



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

FIFTH SECTION

CASE OF KALLWEIT v. GERMANY

(Application no. 17792/07)

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 Kallweit 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. 17792/07) 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 Rüdiger Kallweit (“the applicant”), on 17 April 2007.

2. The applicant was represented by Mr A. Becker, a lawyer practising in Dortmund. 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 particular, that his preventive detention 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 29 March 2010 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 1955 and is currently in Aachen Prison.

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

6. On 7 May 1993 the Bochum Regional Court convicted the applicant of sexual assault and sexual abuse of a minor committed in 1992. It sentenced him to three years and six months' imprisonment and ordered his preventive detention pursuant to Article 66 of the Criminal Code (see paragraphs 26-27 below). The court found that the applicant had sexually assaulted and abused a thirteen-year-old boy who, after having drunk alcoholic beverages with the applicant in front of the Bochum train station, had agreed to spend the night in the applicant's apartment for fear of disputes with his mother. The court, having consulted a medical expert, considered that the applicant had acted with full criminal responsibility. He suffered from a dissocial personality disorder which was characterized notably by a lack of feelings of guilt. That disorder did not, however, amount to an illness diminishing his criminal responsibility.

7. The Bochum Regional Court further noted that the applicant had previously been convicted, in particular, of sexual assault and abuse of a nine-year-old girl committed in 1981, attempted sexual abuse of a nine-year-old girl committed shortly after his release from prison in 1985 and sexual abuse of a five-year-old boy and an eight-year-old boy committed in May 1986 shortly after his previous conviction. He had committed all previous offences with full criminal responsibility.

8. Since 28 March 1996 the applicant, having served his full prison sentence, has been in preventive detention for the first time, initially in Werl Prison and since May 1998 in Aachen Prison.

9. The continuation of the applicant's preventive detention was ordered at regular intervals. In the course of such judicial review proceedings, the Aachen Regional Court had also examined the applicant's request that his preventive detention be executed in a psychiatric hospital. On 10 March 2003 it dismissed that request, considering that the applicant

should make a therapy aimed at changing his conduct, but that this did not necessitate his treatment in a psychiatric hospital.

10. The applicant had served ten years in preventive detention by 27 March 2006.

B. The proceedings at issue

1. The decision of the Aachen Regional Court

11. On 31 May 2006 the Aachen Regional Court, having held a hearing, dismissed the applicant's request to declare his preventive detention terminated after expiry of a period of ten years or to suspend its further execution and grant probation.

12. The Regional Court considered that the applicant, if released, would commit further serious offences, in particular sexual assault and abuse of minors, resulting in considerable psychological or physical harm to the victims (Article 67d § 3 of the Criminal Code, see paragraph 31 below). It agreed in this respect with the conclusions drawn by two medical experts in a psychiatric expert report dated 7 April 2006 and in an additional psychological expert report dated 3 April 2006 who had also found that the applicant suffered from a serious dissocial personality disorder. The Regional Court further took the view that the therapies the applicant had made in the past years had not brought about any change in his propensity to commit offences.

2. The decision of the Cologne Court of Appeal

13. On 27 July 2006 the Cologne Court of Appeal dismissed the applicant's appeal. Having regard to the medical expert reports obtained by the Regional Court, it equally considered that the applicant suffered from a serious personality disorder owing to which he was liable to commit further serious sexual offences. He had to receive further therapy and had to show good conduct in the course of relaxations of his conditions of detention before it could be assumed that he was no longer dangerous to the public.

14. On 3 August 2006 the Cologne Court of Appeal found that the additional reasons given by the applicant for his appeal had reached the court only after it had already dismissed the appeal. Having considered these reasons, the court decided not to amend its previous decision.

3. The decision of the Federal Constitutional Court

15. On 10 September 2006 the applicant lodged a constitutional complaint with the Federal Constitutional Court. He argued that the courts' decision to order his preventive detention breached his right to liberty as guaranteed by the Basic Law and by Article 5 § 1 of the Convention.

Moreover, the retrospective extension of his 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, to an unlimited period of time violated his right under the Basic Law and under Article 7 § 1 of the Convention not to have a heavier penalty imposed on him than the one applicable at the time of his offence.

16. On 22 January 2007 the Federal Constitutional Court declined to consider the applicant's constitutional complaint (file no. 2 BvR 1942/06).

17. The Federal Constitutional Court found that the applicant's complaint had no sufficient prospects of success. The applicant had failed sufficiently to substantiate by which act of a public authority he considered his fundamental rights to have been violated. In order to substantiate sufficiently a constitutional complaint, an applicant, as a rule, had to submit not only the decisions complained of, but also all other documents referred to. This requirement could only be dispensed with if the content of those documents was reproduced in the constitutional complaint in such detail that it was clear from the submissions alone whereby the alleged violation had been caused. In the present case, the applicant had failed, in particular, to submit copies of the psychiatric expert report of 7 April 2006 and of the additional psychological expert report of 3 April 2006, which had been referred to by the lower courts.

18. The Federal Constitutional Court further noted that the decisions complained of were based on legal provisions which it had found to be constitutional. It referred to its leading judgment of 5 February 2004, file no. 2 BvR 2029/01, in this respect, in which it had considered the retrospective extension of a convicted person's preventive detention beyond the initial maximum period of ten years to be constitutional.

C. Subsequent developments

19. On 19 November 2008 the Aachen Regional Court, in judicial review proceedings under Articles 67d and 67e of the Criminal Code (see paragraphs 29 and 31 below), refused to suspend the further execution of the applicant's preventive detention and to grant probation. It found that it could not be expected that the applicant, owing to his criminal tendencies, would no longer commit offences if released. The court endorsed the findings of the psychological expert it had consulted, who had confirmed that the applicant suffered from a dissocial personality disorder and had not yet sufficiently reflected upon his alcohol and drug consumption. It considered that therefore, the applicant was liable to commit robberies, assaults and sexual assault of minors if released.

20. On 16 July 2010 the Aachen Regional Court refused to declare the applicant's preventive detention terminated in view of this Court's findings in the case of *M. v. Germany*. It considered that German law as it stood at

present could not be interpreted in compliance with the Court's judgment of 17 December 2009. It was therefore up to the legislator to execute that judgment.

21. On 16 August 2010 the Cologne Court of Appeal, following the applicant's appeal against the decision of the Aachen Regional Court of 16 July 2010, endorsed the reasons given by the Regional Court by reference to similar decisions taken by several further Courts of Appeal (see for examples paragraph 35 below) and decided to submit the case to the Federal Court of Justice. It sought a preliminary ruling on the question whether, following this Court's judgment in the case of *M. v. Germany*, the current version of Article 67d § 3 of the Criminal Code (see paragraph 31 below), or Article 67d § 1 of the Criminal Code, in the version in force prior to 31 January 1998 (see paragraph 30 below), was applicable in cases parallel to the *M. v. Germany* case.

22. The applicant is still in preventive detention.

II. RELEVANT DOMESTIC AND COMPARATIVE LAW AND PRACTICE

23. 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

24. 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).

25. 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).

26. 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).

27. 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

28. 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

29. 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).

30. 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).

31. 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. Provisions on the detention of mentally ill persons

32. The detention of mentally ill persons is provided for in the Criminal Code as a measure of correction and prevention if the detention is ordered in relation to an unlawful act committed by the person concerned. Article 63 of the Criminal Code provides that if someone commits an unlawful act without criminal responsibility or with diminished criminal responsibility, the court will order his placement – without any maximum duration – in a psychiatric hospital if a comprehensive assessment of the defendant and his acts reveals that, as a result of his condition, he can be expected to commit serious unlawful acts and that he is therefore a danger to the general public.

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

33. 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 25 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.

34. 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).

35. 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).

36. 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 33 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 § 1 OF THE CONVENTION

37. The applicant complained that his preventive detention, which already exceeded a period of ten years, violated 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; ...”

38. The Government contested that argument.

A. Admissibility

39. 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

40. The applicant complained that his preventive detention since 28 March 1996, which already exceeded a period of ten years, breached his right to liberty under Article 5 § 1 of the Convention. He argued that preventive detention, being a preventive measure, was not authorised under any of the sub-paragraphs (a) to (f) of that provision. In particular, there was no sufficient causal connection for the purposes of sub-paragraph (a) between his conviction in 1993 and his preventive detention, the execution of which had been ordered only subsequently in 1996 by the courts responsible for the execution of sentences.

41. The applicant further took the view that his continued preventive detention could not be justified under sub-paragraph (e) of Article 5 § 1. He was not of “unsound mind” within the meaning of that provision as he did not suffer from a true mental disorder. It had been confirmed by numerous psychiatric experts that he did not sufferer from a pathological mental disorder and had thus committed his offences with full criminal responsibility. Moreover, there was no recent expert report proving that he was mentally ill. The domestic courts had also never based their decision to further detain him on a mental illness. In any event, his preventive detention could not be considered as lawful under the said provision as that detention was not executed in an institution appropriate for mental health patients in view of the completely insufficient offers of treatment in prison.

42. 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 only in terms of the temporal course of events, the present application was a parallel case to the application of *M. v. Germany*. Relying on the Court's findings in § 96 of that 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.

43. In the Government's submission, the present application could, however, be distinguished from the case of *M. v. Germany*. In that case, the applicant, Mr *M.*, had no longer suffered from a serious personality disorder and had not been detained for being of unsound mind under sub-paragraph (e) of Article 5 § 1. On the contrary, the preventive detention of the applicant in the present case was justified under sub-paragraph (e) of

the said provision. The sentencing Bochum Regional Court had found that the applicant had acted with full criminal responsibility but suffered from a personality disorder (see paragraph 6 above). In the Government's view, that personality disorder had to be qualified as a "true mental disorder" and the applicant thus had to be considered as of unsound mind. The Government further referred to the findings of the Aachen Regional Court in 2008 in the proceedings for judicial review of the applicant's continued preventive detention in relation to the applicant's dissocial personality and the lack of sufficient consideration he gave to his alcohol and drug consumption (see paragraph 19 above) to support their view.

2. The Court's assessment

a. Recapitulation of the relevant principles

44. 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.*).”

45. The Court further reiterates that, for the purposes of sub-paragraph (e) of Article 5 § 1, an individual cannot be deprived of his liberty as being of “unsound mind” unless the following three minimum conditions are satisfied: firstly, he must reliably be shown to be of unsound mind, that is, a true mental disorder must be established before a competent authority on the basis of objective medical expertise; secondly, the mental disorder must be of a kind or degree warranting compulsory confinement; thirdly, the validity of continued confinement depends upon the persistence of such a disorder (see *Winterwerp v. the Netherlands*, 24 October 1979, § 39, Series A no. 33; *Varbanov v. Bulgaria*, no. 31365/96, §§ 45 and 47, ECHR 2000-X; *Hutchison Reid v. the United Kingdom*, no. 50272/99, § 48, ECHR 2003-IV; and *Shtukaturv v. Russia*, no. 44009/05, § 114, 27 March 2008).

46. Furthermore, there must be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention. In principle, the “detention” of a person as a mental health patient will only be “lawful” for the purposes of sub-paragraph (e) of paragraph 1 if effected in a hospital, clinic or other appropriate institution (see *Ashingdane v. the United Kingdom*, 28 May 1985, § 44, Series A no. 93; *Aerts v. Belgium*, 30 July 1998, § 46, *Reports of Judgments and Decisions* 1998-V; *Hutchison Reid*, cited above, § 49; and *Brand v. the Netherlands*, no. 49902/99, § 62, 11 May 2004).

b. Application of these principles to the present case

47. 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.

48. 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 criminal conviction by the sentencing Bochum Regional Court in 1993, which found him guilty of sexual assault and abuse of a minor and ordered his preventive detention in addition to a prison sentence, and his continuing deprivation of liberty in preventive detention.

49. Unlike the applicant, the Court considers that preventive detention ordered by a sentencing court under Article 66 § 1 of the Criminal Code does not fail to meet the requirements of Article 5 § 1 (a) either owing to its preventive nature or owing to the fact that the actual execution of a preventive detention order, made by the sentencing court, had to be ordered

separately by the courts responsible for the execution of sentences. It refers in this respect 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. In particular, the causal connection between the applicant's criminal conviction and his preventive detention was not broken due to the fact that the court responsible for the execution of sentences, which itself did not impose a "conviction" on the applicant for lack of a finding of guilt of a (new) offence, had to order the execution of the preventive detention imposed on the applicant by the sentencing court (see *ibid.*, §§ 95-96 and 97-105). The reasoning in that judgment, from which it sees no ground to depart, applies *mutatis mutandis* in the present case.

50. The Court further observes that at the time of the applicant's conviction in 1993, 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 30 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 31 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 31 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.

51. 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 ordered in the proceedings at issue. His continuing detention after 26 March 2006 was therefore not justified under sub-paragraph (a) of Article 5 § 1.

52. The Court further notes that the applicant's preventive detention beyond the ten-year point was also not justified under sub-paragraph (c) of Article 5 § 1 as detention "reasonably considered necessary to prevent his

committing an offence” (compare, *mutatis mutandis*, *M. v. Germany*, cited above, § 102).

53. The Court shall further examine whether, as submitted by the Government, the applicant's detention was justified under sub-paragraph (e) of Article 5 § 1 as detention of a person “of unsound mind”. Under the Court's well-established case-law (see paragraph 45 above), this requires, firstly, that the applicant was reliably shown to be of unsound mind; that is, a true mental disorder must have been established before a competent authority on the basis of objective medical expertise.

54. In determining whether the courts responsible for the execution of sentences can be considered to have ordered the applicant's continued preventive detention in the proceedings at issue as he was a person of “unsound mind”, the Court shall therefore examine, first, whether these courts established that the applicant suffered from a true mental disorder. It is true that the domestic courts, relying on the findings of a psychiatric and a psychological expert, considered that the applicant suffered from a serious dissocial personality disorder and was therefore liable to reoffend (see paragraphs 12-13 above).

55. However, the Court is not convinced that thereby, a “true mental disorder” for the purposes of Article 5 § 1 (e) of the Convention was “established” by them. It notes in that connection that in the German legal system, a difference is made between the placement of dangerous offenders in a prison for preventive purposes and the placement of dangerous mentally ill persons, who committed criminal acts without or with diminished criminal responsibility, in a psychiatric hospital. This is illustrated by Articles 66 and 63 of the Criminal Code (see paragraphs 26-27 and 32 above). Thus, it is clear that persons considered as dangerous because of a mental illness were to be placed in a psychiatric hospital by the competent courts. In the applicant's case, the sentencing Bochum Regional Court already considered that the applicant's dissocial personality disorder was not a pathological disorder diminishing the applicant's criminal responsibility and thus did not order the applicant's placement in a psychiatric hospital (see paragraph 6 above). The courts responsible for the execution of sentences had not even ordered the execution of the applicant's preventive detention in such a hospital in the proceedings at issue. A request made by the applicant to that effect had in fact previously been dismissed (see paragraph 9 above).

56. Moreover, these courts, in the judicial review proceedings at issue, were not called upon to examine under the Criminal Code whether the applicant was to be detained as a mentally ill person, but had to determine, with the help of medical expertise, whether the applicant was liable to reoffend owing to his criminal tendencies, irrespective of whether this was a result of his mental condition.

57. Furthermore, under the Court's case-law, the detention of the applicant as a mental health patient could only be "lawful" for the purposes of sub-paragraph (e) of paragraph 1 if effected in a hospital, clinic or other appropriate institution (see paragraph 46 above). In the present case, the applicant was placed in an ordinary prison. As the Court concluded in its recent judgment in the case of *M. v. Germany* (cited above, §§ 127-129), there is no substantial difference in practice between the execution of a (long) prison sentence and that of a preventive detention order in Germany. There is nothing to indicate that this was different in relation to the execution of the applicant's preventive detention in the present case. As shown above, it is the psychiatric hospitals which are considered under German law to be the appropriate institutions to provide conditions of detention adapted to mentally ill persons. Therefore, there was no sufficient relationship between the detention of the applicant as an alleged mental health patient and his placement and conditions of detention in prison.

58. Having regard to the foregoing, the Court finds that the applicant's detention was not covered by sub-paragraph (e) of Article 5 § 1 either. It further takes the view – and this is uncontested by the parties – that none of the other sub-paragraphs of Article 5 § 1 can serve to justify the applicant's detention at issue.

59. 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 27 March 2006.

II. ALLEGED VIOLATION OF ARTICLE 7 § 1 OF THE CONVENTION

60. 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."

61. The Government contested that argument.

A. Admissibility

62. 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*

63. The applicant submitted that under the legal provisions applicable at the time of his offence, ten years had been the maximum duration of the preventive detention, a penalty, ordered against him. The retrospective extension of his preventive detention beyond 27 March 2006, when he had served ten years, to an unlimited period of time therefore violated his right not to have a heavier penalty imposed on him than the one applicable at the time of his offence.

64. 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

65. 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 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

66. The Court is thus called upon to determine, in the light of the foregoing principles, whether the prolongation of the applicant's preventive detention beyond ten years violated the prohibition of retrospective penalties under Article 7 § 1, second sentence.

67. The Court observes that at the time the applicant committed his offence in 1992, 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 30 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 31 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.

68. 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.

69. 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. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

70. The applicant further took the view that the decision of the Federal Constitutional Court not to consider his constitutional complaint because of his failure to submit certain additional documents had breached his right to an effective remedy under Article 13 of the Convention.

71. The Court has examined the applicant's complaint as submitted by him. However, having regard to all the material in its possession, and in particular to the fact that the Federal Constitutional Court must be

considered to have ruled on the merits of the applicant's Convention complaints (compare, *inter alia*, *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland* (no. 2) [GC], no. 32772/02, §§ 43 and 45, ECHR 2009-... with further references), the Court finds that this complaint does not disclose any appearance of a violation of Article 13 or Article 6 § 1 of the Convention. It follows that the complaint must be rejected as manifestly ill-founded, pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

72. Lastly, the applicant complained for the first time in his observations in reply that his preventive detention failed to comply with his right not to be punished twice under Article 4 of Protocol no. 7 of the Convention.

73. As Germany has not, however, ratified Protocol no. 7 to the Convention, this complaint must be rejected as incompatible *ratione personae* with the provisions of the Convention, pursuant to Article 35 §§ 3 (a) and 4.

IV. APPLICATION OF ARTICLE 46 OF THE CONVENTION

74. 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.

75. 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

76. The applicant stressed that he was still not granted relaxations in the execution of his detention regime, let alone be prepared for life outside prison, even though it was clear since 10 May 2010 at the latest that he had to be released.

77. 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 33-34 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 the Convention, wherever relevant. The proceedings were currently still pending before the Federal Court of Justice which would decide on the applicant's release in due course. The Government, referring to two decisions dated 12 May 2010 (file

no. 4 StR 577/09) and 21 July 2010 (file no. 5 StR 60/10; see in detail paragraphs 33 and 36 above), argued that two senates of that court had already considered preventive detention in similar cases to be in breach of the Convention. The applicant thus had an effective remedy before the domestic courts but could not obtain his release before this Court.

B. The Court's assessment

78. 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).

79. 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).

80. 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).

81. 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).

82. 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 20 and 21 above; several Courts of Appeal took the same view, see paragraphs 35-36 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.

83. 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 a senate of the Federal Court of Justice, on the contrary, have considered it possible to interpret German law in accordance with the Convention (see paragraphs 33-34 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.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

84. 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

85. The applicant claimed 322,827 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 356,000 (EUR 100 net per day), from which the salary and pocket money paid in prison by the State (some EUR 33,173) had to be deducted. The applicant further claimed at least EUR 98,800 in respect of non-pecuniary damage suffered as a result of his preventive detention since

28 March 1996, that is, EUR 19 per day of preventive detention. He requested in person that all payments be made into his lawyer's account.

86. The Government considered that the applicant's claim for compensation for loss of earnings was wholly unsubstantiated. 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 since 28 March 2006, when he was in preventive detention for more than ten years.

87. 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.

88. 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 28 March 2006, that is, for more than four years and eight months 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 30,000 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

89. The applicant also claimed EUR 2,500 net for the costs and expenses incurred before the Court, plus value-added tax (VAT), having been charged by his lawyer EUR 250 per hour for ten hours' work.

90. The Government did not comment on that point.

91. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the full sum of EUR 2,500 claimed for the costs and expenses incurred in the proceedings before this Court, plus any tax (including VAT) that may be chargeable.

C. Default interest

92. 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 complaints under Article 5 § 1 and Article 7 § 1 admissible and the remainder of the application inadmissible;
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 27 March 2006;
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,
 - (i) EUR 30,000 (thirty thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (ii) EUR 2,500 (two thousand five hundred euros), plus any tax that may be chargeable, in respect of costs and expenses;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts 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