



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

FIFTH SECTION

CASE OF JENDROWIAK v. GERMANY

(Application no. 30060/04)

JUDGMENT

STRASBOURG

14 April 2011

FINAL

14/07/2011

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

In the case of Jendrowiak v. Germany,

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

Dean Spielmann, *President*,

Karel Jungwiert,

Boštjan M. Zupančič,

Mark Villiger,

Isabelle Berro-Lefèvre,

Ann Power,

Angelika Nußberger, *judges*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 22 March 2011,

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

PROCEDURE

1. The case originated in an application (no. 30060/04) 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 Richard Jendrowiak (“the applicant”), on 10 August 2004.

2. The applicant was initially represented before the Court by Mr C. Trurnit and subsequently by Ms L. Kühnbach, lawyers practising in Freiburg. The German Government (“the Government”) were represented by their Agent, Mrs A. Wittling-Vogel, *Ministerialdirigentin*, and by their permanent Deputy Agent, Mr H.-J. Behrens, *Ministerialrat*, of the Federal Ministry of Justice.

3. The applicant alleged, in particular, that the retrospective extension of his first preventive detention beyond a period of ten years, which had been the maximum for such detention under the legal provisions applicable at the time of his offence, had breached his right to liberty as guaranteed by Article 5 § 1 of the Convention and the prohibition of retrospective punishment under Article 7 § 1 of the Convention.

4. On 13 March 2007 a Chamber of the Fifth Section decided to adjourn the examination of the application pending the outcome of the proceedings in the case of *M. v. Germany*, no. 19359/04. On 22 January 2009 the President of the Fifth Section decided to give notice of the 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* (cited above) 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 1953. When lodging his application, he was detained in Bruchsal Prison. He has been released on 28 August 2009.

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

6. Since 1972 the applicant has been convicted of five counts of rape and two counts of attempted rape of women aged between sixteen and nineteen and has been sentenced three times to terms of imprisonment. Between May 1976 and his arrest in 1989 he spent only some eight and a half months outside prison.

7. On 23 May 1990 the Heilbronn Regional Court convicted the applicant of attempted sexual coercion. It sentenced him to three years' imprisonment and ordered his placement in preventive detention pursuant to Article 66 § 1 of the Criminal Code (see paragraphs 22-23 below). The Regional Court found that in October 1989 the applicant, returning to methods similar to those he had used to commit some of his previous offences, had simulated a breakdown of his car and had asked a twenty-three-year-old woman to help him restart it. He had then attempted to force his victim to submit herself to sexual acts, but she had managed to escape. The preventive detention of the applicant, who had acted with full criminal responsibility, was necessary as he had a tendency to commit serious sexual offences in order to humiliate and abuse women and was thus likely to reoffend.

8. The applicant served his full prison sentence. He was then placed in preventive detention, for the first time, on 24 October 1992; he had thus served ten years in preventive detention by 23 October 2002.

9. The continuation of the applicant's preventive detention was ordered by the Karlsruhe Regional Court at regular intervals.

B. The proceedings at issue

1. The decision of the Karlsruhe Regional Court

10. On 15 October 2002 the Karlsruhe Regional Court, sitting as a chamber responsible for the execution of sentences, having heard the applicant, his counsel and a psychiatric expert, W., in person, ordered the applicant's preventive detention to continue pursuant to Article 67d § 3 of the Criminal Code (see paragraph 25 below). It found that there was still a risk that the applicant, owing to his criminal tendencies, might commit serious sexual offences if released resulting in considerable psychological or physical harm to the victims.

11. The Regional Court subscribed to the opinion given by expert W. in his report of 3 October 2002. The expert, who had to give his view on the basis of the case file as the applicant had refused to make any submissions to him, had concluded that there was nothing to indicate that the applicant, who had committed numerous sexual offences and suffered from a personality disorder, had changed. He was therefore likely to reoffend if released.

12. The Regional Court further found that neither the applicant's personal situation nor his attitude had changed since its last decision. As had also been confirmed by expert W., without submitting himself to a therapeutic treatment, notably to a social therapy, which the applicant kept refusing to do, the conditions for suspending the applicant's preventive detention on probation could not be met.

13. Contrary to the applicant's view, the Regional Court further considered that Article 67d of the Criminal Code, as amended in 1998 (see paragraph 25 below), was constitutional.

2. The decision of the Karlsruhe Court of Appeal

14. On 21 November 2002 the Karlsruhe Court of Appeal, endorsing the reasons given by the Regional Court, dismissed the applicant's appeal.

3. The decision of the Federal Constitutional Court

15. On 13 December 2002 the applicant, represented by counsel, lodged a constitutional complaint with the Federal Constitutional Court. He complained about the decision to prolong his preventive detention on completion of ten years of placement on the basis of the amended Article 67d § 3 of the Criminal Code, which had entered into force after he had committed his offence. He argued that the decision violated the prohibition of retrospective punishment under the Basic Law, the prohibition of retrospective legislation enshrined in the rule of law and his right to liberty. That decision further breached the principle of

proportionality in that the courts responsible for the execution of sentences had made his release dependent on the completion of a social therapy lasting five to seven years, which would unduly prolong his preventive detention.

16. On 22 March 2004 the Federal Constitutional Court declined to consider the applicant's constitutional complaint (file no. 2 BvR 2027/02). It found that the applicant's complaint was ill-founded. Referring to its leading judgment of 5 February 2004 in the case of *M.* (file no. 2 BvR 2029/01; application no. 19359/04 to this Court), it stated that the provisions on which the applicant's continued preventive detention was based, Article 67d § 3 of the Criminal Code, read in conjunction with section 1a § 3 of the Introductory Act to the Criminal Code, as amended in January 1998 (see paragraph 25 below), were constitutional.

17. Moreover, in the Federal Constitutional Court's view, the criminal courts had not applied these provisions to the applicant in a disproportionate manner. There were notably no objections under constitutional law to considering the total absence of a necessary therapy to be a negative factor in the assessment of whether the applicant was likely to reoffend.

C. Subsequent developments

18. In 2004 the applicant was diagnosed with cancer of the lymph nodes and subsequently with cancer of the eyes.

19. On 11 July 2005 and on 1 October 2007 the Karlsruhe Regional Court ordered the continuation of the applicant's preventive detention.

20. On 29 April 2009 the Karlsruhe Regional Court, sitting as a chamber responsible for the execution of sentences, decided to suspend the further execution of the applicant's preventive detention on probation as from 31 August 2009 and ordered the supervision of his conduct. Having consulted a medical expert, it considered that there were justifiable reasons for testing whether the applicant could be released without committing further unlawful acts. It noted that the applicant had persistently refused to make a social (group) therapy, considered most suitable by all medical experts consulted, but had at least made an individual therapy with an external psychotherapist. The applicant was released from preventive detention on 28 August 2009.

II. RELEVANT DOMESTIC AND COMPARATIVE LAW AND PRACTICE

21. 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 referred to in the present case provide as follows:

A. The order of preventive detention by the sentencing court

22. The sentencing court may, at the time of the offender's conviction, order his preventive detention, a so-called measure of correction and prevention, under certain circumstances in addition to his prison sentence, a penalty, 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 of the Criminal Code, in its version in force at the relevant time).

B. The duration of preventive detention

24. 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).

25. 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, provided 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*.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

26. The applicant complained that the retrospective prolongation of his preventive detention beyond ten years, which he could not have foreseen, violated his rights under Article 5 § 1 (a) and Article 6 § 1 of the Convention. The Court considers that this complaint falls to be examined under Article 5 § 1 alone which, in so far as relevant, reads:

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

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

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

(e) the lawful detention ... of persons of unsound mind ...”

27. The Government contested that argument.

A. Admissibility

28. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) 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

29. The applicant, referring to the Court's findings in the case of *M. v. Germany* (no. 19359/04), considered that his continued preventive detention beyond the period of ten years, that is, from 24 October 2002 to 28 August 2009, had violated Article 5 § 1 of the Convention.

30. 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* (cited above). They took the view that in terms of the temporal course of events, the present application was a parallel case to that of *M. v. Germany*.

2. The Court's assessment

(a) Recapitulation of the relevant principles

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

“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-...). ...”

(b) Application of these principles to the present case

32. The Court has to determine whether the applicant's preventive detention beyond a period of ten years was justified under sub-paragraph (a) of Article 5 § 1 as occurring “after conviction”, in other words whether there was still a sufficient causal connection between the applicant's conviction and his deprivation of liberty at issue.

33. The Court notes that at the time of the applicant's criminal conviction by the Heilbronn Regional Court in 1990, which alone entailed a finding of guilt (compare, *mutatis mutandis*, *M. v. Germany*, cited above, §§ 95-96), 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 24 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 25 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 25 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.

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

35. The Court further considers 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, that detention was not justified as detention “reasonably considered necessary to prevent his committing an offence” under sub-paragraph (c) of that provision. The applicant's potential further offences were not sufficiently concrete and specific, as required by the Court's case-law, as regards, in particular, the place and time of their commission and their victims, and do not, therefore, fall within the ambit of Article 5 § 1 (c) (compare, *mutatis mutandis*, *M. v. Germany*, cited above, § 102). Nor is the Court 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.

36. The Court is aware of the fact that the domestic courts ordered the applicant's preventive detention beyond a period of ten years because they considered that there was still a risk that the applicant might commit serious sexual offences, in particular rape, if released. They thus acted in order to protect potential victims from physical and psychological harm amounting to inhuman or degrading treatment which might be caused by the applicant. Under the Court's well-established case-law, States are indeed required under Article 3 to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment, including such ill-treatment administered by private individuals (see, for example, *A. v. the United Kingdom*, 23 September 1998, § 22, *Reports of Judgments and Decisions* 1998-VI; *M.C. v. Bulgaria*, no. 39272/98, §§ 149-150, ECHR 2003-XII; and *Opuz v. Turkey*, no. 33401/02, § 159, ECHR 2009-...). These measures should provide

effective protection and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge (see, *inter alia*, *Z and Others v. the United Kingdom* [GC], no. 29392/95, § 73, ECHR 2001-V; *D.P. and J.C. v. the United Kingdom*, no. 38719/97, § 109, 10 October 2002; compare also, in the context of Article 2, *Mastromatteo v. Italy* [GC], no. 37703/97, §§ 67-68, ECHR 2002-VIII).

37. However, the Court has also repeatedly held that the scope of any positive obligation on State authorities to take preventive operational measures to protect individuals from the criminal acts of another individual must take into consideration the need to ensure that the authorities exercise their powers to control and prevent crime in a manner which fully respects the due process and other guarantees which legitimately place restraints on the scope of their action, including the guarantees contained, in particular, in Article 5 of the Convention (see, *mutatis mutandis*, *Osman v. the United Kingdom*, 28 October 1998, § 116, *Reports* 1998-VIII; and *Opuz*, cited above, § 129). In other words, the Convention obliges State authorities to take reasonable steps within the scope of their powers to prevent ill-treatment of which they had or ought to have had knowledge, but it does not permit a State to protect individuals from criminal acts of a person by measures which are in breach of that person's Convention rights, in particular the right to liberty as guaranteed by Article 5 § 1.

38. Consequently, the State authorities could not, in the present case, rely on their positive obligations under the Convention in order to justify the applicant's deprivation of liberty which, as has been shown above (see paragraphs 32-35), did not fall within any of the exhaustively listed permissible grounds for a deprivation of liberty under sub-paragraphs (a) to (f) of Article 5 § 1. That provision can thus be said to contain all grounds on which a person may be deprived of his liberty in the public interest, including the interest in protecting the public from crime.

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

II. ALLEGED VIOLATION OF ARTICLE 7 OF THE CONVENTION

40. The applicant further complained that the retrospective extension of his first preventive detention from a maximum period of ten years to an unlimited period of time due 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 paragraphs 24-25), breached his right not to have a heavier penalty imposed on him than the one applicable at the time of his offence. He relied on Article 7 § 1 of the Convention, which provides:

“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.”

41. The Government contested that argument.

A. Admissibility

42. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) 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

43. The applicant, referring to the Court's findings in the case of *M. v. Germany* (cited above), considered that his continued preventive detention beyond the period of ten years had also violated Article 7 § 1 of the Convention.

44. The Government referred to their observations made in relation to Article 7 in the application of *M. v. Germany* (cited above) to which, in terms of the temporal course of events, the present application was comparable.

2. The Court's assessment

(a) Recapitulation of the relevant principles

45. 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

46. In determining whether the applicant's preventive detention beyond the initial ten-year point violated the prohibition of retrospective penalties under Article 7 § 1, second sentence, the Court notes that the applicant committed the sexual offence for which his preventive detention was ordered in 1989. At that time, 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 24 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 25 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.

47. 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.

48. The Court would further note that its above observations on the scope of the State authorities' positive obligation to protect potential victims from inhuman or degrading treatment which might be caused by the applicant (see paragraphs 36-38 above) apply, *a fortiori*, in the context of the prohibition of retrospective penalties under Article 7 § 1, provision from

which no derogation is allowed even in time of public emergency threatening the life of the nation (Article 15 §§ 1 and 2 of the Convention). The Convention thus does not oblige State authorities to protect individuals from criminal acts of the applicant by such measures which are in breach of his right under Article 7 § 1 not to have imposed upon him a heavier penalty than the one applicable at the time he committed his criminal offence.

49. 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. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

50. In the applicant's submission, the retrospective abolition of the maximum period of ten years for his preventive detention, whereby it had become impossible for him to foresee when he would be released, was also in breach of Article 3 of the Convention, which reads as follows:

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

51. The Government contested that argument. They took the view that the applicant failed to exhaust domestic remedies in respect of his complaint under Article 3, as required by Article 35 § 1 of the Convention. He had not raised, at least in substance and by reference to the protection of human dignity and of physical integrity under the Basic Law, his complaint that his continued preventive detention had amounted to inhuman or degrading treatment or punishment before the Federal Constitutional Court.

52. The applicant underlined that he had raised in substance a complaint under Article 3 in that, in his constitutional complaint, he had claimed, by reference to the right to liberty and to the prohibition of retrospective punishment as guaranteed by the Basic Law, that his retroactive placement in preventive detention had been unreasonable.

53. The Court observes that in the proceedings before the Federal Constitutional Court, the applicant reasoned his complaint that his prolonged preventive detention was disproportionate by claiming that the therapy he was expected to make prior to his release would take several years (see paragraph 15 above). It finds that the applicant, who was represented by counsel, cannot be considered to have raised at least in substance, by these submissions before the Federal Constitutional Court, the complaint he now raises before the Court that his prolonged preventive detention constituted inhuman and degrading treatment. That court also did not examine that complaint on the merits. The applicant's complaint under Article 3 must therefore be dismissed for non-exhaustion of domestic remedies, pursuant to Article 35 §§ 1 and 4 of the Convention.

IV. OTHER ALLEGED VIOLATION OF THE CONVENTION

54. Lastly, the applicant claimed that his unlimited preventive detention for offences he did not commit breached the presumption of innocence guaranteed by Article 6 § 2 of the Convention.

55. The Court notes that, even assuming the applicability of Article 6, the applicant failed to raise at least in substance also this complaint in the proceedings before the Federal Constitutional Court prior to bringing it before this Court. This part of the application must therefore equally be dismissed for non-exhaustion of domestic remedies, pursuant to Article 35 §§ 1 and 4 of the Convention.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

56. 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

1. The parties' submissions

57. The applicant claimed 301,313.12 euros (EUR) in respect of pecuniary damage. Submitting documentary evidence, he argued that owing to his unlawful detention between 2002 and 2009, he had been unable to work in his profession as a motor mechanic, to earn a salary which, statistically, would have amounted to EUR 280,000 gross, and to acquire pension rights. Moreover, he had had to pay EUR 8,693 to a psychologist for a behaviour therapy and for the treatment of his depressions in order to obtain the necessary psychological care helping him to come to terms with his illegal preventive detention. He could not be expected to have made a different therapy while in illegal detention. Furthermore, he had been obliged to pay EUR 12,620.12 for an antibody therapy to cure a cancer of his eyes, having refused a radiotherapy proposed by the prison authorities which had entailed a risk to go blind. He alleged that a statutory health insurance company, which would have been his insurer had he lived in freedom, would have reimbursed the costs of the antibody therapy.

58. The applicant further claimed that he had suffered non-pecuniary damage in that his preventive detention in breach of the Convention from 24 October 2002 until 28 August 2009 had caused him distress and

frustration. He claimed at least EUR 27,467 under that head, that is, EUR 11 per day of unlawful detention.

59. The Government took the view that the applicant could not claim any compensation for pecuniary damage. He had failed to substantiate sufficiently that he could have earned in practice the salary claimed in his profession as a motor mechanic, which he had exercised only for a couple of months since 1972. As for the medical fees paid to his psychologist by his wife, the Government submitted that the applicant could not claim the reimbursement of the costs of his behaviour therapy he had not borne himself. The authorities had refused to pay for that therapy because the applicant should have made a more far-reaching social therapy in order to treat his personality disorder. He had, however, refused to accept the prison authorities' repeated offers of such treatment which would also have included help in order to deal with a long period of detention. As for the costs for the antibody therapy to cure the cancer of his eyes, the Government argued that those costs, paid again by his wife, had not been caused by his allegedly illegal detention. There was nothing to indicate that a compulsory health insurance company would have reimbursed those costs had he been at liberty as the radiotherapy offered to him had not entailed a substantial risk to go blind.

60. As for the applicant's claim in respect of non-pecuniary damage, the Government left it to the Court's discretion to fix an equitable amount.

2. The Court's assessment

61. The Court notes with regard to the applicant's claim concerning pecuniary damage that the applicant failed to demonstrate that it was his preventive detention beyond the ten-year-point, in breach of Article 5 § 1 and Article 7 § 1, which prevented him from earning a salary as a motor mechanic he would have obtained otherwise. Consequently, no clear causal connection between the Convention violations and the applicant's loss of estimated earnings and pension rights has been established and the Court therefore rejects the applicant's claim in this respect. As to the costs for his psychological treatment, the Court observes that the applicant was offered a more comprehensive social therapy, including help to deal with his long detention. Therefore, the costs incurred for his behaviour therapy cannot be said to have been caused by his detention in breach of the Convention. Finally, the applicant failed to demonstrate that he would not have had to bear the costs of the antibody therapy he chose to cure the cancer of his eyes had he not been in detention at the relevant time; consequently, a causal link between the violation found and the pecuniary damage alleged has not been established in this respect either. Therefore, the Court rejects the applicant's claims for pecuniary damage.

62. As for the applicant's claim for compensation for non-pecuniary damage, the Court takes into consideration that the applicant was detained

in breach of the Convention from 24 October 2002 until his release on 28 August 2009. 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 the amount as calculated by him in respect of non-pecuniary damage, that is, EUR 27,467, in full, plus any tax that may be chargeable.

B. Costs and expenses

63. The applicant, submitting documentary evidence, also claimed a total of EUR 8,325.27 (including VAT) for the costs and expenses incurred before the domestic courts and before this Court. The costs and expenses comprised lawyers' fees of EUR 1,183.20 for the constitutional complaint in the proceedings here at issue, lawyers' fees of EUR 5,382.40 for another constitutional complaint and for the representation before this Court, as well as further lawyers' fees of EUR 1,759.67 for disciplinary proceedings and proceedings concerning his medical treatment.

64. The Government considered that the applicant had not sufficiently substantiated his claims for costs as the content of the agreements between the applicant and his lawyers was not clear from the invoices submitted.

65. 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 that only the costs incurred in the proceedings before the Federal Constitutional Court in the proceedings here at issue and those incurred in the proceedings before this Court were necessarily incurred to prevent the Convention violations at issue. It considers it reasonable to award the sum of EUR 4,000 covering costs under all heads, plus any tax (including VAT) that may be chargeable to the applicant.

C. Default interest

66. 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 concerning the retrospective extension of the applicant's preventive detention beyond a period of ten years admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 5 § 1 of the Convention;
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 27,467 (twenty-seven thousand four hundred and sixty-seven euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (ii) EUR 4,000 (four thousand euros), plus any tax that may be chargeable to the applicant, 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 14 April 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Dean Spielmann
President