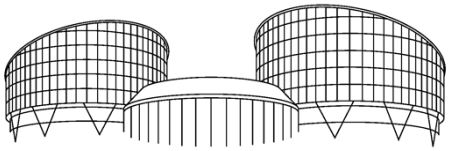

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF P.W. v. AUSTRIA

(Application no. 10425/19)

JUDGMENT

Art 5 § 1 (e) • Persons of unsound mind • Compulsory confinement for about three years warranted by applicant's persisting mental disorder verified on the basis of objective medical expertise • Minor character of an offence not decisive when examining the compliance of a person's deprivation of liberty with Art 5 § 1 (e) • Note taken of currently ongoing domestic discussion on a comprehensive reform of the system of preventive measures and its aims

STRASBOURG

21 June 2022

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of P.W. v. Austria,

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

Tim Eicke, *President,*
Gabriele Kucsko-Stadlmayer,
Yonko Grozev,
Armen Harutyunyan,
Pere Pastor Vilanova,
Jolien Schukking,
Ana Maria Guerra Martins, *judges,*

and Ilse Freiwirth, *Deputy Section Registrar,*

Having regard to:

the application (no. 10425/19) against the Republic of Austria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Austrian national, Ms P.W. ("the applicant"), on 14 February 2019;

the decision to give notice to the Austrian Government ("the Government") of the complaints concerning the applicant's confinement in an institution for mentally ill offenders under Article 5, read alone and in conjunction with Article 14, and under Article 6 of the Convention, and to declare the remainder of the application inadmissible;

the decision not to have the applicant's name disclosed;

the parties' observations;

Having deliberated in private on 31 May 2022,

Delivers the following judgment, which was adopted on that date:

INTRODUCTION

1. The present case concerns the applicant's complaints in relation to her confinement in an institution for mentally ill offenders after having committed an attempt to resist arrest by the police. She relied on Articles 5 and 6 of the Convention as well as Article 14 read in conjunction with Article 5 of the Convention.

THE FACTS

2. The applicant was born in 1964 and lives in Linz. She was represented by Mr H. Graupner and Mr J. Ph. Bischof, lawyers practising in Vienna.

3. The Government were represented by their Agent, Ambassador H. Tichy, Head of the International Law Department at the Federal Ministry for European and International Affairs.

4. The facts of the case, as submitted by the parties, may be summarised as follows.

I. THE APPLICANT'S ARREST ON 7 MAY 2016

5. On the night of 7 May 2016, a taxi driver notified the police because his passenger, the applicant, said that she could not pay the fare as she did not have any cash with her and had forgotten the PIN number for her debit card. The police officers arriving at the scene explained the next steps to the applicant, namely that her personal details would be recorded and that she could pay the fare the next day, but failure to do so would result in a complaint being filed against her. The applicant then became agitated and started to shout at the police officers. As they could not calm her down, they told her that she was being arrested. The applicant attempted to resist arrest by repeatedly hitting the chest of one of the police officers with her hands. Although she applied a certain physical force, she did not injure the police officer. She was subsequently arrested and later examined by the medical officer (*Amtsarzt*) who indicated that she was fit to undergo detention and had the legal capacity to commit an offence (*Haft- und Deliktsfähigkeit*), but added that this could not be determined with absolute certainty. On the grounds that the applicant had psychotic episodes and was a danger to others when she had such a flare-up of aggression, the medical officer ordered the applicant's committal to hospital (*Parere*). The arrest by the police was revoked after the public prosecutor ordered that charges be pressed against the applicant without an arrest being made.

II. THE APPLICANT'S FIRST PLACEMENT FROM 7 MAY UNTIL 20 JUNE 2016

6. Still on the same day, 7 May 2016, the applicant was taken to the Neuromed Campus of the Kepler University Clinic. The placement proceedings (*Unterbringungsverfahren*) conducted there by the Linz District Court (*Bezirksgericht*) led to the applicant being placed in the high-security ward under the Act on the Placement of Mentally Ill Persons in Hospitals (Hospitalisation Act) (*Bundesgesetz über die Unterbringung psychisch Kranker in Krankenanstalten, Unterbringungsgesetz*). Dr M.F., a specialist in psychiatry and neurology, was commissioned to submit an expert opinion on the question whether the applicant met the requirements for a placement, as set out in section 3(1) and (2) of the above-mentioned Act (see paragraph 35 below).

7. In an expert opinion of 17 May 2016, Dr M.F. concluded that the requirements for such a placement were met. The applicant was known to have been suffering from a schizoaffective disorder for years, with the first known institutional inpatient stay dating back to 2006, although she denied any such incidents or any mental disorder. Elements of danger to third parties due to psychosis were present, with the applicant acting as if she was out of touch with reality, and showing an inclination towards aggressive reactions.

Given the applicant's lack of awareness of the fact that she was suffering from a disorder, and her lack of understanding of her need for treatment, Dr M.F. considered that a voluntary hospital stay was not an option.

8. On 23 May 2016 the Linz District Court ordered the applicant's placement until 20 June 2016, on which date the placement was terminated.

III. THE APPLICANT'S SECOND PLACEMENT FROM 24 NOVEMBER 2016 UNTIL 23 JANUARY 2017

9. On 24 November 2016 further placement proceedings were instituted against the applicant by the Linz District Court, after her neighbours had alerted the police as the applicant had, in her apartment, been ranting and raging, talking to herself, and having paranoid ideas and fantasies about killing. In a (second) expert opinion of 15 January 2017, Dr M.F. concluded that the applicant had been suffering from a mental disorder for many years, which now had to be classified as "paranoid schizophrenia". As the applicant had recently agreed to taking medication, it was to be assumed that the requirements for a placement, specifically the elements of being a danger to others, would not continue beyond the date of the upcoming hearing. The applicant's second placement lasted from 24 November 2016 until 23 January 2017, on which date that placement was terminated.

IV. CRIMINAL PROCEEDINGS AGAINST THE APPLICANT

10. On 11 October 2016, that is, prior to the second placement proceedings (see paragraph 9 above), the Linz public prosecutor's office (*Staatsanwaltschaft*) instigated preliminary proceedings against the applicant for the offences of attempted resistance to State authority (*Widerstand gegen die Staatsgewalt*), under Articles 15 and 269 of the Criminal Code (see paragraphs 27 and 31 below), and fraud (*Betrug*), under Article 146 of the Criminal Code (see paragraph 30 below), in connection with the incident of 7 May 2016 (see paragraph 5 above).

11. Dr W.S., a specialist in neurology and psychiatry, was appointed as the psychiatric expert and was commissioned to submit his findings on whether the applicant had been criminally liable under Article 11 of the Criminal Code (see paragraph 26 below) at the time of the offence on 7 May 2016, and on whether the requirements for confinement in an institution for mentally ill offenders under Article 21 § 1 or Article 21 § 2 of the Criminal Code (see paragraph 28 below) were met, in particular how far offences with serious consequences, such as grievous bodily harm or death threats, would have to be expected in the future.

12. In an expert opinion prepared on 16 November 2016 and formally submitted on 7 December 2016, which was based on the files alone, because he was not able to carry out a face-to-face examination as the applicant did

not obey a summons to her examination shortly before her second placement began (see paragraph 9 above), Dr W.S. concluded that the applicant suffered from a schizoaffective disorder. Judging by her ability to control her actions (*Steuerungsfähigkeit*), she had, at the time of the offence, been closer to not being criminally liable than to being liable. However, her ability to act in accordance with an understanding of the wrongfulness of her actions (*Dispositionsfähigkeit*) had not been totally absent. The applicant had thus been criminally liable at the time of the offence. The offence she had been charged with (resisting the police) was not the result of any serious mental or emotional disorder (*seelisch-geistige Abartigkeit*). Dr W.S. concluded that he was not able to make any prognosis about any future offences with serious consequences.

13. On 5 January 2017, that is during the applicant's second placement (see paragraph 9 above), the Linz public prosecutor's office charged the applicant with the offence of attempted resistance to State authority under Article 15 § 1 and Article 269 § 1 of the Criminal Code (see paragraphs 27 and 31 below).

14. In a submission of 9 February 2017, the applicant's defence lawyer lodged a request to be permitted to produce evidence by obtaining a psychiatric and neurological expert opinion aimed at proving that, at the time of the offence, the applicant had lacked capacity for criminal responsibility as defined in Article 11 of the Criminal Code (see paragraph 26 below). He argued that Dr W.S. had not personally examined the applicant, and objected to his expert opinion being used and the same expert being commissioned again. He reiterated that request during the trial hearing of 13 February 2017 before the Linz Regional Court (*Landesgericht*).

15. The Regional Court acceded to the request and ordered another psychiatric expert opinion. In its reasoning, it held that the new expert opinion was commissioned because the opinion provided by Dr M.F. in the first placement proceedings (see paragraph 7 above) had stated that elements of being a danger to others owing to psychosis had been present; moreover, the applicant had had to undergo another inpatient stay in hospital (see paragraph 9 above) after Dr W.S. had prepared his expert opinion.

16. On 1 April 2017, Dr A.K., a specialist in psychiatry and neurology and head of the Forensic Department of the Neuromed Campus of the University Clinic Linz and authorised to teach at university on the basis of a post-doctoral lecturing qualification (*venia docendi*), submitted her twenty-nine-page long expert opinion based on her own examination of the applicant. She concluded that the applicant had already been suffering from a schizophrenic disorder in 2001. Given the multifaceted manifestation of her symptoms, the bizarre subjects of her delusions, her varied hallucinations, her total lack of motivation, her complete social withdrawal, her total loss of the capability to perform socially and of the ability to take care of herself, this had to be classified as undifferentiated schizophrenia. The applicant's

schizophrenic disorder was chronic, she had no awareness of suffering from a disorder and did not accept the necessary treatment. She had repeatedly and without authorisation stopped taking the prescribed medication in the past. At the time of the offence, the applicant had been overcome by her disorder to such an extent that she had no longer had any connection to reality, which is why she had no longer been able to assess the situation in a way that would conform to reality, or to make deliberate decisions or draw conclusions which were not influenced by her disorder. Dr A.K. concluded that, consequently, the applicant had not been criminally liable. With respect to acts of aggression in the future, she considered that the applicant had to be classified as high-risk, as a consequence of, among other things, her lack of awareness of suffering from a disorder, her negative attitude towards treatment, the vast range of existing active symptoms, her documented difficulty in controlling her impulses and the lack of success in treatment so far. This was likely to present a danger to neighbours, caregivers and police officers who could become random victims of serious attacks. Dr A.K. finally noted that the medical requirements for confinement under Article 21 § 1 of the Criminal Code (see paragraph 28 below) were met as mere outpatient treatment would not be sufficient at that time.

V. PROCEEDINGS FOR THE APPLICANT'S DETENTION AS A PREVENTIVE MEASURE (CONFINEMENT IN AN INSTITUTION FOR MENTALLY ILL OFFENDERS)

17. On 19 April 2017 the Linz public prosecutor's office, on the basis of Dr A.K.'s expert opinion, replaced the criminal charges against the applicant (see paragraph 13 above) with a request for her detention as a preventive measure, that is her confinement in an institution for mentally ill offenders (*Einweisung in eine Anstalt für geistig abnorme Rechtsbrecher*) under Article 21 § 1 of the Criminal Code (see paragraph 28 below). The applicant was arrested on 8 May 2017 and, on the following day, was again taken to the Neuromed Campus of the Kepler University Clinic. The Linz Regional Court ordered her provisional detention (*vorläufige Anhaltung*) under Article 429 § 4 of the Code of Criminal Procedure (see paragraph 34 below).

18. During the trial hearing of 8 August 2017, the applicant, represented by a new defence lawyer, was examined, as were the witnesses, and all of the above-mentioned expert opinions (see paragraphs 7, 9, 12 and 16 above) were read out. Dr A.K. explained her opinion in detail, maintaining it in full and addressing the opinions submitted by Dr W.S. and Dr M.F. with regard to the differences in their conclusions.

19. By a judgment of 8 August 2017, the Linz Regional Court held that the applicant had committed an offence which, had she been criminally liable at the time of the offence, would have had to be attributed to her as the offence of attempted resistance to State authority under Article 15 § 1 and Article 269

§ 1 of the Criminal Code (see paragraphs 27 and 31 below). Furthermore, the applicant had committed this offence under the influence of a state of mind which excluded criminal liability under Article 11 of the Criminal Code (see paragraph 26 below), resulting from a serious mental or emotional disorder, namely undifferentiated schizophrenia. As it had to be feared that the applicant would commit further punishable offences with serious consequences, the court ordered her confinement in an institution for mentally ill offenders under Article 21 § 1 of the Criminal Code (see paragraph 28 below). The court based its findings regarding the applicant's criminal liability and dangerousness above all on the expert opinion provided by Dr A.K., which was found to be conclusive and comprehensible and free from contradictions and uncertainties.

20. The applicant lodged a plea of nullity (*Nichtigkeitsbeschwerde*) against the judgment and an appeal against the sentence, and a request to be permitted to produce evidence by obtaining a further psychiatric expert opinion under Article 127 § 3 of the Code of Criminal Procedure (see paragraph 27 below), aimed at proving that she was not dangerous within the meaning of Article 21 § 1 of the Criminal Code (see paragraph 28 below). She also lodged an individual application to challenge the constitutionality of the law (*Parteienantrag auf Normenkontrolle*) with the Constitutional Court (*Verfassungsgerichtshof*).

21. On 6 March 2018 the Constitutional Court declined to deal with the application for lack of prospects of success. It referred to the limits set by the legislature in Article 21 §§ 1 and 3 and Article 25 §§ 1 and 3 of the Criminal Code (see paragraphs 28-29 below) in respect of ordering preventive confinement, and those with regard to persons remaining in preventive confinement which, with due consideration being given to the dangerousness of the person concerned, prevented disproportionate confinement in an institution. It further found that the statutory rules of Article 21 § 1 of the Criminal Code (see paragraph 28 below) were not indeterminate or arbitrary, and that the legislature had thus made use of its discretion in a manner which was irreproachable under constitutional law.

22. On 27 June 2018 the Supreme Court (*Oberster Gerichtshof*) rejected the applicant's plea of nullity and referred the case to the Linz Court of Appeal (*Oberlandesgericht*) for a decision on the appeal. It considered that the applicant had presented arguments for an appeal but not for nullity; further, the applicant had failed to lodge a request under the first sentence of Article 127 § 3 of the Code of Criminal Procedure (see paragraph 27 below), in accordance with which doubts about the expertise of an expert must first be dispelled by questioning the expert in question, and if this failed to achieve the desired result, by consulting another expert.

23. On 6 August 2018 the Linz Court of Appeal dismissed the applicant's request to be permitted to produce evidence by obtaining a further psychiatric expert opinion. It considered that the Regional Court had already correctly

pointed out why the earlier expert opinions, geared towards different statutory requirements, had not been able to call into question the expert opinion obtained in the present proceedings and based on an in-person examination. There was thus no contradiction between the expert opinions and there were no deficiencies in terms of substance within the meaning of Article 127 § 3 of the Code of Criminal Procedure (see paragraph 27 below) which would have necessitated a further expert opinion.

24. Given the lapse of time since the preparation of the most recent expert opinion (see paragraph 16 above), the Court of Appeal requested a supplementary opinion thereto on the question whether the requirements for conditional release were (now) met. On 30 July 2018 Dr A.K. found – after another face-to-face examination – that the applicant was still suffering from undifferentiated schizophrenia and was, at that time, not in remission. She further maintained her previous conclusions, including that there was a still a high probability of offences with serious consequences being committed in the future and that therefore, the psychiatric requirements for confinement in an institution under Article 21 § 1 of the Criminal Code (see paragraph 28 below) were met. On this basis, the Court of Appeal held that conditional suspension of confinement was not a viable option at the time.

VI. SUBSEQUENT DEVELOPMENTS

25. On 15 October 2020 the Linz Regional Court ordered the applicant's conditional release by 30 October 2020, imposing specific requirements and a probationary period of five years. No further details about the applicant's mental health condition or the expert opinions obtained in the context of her release were provided by the parties.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. CRIMINAL CODE (*STRAFGESETZBUCH*)

26. Article 11 of the Criminal Code concerns capacity for criminal responsibility and reads, in so far as relevant, as follows:

> "A person who, at the time of the offence, is incapable of recognising the wrongfulness of his or her act or of acting on the basis of such recognition because of a mental illness, a mental disability, a profound disturbance of consciousness or another serious mental disorder equivalent to one of these conditions, does not act culpably."

27. Article 15 concerns criminal liability for attempts and prescribes that penalties for intentional acts apply not only to the completed act but also to an attempt and any participation in an attempt. The act is attempted as soon as the perpetrator expresses his or her decision to carry it out or to induce another person to do so by an act immediately preceding the execution.

28. The confinement in an institution for mentally ill offenders as a preventive measure is dealt with in Article 21, the relevant parts of which read as follows:

> "(1) If a person commits an offence punishable with a term of imprisonment exceeding one year, and if the person cannot be punished for the sole reason that he or she committed the offence under the influence of a state of mind excluding responsibility (Article 11) resulting from a serious mental or emotional disorder, the court shall order his or her confinement in an institution for mentally ill offenders, if in view of his or her person, his or her condition and the nature of the offence it is to be feared that he or she will otherwise, under the influence of the mental or emotional disorder, commit a criminal offence with serious consequences.
>
> (2) If such a fear exists, an order for confinement in an institution for mentally ill offenders shall also be made in respect of a person who, while not lacking responsibility, commits an offence punishable by a term of imprisonment exceeding one year under the influence of his or her severe mental or emotional disorder. In such a case the confinement is to be ordered at the same time as the sentence is passed."

29. Article 25 regulates the duration of preventive measures associated with deprivation of liberty and prescribes that these preventive measures are to be ordered for an indefinite period and enforced for as long as their purpose requires. The court must decide on the revocation of the preventive measure. Whether confinement in an institution for mentally ill offenders is still necessary must be reviewed by the court of its own motion at least once a year.

30. Article 146 defines the crime of fraud as being committed by a person who, with the intention of unlawfully enriching himself or herself or a third party through the conduct of the deceived person, induces a person by deception to perform an act, acquiesce in an act or omit to perform an act which damages the assets of the deceived person or another person.

31. Article 269 concerns the crime of resistance to State authority (*Widerstand gegen die Staatsgewalt*). It is placed in the chapter "Criminal offences against State authority" and reads, in so far as relevant, as follows:

> "(1) Any person who prevents an authority from performing an official act by force or by threat of force and any person who prevents an official from performing an official act by force or by a dangerous threat shall be liable to a custodial sentence not exceeding three years ...
>
> ...
>
> (3) An official act within the meaning of paragraph 1 ... shall only be deemed to be an act by which the official, as an organ of sovereign administration or jurisdiction, exercises a command or coercive power."

II. CODE OF CRIMINAL PROCEDURE (*STRAFPROZESSORDNUNG*)

32. Article 126 of the Code of Criminal Procedure concerns, among other matters, the experts who are to be appointed if special expertise is required for investigations or for taking evidence which is otherwise not available to

the prosecution authorities. The experts appointed must be, above all, persons who are registered on the list of court experts (*Gerichtssach-verständigenliste*). If other persons are appointed, they must be informed in advance about their essential rights and duties.

33. Article 127 concerning expert opinions reads, in so far as relevant, as follows:

> "(2) Experts shall give their findings and expert opinion *lege artis* and according to the best of their knowledge and conscience. They shall obey summonses from the public prosecutor's office and the court, and answer questions during trials, interviews and reconstructions of the criminal act.
>
> (3) If the findings are inconclusive or the expert opinion is contradictory or otherwise deficient, or if the statements of two experts on the facts observed by them or the conclusions drawn from their observations are significantly contradictory, and the concerns cannot be resolved by questioning them, a further expert shall be commissioned. If the case concerns the examination of psychological conditions and developments, an expert opinion shall be obtained from an expert with an authorisation to teach at a domestic or foreign university."

34. Article 429 concerns the procedure for the confinement in an institution for mentally ill criminal offenders under Article 21 § 1 of the Criminal Code (see paragraph 28 above) and reads, in so far as relevant, as follows:

> "(1) If there are sufficient grounds for assuming that the requirements of Article 21 § 1 of the Criminal Code have been met, the public prosecutor's office shall lodge an application for confinement in an institution for mentally ill criminal offenders ...
>
> ...
>
> (4) ... if the person concerned cannot remain at liberty without danger to himself or herself or others, or if medical observation is required, temporary detention in an institution for mentally ill criminal offenders or admission to a public hospital for mental illnesses shall be ordered ..."

III. ACT ON PLACEMENT OF MENTALLY ILL PERSONS IN HOSPITALS (HOSPITALISATION ACT) (BUNDESGESETZ ÜBER DIE UNTERBRINGUNG PSYCHISCH KRANKER IN KRANKENANSTALTEN, UNTERBRINGUNGSGESETZ)

35. Section 3 of the Hospitalisation Act concerns the requirements for the placement of mentally ill persons in hospitals and psychiatric wards under civil and administrative law. It provides that the only persons who may be accommodated in such an institution are those who: (1) suffer from a mental illness, and in connection therewith seriously and substantially endanger their life or health or the life or health of others, and (2) cannot be adequately medically treated or cared for in another way, in particular outside a psychiatric ward.

IV. REFORM OF THE SYSTEM OF PREVENTIVE MEASURES

36. In January 2015 a working group set up by the then Minister of Justice concerning a comprehensive reform of the system of preventive measures under the Criminal Code (*Maßnahmenvollzug*) submitted a report on the results achieved (see "Arbeitsgruppe Maßnahmenvollzug: Bericht an den Bundesminister für Justiz über die erzielten Ergebnisse", BMJ-V70301/0061-III 1/2014, January 2015). It aimed at fundamentally improving law and practice in the area of preventive measures, in particular the quality of the risk prognoses for mentally ill offenders in confinement. The report found that the number of persons held in such confinement had considerably increased in the past few years. Among various other flaws it found that there was a tendency towards admissions for offences with a lower risk potential. It considered that the best-case scenario was to assume four "false positives" for one "true positive" person held in confinement and pointed at continued doubts about the consistent quality of expert opinions produced in the admission and discharge procedures, notably as regards the reliability of the risk prognoses, as attested by a previously commissioned study in 2011. The expert group therefore proposed, among many other things, that in the future, confinement should in principle be permitted for underlying offences which were punishable by more than three years' imprisonment (with exceptions for cases of particularly high risk) and that there should be a direct causal relationship, specific to the serious mental illness, between the illness and the underlying offence. As a very important point it also made proposals with a view to improving the quality of expert opinions, notably by ensuring adequate remuneration of forensic psychiatric experts and by establishing (minimum) quality standards for their expert opinions and by promoting the range of qualification modules by the doctors' association.

37. The Ministry of Justice subsequently produced first draft legislative amendments in 2017. The most recent proposals date from May 2021 and aim at reforming the system of preventive measures in a comprehensive manner, with proposals for amendments of the Criminal Code, the Code of Criminal Procedure and the Juvenile Justice Act. This new initiative was also triggered by recent judgments of the Court having found violations of the Convention in that area (see *Kuttner v. Austria,* no. 7997/08, 16 July 2015, and *Lorenz v. Austria,* no. 11537/11, 20 July 2017), the need to bring the law in line with the Court´s increased case-law on Article 5 of the Convention and furthermore with the UN Convention on the Rights of Persons with Disabilities. The proposed amendments intend to strengthen the principle of proportionality in the confinement of mentally ill offenders, to improve the risk prognoses and to raise the quality standards of such confinement. Based on the finding that the confinement of approximately 40 per cent of the persons currently held in institutions for mentally ill offenders has been

ordered on the basis of underlying offences of a minor character, a new threshold is proposed to include only those underlying offences which are punishable by more than three years' imprisonment. An exception is proposed with regard to offenders who are particularly dangerous to the life, limb, sexual integrity or sexual self-determination of others, in which case confinement will also be possible for offences punishable by one to three years' imprisonment.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

38. The applicant complained that her confinement in an institution for mentally ill offenders by the judgment of 8 August 2017, confirmed on 27 June and 6 August 2018 (see paragraphs 19, 22 and 23 above), had not been necessary or proportionate and was therefore contrary to Article 5 § 1 of the Convention, the relevant parts of which read as follows:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> ...
>
> (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. Admissibility

39. The Court notes that the complaints are neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. They must therefore be declared admissible.

B. Merits

1. Submissions by the parties

(a) The applicant

40. The applicant submitted that deprivation of liberty within the meaning of Article 5 § 1 (e) of the Convention was only permissible if it was necessary in accordance with the purpose of that measure, which in the present case was the protection of society from serious crimes by providing medical treatment for offenders with genuine mental illnesses, which could only be carried out on an inpatient basis. The criminal law penalties should be proportionate to the offence committed, otherwise the requirement of the proportionality of criminal law penalties with regard to the underlying offence would be violated. It would, for example, not be proportionate to impose a life sentence

on someone for committing the offence of resistance to State authority. In the same vein, it would not be proportionate to order a person's (potentially life-long) confinement in an institution for mentally ill offenders, in particular in cases of minor and one-off violence, as in the applicant's case. The applicant argued that proportionality took on a particularly practical significance when determining the duration of deprivation of liberty. Even a deprivation of liberty that was in itself necessary, appropriate and initially reasonable might become disproportionate if it exceeded a certain duration.

41. The applicant further submitted that under Article 21 of the Criminal Code (see paragraph 28 above), the duration of the confinement was detached from the underlying offence and the courts only considered the question of dangerousness (if and for as long as the mentally ill offender was considered to be dangerous). The underlying offence only set the threshold for when a potentially life-long confinement could be ordered, that is in the case of all offences, except property offences, which provided for the deprivation of liberty for more than one year. Domestic legislation did not, however, permit a proportionality analysis between the underlying offence and the duration of the confinement. It was consequently not in compliance with Article 5 § 1 (e) of the Convention, as it did not ensure that confinement only took place in those cases where the mental illness by its nature or extent might justify compulsory confinement. Domestic legislation also allowed for confinement if there was no high risk of serious violent or sexual offences being committed, which could be ascertained from concrete circumstances relating to the person or his or her behaviour.

42. In addition, the applicant maintained that Dr A.K., on whose expert opinion the Regional Court had mainly relied in its verdict (see paragraph 19 above), was not registered on the list of court experts, whereas the other two experts who had been consulted, Dr W.S. and Dr M.F. (see paragraphs 6-7 and 9 and 11-12 above), were on that list. The applicant was in particular insistent about the expert opinion of Dr W.S. who, according to her, had found that she did not present any danger of committing a serious crime (see paragraph 12 above). As regards the expert opinion provided by Dr A.K. almost eleven months after the offence at issue, reasonable doubts as to its correctness had been shown to exist, in particular because it contradicted the findings of Dr M.F. The Regional Court had failed to give sufficient reasons for its decision on why it had not followed Dr M.F.'s prognosis with regard to the applicant's dangerousness, or for its conclusion that the applicant had posed a long-term threat, because the court had simply adopted the opinion of the expert whom it had appointed itself. The applicant also pointed out that besides the evening in question, there had never been another known incident in which she had been physically aggressive towards other persons. It was therefore incomprehensible, given the minor character of the offence at issue and the differing expert opinions, that no decisive expert opinion

(*Obergutachten*) had been requested, as prescribed by Article 127 § 3 of the Code of Criminal Procedure (see paragraph 27 above).

(b) The Government

43. The Government insisted that the requirements of subparagraph (e) of Article 5 § 1 of the Convention were met in the present case. The Regional Court had based its decision primarily, but not exclusively, on the expert opinion of Dr A.K. (see paragraph 16 above), who had a *venia docendi* and who had examined the applicant in person. Dr A.K. had scrutinised the expert opinion provided by Dr W.S. in the preliminary proceedings (see paragraphs 11-12 above), attributing the differences in the findings to Dr W.S. only having carried out a rudimentary study of the applicant's medical history and not having examined the applicant in person. Dr A.K. had further discussed her expert opinion during the trial, providing the court and the applicant with the opportunity to put questions to her. No concerns had emerged as regards her professional competence. It was also not relevant that she was no longer registered on the list of court experts, as the same rights and obligations were incumbent on her under Article 127 § 2 of the Code of Criminal Procedure (see paragraph 27 above).

44. Furthermore, the Regional Court had been able to gain a first-hand impression of the applicant's mental state during the trial hearing and had not discerned any contradictions between those impressions and the expert opinion provided by Dr A.K., or other indications pointing to the incorrectness or any other deficiency in that opinion. The expert opinion provided by Dr M.F. during the placement proceedings (see paragraphs 6-7 and 9 above) had been read out during the trial at the request of the applicant's defence lawyer, and the Regional Court had taken note of it in its assessment of the evidence. Nor had any concerns as to the quality of Dr A.K.'s expert opinion been brought to light during the appeal proceedings.

45. As regards the question whether the kind or degree of the applicant's mental illness had warranted compulsory confinement, the Government referred to the findings of the Regional Court concerning the applicant's dangerousness, according to which it was highly likely that she would, without inpatient treatment, commit an offence with serious consequences under the influence of her mental illness, above all a punishable offence against life and limb. Furthermore, the Court of Appeal had commissioned a supplementary opinion from Dr A.K. which confirmed, in particular, that offences with serious consequences were highly likely to be committed in the future (see paragraph 24 above).

46. In addition, the Government argued that under Article 25 of the Criminal Code (see paragraph 29 above), preventive measures were to be implemented only for as long as their purpose required, and the necessity of continued confinement had to be reviewed by a court of its own motion at least once a year. The fact that the applicant was granted conditional release

on 30 October 2020 (see paragraph 25 above) showed that the domestic courts had complied with Article 5 § 4 of the Convention when reviewing the need for the applicant's continued confinement and concluding that at that moment in time she no longer presented a danger or at least not a danger warranting such measures. Lastly, the Government pointed out that the applicant had been placed in an institution specialising in mental and neurological disorders.

2. The Court's assessment

(a) General principles established in the Court's case-law

47. The Court reiterates that in order to determine whether someone has been "deprived of his liberty" within the meaning of Article 5, the starting point must be his or her concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question (see, among many other authorities, *De Tommaso v. Italy* [GC], no. 43395/09, § 80, 23 February 2017). No deprivation of liberty will be lawful unless it falls within one of the permissible grounds specified in sub-paragraphs (a) to (f) of Article 5 § 1 (see *Khlaifia and Others v. Italy* [GC], no. 16483/12, § 88, 15 December 2016).

48. As regards the deprivation of liberty of persons suffering from mental disorders, an individual cannot be deprived of his liberty as being of "unsound mind" unless the following three minimum conditions are satisfied: firstly, he must reliably be shown to be of unsound mind, that is, a true mental disorder must be established before a competent authority on the basis of objective medical expertise; secondly, the mental disorder must be of a kind or degree warranting compulsory confinement; thirdly, the validity of continued confinement depends upon the persistence of such a disorder (see, among many other authorities, *Ilnseher v. Germany* [GC], nos. 10211/12 and 27505/14, § 127, 4 December 2018; *Rooman v. Belgium* [GC], no. 18052/11, § 192, 31 January 2019; and *Denis and Irvine v. Belgium* [GC], nos. 62819/17 and 63921/17, § 135, 1 June 2021).

49. 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 *Denis and Irvine*, cited above, § 136).

50. As regards the first condition for a person to be deprived of his liberty as being of "unsound mind", namely that a true mental disorder must have been established before a competent authority on the basis of objective medical expertise, the Court reiterates that, despite the fact that the national authorities have a certain discretion, in particular on the merits of clinical

diagnoses, 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, and *Denis and Irvine*, cited above, § 136).

51. No deprivation of liberty of a person considered to be of unsound mind may be deemed in conformity with Article 5 § 1 (e) of the Convention if it has been ordered without seeking the opinion of a medical expert. Any other approach falls short of the required protection against arbitrariness, inherent in Article 5 of the Convention (see *Kadusic v. Switzerland*, no. 43977/13, § 43, 9 January 2018, with further references). The particular form and procedure in this respect may vary depending on the circumstances. It may be acceptable, in urgent cases or where a person is arrested because of his violent behaviour, that such an opinion be obtained immediately after the arrest. In all other cases, a prior consultation is necessary. Where no other possibility exists, for instance owing to a refusal of the person concerned to appear for an examination, at least an assessment by a medical expert on the basis of the file must be sought, failing which it cannot be maintained that the person has reliably been shown to be of unsound mind (see *Varbanov v. Bulgaria*, no. 31365/96, § 47, ECHR 2000-X, and *Constancia v. the Netherlands* (dec.), no. 73560/12, § 26, 3 March 2015).

52. As for the requirements to be met by an "objective medical expertise", the Court considers in general that the national authorities are better placed than itself to evaluate the qualifications of the medical expert in question. However, in certain specific cases, it has considered it necessary for the medical experts in question to have a specific qualification, and has in particular required the assessment to be carried out by a psychiatric expert where the person confined as being "of unsound mind" had no history of mental disorders, as well as, sometimes, the assessment to be made by an external expert (see *Ilnseher*, cited above, § 130, and the references therein).

53. Moreover, the objectivity of the medical expertise entails a requirement that it was sufficiently recent. The question whether the medical expertise was sufficiently recent depends on the specific circumstances of the case before it (ibid., § 131, and the references therein).

54. As regards the second requirement for an individual to be deprived of his liberty as being of "unsound mind", namely that the mental disorder must be of a kind or degree warranting compulsory confinement, the Court reiterates that a mental disorder may be considered as being of a degree warranting compulsory confinement if it is found that the confinement of the person concerned is necessary because the person needs therapy, medication or other clinical treatment to cure or alleviate his condition, but also where the person needs control and supervision to prevent him from, for example,

causing harm to himself or other persons (ibid., § 133; see also *Stanev v. Bulgaria* [GC], no. 36760/06, § 146, ECHR 2012).

55. 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 *Denis and Irvine*, cited above, § 137).

56. The Court reiterates that, in certain circumstances, the welfare of a person with mental disorders might be a further factor to take into account, in addition to medical evidence, in assessing whether it is necessary to place the person in an institution. However, the objective need for accommodation and social assistance must not automatically lead to the imposition of measures involving deprivation of liberty. The Court considers that any protective measure should reflect as far as possible the wishes of persons capable of expressing their will. Failure to seek their opinion could give rise to situations of abuse and hamper the exercise of the rights of vulnerable persons. Therefore, any measure taken without prior consultation of the interested person will, as a rule, require careful scrutiny (see *N. v. Romania*, no. 59152/08, § 146, 28 November 2017, and *Stanev*, cited above, § 153).

57. Furthermore, it is primarily for the domestic courts to assess the scientific quality of different psychiatric opinions and, in that respect, they have a certain margin of appreciation. When the national courts have examined all aspects of different expert reports on the necessity of an individual's psychiatric internment, the Court will not intervene unless their findings are arbitrary or unscientific (see *Hodžić v. Croatia*, no. 28932/14, § 63, 4 April 2019, and *Ruiz Rivera v. Switzerland*, no. 8300/06, § 62, 18 February 2014).

58. Lastly, 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 *Denis and Irvine*, cited above, § 168). It allows compulsory confinement as a security measure, the purpose of which is preventive rather than punitive (ibid., § 141).

(b) Application of the above principles to the present case

59. The Court notes at the outset that Article 5 of the Convention is applicable to the present case as the applicant has been deprived of her liberty (see paragraph 47 above). The Court further notes that the issue in dispute between the parties concerns the question whether the applicant's

confinement in an institution for mentally ill offenders as a preventive measure complied with Article 5 § 1 (e) of the Convention.

60. The applicant mainly contended that this measure was disproportionate to the underlying minor offence, and that there had been differing conclusions by the experts and therefore another, decisive, expert opinion had been called for. The Government disagreed, insisting that all relevant Convention requirements had been met in the present case.

61. The Court first observes that during the criminal proceedings initiated against the applicant, expert opinions were requested from two experts, Dr W.S. and Dr A.K., who concluded that the applicant suffered from a schizoaffective disorder (Dr W.S.) or undifferentiated schizophrenia (Dr A.K.) (see paragraphs 12, 16 and 24 above). Similarly, a third expert, Dr M.F., who was consulted during the two civil placement proceedings held in 2016-2017, equally concluded, in the respective sets of proceedings that the applicant suffered from a schizoaffective disorder, or from "paranoid schizophrenia" (see paragraphs 7 and 9 above). All three experts consulted were medical specialists in psychiatry and neurology. Two of them, namely Dr A.K. and Dr M.F., reached their conclusions after conducting face-to-face examinations. All of the expert opinions were produced in 2016 and 2017, that is the period in which the underlying offence had been committed (2016) and criminal proceedings instituted against the applicant (2016-2017), and therefore they were sufficiently recent in the circumstances of this case. Furthermore, the diagnoses of all three experts concluded with diagnosing a type of schizophrenic disorder, which is undoubtedly serious enough to be considered as a "true" mental disorder which may render treatment in an institution necessary.

62. As regards the applicant's argument that Dr A.K., on whose expert opinion the Regional Court mainly relied in its verdict, was not registered on the list of court experts (see paragraph 42 above), the Court first reiterates that the national authorities are better placed than itself to evaluate the qualifications of the medical experts in question (see paragraph 52 above) and that it is primarily for the domestic courts to assess the scientific quality of different psychiatric opinions (see paragraph 57 above). Concerning the present case, the Court notes that Article 126 of the Code of Criminal Procedure does not require court-appointed experts to be mandatorily registered on the list of court experts (see paragraph 32 above). Article 126 provides that the experts appointed must be, above all, those who are registered on the list in question. However, it does not exclude the appointment as court experts of persons not registered on the list. Furthermore, all experts, whether or not registered on the list, are bound by the same rights and duties, notably the obligation to give their findings and expert opinion *lege artis* and according to the best of their knowledge and conscience, as provided in Article 127 § 2 of the Code of Criminal Procedure (see paragraph 27 above). The Court also notes in this context that Dr A.K. is

a renowned expert with a university *venia docendi* and head of the Forensic Department of the Neuromed Campus of the University Clinic Linz. The applicant did not call into question her qualifications as an expert in the domestic proceedings. Furthermore, the Court observes that the applicant's initial defence lawyer in fact objected to the use of the expert opinion by Dr W.S., who had concluded that the applicant had been criminally liable at the time of the offence, and requested to be permitted to produce evidence by obtaining another expert opinion with the aim of proving that, at the time of the offence, the applicant had lacked the capacity for criminal liability (see paragraph 14 above). In conclusion, the Court sees no reason to doubt that the applicant's mental disorder was established on the basis of objective medical expertise.

63. Turning to the question of whether the applicant's mental disorder was of a kind or degree warranting compulsory confinement, the Court reiterates that the Regional Court, in its decision ordering her confinement in an institution for mentally ill offenders, above all relied on the expert opinion provided by Dr A.K., and the latter's assessment of the danger she represented to others (see paragraph 19 above). In this context, the Court considers it important to note that Dr A.K. was able to conduct a face-to-face examination of the applicant, whereas Dr W.S. could not, as the applicant did not obey a summons for her examination. Dr W.S. therefore had to base his expert opinion solely on the existing files, and concluded himself, contrary to the claim of the applicant (see paragraph 42 above), that he was not able to make any prognosis about any future offences with serious consequences (see paragraph 12 above). At the same time, Dr A.K.'s expert opinion was very detailed and stretched over twenty-nine pages. Furthermore, during the trial, Dr A.K. thoroughly discussed the expert opinion provided by Dr W.S., as well as those provided by Dr M.F. during the civil placement proceedings, all of which were read out, and she explained the differences between them (see paragraphs 16 and 18 above).

64. The Court further observes that the applicant was described as lacking awareness of the fact that she suffered from a disorder and as displaying a negative attitude towards treatment, and as sometimes also having refused to take medication in the past (see paragraphs 7, 9 and 16 above). These were all factors which were taken into consideration by the domestic courts when deciding on the applicant's confinement as opposed to outpatient treatment. The Court is therefore satisfied that the applicant's deprivation of liberty had been shown to have been necessary in the circumstances of her case.

65. As regards the question of the persistence of the mental disorder, verified by objective medical evidence, throughout the applicant's confinement, the Court notes that her confinement was ordered by the Regional Court's judgment of 8 August 2017 (see paragraph 19 above) on the basis of, above all, Dr A.K.'s expert opinion of 1 April 2017. Although, one year later, the Court of Appeal upheld the confinement order on 6 August

2018, it did not do so until it received a supplementary opinion to Dr A.K.'s expert opinion, precisely because of the lapse of time since the preparation of that expert opinion (see paragraph 24 above). Significantly, Dr A.K. conducted another face-to-face examination of the applicant and submitted her supplementary opinion on 30 July 2018, again concluding that the applicant still suffered from undifferentiated schizophrenia, and also maintaining her risk prognosis with regard to future offences with serious consequences. The Court is therefore satisfied that, when the Court of Appeal confirmed the initial confinement order, the persistence of the applicant's mental disorder was reliably verified by objective medical evidence. In this context, the Court also observes that on 15 October 2020, that is slightly more than two years later, the same Regional Court ordered her conditional release from confinement (see paragraph 25 above). While no further details were provided to the Court on any possible expert opinions obtained in this context, it is noted that in accordance with Article 25 of the Criminal Code, preventive measures, including confinement in an institution for mentally ill offenders, are only to be enforced for as long as their purpose requires, and the continued necessity of such confinement must be reviewed by a court of its own motion at least once a year (see paragraph 29 above).

66. While the Court is mindful of the fact that the applicant was accused of attempted resistance to State authority, which the applicant considers an offence of a minor character and therefore not proportionate to the sanction of confinement as preventive measure imposed on her (see paragraph 40 above), it stresses that it has already held that Article 5 § 1 (e) of the Convention does not specify the possible acts, punishable under the 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 paragraph 58 above; and see also *Denis and Irvine*, cited above, § 168). In other words, whether or not it was a minor offence is not decisive when examining the compliance of a person's deprivation of liberty with Article 5 § 1 (e) of the Convention. Indeed, the authorities are not required to take into account the nature of the acts committed by the individual concerned which gave rise to his or her compulsory confinement (ibid., § 169). Nonetheless, the Court takes note of the currently ongoing discussion on a comprehensive reform of the system of preventive measures in Austria, in particular its aim to achieve compliance with the Court´s case-law, to strengthen the principle of proportionality in the system of preventive detention and to improve considerably the quality of the risk prognoses. This encompasses the aim of improving the quality of expert opinions produced in this context by, for example, establishing (minimum) quality standards for such expert opinions (see paragraphs 36–37 above).

67. In conclusion, the foregoing considerations are sufficient to enable the Court to consider that at the time of the decision ordering the applicant's confinement in an institution for mentally ill offenders on 8 August 2017, she

was reliably shown to be of unsound mind, that is, a true mental disorder had been established before a competent authority on the basis of objective medical expertise, and that her mental disorder was of a kind or degree warranting compulsory confinement. Furthermore, before confirming her continued confinement on 6 August 2018, the persistence of her mental disorder has been reliably verified on the basis of objective medical evidence.

68. There has accordingly been no violation of Article 5 § 1 (e) of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

69. The applicant complained that the rejection of her request to consult a further medical expert concerning her state of mind at the time of the events had resulted in a breach of her right to a fair trial as provided for in Article 6 § 1 of the Convention, which reads as follows:

> "In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

70. The Government considered that the domestic courts had complied with the Convention requirements flowing from the principle of equality of arms concerning the expert reports. The applicant insisted that the domestic courts should have ordered a further, decisive expert opinion (*Obergutachten*) under Article 127 § 3 of the Code of Criminal Procedure (see paragraph 27 above) and that the failure to do so had rendered her trial unfair.

71. At the outset the Court reiterates that Article 6 § 1 of the Convention does not lay down any rules on the admissibility of evidence or the way in which evidence should be assessed, these being primarily matters for regulation by national law and the national courts. Normally, issues such as the weight attached by the national courts to particular items of evidence or to findings or assessments submitted to them for consideration are not for the Court to review. The Court should not act as a fourth-instance body and will therefore not question under Article 6 § 1 the national courts' assessment, unless their findings can be regarded as arbitrary or manifestly unreasonable (see *Moreira Ferreira v. Portugal (no. 2)* [GC], no. 19867/12, § 83, 11 July 2017, with further references).

72. In determining whether the proceedings as a whole were fair, regard must also be had to whether the rights of the defence were respected. It must be examined in particular whether the applicant was given the opportunity of challenging the authenticity of the evidence and of opposing its use. In addition, the quality of the evidence must be taken into consideration, including whether the circumstances in which it was obtained cast doubt on its reliability or accuracy (see *Bykov v. Russia* [GC], no. 4378/02, § 90, 10 March 2009, with further references).

73. Furthermore, the requirement of a fair trial does not impose on a trial court an obligation to order an expert opinion or any other investigative

measure merely because a party has requested it. Where the defence insists on the court hearing a witness or taking other evidence (such as an expert report, for instance), it is for the domestic courts to decide whether it is necessary or advisable to accept that evidence for examination at the trial (see *Poletan and Azirovik v. the former Yugoslav Republic of Macedonia*, nos. 26711/07 and 2 others, § 95, 12 May 2016, and *Khodorkovskiy and Lebedev v. Russia*, nos. 11082/06 and 13772/05, § 718, 25 July 2013, with further references).

74. Turning to the circumstances of the present case, the Court notes that the applicant's complaint under this head concerned the domestic courts' refusal to order yet another expert report as further evidence. However, the admissibility of evidence, including the question of ordering further evidence, is primarily a matter for the national courts. Moreover, the Court observes that the applicant had ample opportunity of challenging the expert reports produced in the course of the proceedings and to oppose their use, and that she had indeed availed herself of that opportunity (see, for example, paragraph 14 above). No argument was put forward before this Court which would make it doubt the quality of the expert reports produced by the various experts consulted during the proceedings. There is no need for the Court to determine whether Article 6 of the Convention is applicable to the present case under its civil or criminal head (for an outline of the Court's case-law concerning the applicability of Article 6 in the context of the internment in a psychiatric hospital of mentally ill offenders, see *Hodžić*, cited above, §§ 40-47), as in any event the domestic courts' findings do not disclose any appearance of arbitrariness nor of manifest unreasonableness (contrast with, for example, *Hodžić*, cited above, §§ 69-75). Consequently, this complaint must be rejected as manifestly ill-founded in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 14 IN CONJUNCTION WITH ARTICLE 5 OF THE CONVENTION

75. The applicant complained that under domestic law it would not have been an offence justifying her confinement in an institution if she had slapped someone who was not a State official. She relied in substance on Article 5 in conjunction with Article 14 of the Convention, which reads as follows:

> "The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

76. The Government submitted that there was no difference in the treatment of persons finding themselves in comparable situations to that of the applicant. They argued that if another mentally ill offender had acted in the same way *vis-à-vis* a State official, he or she would have been subjected

to the same treatment and would – provided all requirements set out in Article 21 § 1 of the Criminal Code (see paragraph 28 above) had been met – likewise have had to be confined in an institution for mentally ill offenders. The applicant had thus not been subjected to a difference in treatment on the basis of the Criminal Code to any other mentally ill offender. The Government consequently contended that there was no reason for them to elaborate on any possible grounds for justification on this point.

77. The applicant insisted that her right to freedom from discrimination had been severely curtailed. Hitting a police officer in the chest, without causing an injury, could result in a potentially life-long confinement for a mentally ill offender. If she had hit another person in the same way, she would not have been placed in a psychiatric ward. In her view, the differentiation in domestic legislation between hitting a police officer and hitting another person did not serve any legitimate purpose.

78. The Court reiterates that Article 14 complements the other substantive provisions of the Convention and the Protocols thereto. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions. It is necessary but it is also sufficient for the facts of the case to fall "within the ambit" of one or more of the Convention Articles (see *Carson and Others v. the United Kingdom*, no. 42184/05, § 63, 4 November 2008, with further references). Given that the applicant's personal liberty was at stake in the present case, the facts fall within the ambit of Article 5 of the Convention.

79. The Court has established in its case-law that only differences in treatment based on an identifiable characteristic, or "status", are capable of amounting to discrimination within the meaning of Article 14. Moreover, for an issue to arise under Article 14 there must be a difference in the treatment of persons in analogous, or relevantly similar, situations. Article 14 lists specific grounds which constitute "status" including, inter alia, race, national or social origin and birth. However, the list is illustrative and not exhaustive, as is shown by the words "any ground such as" and the inclusion in the list of the phrase "any other status". Those words have generally been given a wide meaning and their interpretation has not been limited to characteristics which are personal in the sense that they are innate or inherent (see *Biao v. Denmark* [GC], no. 38590/10, § 89, 24 May 2016, with further references). Furthermore, not all differences in treatment – or failure to treat differently persons in relevantly different situations – constitute discrimination, but only those devoid of an "objective and reasonable justification", that is, if it does not pursue a "legitimate aim" or if there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realised" (see *Molla Sali v. Greece* [GC], no. 20452/14, § 135, 19 December 2018; *Fabris v. France* [GC], no. 16574/08, § 56, ECHR 2013 (extracts); and *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, § 175, ECHR 2007-IV).

80. The question therefore arises whether there has been a difference in treatment in the present case of persons in relevantly similar situations on the basis of an identifiable "status" and if so, whether that treatment pursued a legitimate aim. The Government argued that all mentally ill offenders would receive the same treatment, whereas the applicant contended that the discriminatory aspect was the fact of having hit a police officer rather than a private citizen.

81. At the outset the Court notes that there are doubts whether the present case concerns a difference of treatment based on "status" within the meaning of Article 14 of the Convention. This question can be left open however as this complaint is in any event manifestly ill-founded on other grounds. For the Court the starting point is the definition of the offence which the applicant has been accused of, namely resistance to State authority, which is defined in Article 269 of the Criminal Code as "any person who prevents an authority from performing an official act by force or by threat of force and any person who prevents an official from performing an official act by force or by a dangerous threat" (see paragraph 31 above). It is clear under domestic law that, while the use of "force" is a necessary requirement to establish this offence, its purpose is not to punish the fact that the applicant hit a police officer but rather to punish (in this case) the attempt to prevent the police officer from performing an official act when the latter was arresting her, contrary to the special protection the Austrian legislator intended to confer on the enforcement and the exercise of State authority (see paragraph 31 above). The same provision cannot come into play when the same action is done *vis-à-vis* a private citizen, so far as the latter are not entitled to perform an official act in the exercise of State authority. The applicant is therefore not in a relevantly similar situation with someone who has hit a private person. Consequently, this complaint is unsubstantiated and must be rejected as manifestly ill-founded in accordance with Article 35 §§ 3 (a) and 4 of the Convention.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaint concerning the applicant's confinement in an institution for mentally ill offenders under Article 5 § 1 (e) of the Convention admissible and the remainder of the application inadmissible;

2. *Holds* that there has been no violation of Article 5 § 1 (e) of the Convention.

Done in English, and notified in writing on 21 June 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Ilse Freiwirth Deputy Registrar	Tim Eicke President