable for the detention of such patients."

33. In *Lorenz v. Austria* (no. 11537/17, 20 July 2017), the Court found that the applicant's detention in a prison unit for mentally ill offenders was not in accordance with Article 5 § 1(e), as the authorities had failed to examine whether the applicant should be transferred to a similar unit in another prison – which was the only institution capable of providing the special therapy needed in order to prepare him for release. It stated as follows:

"61. First, the Court will examine **whether the applicant had been offered the opportunity to undergo the necessary treatment and preparation for release**, which – according to the domestic courts – could only be provided in the Vienna-Mittersteig Prison. … **Moreover, when dealing with mentally ill offenders, the authorities are under an obligation to work towards the goal of preparing the person concerned for their release,** for example by providing incentives for further therapy such as the transfer to an institution where they can actually receive the necessary treatment, or by granting certain privileges, if the situation so allows (compare and contrast *Rangelov*, § 98 *in fine*, cited above).

…

64. The Court concludes from the above that the prison authorities ignored, over several years, the obvious need – which had clearly been stated in the domestic courts' decisions – that the applicant be transferred to the Vienna-Mittersteig Prison to receive the appropriate therapy and be prepared for an eventual release, even though at the latest from 2009 the authorities could and should have been alerted that this was the only institution where the applicant could receive such treatment. While the applicant refused to undergo any more therapy, he requested measures for his release. It was thus for the authorities to find a way to overcome this obvious deadlock and examine the question of the transfer of the applicant to that prison.

65. Thus, because the authorities failed to examine in the review proceedings the question of the applicant's transfer to the Vienna-Mittersteig Prison, the applicant's detention was not in line with the requirements of lawfulness of Article 5 § 1 (e) of the Convention."

34. The case of *Papillo v. Switzerland* (no. 43368/08, 27 January 2015), demonstrates that even an ordinary prison can be considered an appropriate institution if it is capable of providing appropriate care. The applicant had initially been interned in a psychiatric clinic, but as he refused treatment he was imprisoned. While in prison he received care which brought about an improvement in his condition, permitting his release. Before the Court the applicant argued that the care he had received in prison meant that the prison was not an appropriate institution. The Court disagreed:

« 48. En l'espèce, durant sa détention, le requérant a bénéficié de consultations médicales régulières et d'un traitement par neuroleptiques. Ce traitement eut pour conséquence une stabilisation de son état de santé et, subséquemment, sa remise en liberté le 25 janvier 2007. **La Cour considère donc que les soins dont a bénéficié le requérant lors de sa détention peuvent être considérés comme appropriés** (voir, *a contrario*, *Claes c. Belgique*, précité, §116).

49. Par conséquent, la Cour constate que la détention du requérant durant la période du 30 mars 2006 au 25 janvier 2007 était conforme au but de l'article 5 § 1 e). »

E. Psychiatric institutions

35. Although psychiatric hospitals are by definition appropriate institutions for the detention of mentally ill individuals, the Court has still stressed the need for suitable treatment. In *Frank v. Germany* (dec.)

(no. 32705/06, 28 September 2010), where the applicant had been confined in a psychiatric hospital following his acquittal, the Court pointed out that:

> "... in order not to deprive persons placed in a psychiatric hospital of a prospect of release, the national authorities should see to it that **any such placement be accompanied by efficient and consistent therapy measures.**"[34]

36. In *Klinkenbuss v. Germany* (no. 53157/11, 25 February 2016), the applicant had been sentenced to 5 years' imprisonment for various crimes, including sexual offences, and confined in a psychiatric hospital. He complained that his continued detention for over 28 years, without his receiving any further therapy was in breach of Article 5. As the applicant had been convicted, the Court examined this complaint under Article 5 § 1 (a) of the Convention. It observed more generally that:

> "47**.** A decision not to release a detainee may become inconsistent with the objectives of the sentencing court's order for that person's detention if the person concerned was placed, and later remanded, in detention as there was a risk that he or she would reoffend, but **the person is, at the same time, deprived of the necessary means, such as suitable therapy, to demonstrate that he or she was no longer dangerous** (see *Ostermünchner v. Germany*, no. 36035/04, § 74, 22 March 2012; and *H.W. v. Germany*, no. 17167/11, § 112, 19 September 2013)."

37. On the issue of treatment in this specific case, the Court stated as follows:

> "51. The Court further takes note, in this context, of the applicant's argument that he was no longer receiving any therapy and was therefore deprived of any prospect of a life outside prison**.** It reiterates that the failure to offer suitable therapy to a person deprived of his or her liberty for being dangerous, thereby putting that person in a position to demonstrate that he or she was no longer dangerous, may result in the decision not to release the detainee becoming inconsistent with the objectives of the sentencing court's order for the person's detention (see paragraph 47 above). ...
>
> 53. The Court would stress that the objective of the applicant's detention in a psychiatric hospital, a measure of correction and prevention, was not only to protect the public from him as long as he was dangerous as a result of his condition: it was equally aimed at offering the applicant the necessary treatment to improve his state of health and thus to permit his rehabilitation**. …**
>
> 54. It is therefore **essential that the applicant continued to be offered suitable treatment aimed at reducing the danger he represented to the public**. Having regard to the material before it, the Court is satisfied that this condition was met during the applicant's detention at the relevant time. The applicant in fact did not contest that he had been offered the therapy reasonably considered necessary by the domestic courts, that is, sex therapy, and confirmed that he had refused to restart such

[34]. On the facts of the case the Court found that the applicant's detention had been justified under Article 5 § 1 (e), as the applicant had been provided with various forms of treatment; his release could nonetheless not be ordered as he had not made sufficient progress in therapy and was thus at risk of re-offending if released.

a therapy. It follows that the domestic courts' decision not to release the applicant was consistent with the objectives of the judgment of the sentencing court in the present case."

38. Lastly, it should be noted that even outside the context of detention of persons of unsound mind, issues may arise under Article 5 § 1(a) in the cases of persons who are detained only because of the risk they pose to the public, if there are no special measures, instruments or institutions in place aimed at reducing the danger they present and thus limiting the duration of their detention.[35] It is also interesting to note that the concept of the lawfulness of detention for educational supervision, pursuant to Article 5 § 1 (d), requires that such detention "take place in an appropriate facility with the resources to meet the necessary educational objectives and security requirements."[36]

CONCLUSION

39. The above overview demonstrates that there is now a close link between the lawfulness of the detention of persons of unsound mind and the appropriate treatment of their mental condition. In contrast to early cases which regarded the therapeutic function as essentially irrelevant for Article 5 purposes, it is clear that proper therapy has now become an essential requirement of the broader notion of lawfulness. Any detention of mentally ill persons must have a therapeutic purpose, aimed at curing or alleviating their condition and reducing the risk they may pose to the public or themselves. The Court has consistently stressed that mentally ill individuals must be provided with a suitable medical environment accompanied by effective therapeutic measures, with a view to preparing them for their eventual release.

40. The level of care for psychiatric patients must go beyond basic care. Mere access to health professionals, consultations and provision of medication, is not sufficient for a treatment to be considered appropriate and thus as satisfying the requirements of Article 5.

41. In determining whether a particular institution is an appropriate one within the meaning of Article 5 § 1(e), the Court examines the specific conditions of detention in that facility, especially the treatment provided to a mentally ill detainee. It is therefore possible that an institution which is *a priori* inappropriate (i.e. a prison structure) may nevertheless be considered

[35]. See *James, Wells and Lee v. the United Kingdom*, nos. 25119/09 and 2 others, § 194, 18 September 2012, concerning the failure, for lack of necessary resources, to provide rehabilitative courses to prisoners which were necessary for their release.

[36]. See *Blokhin v. Russia* [GC], cited above, § 167.

as suitable if it provides adequate care. Conversely, an institution which appears appropriate by definition (i.e. a psychiatric establishment) may nonetheless fail to provide the necessary therapy. Appropriate treatment is hence an essential part of the notion of "appropriate institution".

42. Lack of resources is never an acceptable excuse for failure to provide appropriate medical care under Article 3 of the Convention. Resource consideration may come into play under Article 5 if the provision of therapy/courses is delayed, but such delay cannot be significant.