



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

FIFTH SECTION

CASE OF SCHUMMER v. GERMANY

(Applications nos. 27360/04 and 42225/07)

JUDGMENT

STRASBOURG

13 January 2011

FINAL

13/04/2011

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Schummer v. Germany,

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

Peer Lorenzen, *President*,
Renate Jaeger,
Rait Maruste,
Isabelle Berro-Lefèvre,
Mirjana Lazarova Trajkovska,
Zdravka Kalaydjieva,
Ganna Yudkivska, *judges*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 7 December 2010,

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

PROCEDURE

1. The case originated in two applications (nos. 27360/04 and 42225/07) against the Federal Republic of Germany lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a German national, Mr Martin Schummer (“the applicant”), on 10 July 2004 and 4 September 2007 respectively.

2. The applicant, who had been granted legal aid, was represented by Mr R. Kirpes, a lawyer practising in Offenburg. The German Government (“the Government”) were represented by their Agent, Mrs A. Wittling-Vogel, *Ministerialdirigentin*, of the Federal Ministry of Justice.

3. The applicant alleged in both applications, in particular, that the retrospective extension of his preventive detention from a maximum period of ten years, which had been the maximum for such detention under the legal provisions applicable at the time of his offence, to an unlimited period of time breached the prohibition of retrospective punishment under Article 7 § 1 of the Convention. In his application no. 42225/07, he further complained under Article 5 § 1 of the Convention about his continued preventive detention beyond the ten-year period.

4. On 13 March 2007 a Chamber of the Fifth Section decided to adjourn the examination of application no. 27360/04 pending the outcome of the proceedings in the case of *M. v. Germany*, no. 19359/04. On 22 January 2009 the President of the Fifth Section decided to give notice of the applications no. 27360/04 and no. 42225/07 to the Government, requested them to submit information on changes in the applicant's detention regime and adjourned the examination of the applications until the

judgment in the case of *M. v. Germany*, no. 19359/04, has become final. It was also decided to rule on the admissibility and merits of the applications at the same time (Article 29 § 1). In view of the fact that the judgment of 17 December 2009 in the case of *M. v. Germany* became final on 10 May 2010, the President decided on 20 May 2010 that the proceedings in the two applications at issue be resumed and granted priority to the applications (Rule 41 of the Rules of Court).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1959 and lives in Freiburg.

A. The applicant's previous convictions and the order for his preventive detention and execution thereof

6. On 6 March 1985 the Stuttgart Regional Court convicted the applicant of two counts of rape and abduction and of one count of attempted rape and deprivation of liberty committed in 1984. It sentenced him to five years' imprisonment and ordered his placement in preventive detention pursuant to Article 66 of the Criminal Code (see paragraphs 35-36 below). The court found that the applicant, acting with full criminal responsibility, had raped two young women and had attempted to rape another woman all of whom he had taken with him in his car. It further noted that the applicant had previously been convicted by juvenile courts of attempted rape and of rape; in respect of the second offence he had been placed in a psychiatric hospital.

7. The applicant served his full prison sentence in Freiburg Prison. He was then placed in preventive detention, executed in that same prison, for the first time on 27 June 1989; he had thus served ten years in preventive detention by 26 June 1999.

8. The continuation of the applicant's preventive detention was ordered by the Freiburg Regional Court on several occasions.

B. The first set of proceedings (application no. 27360/04)

1. The decision of the Freiburg Regional Court

9. On 11 December 2001 the Freiburg Regional Court, in judicial review proceedings under Article 67e of the Criminal Code (see paragraph 38

below), refused to suspend the applicant's preventive detention and grant probation.

10. The Regional Court considered that the applicant's continued preventive detention was necessary because there was still a risk that the applicant, owing to his criminal tendencies, might commit serious offences resulting in considerable psychological or physical harm to the victims if released (Article 67d § 3 of the Criminal Code; see paragraph 40 below). Since the court's last order of 18 June 1999, to the reasoning of which it referred, no circumstances leading to a more positive conclusion had become known.

11. The Regional Court had consulted a psychological expert on the question whether there was a risk that the applicant, if released, might commit offences by which his victims would suffer serious physical or mental harm. However, the expert could only submit a view on the basis of the case file as the applicant had refused to talk to her.

12. The Regional Court further noted that in his report of 11 November 1991 a neurologic expert had found that the applicant suffered from a personality disorder which had resulted in his acts of sexual aggression. The Regional Court acknowledged that the applicant had accepted social-therapeutic treatment from August 1985 until June 1988. However, he had then terminated that treatment. In 1992 the detention authorities had proposed certain relaxations in the conditions of the applicant's detention, but the applicant had refused to cooperate. In his report of 12 April 1999 the neurologic expert had found that the applicant still suffered from the said personality disorder. In recent years the applicant had refused any therapy. Therefore, there was nothing to indicate that the applicant was no longer dangerous. In any event, his release could only be taken into consideration after his conditions of detention had been relaxed, combined with a successful social-therapeutic treatment.

13. The Regional Court further stated that it did not consider the new version of Article 67d of the Criminal Code of January 1998 (see paragraph 40 below) to breach constitutional law in so far as it applied also to persons convicted prior to that change in the law.

2. The decision of the Karlsruhe Court of Appeal

14. By a decision of 21 March 2002, served on the applicant on 2 April 2002, the Karlsruhe Court of Appeal, fully endorsing the reasons given by the Regional Court, dismissed the applicant's appeal. In particular, contrary to the applicant's submission, it considered that Article 67d of the Criminal Code, read in conjunction with section 1a of the Introductory Act to the Criminal Code (see paragraph 40 below), which entered into force on 31 January 1998, were constitutional. The prohibition on retrospective punishment did not apply to orders of preventive detention, which did not constitute a penalty, but a measure of correction and prevention. In view of

the fact that there was a risk that the applicant, if released, might commit sexual offences similar to those he had previously committed, his continued detention was not yet disproportionate.

3. The decision of the Federal Constitutional Court

15. On 29 April 2002 the applicant lodged a constitutional complaint with the Federal Constitutional Court against the decisions ordering his continued preventive detention even on completion of the ten-year period. He argued that these decisions were based on Article 67d § 3 of the Criminal Code, as amended in 1998, under the terms of which the duration of a convicted person's first period of preventive detention was extended retrospectively from a maximum period of ten years, applicable prior to the change in the law, to an unlimited period of time. Therefore, this provision violated the prohibition on retrospective punishment under Article 103 § 2 of the Basic Law, the prohibition of retrospective legislation enshrined in the rule of law, his right to liberty under Article 2 § 2, second sentence, of the Basic Law and the principle of proportionality (see paragraph 32 below).

16. On 22 March 2004 the Federal Constitutional Court declined to consider the applicant's constitutional complaint (file no. 2 BvR 664/02) as it was ill-founded. Referring to its leading decision given on 5 February 2004 in relation to the case of *M.* (file no. 2 BvR 2029/01; application no. 19359/04 before this Court), it found that Article 67d § 3 of the Criminal Code, read in conjunction with section 1a § 3 of the Introductory Act to the Criminal Code, as amended on 26 January 1998, were constitutional.

C. The second set of proceedings (application no. 42225/07)

1. The decision of the Freiburg Regional Court

17. On 12 July 2006 the Freiburg Regional Court, having consulted a psychiatric expert, W., again refused to suspend the applicant's preventive detention and grant probation under Article 67d § 3 of the Criminal Code.

2. The decision of the Karlsruhe Court of Appeal

18. On 11 December 2006 the Karlsruhe Court of Appeal dismissed the applicant's appeal. The Court of Appeal endorsed the Regional Court's view that there was still a risk that the applicant, if released, might commit serious offences resulting in considerable psychological or physical harm to the victims.

19. The Court of Appeal had regard to the report of 16 March 2006 by psychiatric expert W., who, having examined the applicant and the case file, had considered the applicant liable to reoffend. According to the expert, the

applicant still suffered from a personality disorder which had, in the past, manifested itself by violent sexualised behaviour.

20. The Court of Appeal observed that the expert's negative prognosis was based on a limited factual basis in respect of the applicant's personal development after his offences. The expert had only found that the applicant's personality disorder had not been cured by therapy, without assessing whether this disorder would still manifest itself in similar offences in the future. It was for the prison authorities and the regional courts to extend the basis for a prognosis by therapeutic measures and by granting relaxations in the conditions of detention. However, such therapeutic measures had not been taken in the applicant's case in the past years, even though an expert had already made specific proposals for such measures in 1991 and again in 1999. The applicant had refused a dialogue with the prison authorities on his therapy, but it was for the prison authorities to make reasonable offers of treatment and to grant relaxations in the conditions of the applicant's detention, which it had failed to do. However, without testing and preparing the applicant for release in the course of relaxations in his conditions of detention, there was a risk that he would commit serious sexual offences if released.

3. The decision of the Federal Constitutional Court

21. On 16 January 2007 the applicant lodged a constitutional complaint with the Federal Constitutional Court. He argued that his continued preventive detention violated his right to liberty, the prohibition of retrospective punishment, the prohibition of double punishment for the same offence and the prohibition of inhuman treatment. He argued, in particular, that by the further execution of preventive detention against him, he had been treated as a mere object of State action in disregard of his human dignity. Moreover, his right to a fair trial had been breached, in particular in that the criminal courts had failed to decide on his continued preventive detention within the statutory time-limit.

22. On 26 April 2007 the Federal Constitutional Court declined to consider the applicant's constitutional complaint (file no. 2 BvR 157/07).

23. It found that the applicant's complaint was inadmissible for non-exhaustion of domestic remedies in so far as he had complained about the Regional Court's failure to decide on his continued preventive detention already in 2003, as prescribed by Article 67e §§ 1 and 2 of the Criminal Code (see paragraph 38 below). The applicant had failed to apply for judicial review of this failure to comply with the statutory time-limit.

24. In so far as the applicant had complained about his continued preventive detention for a period exceeding ten years, his complaint was ill-founded. His continued preventive detention on the basis of Article 67d § 3 of the Criminal Code, as amended in 1998, was constitutional.

The criminal courts had further respected the principle of proportionality in respect of deprivations of liberty in their decisions.

D. Subsequent developments

25. On 31 July 2009 the Freiburg Regional Court, reviewing the necessity of the applicant's continued detention, decided that the applicant was to remain in preventive detention as, owing to his criminal tendencies, he was still liable to commit serious offences resulting in considerable psychological or physical harm to the victims.

26. On 31 August 2009 the Karlsruhe Court of Appeal quashed that decision and remitted the case to the Freiburg Regional Court. It found that the Regional Court had not sufficiently established the facts on which it had based its decision and had failed to hear the medical expert, who had submitted a report in writing on its request, also in person at the hearing.

27. On 11 June 2010 the Federal Constitutional Court dismissed the applicant's request of 15 May 2010 that the Constitutional Court, by way of an interim injunction, request the Regional Court to order the applicant's immediate release and declare whether the Court's findings in its judgment in the case of *M. v. Germany*, no. 19359/04, were applicable to other detainees (file no. 2 BvQ 34/10). It found that the applicant had failed to explain why he could not be expected to await the decisions to be taken by the courts responsible for the execution of sentences on his further detention.

28. On 8 July 2010 the Freiburg Regional Court again decided not to suspend the applicant's preventive detention and grant probation.

29. On 10 September 2010 the Karlsruhe Court of Appeal declared the applicant's preventive detention terminated and ordered his supervision of conduct. The Court of Appeal, referring to a leading decision of the Federal Court of Justice of 12 May 2010 (see paragraph 41 below), argued that it was possible to interpret the Criminal Code so as to comply with the Convention as interpreted by this Court in the case of *M. v. Germany*. Accordingly, it found that in relation to preventive detention the application of a new statutory provision retrospectively to the detriment of the person concerned was prohibited and the law in force at the time of the offence had to be applied. As Article 67d § 1 of the Criminal Code, in its version in force at the time the applicant committed his offences, provided that the first period of preventive detention could not exceed ten years, the applicant's preventive detention was terminated and the applicant was to be released.

30. The Karlsruhe Court of Appeal further found that the applicant had no claim for damages under the Act on Compensation for Measures of Criminal Prosecution (*Gesetz über die Entschädigung für Strafverfolgungsmaßnahmen*). A claim for damages under Article 5 § 5 of the Convention or official liability proceedings had to be brought in the civil courts.

31. The applicant was released on 10 September 2010 and has been submitted to constant surveillance by five police officers since then.

II. RELEVANT DOMESTIC AND COMPARATIVE LAW AND PRACTICE

32. A comprehensive summary of the provisions of the Criminal Code and of the Code of Criminal Procedure governing the distinction between penalties and measures of correction and prevention, in particular preventive detention, and the making, review and execution in practice of preventive detention orders, is contained in the Court's judgment in the case of *M. v. Germany* (no. 19359/04, §§ 45-78, 17 December 2009). The provisions relevant to the present case can be summarised as follows:

A. The order of preventive detention by the sentencing court

33. The German Criminal Code distinguishes between penalties (*Strafen*) and so-called measures of correction and prevention (*Maßregeln der Besserung und Sicherung*) to deal with unlawful acts. Preventive detention (Article 66 *et seq.* of the Criminal Code) is classified as a measure of correction and prevention. The purpose of such measures is to rehabilitate dangerous offenders or to protect the public from them. They may be ordered for offenders in addition to their punishment (compare Articles 63 *et seq.*). They must, however, be proportionate to the gravity of the offences committed by, or to be expected from, the defendants as well as to their dangerousness (Article 62 of the Criminal Code).

34. The temporal applicability of provisions of the Criminal Code depends on whether they relate to penalties or measures of correction and prevention. The penalty is determined by the law which is in force at the time of the act (Article 2 § 1 of the Criminal Code); if the law in force on completion of the act is amended before the court's judgment, the more lenient law applies (Article 2 § 3). On the other hand, decisions on measures of correction and prevention are to be based on the law in force at the time of the decision unless the law provides otherwise (Article 2 § 6).

35. The sentencing court may, at the time of the offender's conviction, order his preventive detention under certain circumstances in addition to his prison sentence if the offender has been shown to be dangerous to the public (Article 66 of the Criminal Code).

36. In particular, the sentencing court orders preventive detention in addition to the penalty if someone is sentenced for an intentional offence to at least two years' imprisonment and if the following further conditions are satisfied. Firstly, the perpetrator must have been sentenced twice already, to at least one year's imprisonment in each case, for intentional offences committed prior to the new offence. Secondly, the perpetrator must

previously have served a prison sentence or must have been detained pursuant to a measure of correction and prevention for at least two years. Thirdly, a comprehensive assessment of the perpetrator and his acts must reveal that, owing to his propensity to commit serious offences, notably those which seriously harm their victims physically or mentally or which cause serious economic damage, the perpetrator presents a danger to the general public (see Article 66 § 1).

B. The order for execution of the placement in preventive detention

37. Article 67c of the Criminal Code governs orders for the preventive detention of convicted persons which are not executed immediately after the judgment ordering them becomes final. Paragraph 1 of the Article provides that if a term of imprisonment is executed prior to a simultaneously ordered placement in preventive detention, the court responsible for the execution of sentences (that is, a special Chamber of the Regional Court composed of three professional judges, see sections 78a and 78b(1)(1) of the Court Organisation Act) must review, before completion of the prison term, whether the person's preventive detention is still necessary in view of its objective. If that is not the case, it suspends on probation the execution of the preventive detention order; supervision of the person's conduct (*Führungsaufsicht*) commences with suspension.

C. Judicial review and duration of preventive detention

38. Pursuant to Article 67e of the Criminal Code the court (*i.e.* the chamber responsible for the execution of sentences) may review at any time whether the further execution of the preventive detention order should be suspended on probation. It is obliged to do so within fixed time-limits (paragraph 1 of Article 67e). For persons in preventive detention, this time-limit is two years (paragraph 2 of Article 67e).

39. Under Article 67d § 1 of the Criminal Code, in its version in force prior to 31 January 1998, the first period of preventive detention may not exceed ten years. If the maximum duration has expired, the detainee shall be released (Article 67d § 3).

40. Article 67d of the Criminal Code was amended by the Combating of Sexual Offences and Other Dangerous Offences Act of 26 January 1998, which entered into force on 31 January 1998. Article 67d § 3, in its amended version, provides that if a person has spent ten years in preventive detention, the court shall declare the measure terminated (only) if there is no danger that the detainee will, owing to his criminal tendencies, commit serious offences resulting in considerable psychological or physical harm to the victims. Termination shall automatically entail supervision of the conduct of the offender. The former maximum duration of a first period of

preventive detention was abolished. Pursuant to section 1a § 3 of the Introductory Act to the Criminal Code, the amended version of Article 67d § 3 of the Criminal Code was to be applied without any restriction *ratione temporis*.

D. The application of the Court's findings in the *M. v. Germany* case by the domestic courts

41. By a decision of 12 May 2010 (file no. 4 StR 577/09) the Federal Court of Justice (fourth senate), in a decision concerning a retrospective order of preventive detention (*nachträgliche Sicherungsverwahrung*), found that the Criminal Code was to be and could be interpreted so as to comply with Article 7 § 1 of the Convention as interpreted by this Court in its judgment in *M. v. Germany*, no. 19359/04. Under Article 2 § 6 of the Criminal Code (see paragraph 34 above), decisions on measures of correction and prevention were to be based on the law in force at the time of the court's decision unless the law provided otherwise. Article 7 § 1 of the Convention, in its interpretation by this Court, was such a law which provided otherwise as the Court had considered that preventive detention was to be qualified as a penalty for the purposes of Article 7 to which the prohibition of retrospective punishment applied (the fifth senate of the Federal Court of Justice, in its decision of 21 July 2010, file no. 5 StR 60/10, disagreed with the fourth senate on that point in relation to a different provision on retrospective preventive detention). Therefore, court decisions concerning orders of preventive detention had to be based on the law in force at the time of the offence.

42. Referring, in particular, to these findings of the Federal Court of Justice, several Courts of Appeal found in cases comparable, as regards the temporal course of events, to the *M. v. Germany* case that the abolition of the maximum period of ten years laid down in Article 67d § 1 of the Criminal Code in its version in force before 31 January 1998 could not be effected retrospectively and therefore still applied to preventive detention ordered in relation to offences committed prior to that date. As a consequence, these courts declared terminated the preventive detention of the detainees concerned whose first period of preventive detention had been executed beyond that maximum period and ordered their release (see, in particular, Frankfurt am Main Court of Appeal, decision of 24 June 2010, file no. 3 Ws 485/10; Hamm Court of Appeal, decision of 6 July 2010, file no. 4 Ws 157/10; Karlsruhe Court of Appeal, decision of 15 July 2010, file no. 2 Ws 458/09; and Schleswig-Holstein Court of Appeal, decision of 15 July 2010, file no. 1 Ws 267/10).

43. On the contrary, several Courts of Appeal considered that the Court's findings in the case of *M. v. Germany* could not be applied at present by the domestic courts responsible for the execution of sentences as the Criminal

Code as it stood did not permit its interpretation in compliance with Articles 5 and 7 of the Convention. Section 1a § 3 of the Introductory Act to the Criminal Code had expressly stipulated that the abolition of the maximum duration of ten years for a first period of preventive detention also applied to persons who had committed the offences in question prior to the entry into force of that abolition and had thereby unambiguously authorized the application of the amended law with retrospective effect. It was therefore for the legislator to execute the Court's judgment in the *M.* case. These Courts of Appeal accordingly did not terminate the preventive detention of the persons concerned (see, in particular, Celle Court of Appeal, decision of 25 May 2010, file no. 2 Ws 169-170/10; Stuttgart Court of Appeal, decision of 1 June 2010, file no. 1 Ws 57/10; Koblenz Court of Appeal, decision of 7 June 2010, file no. 1 Ws 108/10; Nuremberg Court of Appeal, decision of 24 June 2010, file no. 1 Ws 315/10; and Cologne Court of Appeal, decision of 14 July 2010, file no. 2 Ws 428/10). Several of these Courts of Appeal subsequently submitted such cases to the Federal Court of Justice for a preliminary ruling under a new provision of the Court Organisation Act (section 121 § 2 no. 3) in force since 30 July 2010, which is aimed at securing a uniform case-law of the German courts on that issue (see, for instance, Koblenz Court of Appeal, decision of 30 September 2010, file no. 1 Ws 108/10).

THE LAW

I. JOINDER OF THE APPLICATIONS

44. Given that the present two applications concern two sets of proceedings in both of which a similar subject-matter, namely the applicant's continued preventive detention, was at issue, the Court decides that the applications shall be joined (Rule 42 § 1 of the Rules of Court).

II. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

45. The applicant complained in his application no. 42225/07 that his continued preventive detention beyond the period of ten years which had been the maximum for such detention under the legal provisions applicable at the time of his offence and conviction breached Article 5 § 1 of the Convention which, in so far as relevant, provides:

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

(a) the lawful detention of a person after conviction by a competent court; ...

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; ...

(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; ...”

46. The Government contested that argument.

A. Admissibility

47. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

48. The applicant argued that the retrospective prolongation of his preventive detention from an initial maximum period of ten years to an unlimited period of time, eighteen months before his scheduled release from preventive detention, had rendered his detention arbitrary and failed to comply with Article 5.

49. The Government took the view that in terms of the temporal course of events, the present applications were parallel cases to the application of *M. v. Germany*, no. 19359/04. At the time of the applicant's conviction in 1985, a first order of preventive detention was limited by law to a maximum duration of ten years. Following the abolition of the ten-year maximum period in 1998, the applicant kept being placed in preventive detention also after 26 June 1999, when he had served ten years in his first preventive detention. The courts responsible for the execution of sentences had considered that there was still a risk that the applicant, owing to his criminal tendencies, might commit serious offences resulting in considerable psychological or physical harm to the victims if released. As regards the compliance of the applicant's continued detention with Article 5 § 1, the Government referred to their observations made on that issue in the case of *M. v. Germany*.

50. The Government further argued that it was for the domestic courts to decide on the termination of the applicant's preventive detention, having regard to the Court's findings in the case of *M. v. Germany*. Referring to

recent decisions taken by the Schleswig-Holstein, Karlsruhe, Frankfurt am Main and Hamm Courts of Appeal (see paragraphs 41-42 above), they took the view that it was possible for the courts responsible for the execution of sentences to interpret German law in compliance with Articles 5 and 7 of the Convention.

2. *The Court's assessment*

a. Recapitulation of the relevant principles

51. The Court reiterates the fundamental principles laid down in its case-law on Article 5 § 1 of the Convention, which have been summarised in its judgment of 17 December 2009 in the case of *M. v. Germany*, no. 19359/04, as follows:

“86. Article 5 § 1 sub-paragraphs (a) to (f) contain an exhaustive list of permissible grounds for deprivation of liberty, and no deprivation of liberty will be lawful unless it falls within one of those grounds (see, *inter alia*, *Guzzardi v. Italy*, 6 November 1980, § 96, Series A no. 39; *Witold Litwa v. Poland*, no. 26629/95, § 49, ECHR 2000-III; and *Saadi v. the United Kingdom* [GC], no. 13229/03, § 43, ECHR 2008-...). ...

87. For the purposes of sub-paragraph (a) of Article 5 § 1, the word “conviction”, having regard to the French text (“*condamnation*”), has to be understood as signifying both a finding of guilt after it has been established in accordance with the law that there has been an offence (see *Guzzardi*, cited above, § 100), and the imposition of a penalty or other measure involving deprivation of liberty (see *Van Droogenbroeck v. Belgium*, 24 June 1982, § 35, Series A no. 50).

88. Furthermore, the word “after” in sub-paragraph (a) does not simply mean that the “detention” must follow the “conviction” in point of time: in addition, the “detention” must result from, follow and depend upon or occur by virtue of the “conviction” (see *Van Droogenbroeck*, cited above, § 35). In short, there must be a sufficient causal connection between the conviction and the deprivation of liberty at issue (see *Weeks v. the United Kingdom*, 2 March 1987, § 42, Series A no. 114; *Stafford v. the United Kingdom* [GC], no. 46295/99, § 64, ECHR 2002-IV; *Waite v. the United Kingdom*, no. 53236/99, § 65, 10 December 2002; and *Kafkaris v. Cyprus* [GC], no. 21906/04, § 117, ECHR 2008-...). ...

89. Furthermore, under sub-paragraph (c) of Article 5 § 1, detention of a person may be justified “when it is reasonably considered necessary to prevent his committing an offence”. However, that ground of detention is not adapted to a policy of general prevention directed against an individual or a category of individuals who present a danger on account of their continuing propensity to crime. It does no more than afford the Contracting States a means of preventing a concrete and specific offence (see *Guzzardi*, cited above, § 102; compare also *Eriksen*, cited above, § 86). This can be seen both from the use of the singular (“an offence”) and from the object of Article 5, namely to ensure that no one should be dispossessed of his liberty in an arbitrary fashion (see *Guzzardi*, *ibid.*).”

b. Application of these principles to the present case

52. The Court has to determine, in the light of the foregoing principles, whether the applicant, during his preventive detention at issue, which exceeded a period of ten years, was deprived of his liberty in accordance with one of the sub-paragraphs (a) to (f) of Article 5 § 1. That detention was justified under sub-paragraph (a) of Article 5 § 1 if it still occurred “after conviction”, in other words if there was still a sufficient causal connection between the applicant's conviction and his continuing deprivation of liberty occurring after 26 June 1999, when he had served ten years in preventive detention.

53. The Court considers that the applicant's “conviction”, for the purposes of Article 5 § 1 (a), is only his criminal conviction by the sentencing Stuttgart Regional Court in 1985, which alone found him guilty of several offences (amongst others, rape), and which ordered his preventive detention in addition to a prison sentence. The subsequent decisions of the courts responsible for the execution of sentences to retain the applicant in preventive detention did not, on the contrary, satisfy the said requirement of “conviction” as they no longer involved a finding of guilt of a (new) offence (compare, *mutatis mutandis*, *M. v. Germany*, cited above, §§ 95-96).

54. At the time of the applicant's conviction in 1985, the order for his preventive detention, read in conjunction with Article 67d § 1 of the Criminal Code in the version then in force (see paragraph 39 above), meant that the applicant, against whom preventive detention was ordered for the first time, could be kept in preventive detention for a maximum period of ten years. Thus, had it not been for the amendment of Article 67d of the Criminal Code in 1998 (see paragraph 40 above), which was declared applicable also to preventive detention orders which had been made – as had the order against the applicant – prior to the entry into force of that amended provision (section 1a § 3 of the Introductory Act to the Criminal Code; see paragraph 40 above), the applicant would have been released when ten years of preventive detention had expired, irrespective of whether he was still considered dangerous to the public.

55. The present application is therefore a follow-up case, in terms of the temporal course of events, to the application of *M. v. Germany* (cited above), and the Court sees no reason to depart from its findings in that judgment. The Court thus considers, as it has done in the case of *M. v. Germany*, (cited above, §§ 92-101), that there was not a sufficient causal connection between the applicant's conviction by the sentencing court and his continued deprivation of liberty beyond the period of ten years in preventive detention. His continuing detention was therefore not justified under sub-paragraph (a) of Article 5 § 1.

56. The Court further notes that the applicant's preventive detention beyond the ten-year point was also not justified under any of the other sub-paragraphs of Article 5 § 1. In particular, the applicant's preventive

detention ordered under Article 66 § 1 of the Criminal Code (see paragraphs 6 and 35-36 above) was not justified as detention “reasonably considered necessary to prevent his committing an offence” under sub-paragraph (c) of that provision (compare, *mutatis mutandis*, *M. v. Germany*, cited above, § 102). Likewise, the Court is not satisfied that the domestic courts, which were called upon to determine whether the applicant was liable to reoffend owing to his criminal tendencies, based their decision to retain the applicant in preventive detention, executed in prison, on the ground that he suffered from a serious mental disorder and was thus “of unsound mind” within the meaning of sub-paragraph (e) of Article 5 § 1.

57. The Court observes that following its judgment in the *M. v. Germany* case, the Karlsruhe Court of Appeal considered, as did the Government in the present proceedings, that it was possible for the courts responsible for the execution of sentences to interpret the provisions of the Criminal Code in compliance with Article 5 and Article 7 of the Convention, as interpreted by the Court, and terminated the applicant's preventive detention. It welcomes the fact that the domestic court thus ended the applicant's continued deprivation of liberty in breach of Article 5 § 1, one of the core rights guaranteed by the Convention. This is in keeping with the subsidiary nature of the supervisory mechanism of complaint to the Court articulated in Articles 1, 35 § 1 and 13 of the Convention and reiterated in the Interlaken Declaration of 19 February 2010 (*ibid.*, PP 6 and part B., § 4 of the Action Plan), which lays the primary responsibility for implementing and enforcing the rights and freedoms of the Convention on the national authorities. The applicant's release does not, however, alter the fact that in relation to his preventive detention beyond the ten-year point up to his release, he may claim to have been a victim of a breach of Article 5.

58. There has accordingly been a violation of Article 5 § 1 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 7 OF THE CONVENTION

59. The applicant further complained in both applications to the Court that the retrospective extension of his preventive detention from a maximum period of ten years to an unlimited period of time breached his right not to have a heavier penalty imposed on him than the one applicable at the time of his offence. He relied on Article 7 § 1 of the Convention, which reads as follows:

“1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.”

60. The Government contested that argument.

A. Admissibility

61. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. *The parties' submissions*

62. The applicant argued that preventive detention had to be classified as a penalty. By the abolition of the maximum duration of ten years of his preventive detention, which was applicable at the time of his offence, a heavier penalty had therefore been imposed on him retrospectively, in breach of Article 7 § 1 of the Convention. Moreover, the duration of preventive detention was insufficiently defined.

63. The Government referred to their observations made in relation to Article 5 in the present application and to those made on Article 7 in the case of *M. v. Germany*.

2. *The Court's assessment*

a. Recapitulation of the relevant principles

64. The Court reiterates the relevant principles laid down in its case-law on Article 7 of the Convention, which have been summarised in its judgment of 17 December 2009 in the case of *M. v. Germany* (cited above), as follows:

“118. Article 7 embodies, *inter alia*, the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*). While it prohibits in particular the retrospective application of the criminal law to an accused's disadvantage (see *Kokkinakis v. Greece*, 25 May 1993, § 52, Series A no. 260-A) or extending the scope of existing offences to acts which previously were not criminal offences, it also lays down the principle that the criminal law must not be extensively construed to an accused's detriment, for instance by analogy (see *Uttley v. the United Kingdom* (dec.), no. 36946/03, 29 November 2005, and *Achour v. France* [GC], no. 67335/01, § 41, ECHR 2006-IV). ...

120. The concept of “penalty” in Article 7 is autonomous in scope. To render the protection afforded by Article 7 effective the Court must remain free to go behind appearances and assess for itself whether a particular measure amounts in substance to a “penalty” within the meaning of this provision (see *Welch v. the United Kingdom*, 9 February 1995, § 27, Series A no. 307-A; *Jamil v. France*, 8 June 1995, § 30, Series A no. 317-B; and *Uttley*, cited above). The wording of Article 7 paragraph 1, second sentence, indicates that the starting-point in any assessment of the existence of a penalty is whether the measure in question is imposed following conviction for a

“criminal offence”. Other relevant factors are the characterisation of the measure under domestic law, its nature and purpose, the procedures involved in its making and implementation, and its severity (see *Welch*, cited above, § 28; *Jamil*, cited above, § 31; *Adamson v. the United Kingdom* (dec.), no. 42293/98, 26 January 1999; *Van der Velden v. the Netherlands* (dec.), no. 29514/05, ECHR 2006-XV; and *Kafkaris*, cited above, § 142). The severity of the measure is not, however, in itself decisive, since, for instance, many non-penal measures of a preventive nature may have a substantial impact on the person concerned (see *Welch*, cited above, § 32; compare also *Van der Velden*, cited above).”

b. Application of these principles to the present case

65. The Court is thus called upon to determine, in the light of the foregoing principles, whether the extension of the applicant's preventive detention from a maximum of ten years to an unlimited period of time, as a result of which the applicant was kept in preventive detention beyond the initial ten-year point, violated the prohibition of retrospective penalties under Article 7 § 1, second sentence.

66. The Court observes that at the time the applicant committed his sexual offences in 1984, a preventive detention order made by a sentencing court for the first time, read in conjunction with Article 67d § 1 of the Criminal Code in the version then in force (see paragraph 39 above), meant that the applicant could be kept in preventive detention for ten years at the most. Based on the subsequent amendment in 1998 of Article 67d of the Criminal Code, read in conjunction with section 1a § 3 of the Introductory Act to the Criminal Code (see paragraph 40 above), which abolished that maximum duration with immediate effect, the courts responsible for the execution of sentences then ordered, in the two sets of proceedings here at issue, the applicant's continued preventive detention beyond the ten-year point. Thus, the applicant's preventive detention – as that of the applicant in the case of *M. v. Germany* – was prolonged with retrospective effect, under a law enacted after the applicant had committed his offence.

67. The Court further refers to its conclusion in the case of *M. v. Germany* (cited above, §§ 124-133) that preventive detention under the German Criminal Code, having notably regard to the facts that it is ordered by the criminal courts following a conviction for a criminal offence and that it entails a deprivation of liberty which, following the change in the law in 1998, no longer has any maximum duration, is to be qualified as a “penalty” for the purposes of the second sentence of Article 7 § 1 of the Convention. It again sees no reason to depart from that finding in the present case.

68. The foregoing considerations are sufficient to enable the Court to conclude that there has been a violation of Article 7 § 1 of the Convention.

IV. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

69. The applicants also complained that his prolonged preventive detention constituted inhuman and degrading treatment or punishment in breach of Article 3 of the Convention, which provides:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

70. The Government contested that argument.

A. The parties' submissions

71. In the Government's submission, the applicant failed to exhaust domestic remedies in relation to his complaint under Article 3 in the proceedings which are at issue in his application no. 27360/04. Other than in the proceedings at issue in application no. 42225/07, he failed to argue in his constitutional complaint of 29 April 2002 to the Federal Constitutional Court that his continued preventive detention for an indefinite duration constituted inhuman or degrading punishment.

72. The Government further took the view that the applicant's continued preventive detention on the basis of a judgment delivered in 1985 had not violated Article 3 of the Convention. The applicant's preventive detention for an indefinite duration did not amount to an irreducible life sentence because the courts responsible for the execution of sentences had to examine at least every two years whether the applicant was still liable to commit serious offences and had to release him if that was not the case. The fact that the applicant may have supposed at the time of his conviction that he could not be placed in preventive detention for more than ten years did not warrant protection because in accordance with Article 2 § 6 of the Criminal Code (see paragraph 34), the maximum duration of preventive detention had always been susceptible to be changed. It was only the Court's new case-law developed in *M. v. Germany* which led to the conclusion that the said provision could only be applied to a limited extent in respect of preventive detention.

73. The Government submitted that the applicant had not been granted relaxations in the execution of his detention regime, which were a precondition for his release, because he had refused to make a therapy. They considered that in fact, the applicant's complaint about a retrospective change in the consequences of his offences fell to be examined under Article 7 and 5 § 1, but not under Article 3.

74. The applicant contested that view. He argued that he had exhausted domestic remedies in relation to both applications because the Federal Constitutional Court, in its leading decision of 5 February 2004 to which that court's decision in his case had referred, had also had regard to the

provisions of the Basic Law which corresponded to Article 3 of the Convention.

75. The applicant further submitted that the prolongation of his preventive detention to an indefinite duration amounted to a breach of Article 3. He complained that he had never been given a chance to prove, during relaxations in the execution of his detention regime, that he was no longer dangerous to the public. As he had not been granted any privileges in preventive detention compared to the conditions of detention for other prisoners serving their sentence, the execution of his preventive detention had violated Article 3.

B. The Court's assessment

76. The Court notes that in the proceedings at issue in application no. 27360/04, the applicant failed to raise in substance his complaint that his prolonged preventive detention constituted inhuman and degrading treatment in the proceedings before the Federal Constitutional Court prior to bringing it before this Court. His complaint under Article 3 must therefore be dismissed for non-exhaustion of domestic remedies in relation to that application, pursuant to Article 35 §§ 1 and 4 of the Convention.

77. As regards the applicant's complaint under Article 3 in relation to application no. 42225/07, the Court reiterates that ill-treatment, including punishment, must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the nature and context of the treatment or punishment, the manner and method of its execution, its duration, its physical or mental effects and, in some instances, the sex, age and state of health of the victim (see, *inter alia*, *Soering v. the United Kingdom*, 7 July 1989, § 100, Series A no. 161; and *Kudła v. Poland* [GC], no. 30210/96, § 91, ECHR 2000-XI).

78. The Court has further found, in relation to the imposition of a penalty, that matters of appropriate sentencing largely fall outside the scope of the Convention, but has not excluded that an arbitrary or disproportionately lengthy sentence might in some circumstances raise issues under the Convention (see, *inter alia*, *Sawoniuk v. the United Kingdom* (dec.), no. 63716/00, 29 May 2001, concerning a life sentence imposed on a person of advanced age; and also *Weeks*, cited above, § 47; *V. v. the United Kingdom* [GC], no. 24888/94, §§ 97 *et seq.*, ECHR 1999-IX and *T. v. the United Kingdom* [GC], no. 24724/94, §§ 96 *et seq.*, 16 December 1999, all three judgments concerning life sentences imposed on minors). Likewise, it cannot be excluded that leaving a detainee in uncertainty over a long time as to his future, notably as to the duration of his imprisonment, or removing from a detainee any prospect of release might also give rise to an issue under Article 3 (compare, in particular,

T. v. the United Kingdom, cited above, § 99; *V. v. the United Kingdom*, cited above, § 100; and *Sawoniuk*, cited above). Furthermore, the fact that a sentence had no legal basis or legitimacy for Convention purposes is another factor capable of bringing a punishment received by the convicted person within the proscription under Article 3 (compare *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, § 436, ECHR 2004-VII). These principles, developed in relation to prison sentences, must apply, *mutatis mutandis*, to a person's preventive detention after he fully served his prison sentence, which is here at issue.

79. The Court notes in relation to application no. 42225/07 that the applicant was kept in preventive detention beyond the ten-year point since 26 June 1999. His preventive detention, following a term of imprisonment of five years, thus lasted for more than seventeen years and exceeded the former maximum duration already for more than seven years at the time of the decisions taken by the domestic courts in the proceedings at issue. The Court observes, however, that despite the applicant's prolonged detention, the domestic courts did not remove from him any prospect of release. They reviewed at regular intervals whether the applicant's continued preventive detention was still necessary in view of its objective.

80. The Court further observes that, as found above, the applicant's preventive detention at issue, beyond ten years, was in breach of both Article 5 § 1 and Article 7 § 1 of the Convention. However, there is no indication that the domestic authorities were acting in bad faith when prolonging the applicant's preventive detention as they relied on the fact that such prolongation was constitutional and were not aware of the fact that it failed to comply with the Convention. This can be seen to be confirmed by the fact that the Karlsruhe Court of Appeal subsequently ordered the applicant's release on 10 September 2010 by reference to the Court's judgment in the case of *M. v. Germany*. In these circumstances, the Court finds that the applicant's prolonged preventive detention cannot be considered as ill-treatment or punishment which attained the minimum level of severity so as to fall within the scope of Article 3.

81. It follows that the applicant's complaint under Article 3 in this respect must be rejected as manifestly ill-founded, pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

V. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

82. In his application no. 42225/07 alone the applicant further complained under Article 3 of the Convention about different measures taken by the prison authorities during his preventive detention, including the refusal to let him terminate his polytechnic education, the refusal to pay him pocket money and the obligation to defray the costs of his detention.

83. Invoking Article 6 of the Convention, he also claimed in application no. 42225/07 that the hearing in the proceedings for judicial review of his preventive detention had not been fair as the courts had failed to respect the two-year time-limit for judicial review of his preventive detention, as he had to prove that he was no longer dangerous and as his court-appointed counsel had been unable to defend him effectively in view of the low remuneration she received.

84. Moreover, the applicant argued that preventive detention for a period exceeding ten years, which had to be regarded as a penalty, violated his right not to be punished twice, as guaranteed by Article 4 § 1 of Prot. no. 7 to the Convention.

85. The Court has examined the remainder of the applicant's complaints as submitted by him. However, having regard to all the material in its possession, the Court finds that these complaints do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that the remainder of the applicant's complaints must be rejected as manifestly ill-founded, pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

VI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

86. Article 41 of the Convention provides:

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

A. Damage

87. The applicant claimed, firstly, EUR 300,000 in compensation for damage suffered as a result of his unlawful detention. He argued that he would have earned that amount, comprising salary and pension claims, had he been employed as a steel construction worker, the profession he had exercised up to the day of his arrest. Moreover, he had to be compensated for the fact that owing to his unlawful detention, he was in a bad physical and mental condition and could therefore no longer obtain a sufficient pension claim.

88. The applicant further claimed to be paid at least EUR 200 per day since 25 June 1999, the date since which he was in preventive detention for a period exceeding ten years. He claimed that he had already complained about his preventive detention in 1999, that is, before the proceedings in 2001 which are the subject of application no. 27360/04.

89. The Government submitted that the applicant could not claim any damage arising from his preventive detention prior to 11 December 2001 because the previous court decisions taken in 1999 were not at issue in the present applications.

90. The Government further considered the applicant's claim for compensation for loss of salaries and pension insurance to be wholly unsubstantiated. As to the applicant's claim for compensation for non-pecuniary damage, they left it to the Court's discretion to fix an appropriate amount. However, they considered the applicant's claim to be paid EUR 200 per day in respect of non-pecuniary damage to be excessive.

91. With regard to the applicant's claim concerning pecuniary damage having arisen from the loss of actual and future salaries and pension claims, the Court reiterates that there must be a clear causal connection between the pecuniary damage claimed by the applicant and the violation of the Convention found, and that this may, where appropriate, include compensation in respect of loss of earnings or other sources of income (see, among other authorities, *Barberà, Messegue and Jabardo v. Spain* (Article 50), 13 June 1994, §§ 16-20, Series A no. 285-C; and *Çakıcı v. Turkey* [GC], no. 23657/94, § 127, ECHR 1999-IV). The Court refers to its above findings that the applicant's preventive detention beyond the ten-year point violated Article 5 § 1 and Article 7 § 1 of the Convention. However, that preventive detention did not interfere with an existing source of income because the applicant had been detained as a result of his conviction in 1985 already for fifteen years and was not working as a steel construction worker prior to the ten-year point. Consequently, no clear causal connection between the Convention violations and the applicant's loss of estimated earnings and pensions has been established and the Court therefore rejects the applicant's claim in this respect.

92. As to the applicant's claim for compensation of non-pecuniary damage, the Court notes that in the Government's submission, the applicant could not claim any compensation for damage arising from his preventive detention prior to 11 December 2001 because the court decisions taken before that date were not the subject-matter of the present applications. It considers, however, that the applicant based his Convention complaints both before the domestic courts and before this Court on the fact that his preventive detention had been extended retrospectively by a change in the applicable law from a maximum period of ten years – which expired on 26 June 1999 – to an unlimited period of time. It is in view of that retrospective extension beyond the ten-year period that the Court found violations of Article 5 § 1 and Article 7 § 1 of the Convention. Moreover, the applicant remained in detention on the basis of the decisions of the domestic courts here at issue until his release on 10 September 2010. In these circumstances, the Court takes into consideration that the applicant has been detained in breach of the Convention from 26 June 1999 until

10 September 2010, that is, for more than eleven years and two months. This must have caused him non-pecuniary damage such as distress and frustration, which cannot be compensated solely by the findings of a Convention violation. Having regard to all the circumstances of the case and making its assessment on an equitable basis, it awards the applicant EUR 70,000 under this head, plus any tax that may be chargeable.

B. Costs and expenses

93. The applicant, who was granted legal aid in the proceedings before this Court, did not submit a claim for the reimbursement of costs and expenses incurred in the proceedings before the domestic courts and before the Court. The Court therefore does not make an award under this head.

C. Default interest

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

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Decides* to join the applications;
2. *Declares* the complaint under Article 5 § 1 made in application no. 42225/07 and the complaint under Article 7 § 1 made in both applications admissible and the remainder of the applications inadmissible;
3. *Holds* that there has been a violation of Article 5 § 1 of the Convention;
4. *Holds* that there has been a violation of Article 7 § 1 of the Convention;
5. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 70,000 (seventy thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate

equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

6. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 13 January 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Peer Lorenzen
President