



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

FIFTH SECTION

CASE OF KRONFELDNER v. GERMANY

(Application no. 21906/09)

JUDGMENT

STRASBOURG

19 January 2012

FINAL

19/04/2012

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

In the case of Kronfeldner v. Germany,

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

Dean Spielmann, *President*,

Elisabet Fura,

Boštjan M. Zupančič,

Ann Power-Forde,

Ganna Yudkivska,

Angelika Nußberger,

André Potocki, *judges*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 13 December 2011,

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

PROCEDURE

1. The case originated in an application (no. 21906/09) 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 Franz Xaver Kronfeldner (“the applicant”), on 24 April 2009.

2. The applicant was initially represented by Ms M. Kronfeldner, his sister, and subsequently by Mr A. Ahmed, a lawyer practising in Munich. 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 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 Article 5 of the Convention.

4. On 22 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, had 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 1958 and was in Straubing Prison until his preventive detention was declared terminated and his provisional detention in a suitable institution under the Therapy Detention Act was ordered on 28 November 2011. He is currently detained in Straubing Psychiatric Hospital.

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

6. Since the age of sixteen, the applicant was sentenced to terms of imprisonment several times and spent only some four years outside prison.

7. On 20 November 1990 the Regensburg Regional Court convicted the applicant of rape. It sentenced him to eight years' imprisonment and ordered his placement in preventive detention pursuant to Article 66 § 1 of the Criminal Code (see paragraphs 32-33 below). The court found that in July 1989, some four months after his release from prison, the applicant had raped a woman whom he had come across in Regensburg at night.

8. The Regional Court had consulted a psychiatric expert, S., on the applicant's criminal responsibility and his propensity to commit further sexual offences and endorsed his findings. The expert had found that the applicant did not suffer from a mental illness diminishing his criminal responsibility. His criminal responsibility had, however, been diminished at the time of the offence due to his prior consumption of alcohol. The court further noted that the applicant had previously been convicted, in addition to several offences against the property of others, in particular, of attempted rape committed in 1973, two counts of sexual assault committed in 1978 and rape and coercion committed in 1984. The court considered that owing to his propensity to commit serious sexual offences, the applicant was dangerous to the public.

9. Since 13 November 1997 the applicant, having served his full prison sentence, has been in preventive detention. Its continuation was ordered by the Amberg Regional Court on 3 November 1999 and on 26 February 2002.

10. On 4 March 2004 the Regensburg Regional Court again decided not to suspend the applicant's preventive detention on probation and ordered the execution of that measure in a detoxification facility (Article 67a §§ 1 and 2, read in conjunction with Article 64 of the Criminal Code; see paragraph 37 below). The applicant was accordingly transferred from Straubing Prison to Regensburg District Clinic on 31 March 2004.

11. On 26 October 2005 the Regensburg Regional Court declined to suspend the applicant's preventive detention on probation and ordered its execution in a psychiatric hospital (Article 67a §§ 1 and 2 of the Criminal Code; see paragraph 37 below). It had consulted a psychiatric expert, N., who had considered that the applicant suffered from a dissocial personality disorder since his youth and that it was very likely that he would reoffend if released. His disorder could only possibly be treated in a psychiatric hospital. The applicant was accordingly transferred to Straubing Psychiatric Hospital on 15 December 2005. On 25 October 2007 the Regensburg Regional Court prolonged the execution of the applicant's preventive detention in a psychiatric hospital.

12. As the execution of his preventive detention was interrupted in order to execute another sentence of imprisonment, the applicant had served ten years in preventive detention by 11 May 2008.

B. The proceedings at issue

1. The decision of the Regensburg Regional Court

13. On 12 June 2008 the Regensburg Regional Court, having heard the applicant, his counsel H. and expert K. in person, decided neither to terminate the applicant's preventive detention after expiry of a period of ten years nor to suspend it and grant probation.

14. The Regional Court considered that it was very likely that the applicant, if released, would commit further serious offences resulting in considerable physical or psychological harm to the victims (Article 67d § 3 of the Criminal Code; see paragraph 36 below). Having regard to the observations made by the psychiatric expert K. it had consulted and to the applicant's previous convictions, the court took the view that the applicant's dangerousness had not diminished. Owing to his strong propensity to commit crimes, there was a risk that he might commit further violent sexual offences, in particular rapes.

15. The Regional Court noted in this connection that expert K. had consulted, *inter alia*, the applicant's medical files drawn up by doctors of Straubing Psychiatric Hospital. Having examined the applicant, the expert had diagnosed him with a serious dissocial personality disorder which was notably reflected in a number of sexual offences he had committed. The expert found that the applicant did not, however, suffer from a pathological sexual deviation, a psychiatric illness or a mental disorder which diminished his criminal responsibility or called for a psychiatric therapy. He noted that the psychiatric experts having examined the applicant throughout the proceedings had agreed on that point.

16. The Regional Court further quashed its decision of 26 October 2005 to execute the applicant's preventive detention in a psychiatric hospital and

decided to retransfer the applicant to prison in accordance with Article 67a § 3 of the Criminal Code (see paragraph 37 below). Having regard to the statements made by the psychiatric expert and by Straubing Psychiatric Hospital, it found that the reintegration into society of the applicant, who did not suffer from a psychiatric illness, could not better be furthered in that hospital. The therapy in the psychiatric hospital, in which he might become even more dangerous, had not yielded any success.

17. The applicant was accordingly transferred from Straubing Psychiatric Hospital to Straubing Prison on 19 June 2008.

2. The decision of the Nuremberg Court of Appeal

18. On 22 July 2008 the Nuremberg Court of Appeal, fully endorsing the reasons given by the Regional Court, dismissed the applicant's appeal as ill-founded.

19. The Court of Appeal added that the reasons why the applicant's therapy in Straubing Psychiatric Hospital had not been successful were irrelevant for the question whether there was still a risk that the applicant, if released, might commit further sexual offences. Therefore, Straubing Psychiatric Hospital had not been obliged to submit information concerning therapeutic methods contained in the medical files as requested by the applicant. Furthermore, the psychiatric expert report drawn up by expert K. was clear and conclusive and complied with the minimum standards required for such reports. The court further referred to the leading judgment dated 5 February 2004 of the Federal Constitutional Court, in which the latter had considered the retroactive extension of a convicted person's preventive detention beyond a period of ten years to be constitutional (file no. 2 BvR 2029/01; see paragraph 36 below). It found, accordingly, that the applicant's continued preventive detention was lawful and proportionate.

3. The decision of the Federal Constitutional Court

20. On 21 August 2008 the applicant, represented by counsel H., lodged a constitutional complaint with the Federal Constitutional Court. He argued that the court decisions ordering his preventive detention to continue violated his right to liberty under the Basic Law. He complained, in particular, that the psychiatric expert report on which the decisions had been based had not complied with the minimum standards to be met by such reports. Moreover, his right to a fair trial had been breached because he had not obtained information he had requested concerning the therapy in Straubing Psychiatric Hospital and because the courts had disregarded his submissions.

21. On 3 November 2008 the Federal Constitutional Court declined to consider the applicant's constitutional complaint without giving reasons (file no. 2 BvR 1921/08).

C. The conditions of the applicant's detention during the execution of the preventive detention order in prison

22. From 13 November 1997 to 31 March 2004 and from 19 June 2008 onwards, the preventive detention order against the applicant has been executed in a separate wing of Straubing Prison for persons in preventive detention. Persons in preventive detention have certain privileges compared with convicted offenders serving their sentence.

23. In particular, at the relevant time, persons in preventive detention in Straubing Prison had more wide-ranging possibilities to occupy themselves in their spare time (one extra hour could be spent outside on non-working days; use of a kitchen and a well-equipped sports room; additional private telephone calls). They had shorter lock-up hours (some five hours less per day), more generous visiting times (up to ten hours per month) and more wide-ranging opportunities to purchase goods (six extra opportunities to buy a larger variety of goods). They further had the right to wear their own underwear and T-Shirts, use their own bed linen and bath robes, and receive more pocket money. They had bigger cells (between 8.75 and 10.3 sq. m) which they could equip with bigger TV sets and additional furniture.

24. The applicant was considered by the Straubing Prison authorities to be a self-confident, demanding and mistrustful person. He received regular visits from his mother, his brother and his sister and spoke to them regularly on the phone. Since July 2009 he has been working in the prison's furniture factory. From 2002 to 2004 he participated in a discussion group in prison. Following his retransfer to Straubing Prison in June 2008 the applicant did not make any of the therapies available – notably a group or possibly individual social therapy for sexual offenders – for lack of motivation. He consistently refused the treatment offered, questioning the therapists' expertise. He was not granted any relaxations in the execution of the preventive detention order against him for fear of abuse.

D. Subsequent developments

25. On 26 July 2010 the Regensburg Regional Court, having consulted psychiatric expert A., ordered the applicant's preventive detention to continue (Article 67d § 3 of the Criminal Code).

26. On 24 August 2010 the Nuremberg Court of Appeal, following the applicant's appeal, referred the case to the Federal Court of Justice for a preliminary ruling. The Court of Appeal asked the Federal Court of Justice to decide whether, having regard to this Court's judgment of 17 December

2009 in the case of *M. v. Germany*, the preventive detention of persons in the applicant's situation could exceed ten years.

27. On 10 November 2010 the Federal Court of Justice decided to adjourn the case pending a decision of its grand senate on the legal question at issue. It remitted the case-file to the Nuremberg Court of Appeal in order for it to review whether, applying a stricter standard of proportionality, the applicant's preventive detention was to continue (Articles 67d and 67e of the Criminal Code; see paragraphs 34 and 36 below). The Federal Court of Justice subsequently confirmed that the criteria set up by the Federal Constitutional Court in its leading judgment of 4 May 2011 (see paragraphs 41-45 below) should be applied to the case at issue.

28. By decision of 12 January 2011 the Nuremberg Court of Appeal ordered expert A. to supplement his previous report. In his fresh report dated 9 March 2011 expert A. took the view that there were no concrete circumstances in the applicant's personality or conduct which warranted the conclusion that there was a very high risk that he would commit the most serious violent or sexual offences if released. The Court of Appeal took the view that expert A.'s report was not a suitable basis for its decision. On 18 April 2011 it ordered expert L. to submit another expert report, which the latter did on 26 August 2011 and which he supplemented on 19 October 2011.

29. On 28 November 2011 the Nuremberg Court of Appeal quashed the decision of the Regensburg Regional Court of 26 July 2010. It declared the applicant's preventive detention terminated with immediate effect and ordered the supervision of his conduct. It found that, having regard to the criteria set up by the Federal Constitutional Court in its judgment dated 4 May 2011 (see, in particular, paragraph 43 below), the applicant's preventive detention was disproportionate. It had not been shown that the applicant, owing to specific circumstances, was highly likely to commit the most serious crimes of violence or sexual offences if released.

30. In a different set of proceedings, the Straubing Prison authorities requested the Regensburg Regional Court on 3 January 2011 to order the applicant's placement in a suitable institution under Article 1 of the Therapy Detention Act (see paragraph 40 below). These proceedings are currently pending. On 28 November 2011 the Regensburg Regional Court ordered the applicant's provisional detention in a suitable institution pending a decision on his placement under the Therapy Detention Act. The applicant was transferred to Straubing Psychiatric Hospital thereupon. The applicant had not previously been placed in a psychiatric hospital under section 1 of the Bavarian (Mentally Ill Persons') Placement Act (see paragraph 39 below).

II. RELEVANT DOMESTIC AND COMPARATIVE LAW AND PRACTICE

31. 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

32. 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 a danger to the public (Article 66 of the Criminal Code).

33. 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. Judicial review and duration of preventive detention

34. Pursuant to Article 67e of the Criminal Code, the court (that is, 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 and a measure of probation applied or whether it should be declared terminated. 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).

35. 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).

36. 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 offender's conduct. 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*. These provisions were initially considered compatible with the Basic Law by the Federal Constitutional Court in its leading judgment of 5 February 2004 (file no. 2 BvR 2029/01; the decision at issue in the case of *M. v. Germany*, cited above, §§ 27-40). That case-law was subsequently reversed (see paragraphs 41-45 below).

C. Transfer for enforcement of a different measure of correction and prevention

37. Article 67a of the Criminal Code contains provisions on the transfer of detainees for the execution of a different measure of correction and prevention than the measure ordered in the judgment against them. Under Article 67a § 2, read in conjunction with § 1, of the Criminal Code, the court may subsequently transfer a person against whom preventive detention was ordered to a psychiatric hospital or to a detoxification facility (see Article 64 of the Criminal Code) if the person's reintegration into society can be better promoted thereby. The court may quash that decision if it later emerges that no success can be achieved by placing the person in a psychiatric hospital or a detoxification facility (Article 67a § 3). The duration of the placement is determined by the provisions which apply to the measure ordered in the judgment (Article 67a § 4).

D. The detention of mentally ill persons

38. The detention of mentally ill persons is provided for, first of all, 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.

39. Secondly, pursuant to sections 1 § 1, 5 and 7 of the Bavarian Act on the Placement in an Institution of Mentally Ill Persons and Their Care of 5 April 1992 (Bavarian (Mentally Ill Persons') Placement Act – *Bayerisches Gesetz über die Unterbringung psychisch Kranker und deren Betreuung*) a court may order a person's placement in a psychiatric hospital at the request of the authorities of a town or county if the person concerned is mentally ill and thereby poses a severe threat to public security and order. Such an order may only be executed as long as no measure under Article 63 of the Criminal Code has been taken (section 1 § 2 of the said Act).

40. Furthermore, on 1 January 2011, following the Court's judgment in the case of *M. v. Germany* (cited above), the Act on Therapy and Detention of Mentally Disturbed Violent Offenders (Therapy Detention Act – *Gesetz zur Therapie und Unterbringung psychisch gestörter Gewalttäter*) entered into force. Under sections 1 § 1 and 4 of that Act, the civil sections of the Regional Court may order the placement in a suitable institution of persons who may no longer be kept in preventive detention in view of the prohibition of retrospective aggravations in relation to preventive detention. Such a therapy detention may be ordered if the person concerned has been found guilty by final judgment of certain serious offences for which preventive detention may be ordered under Article 66 § 3 of the Criminal Code. The person must further suffer from a mental disorder owing to which it is highly likely that he will considerably impair the life, physical integrity, personal liberty or sexual self-determination of another person. The person's detention must be necessary for the protection of the public.

E. Recent case-law of the Federal Constitutional Court on preventive detention

41. On 4 May 2011 the Federal Constitutional Court delivered a leading judgment concerning the retrospective prolongation of the complainants' preventive detention beyond the former ten-year maximum period and about the retrospective order of the complainants' preventive detention respectively (file nos. 2 BvR 2365/09, 2 BvR 740/10, 2 BvR 2333/08, 2 BvR 1152/10 and 2 BvR 571/10). The Federal Constitutional Court held that all provisions on the retrospective prolongation of preventive detention and on the retrospective order of such detention were incompatible with the Basic Law as they failed to comply with the constitutional protection of legitimate expectations guaranteed in a State governed by the rule of law, read in conjunction with the constitutional right to liberty.

42. The Federal Constitutional Court further held that all provisions of the Criminal Code on the imposition and duration of preventive detention at issue were incompatible with the fundamental right to liberty of the persons in preventive detention. It found that those provisions did not satisfy the constitutional requirement of establishing a difference between preventive detention and detention for serving a term of imprisonment (*Abstandsgebot*). These provisions included, in particular, Article 66 of the Criminal Code in its version in force since 27 December 2003.

43. The Federal Constitutional Court ordered that all provisions declared incompatible with the Basic Law remained applicable until the entry into force of new legislation and until 31 May 2013 at the most. In relation to detainees whose preventive detention had been prolonged or ordered retrospectively, the courts dealing with the execution of sentences had to examine without delay whether the persons concerned, owing to specific circumstances relating to their person or their conduct, were highly likely to commit the most serious crimes of violence or sexual offences and if, additionally, they suffered from a mental disorder within the meaning of section 1 § 1 of the Therapy Detention Act (see paragraph 40 above). As regards the notion of mental disorder, the Federal Constitutional Court explicitly referred to the interpretation of the notion of “persons of unsound mind” in Article 5 § 1 sub-paragraph (e) of the Convention made in this Court’s case-law (see §§ 138 and 143-156 of the Federal Constitutional Court’s judgment). If the above pre-conditions were not met, those detainees had to be released no later than 31 December 2011. The other provisions on the imposition and duration of preventive detention could only be further applied in the transitional period subject to a strict review of proportionality; as a general rule, proportionality was only respected where there was a danger of the person concerned committing serious crimes of violence or sexual offences if released.

44. In its judgment, the Federal Constitutional Court stressed that the fact that the Constitution stood above the Convention in the domestic hierarchy of norms was not an obstacle to an international and European dialogue between the courts, but was, on the contrary, its normative basis in view of the fact that the Constitution was to be interpreted in a manner that was open to public international law (*völkerrechtsfreundliche Auslegung*; see § 89 of the Federal Constitutional Court’s judgment). It stressed that, in line with that openness of the Constitution to public international law, it attempted to avoid breaches of the Convention in the interpretation of the Constitution (see §§ 82 and 89 of the Federal Constitutional Court’s judgment).

45. In its reasoning, the Federal Constitutional Court relied on the interpretation of Article 5 and Article 7 of the Convention made by this Court in its judgment in the case of *M. v. Germany* (cited above; see §§ 137 ss. of the Federal Constitutional Court’s judgment). It stressed, in

particular, that the constitutional requirement of establishing a difference between preventive detention and detention for serving a term of imprisonment and the principles laid down in Article 7 of the Convention required an individualised and intensified offer of therapy and care to the persons concerned. In line with the Court's findings in the case of *M. v. Germany* (cited above, § 129), it was necessary to provide a high level of care by a team of multi-disciplinary staff and to offer the detainees an individualised therapy if the standard therapies available in the institution did not have prospects of success (see § 113 of the Federal Constitutional Court's judgment).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

46. The applicant complained that the retrospective extension of his preventive detention from a maximum period of ten years to an unlimited period of time was unlawful and violated Article 5 of the Convention, which, in so far as relevant, reads as follows:

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

(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, ...; ...”

47. The Government contested that argument.

A. Admissibility

1. The parties' submissions

(a) The Government

48. In their further observations dated 1 December 2010, made in reply to the applicant's observations, the Government submitted that the applicant had failed to exhaust domestic remedies as required by Article 35 § 1 of the

Convention. He had not yet obtained a decision of the Federal Court of Justice on the continuation of his preventive detention in the fresh review proceedings initiated in 2010 (see paragraphs 26 ss. above). Following the development in the domestic courts' case-law after the Court's judgment in the case of *M. v. Germany*, this review was an effective remedy for the applicant to obtain his release which he therefore had to exhaust.

49. In their further observations dated 14 June 2011 the Government objected that the applicant had failed to exhaust domestic remedies also for another reason. They argued that in its leading judgment of 4 May 2011 on preventive detention (see paragraphs 41-45 above), the Federal Constitutional Court had introduced a new domestic remedy for review of the ongoing preventive detention of persons concerned by that judgment. In particular, in parallel cases to the *M. v. Germany* case (cited above), in which preventive detention had been extended beyond the former ten-year maximum duration, the courts dealing with the execution of sentences could only order the continuation of that detention under restrictive conditions. The preventive detention of the persons concerned could only be prolonged if, owing to specific circumstances relating to their person or their conduct, they were highly likely to commit the most serious crimes of violence or sexual offences and if, additionally, they suffered from a mental disorder within the meaning of sub-paragraph (e) of Article 5 § 1. If that was not the case, the detainees had to be released no later than 31 December 2011. The applicant had been obliged to exhaust that new domestic remedy.

50. The Government further took the view that the applicant could no longer claim to be the victim of a violation of his Convention rights. In its above-mentioned judgment, the Federal Constitutional Court had implemented the findings the Court had made in its judgments on German preventive detention. The Convention violations found have thus partly been remedied by the Federal Constitutional Court in its transitional rules, and will partly be remedied as soon as possible.

(b) The applicant

51. The applicant took the view that he had exhausted domestic remedies. He was not obliged to await the outcome of the new proceedings for review of the necessity of his preventive detention.

52. The applicant further considered that he could still claim to be the victim of a breach of Article 5 of the Convention. He stressed that the Court's findings in its judgment in the *M. v. Germany* case had not been implemented in his case, neither before nor after the Federal Constitutional Court's leading judgment of 4 May 2011. His situation in preventive detention had remained unchanged.

2. *The Court's assessment*

(a) Exhaustion of domestic remedies

53. The Court reiterates that under Article 35 § 1 of the Convention, recourse should be had to remedies which are available and sufficient to afford redress in respect of the breach of the Convention alleged (see, among many others, *Akdivar and Others v. Turkey*, 16 September 1996, § 66, *Reports of Judgments and Decisions* 1996-IV).

54. According to Rule 55 of the Rules of Court, any plea of inadmissibility must, in so far as its character and the circumstances permit, be raised by the respondent Contracting Party in its observations on the admissibility of the application submitted as provided in Rule 54 (compare *Sejdovic v. Italy* [GC], no. 56581/00, § 41, ECHR 2006-II; *Mooren v. Germany* [GC], no. 11364/03, § 57, ECHR 2009-...; and *Medvedyev and Others v. France* [GC], no. 3394/03, § 69, ECHR 2010-...). The Court observes that the Government objected that the applicant had failed to exhaust the domestic remedies made available in the domestic legal order after the Court's judgment in the *M. v. Germany* case only in observations lodged partly in reply to the applicant's observations, partly after the exchange of observations between the parties had been completed in compliance with Rule 54 § 2 (b). Therefore, an issue arises in relation to whether the Government must be considered to have been prevented from raising that objection at this stage of the proceedings (compare also *Stanev v. Bulgaria* (dec.), no. 36760/06, § 114, 29 June 2010).

55. The Court further reiterates that the assessment of whether domestic remedies have been exhausted is normally carried out with reference to the date on which the application was lodged with it. However, as it has held on many occasions, this rule is subject to exceptions, which may be justified by the particular circumstances of each case (see *Demopoulos and Others v. Turkey* (dec.) [GC], nos. 46113/99, 3843/02, 13751/02, 13466/03, 10200/04, 14163/04, 19993/04, 21819/04, § 87, 1 March 2010 with many further references). This was notably the case if the remedies under consideration were enacted to redress at a domestic level the Convention grievances of persons whose applications pending before the Court concerned similar issues (see *Demopoulos*, cited above, § 87).

56. The Court observes that in the proceedings at issue in the application before it the applicant appealed against the decision of the Regensburg Regional Court dated 12 June 2008 and obtained decisions on the merits from the Nuremberg Court of Appeal (22 July 2008) and from the Federal Constitutional Court (3 November 2008). He had therefore exhausted domestic remedies as required by Article 35 § 1 of the Convention at the date on which he lodged his application with the Court.

57. The Court further takes note of the Government's argument that the applicant should also have exhausted the new remedies available following this Court's judgment in the case of *M. v. Germany* (cited above) and the Federal Constitutional Court's judgment dated 4 May 2011. The Court considers that it can leave open the question whether the Government were (partly) estopped from raising these objections at this stage of the proceedings. It may further leave open whether it should make an exception from the rule that the assessment of whether domestic remedies have been exhausted is carried out with reference to the date on which the application was lodged with it. The applicant in the present case complained about his preventive detention as ordered by the decision of the Regensburg Regional Court dated 12 June 2008, confirmed on appeal. Any remedies introduced subsequently, after the Court's judgment of 17 December 2009 in the *M. v. Germany* case (cited above; final since 10 May 2010), for review of his continued preventive detention are not, therefore, capable of affording redress to the applicant in relation to the prior period of preventive detention here at issue. In particular, it has not been shown that by exhausting these remedies, the applicant could obtain adequate compensation in relation to his preventive detention starting on 12 May 2008. The applicant thus did not have to exhaust these remedies for the purposes of Article 35 § 1 of the Convention. Consequently, the Government's objections of non-exhaustion of domestic remedies must be rejected.

(b) Loss of victim status

58. The Court observes that the Government also objected that the applicant could no longer claim to be the victim of a violation of his Convention rights as the Federal Constitutional Court remedied the alleged Convention violations by its judgment of 4 May 2011 and, in particular, by the transitional rules it contains. The Court reiterates that a decision or measure favourable to the applicant is not in principle sufficient to deprive him of his status as a "victim" of a violation of a Convention right within the meaning of Article 34 of the Convention unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention (see, *inter alia*, *Eckle v. Germany*, 15 July 1982, § 66, Series A no. 51; *Amuur v. France*, 25 June 1996, § 36, *Reports* 1996-III; and *Dalban v. Romania* [GC], no. 28114/95, § 44, ECHR 1999-VI).

59. The Court notes that in its leading judgment of 4 May 2011, the Federal Constitutional Court relied on the interpretation of Article 5 and Article 7 of the Convention adopted by this Court in its judgment in *M. v. Germany* (cited above) and the follow-up cases thereto. It welcomes the Federal Constitutional Court's approach of interpreting the provisions of the Basic Law also in the light of the Convention and this Court's case-law, which demonstrates that court's continuing commitment to the protection of

fundamental rights not only on national, but also on European level. It agrees with the Government that by its judgment, the Federal Constitutional Court implemented this Court's findings in its above-mentioned judgments on German preventive detention in the domestic legal order. It gave clear guidelines both to the domestic criminal courts and to the legislator on the consequences to be drawn in the future from the fact that numerous provisions of the Criminal Code on preventive detention were incompatible with the Basic Law, interpreted, *inter alia*, in the light of the Convention. Its judgment thus reflects and assumes the joint responsibility of the State Parties and this Court in securing the rights set forth in the Convention.

60. Having regard to the scope of the Federal Constitutional Court's judgment, the Court, referring to its findings above (see paragraph 57), considers, however, that that judgment cannot be considered as having granted redress for the alleged breach of Article 5 § 1 by the applicant's prior preventive detention as from 12 May 2008 at issue in the impugned decisions of the domestic courts, covering the period until 26 July 2010 (see paragraph 25). The Government's objection that the applicant lost his victim status must therefore equally be rejected.

61. 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

(a) The applicant

62. The applicant took the view that his case was a parallel case to that of *M. v. Germany* (cited above) and that, accordingly, his continued preventive detention beyond a period of ten years violated Article 5 § 1 of the Convention. He argued, in particular, that he did not suffer from a psychiatric illness. This was also confirmed by the fact that the competent authorities had not placed him in a psychiatric hospital under the Bavarian (Mentally Ill Persons') Placement Act (see paragraph 30 above). His detention could therefore not be justified under sub-paragraph (e) of Article 5 § 1 as that of a person "of unsound mind".

(b) The Government

63. 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*.

64. However, the Government generally expressed doubts whether a narrow interpretation of sub-paragraphs (a) to (e) of Article 5 § 1 was necessary to protect individuals from arbitrary detention. That interpretation had to take into account the States' duty, flowing from Articles 2 and 3 of the Convention, to protect victims from further offences. They took the view that "conviction" under sub-paragraph (a) of Article 5 § 1, contrary to the Court's case-law, should not only comprise a finding of guilt in respect of an offence and the imposition of a measure involving deprivation of liberty by the sentencing court. It should also comprise the decisions of the courts responsible for the execution of sentences to extend a person's detention depending on the danger he or she presented. There was also a causal connection between the order for the applicant's preventive detention by the sentencing court and his continued preventive detention after the ten-year point because the latter complied with the aim of the initial decision of the sentencing court to protect the public from crime.

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

66. The sentencing Regional Court, having consulted an expert, had already found that the applicant was an abnormal personality with a propensity to commit violent sexual offences and had suffered from a pathological mental disorder diminishing his criminal responsibility at the time of his offence. The experts consulted during his preventive detention had equally diagnosed him as suffering from a dissocial personality disorder which was at the root of his sexual offences, and thus as mentally ill and therefore dangerous to the public.

67. The Government took the view that the applicant's personality disorder had to be qualified as a "true mental disorder" for the purposes of the Court's case-law as established, in particular, in *Winterwerp v. the Netherlands* (24 October 1979, Series A no. 33), and the applicant thus had to be considered as being of unsound mind. They took the view that sub-paragraph (e) of Article 5 § 1 and section 1 of the Therapy Detention Act (see paragraph 40 above) also covered persons with mental disorders which made them dangerous without affecting their criminal responsibility. They considered that a person may have been fully capable of appreciating the wrongfulness of his act and of acting accordingly at the time of his offence and thus have been criminally responsible. This did not, however, exclude that owing to a serious mental disorder, it was very likely

that that person would commit serious violent or sexual offences in the future.

68. The Government further stressed that the Regensburg Regional Court, in the proceedings here at issue, ended the applicant's placement in a psychiatric hospital in view of his conduct and not because he was no longer mentally ill. For persons who were unwilling to undergo therapy, psychiatric hospitals were not a suitable institution for the purposes of the said provision. These persons would disturb the proper working of those institutions to the detriment of other patients.

2. *The Court's assessment*

(a) **Recapitulation of the relevant principles**

69. 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 relating to preventive detention 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.*).”

70. The Court further reiterates that the term “persons of unsound mind” in sub-paragraph (e) of Article 5 § 1 does not lend itself to precise definition since its meaning is continually evolving as research in psychiatry progresses (see *Winterwerp v. the Netherlands*, 24 October 1979, § 37, Series A no. 33, and *Rakevich v. Russia*, no. 58973/00, § 26, 28 October 2003). 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*, cited above, § 39; *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; *Shtukaturv v. Russia*, no. 44009/05, § 114, 27 March 2008; and *Kallweit v. Germany*, no. 17792/07, § 45, 13 January 2011).

71. In deciding whether an individual should be detained as a person “of unsound mind”, the national authorities are to be recognised as having a certain discretion since it is in the first place for the national authorities to evaluate the evidence adduced before them in a particular case; the Court’s task is to review under the Convention the decisions of those authorities (see *Winterwerp*, cited above, § 40; and *H.L. v. the United Kingdom*, no. 45508/99, § 98, ECHR 2004-IX). The relevant time at which a person must be reliably established to be of unsound mind, for the requirements of sub-paragraph (e) of Article 5 § 1, is the date of the adoption of the measure depriving that person of his liberty as a result of that condition (compare *Luberti v. Italy*, 23 February 1984, § 28, Series A no. 75).

72. 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* 1998-V; *Hutchison Reid*, cited above, § 49; *Brand v. the Netherlands*, no. 49902/99, § 62, 11 May 2004; and *Haidn v. Germany*, no. 6587/04, § 78, 13 January 2011).

(b) Application of these principles to the present case

73. The Court must first determine whether the applicant’s preventive detention at issue 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.

74. The Court notes that the applicant’s criminal conviction, which alone entailed a finding of guilt (compare, *mutatis mutandis*, *M. v. Germany*, cited above, §§ 95-96), was pronounced by the Regensburg Regional Court in 1990. At that time, 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 35 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. That maximum period was subsequently abolished by the amendment of Article 67d of the Criminal Code in 1998 (see paragraph 36 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 36 above). Thus, had it not been for the subsequent amendment of the said legal provision, the applicant would have been released when ten years of preventive detention had elapsed, irrespective of whether he was still considered a danger to the public.

75. 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). The Court, having also had regard to the Government’s submissions relating to its well-established case-law (see paragraph 64 above), sees no reason to depart from its findings in that judgment. The Court thus considers, as it did 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 continued detention was therefore not justified under sub-paragraph (a) of Article 5 § 1.

76. The Court further considers 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”. 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).

77. 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 70 above), this requires, in the first place, 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.

78. The Court notes in this connection that in the proceedings here at issue, the domestic courts based their decision to extend the applicant's preventive detention on the report of a psychiatric expert, K. (see paragraphs 13-16 and 19 above). The expert, who had examined the applicant in person, had diagnosed him with a serious dissocial personality disorder which manifested itself in the sexual offences he had committed. According to expert K., the findings of whom the domestic courts endorsed, the applicant did not, however, suffer from a pathological sexual deviation, a psychiatric illness or a mental disorder which diminished his criminal responsibility or called for a psychiatric therapy. The psychiatric experts who examined the applicant throughout the proceedings had agreed on that point.

79. In view of these findings, it appears doubtful whether the courts responsible for the execution of sentences could be said to have established that the applicant was "of unsound mind" within the meaning of sub-paragraph (e) of Article 5 § 1 on the basis of the said objective medical expertise before them. Moreover, it is clear from the domestic courts' reasoning that it was not decisive for their decision on the extension of the applicant's preventive detention whether the applicant suffered from a mental illness and the particular nature of that illness. The question before them was whether the applicant was liable to reoffend if released (Article 67d § 3 of the Criminal Code, see paragraphs 14 and 36 above), be it because of his mental condition or not (compare in this respect also *Kallweit*, cited above, § 56). The courts further had to determine under Article 67a § 3 of the Criminal Code (see paragraph 37 above) whether the applicant's reintegration into society could be better promoted if his necessary preventive detention kept being executed in a psychiatric hospital. Again, this finding could, however, be made without the applicant suffering from a pathological mental disorder diminishing his criminal responsibility (Article 63 of the Criminal Code). The courts only had to decide whether or not a therapy available in the psychiatric hospital could yield more success than the applicant's placement in prison (see paragraph 16 above).

80. However, even assuming that the courts responsible for the execution of sentences could be said to have established, as a competent authority, that the applicant suffered from a "true mental disorder" warranting his compulsory confinement, the Court cannot but note that, as a result of the proceedings at issue, the applicant was detained in a separate wing of Straubing Prison for persons in preventive detention. It refers in this connection to its above case-law that, in principle, the detention of a person as a mental health patient will only be "lawful" for the purposes of sub-paragraph (e) of Article 5 § 1 if effected in a hospital, clinic or other appropriate institution (see paragraph 72 above).

81. Having regard to the applicant's conditions of detention in Straubing Prison (see paragraphs 22-24 above), the Court is not convinced that the applicant has been offered the therapeutic environment appropriate for a person detained as being of unsound mind. He does not appear to have received any treatment since his retransfer from Straubing Psychiatric Hospital to prison in June 2008 (see paragraph 24 above). The Court does not overlook, in this connection, the fact that the domestic courts, in the proceedings at issue, decided to retransfer the applicant from a psychiatric hospital – where persons considered as mentally ill under German law were placed at the relevant time – to prison because the therapy the applicant had made in the psychiatric hospital had not yielded any success.

82. However, the applicant's conduct or attitude does not exempt the domestic authorities from providing persons detained (solely) as mental health patients with a medical and therapeutic environment appropriate for their condition. The Court cannot but subscribe in this context to the reasoning of the Federal Constitutional Court in its judgment of 4 May 2011 in respect of the suitable institutions for persons in preventive detention. That court stressed that both the German Constitution and the Convention required a high level of individualised and intensified offer of therapy and care by a team of multi-disciplinary staff to persons in preventive detention. It further found that detainees had to be offered an individualised therapy if the standard therapies available in the institution did not have prospects of success (see paragraph 45 above).

83. The Court further has regard, in this respect, to the general observations made by both the Council of Europe's Commissioner for Human Rights and the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) on the situation of persons in preventive detention (for a summary and further references see *M. v. Germany*, cited above, §§ 76-77). It is thus aware that long-term detainees suffering from disorders such as the applicant, who appears unable to make any effort to improve the prospects of his own release, must be an enormous challenge to the staff working with them. It takes the view that the applicant nevertheless had to be provided with a therapeutic environment appropriate for his mental condition.

84. Having regard to the foregoing, the Court considers that in the circumstances of the present case, the applicant has not been detained in an institution suitable for the detention of mental health patients.

85. Consequently, the continuation of the applicant's detention was not covered by sub-paragraph (e) of Article 5 § 1 either. The Court 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.

86. Furthermore, the Court, having regard to the Government's submission that its interpretation of Article 5 § 1 had to take into account

the States' duty under Articles 2 and 3 of the Convention to protect victims from further offences (see paragraph 64 above), refers to its findings in the case of *Jendrowiak v. Germany* (no. 30060/04, §§ 36-38, 14 April 2011). It 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 rapes, if released. They thus acted in order to protect potential victims from physical and psychological harm which might be caused by the applicant.

87. However, while the Convention, and in particular its Articles 2 and 3, obliges State authorities to take reasonable steps within the scope of their powers to prevent offences of which they had or ought to have had knowledge, 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 (see, *mutatis mutandis*, *Osman v. the United Kingdom*, 28 October 1998, § 116, *Reports* 1998-VIII; and *Opuz v. Turkey*, no. 33401/02, § 129, ECHR 2009-...), as interpreted in the Court's well-established case-law. Consequently, the State authorities cannot, 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 73 ss. above), did not fall within any of the permissible grounds for deprivation of liberty exhaustively listed under sub-paragraphs (a) to (f) of Article 5 § 1.

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

II. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

89. Relying on Article 6 of the Convention, taken alone and in conjunction with Article 13 of the Convention, the applicant further complained that the proceedings in which his continued preventive detention had been ordered had been unfair. He submitted, in particular, that the domestic courts had disregarded his submissions concerning, *inter alia*, the insufficient qualification of therapists without giving sufficient reasons and that the insufficiently reasoned medical expert reports had disregarded the presumption of innocence. Moreover, his right to equality of arms had been breached because he had not obtained the written reports drawn up by staff of the psychiatric hospital on the therapies he had made.

90. The applicant further argued that he had been discriminated as a prisoner by the persons involved in the execution of sentences, in breach of Article 6, read in conjunction with Article 14 of the Convention.

91. Relying on Article 4 of Prot. No. 7 to the Convention, the applicant claimed, lastly, that he had been punished twice for the same offence

because his previous convictions had been referred to in the decisions on the question whether or not to suspend the execution of his preventive detention on probation.

92. The Court has examined the applicant's complaints as submitted by him. However, having regard to all the material in its possession, the Court finds that, even assuming the compatibility *ratione personae* with the Convention and the exhaustion of domestic remedies in all respects, this part of the application does not disclose any appearance of a violation of the Convention or its Protocols. It follows that the remainder of the application must be rejected as manifestly ill-founded, pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

III. APPLICATION OF ARTICLE 46 OF THE CONVENTION

93. The Court notes that in several previous judgments concerning German preventive detention (see, in particular, *Mautes v. Germany*, no. 20008/07, §§ 57 ss., 13 January 2011; and *Kallweit*, cited above, §§ 74 ss.) it addressed the issue of the execution of its final judgments. Having regard to the circumstances of the case and the recent developments in the domestic legal order, it considers it adequate to determine what consequences may be drawn from Article 46 of the Convention for the respondent State also in the present case.

94. 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

95. The applicant argued that his case was a parallel case to that of *M. v. Germany* (cited above). The defendant State was therefore obliged under Articles 1 and 46 of the Convention to put an end to the Convention violation also in his case. It was possible for the German courts to interpret the relevant provisions of German law in conformity with the Convention (the applicant referred, in particular, to a decision of the Federal Court of Justice (fourth senate) of 12 May 2010 (file no. 4 StR 577/09)). The new Therapy Detention Act (see paragraph 40 above) was unconstitutional, circumvented the Court's findings in the *M.* case and led to a prolongation of the deprivation of liberty in breach of the Convention of the persons concerned.

96. The Government took the view that by its leading judgment of 4 May 2011 (see paragraphs 41-45 above), the Federal Constitutional Court

had implemented this Court's judgments on German preventive detention. It had *de facto* anticipated a pilot judgment procedure by this Court, addressing the structural deficits of the legislation on preventive detention. The Government argued that, therefore, the present case should be adjourned until the fresh proceedings before the domestic courts which were made necessary by the Federal Constitutional Court's leading judgment were terminated. The case should only be resumed after the domestic courts had determined whether the applicant's current preventive detention was to continue in the light of the criteria set up in the Federal Constitutional Court's judgment.

B. The Court's assessment

97. 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).

98. 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).

99. 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).

100. 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).

101. The Court observes in the present case that following its judgment in the case of *M. v. Germany* (cited above) and several follow-up cases, the Federal Constitutional Court, in a leading judgment of 4 May 2011, held that all provisions on the retrospective prolongation of preventive detention were incompatible with the Basic Law. That court further ordered that the courts dealing with the execution of sentences had to review without delay the detention of persons – as the applicant in the present case – whose preventive detention had been prolonged retrospectively. These courts have to examine whether, owing to specific circumstances relating to his person or his conduct, the applicant was highly likely to commit the most serious crimes of violence or sexual offences and if, additionally, he suffered from a mental disorder within the meaning of section 1 § 1 of the Therapy Detention Act (compare paragraphs 41-43 above). As regards the notion of mental disorder, the Federal Constitutional Court explicitly referred to the interpretation of the notion of “persons of unsound mind” in Article 5 § 1 sub-paragraph (e) of the Convention made in this Court's case-law. If the above pre-conditions are not met, detainees in the applicant's position will have to be released no later than 31 December 2011 (see paragraph 43 above). The Court further observes that such review proceedings have been terminated. The proceedings on the applicant's placement under the Therapy Detention Act are still pending (see paragraphs 25 ss. above).

102. 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 (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. As it found above (see paragraph 59), the Court considers, as does the Government, that by its judgment, the Federal Constitutional Court implemented this Court's findings in its above-mentioned judgments on German preventive detention in the domestic legal order. It thereby fully assumed that responsibility. By setting a relatively short time-frame of less than eight months for the domestic courts to reconsider the continuing preventive detention of the persons concerned in the light of the requirements of the Basic Law and Articles 5 and 7 of the Convention, it proposed an adequate solution to put an end to ongoing Convention violations.

103. In the light of the foregoing, the Court does not consider it necessary to indicate any specific or general measures to the respondent State which are called for in the execution of this judgment. It understands

that the above-mentioned judgment of the Federal Constitutional Court has been executed in the present case and the new review proceedings have been concluded in the light of that court's and this Court's case-law and within the time-limit prescribed in the Federal Constitutional Court's judgment.

104. The Court further notes that the Convention compliance of the applicant's preventive detention as ordered by the Regensburg Regional Court on 12 June 2008 and as confirmed by the Nuremberg Court of Appeal (22 July 2008) and the Federal Constitutional Court (3 November 2008) here at issue was not the subject-matter of the said leading judgment of the Federal Constitutional Court. The new judicial review ordered by the latter court, consequently, does not cover the applicant's past preventive detention during that period. The Court did not, therefore, consider it adequate to further adjourn the examination of the case before it.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

105. 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

106. The applicant claimed payment of at least 100,000 euros (EUR) in respect of non-pecuniary damage. He should be paid EUR 25 per day of detention in breach of the Convention. He claimed that he had particularly suffered from the insecurity caused by Germany's failure to implement the Court's findings in the *M. v. Germany* case. His long detention had caused irreparable damage to his health; in particular, he suffered from the Morbus Chron disease.

107. The Government left the amount of non-pecuniary damage, if payable to the applicant, to the Court's discretion. They considered, however, that the amount claimed by the applicant was excessive compared to the amounts awarded by the Court in previous cases concerning preventive detention (some EUR 16.50 per day of detention). They further stressed that the applicant had failed to demonstrate that an illness had been caused as a result of his detention allegedly in breach of the Convention.

108. The Court notes that the applicant failed to demonstrate that the disease he allegedly suffered from had been caused by his preventive detention beyond the former ten-year maximum period. It therefore rejects the applicant's claim in this respect. It further takes into consideration that

the applicant has been detained in breach of the Convention since June 2008. 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 15,000, plus any tax that may be chargeable.

B. Costs and expenses

109. Without submitting any documentary evidence, the applicant also claimed EUR 7,500 for lawyer's fees incurred in the proceedings before the domestic courts, EUR 2,500 (exclusive of value-added tax) for expenses and EUR 2,500 for lawyers' fees and expenses incurred in the proceedings before the Court.

110. The Government considered that the applicant had failed to substantiate whether the lawyers' fees claimed had been actually and necessarily incurred in the proceedings at issue.

111. 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 rejects the claim for costs and expenses in its entirety as no documents supporting the claims made have been submitted within the time-limit fixed for submission of these claims (see Rule 60 § 2 of the Rules of Court).

C. Default interest

112. 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 complaint under Article 5 § 1 of the Convention 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*

(a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 15,000 (fifteen thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 19 January 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Dean Spielmann
President