



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

FIFTH SECTION

CASE OF MAUTES v. GERMANY

(Application no. 20008/07)

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 Mautes 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 an application (no. 20008/07) 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 Manuel Mautes (“the applicant”), on 24 April 2007.

2. The applicant was represented by Mr R. Breuer, a lawyer practising in Aachen. 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 that his preventive detention since 4 January 1997 was incompatible with his right to liberty under Article 5 § 1 of the Convention. Moreover, the retrospective extension of his preventive detention from a 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, violated the prohibition of retrospective punishment under Article 7 § 1 of the Convention.

4. On 22 January 2009 the President of the Fifth Section decided to give notice of the application to the Government, requested them to submit information on changes in the applicant's detention regime and adjourned the examination of the application 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 application 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 application at issue be

resumed and granted priority to the application (Rule 41 of the Rules of Court).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1960 and is currently in Aachen Prison.

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

6. Since 1981 the applicant has been convicted seven times of offences including assault and dangerous assault, theft, joint serious robbery, coercion and sexual coercion. He was notably found guilty in 1984 of assaulting in a humiliating manner and over a period of several days another man locked up in the same cell, and of forcing him to take part in oral sex.

7. On 22 July 1991 the Duisburg Regional Court convicted the applicant of dangerous assault combined with joint coercion, with sexual coercion, with joint extortion and coercion and with attempted sexual assault committed in 1990. It sentenced him to six years' imprisonment and ordered his preventive detention under Article 66 § 1 of the Criminal Code (see paragraphs 22-23 below). The Regional Court found that the applicant, partly acting jointly with others and acting with diminished criminal responsibility due to drug consumption, had assaulted a man who had allowed the applicant to share his apartment using objects including shoes, belts, scissors and cigarettes, had forced him to let the applicant masturbate into his mouth, to eat rubbish and grass and to withdraw money from his account for the applicant. Moreover, the applicant had beaten up another prisoner locked up in the same cell several times and had attempted to force the other man to perform sex acts on him. Having consulted a medical expert, the Regional Court found that the applicant, acting with full criminal responsibility, had a tendency to commit offences against the physical integrity and property of others by violence and was therefore dangerous to the public.

8. The applicant served his full prison sentence. He was then placed in preventive detention, for the first time, on 4 January 1997; he had thus served ten years in preventive detention by 3 January 2007. The continuation of the applicant's preventive detention was ordered by the Arnsberg Regional Court in 1999, 2002 and 2004. Since March 2006, the applicant's preventive detention is executed in Aachen Prison.

B. The proceedings at issue

1. The decision of the Arnsberg Regional Court

9. On 25 October 2006 the Arnsberg Regional Court ordered the continuation of the applicant's preventive detention beyond ten years. It found 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 (Article 67d § 3 of the Criminal Code; see paragraph 27 below).

10. Relying on the report submitted by a psychiatric expert, M., the Regional Court found that on account of his psychotherapeutic treatment, the applicant had made progress in the course of his detention. He no longer attempted to solve conflicts by violence and now abused alcohol and drugs less than before. He now had a stable heterosexual identity and felt guilty about his offences. However, he still lacked social skills, including the capacity to resolve conflicts himself, and had no social contacts outside prison. He was therefore liable to commit further thefts, robberies and dangerous assaults if released. He first had to be prepared for release through relaxations in the conditions of his detention.

2. The decision of the Hamm Court of Appeal

11. By a decision of 19 December 2006, which the applicant received on 8 January 2007, the Hamm Court of Appeal, endorsing the reasons given by the Regional Court, dismissed the applicant's appeal. It added that, contrary to the applicant's view, his continued preventive detention for a period exceeding ten years on the basis of Article 67d of the Criminal Code, as amended in 1998, was constitutional.

3. The decision of the Federal Constitutional Court

12. On 31 January 2007 the applicant lodged a constitutional complaint with the Federal Constitutional Court. He argued that the continuation of his preventive detention beyond ten years, resulting from the application of the amended Article 67d § 3 of the Criminal Code, which had entered into force after he had committed his offences, violated his right to liberty and the prohibition of retrospective punishment under Article 2 § 2 and Article 103 § 2 of the Basic Law and Article 5 § 1 and Article 7 § 1 of the Convention.

13. On 20 February 2007 the Federal Constitutional Court, without giving further reasons, declined to consider the applicant's constitutional complaint (file no. 2 BvR 270/07).

C. Subsequent developments

14. On 16 October 2008 the Aachen Regional Court ordered the continuation of the applicant's 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. The psychiatric expert which the court had consulted and the conclusions of whom the court had endorsed, had found that the applicant no longer suffered from a serious personality disorder and that there was no longer a high risk that the applicant committed further sexual offences. However, prior to a successful completion of relaxations in the conditions of his detention, the applicant was still liable to commit serious offences.

15. On 1 June 2010 the Aachen Regional Court refused to declare the applicant's preventive detention terminated in view of the Court's findings in the case of *M. v. Germany*. It found that the courts responsible for the execution of sentences had to apply Article 67d § 3 of the Criminal Code, being the law in force which could not be interpreted in compliance with the Convention, and that it was for the legislator to execute the Court's judgment.

16. On 30 July 2010 the Cologne Court of Appeal dismissed the applicant's appeal against the Regional Court's decision of 1 June 2010, endorsing the reasons given by the Regional Court and referring to the reasons given in its own decision of 14 July 2010 (file no. 2 Ws 428/10; see paragraph 30 below).

17. On 13 September 2010 the Federal Constitutional Court refused to terminate the applicant's preventive detention by way of an interim order (file no. 2 BvR 1940/10). It found that the applicant's constitutional complaint was not manifestly ill-founded and would have to be examined on the merits. Weighing the consequences of granting an interim order against those of refusing such an order, it found that the public interest in security outweighed the applicant's interest in his liberty, having regard to the seriousness of the offences the applicant was liable to commit if released.

18. The applicant is currently still in preventive detention.

II. RELEVANT DOMESTIC LAW AND COMPARATIVE LAW AND PRACTICE

19. 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

20. 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 in certain circumstances 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).

21. 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).

22. 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).

23. 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

24. 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

25. 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).

26. 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).

27. 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

28. 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 21 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.

29. 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 that this maximum period 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).

30. 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).

31. 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). On 9 November 2010 the fifth senate of the Federal Court of Justice decided to consult notably the fourth senate whether it intended to uphold its view on that point, which differed from that of the fifth senate (file no. 5 StR 394/10 and others). Unlike the fourth senate in its decision of 12 May 2010 (file no. 4 StR 577/09; see paragraph 28 above), the fifth senate considered that in cases parallel to that of *M.*, the detainees concerned were not to be released automatically without a further examination on the merits. However, if applied retrospectively, Article 67d § 3 of the Criminal Code had to be interpreted restrictively in the light of the judgment in *M. v. Germany*. Preventive detention could from now on only be executed beyond the ten-year point in those parallel cases if specific circumstances in the detainee's personality or conduct disclosed an extreme risk of the most serious violent or sexual offences.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

32. The applicant complained that his preventive detention, which lasted already for more than ten years, was incompatible with his right to liberty as provided in Article 5 § 1 of the Convention, which, in so far as relevant, reads as follows:

“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; ...”

33. The Government contested that argument.

A. Admissibility

34. 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

35. The applicant argued that his preventive detention since 4 January 1997 violated Article 5 § 1 because such detention, being a preventive measure, was not covered by any of the sub-paragraphs (a) to (f) of Article 5 § 1. In particular, there was no sufficient causal connection between his conviction in 1991 and his preventive detention, which had been ordered subsequently by the courts responsible for the execution of sentences.

36. 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*, no. 19359/04. They took the view that in terms of the temporal course of events, the present application was a parallel case to the application of *M. v. Germany*. At the time of the applicant's conviction in 1991, the first order of preventive detention made against him was limited by law to a maximum duration of ten years. Following the abolition of the ten-year maximum period in 1998, the domestic courts ordered in the proceedings at issue that the applicant had to remain in preventive detention also after 3 January 2007, 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. Relying on the Court's findings in § 96 of the *M. v. Germany* judgment, the Government stressed that, in any event, the applicant's preventive detention prior to the ten-year point had been covered by sub-paragraph (a) of Article 5 § 1.

2. The Court's assessment

a. Recapitulation of the relevant principles

37. 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

38. The Court has to determine, in the light of the foregoing principles, whether the applicant, during his preventive detention, was deprived of his liberty in accordance with one of the sub-paragraphs (a) to (f) of Article 5 § 1.

39. That detention was justified under sub-paragraph (a) of Article 5 § 1 if it occurred “after conviction”, in other words if there was a sufficient causal connection between the applicant's conviction and his continuing deprivation of liberty since 4 January 1997, when, having fully served his sentence, he was placed in preventive detention.

40. The Court considers that the applicant's “conviction”, for the purposes of Article 5 § 1 (a), is only his criminal conviction by the sentencing Duisburg Regional Court in 1991, which alone found him guilty of an offence (amongst others, dangerous assault combined with sexual coercion), 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).

41. As regards the applicant's preventive detention up to the former ten-year maximum duration under Article 67d § 1 of the Criminal Code, in its version in force prior to 31 January 1998 (see paragraph 26 above), the Court refers to its findings in its recent judgment of 17 December 2009 in the case of *M. v. Germany* (cited above). In that judgment, it found that Mr *M.*'s preventive detention, which, as in the present case, was ordered by the sentencing court under Article 66 § 1 of the Criminal Code, was covered by sub-paragraph (a) of Article 5 § 1 in so far as it had not been prolonged beyond the statutory maximum period applicable at the time of that applicant's offence and conviction (see *ibid.*, §§ 96 and 97-105). The Court was satisfied that Mr *M.*'s initial preventive detention within that maximum period occurred “after conviction” by the sentencing court for the purposes of Article 5 § 1 (a). The Court took note of the fact that preventive detention was fixed with regard to the danger the person concerned presented to the public – and thus served (also) a preventive purpose. It considered, however, that an order of preventive detention under Article 66 § 1 of the Criminal Code was nevertheless always dependent on and ordered together with a sentencing court's finding that the person concerned was guilty of an offence and thus resulted from a “conviction” (*ibid.*, § 96).

42. Having regard to these findings in its judgment in the application of *M. v. Germany*, from which it sees no reason to depart, the Court considers that the preventive detention under Article 66 of the Criminal Code of the applicant in the present case was based on his “conviction”, for the purposes

of Article 5 § 1 (a), by the Duisburg Regional Court in 1991 up to the ten-year point (that is, until 3 January 2007).

43. The Court further observes that at the time of the applicant's conviction in 1991, 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 26 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 27 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 27 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.

44. 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 after 3 January 2007 was therefore not justified under sub-paragraph (a) of Article 5 § 1.

45. 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 7 and 22-23 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.

46. There has accordingly been a violation of Article 5 § 1 of the Convention in so far as the applicant has been retained in preventive detention after 3 January 2007.

II. ALLEGED VIOLATION OF ARTICLE 7 OF THE CONVENTION

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

“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.”

48. The Government contested that argument.

A. Admissibility

49. 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*

50. The applicant submitted that preventive detention was to be classified as a penalty. The retrospective extension of his first period of preventive detention from a maximum duration of ten years to an unlimited period of time owing to the amendment in 1998 of Article 67d §§ 1 and 3 of the Criminal Code, read in conjunction with section 1a § 3 of the Introductory Act to the Criminal Code (see paragraph 27 above), had therefore violated his right not to have a heavier penalty imposed than the one applicable at the time of his offence guaranteed by Article 7 § 1 of the Convention.

51. The Government took the view that in terms of the temporal course of events, the present application was a parallel case to the application of *M. v. Germany*, no. 19359/04. They referred to their observations made in relation to Article 5 in the present application and to those made in relation to Article 7 in the case of *M. v. Germany*.

2. *The Court's assessment*

a. Recapitulation of the relevant principles

52. 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

53. 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.

54. The Court observes that at the time the applicant committed his offences in 1990, 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 26 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 27 above), which abolished that maximum duration with immediate effect, the courts responsible for the execution of sentences then ordered, in the 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.

55. 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.

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

III. APPLICATION OF ARTICLE 46 OF THE CONVENTION

57. Having regard to the circumstances of the case and the parties' arguments, the Court considers it necessary to determine what consequences may be drawn from Article 46 of the Convention for the respondent State.

58. Article 46 of the Convention, in so far as relevant, provides:

“1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.”

2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.”

A. The parties' submissions

59. The applicant submitted that he should have been released immediately when the Court's judgment in the case of *M. v. Germany* became final on 10 May 2010.

60. The Government argued that it was for the domestic courts to decide on the termination of the applicant's preventive detention, which was still executed, 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 28-29 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.

B. The Court's assessment

61. The Court reiterates that, in accordance with Article 46 of the Convention, the finding of a violation imposes on the respondent State a legal obligation not just to pay those concerned the sums awarded by way of just satisfaction under Article 41, but also to select, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be adopted in their domestic legal order to put an end to the violation found by the Court and to redress so far as possible the effects (see, *inter alia*, *Broniowski v. Poland* [GC], no. 31443/96, § 192, ECHR 2004-V; and *Sürmeli v. Germany* [GC], no. 75529/01, § 137, ECHR 2006-VII).

62. Furthermore, it follows from the Convention, and from Article 1 in particular, that in ratifying the Convention the Contracting States undertake to ensure that their domestic legislation is compatible with it. Consequently, it is for the respondent State to remove any obstacles in its domestic legal system that might prevent the applicant's situation from being adequately redressed (see *Maestri v. Italy* [GC], no. 39748/98, § 47, ECHR 2004-I; and *Assanidze v. Georgia* [GC], no. 71503/01, § 198, ECHR 2004-II).

63. The Court further reiterates that its judgments are essentially declaratory in nature and that, in general, it is primarily for the State concerned to choose, subject to supervision by the Committee of Ministers, the means to be used in its domestic legal order in order to discharge its obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment (see, among other authorities, *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 249, ECHR 2000-VIII; *Öcalan v. Turkey* [GC], no. 46221/99, § 210, ECHR 2005-IV; and *Fatullayev v. Azerbaijan*, no. 40984/07, § 173, 22 April 2010).

64. However, exceptionally, with a view to helping the respondent State to fulfil its obligations under Article 46, the Court will seek to indicate the type of measure that might be taken in order to put an end to a violation it has found to exist. In certain cases, the nature of the violation found may be such as to leave no real choice as to the measures required to remedy it and the Court may decide to indicate only one such measure, such as, for instance, securing an applicant's immediate release (see, in particular, *Assanidze*, cited above, §§ 202-203; and *Fatullayev*, cited above, §§ 174-177).

65. The Court observes in the present case that following its judgment in the case of *M. v. Germany*, the Aachen Regional Court and the Cologne Court of Appeal considered that the applicant's preventive detention was not

to be declared terminated in view of this Court's judgment as it was impossible for the German courts to interpret the Criminal Code in compliance with the Convention (see paragraphs 15 and 16 above; several Courts of Appeal took the same view, see paragraphs 30-31 above). As a result, they prolonged the applicant's detention despite the fact that they were aware that it was in breach of the Convention.

66. The Court would recall that 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) lays the primary responsibility for implementing and enforcing the rights and freedoms of the Convention on the national authorities. It notes that several Courts of Appeal, as well as the Federal Court of Justice, on the contrary, have considered it possible to interpret German law in accordance with the Convention (see paragraphs 28-29 above) and that the Government in the present proceedings agreed with that view. In the light of the foregoing, the Court does not consider it necessary, at present, to indicate any specific or general measures to the respondent State which are called for in the execution of this judgment. It would, however, urge the national authorities, and in particular the courts, to assume their responsibility for implementing and enforcing speedily the applicant's right to liberty, a core right guaranteed by the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

67. 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

68. The applicant claimed 307,752 euros (EUR) in respect of loss of earnings. He argued that, had he been able to work outside prison during the time he spent in preventive detention, he would have earned some EUR 337,500 (EUR 100 per day), from which the salary and pocket money paid in prison by the State (some EUR 29,748) had to be deducted. The applicant further claimed at least EUR 93,575 in respect of non-pecuniary damage suffered as a result of his preventive detention since 4 January 1997, that is, EUR 19 per day of preventive detention. He requested in person that all payments be made into his lawyer's account.

69. The Government considered that the applicant's claim for compensation for loss of earnings was wholly unsubstantiated as he had failed to specify his professional qualifications and the kind of work he could have carried out outside prison. As for the applicant's claim in respect of non-pecuniary damage, they left it to the Court's discretion to fix an appropriate amount. They stressed, however, that the applicant could claim compensation for potential damage only in so far as it had arisen after 3 January 2007, when he was in preventive detention for more than ten years.

70. As for the applicant's claim concerning pecuniary damage having arisen from a loss of earnings the Court, having regard to the material before it, considers that no clear causal connection between the Convention violations found and the applicant's loss of estimated earnings has been established. It therefore rejects the applicant's claim in this respect.

71. As for the applicant's claim in respect of non-pecuniary damage, the Court takes into consideration that the applicant has been detained in breach of the Convention since 4 January 2007, that is, for almost four years at present, and that his preventive detention continued also long after the Court's judgment in the case of *M. v. Germany* became final on 10 May 2010. This must have caused him non-pecuniary damage such as distress and frustration, which cannot be compensated solely by the finding 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 25,000 under this head, plus any tax that may be chargeable. Having regard to the request made by the applicant in person, it orders this sum, awarded to the applicant, to be paid into his lawyer's fiduciary bank account.

B. Costs and expenses

72. The applicant 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

73. 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. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 5 § 1 of the Convention in so far as the applicant has been retained in preventive detention after 3 January 2007;
3. *Holds* that there has been a violation of Article 7 § 1 of the Convention;
4. *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 25,000 (twenty-five thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be paid into his lawyer's fiduciary bank account;
 - (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;
5. *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