



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

FIFTH SECTION

CASE OF OSTERMÜNCHNER v. GERMANY

(Application no. 36035/04)

JUDGMENT

STRASBOURG

22 March 2012

FINAL

22/06/2012

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

In the case of Ostermünchner v. Germany,

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

Dean Spielmann, *President*,

Boštjan M. Zupančič,

Mark Villiger,

Ann Power-Forde,

Ganna Yudkivska,

Angelika Nußberger,

André Potocki, *judges*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 21 February 2012,

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

PROCEDURE

1. The case originated in an application (no. 36035/04) 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 an Austrian national, Mr Franz Ostermünchner (“the applicant”), on 4 October 2004.

2. The applicant was represented by Ms A. Haucke-D’Aiello, a lawyer practising in Munich. The German Government (“the Government”) were represented by their Agents, Mrs A. Wittling-Vogel, *Ministerialdirigentin*, and Mr H.-J. Behrens, *Ministerialrat*, of the Federal Ministry of Justice.

3. The applicant alleged, in particular, that his continued preventive detention without admitting him to a therapy because of his impending expulsion to Austria and because of his age had breached Article 5 § 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).

5. The Government of Austria, having been informed of their right to intervene in the proceedings (Article 36 § 1 of the Convention and Rule 44 of the Rules of Court), indicated that they did not wish to exercise that right.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1953 and is currently detained in Vienna (Austria).

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

1. The applicant's convictions and the order for his preventive detention and for his expulsion

7. Between 1968 and 1988 the applicant was convicted by Austrian courts in seven judgments of offences including robbery, theft, assault and dangerous assault. In 1981 he was also found guilty of raping a woman he had followed from the street into her house on the day of his release from prison. He was sentenced to seven years' imprisonment; the court further ordered his placement in an institution for mentally disturbed offenders. The applicant was detained altogether for more than ten years, at times in an institution for mentally disturbed criminals.

8. On 14 June 1991 the Munich I Regional Court convicted the applicant of three counts of sexual abuse of children, combined with attempted rape in one case and with attempted sexual assault in another case, committed in 1989 and 1990. It sentenced him to five years and six months' imprisonment and ordered his preventive detention pursuant to Article 66 § 1 of the Criminal Code (see paragraphs 31-32 below). The Regional Court found that the applicant, who had acted with full criminal responsibility, had sexually abused and attempted to sexually assault an eight-year-old girl he had followed from the street into her home. He had further sexually abused and attempted to rape a ten-year-old girl he had lured into the cellar of her house and had sexually abused another eight-year-old girl in a playground. The Regional Court found that the applicant, whom the court-appointed experts had described as an egocentric anti-social personality lacking empathy, had a propensity to commit serious offences which considerably harm their victims physically or mentally.

9. By a decision of 19 September 1991 the City of Munich, having regard to the applicant's conviction by the Munich I Regional Court on 14 June 1991, decided to expel the applicant from German territory and prohibited him from ever re-entering Germany. The expulsion was to be enforced on the applicant's release from prison. The decision became final on 30 October 1991.

2. The execution of the preventive detention order

10. The applicant served his full prison sentence until 20 March 1996. He was then placed in preventive detention, for the first time, on 21 March 1996, which was executed in a separate wing of Straubing Prison.

11. On 15 July 1997 the Regensburg Regional Court ordered the execution of the preventive detention order against the applicant (Article 67c § 1 of the Criminal Code, see paragraph 33 below). It noted that in his reports dated 15 October 1996 and 20 June 1997 the psychiatric and neurologic expert, A., it had consulted had found that the applicant suffered from a dissocial personality disorder and had not wished to undergo a therapy addressing his sexual offences in prison for fear of being harassed by other detainees. He considered that the applicant should first undergo a social therapy in prison to test his readiness to change his personality and should then be admitted to a therapy for sexual offenders.

12. The Regional Court found that unless the applicant had completed a therapy for sexual offenders, there was still a risk that he would commit further sexual offences if released. The court further refused to transfer the applicant to a psychiatric hospital (Article 67a § 2 of the Criminal Code, see paragraph 39 below). The applicant's reintegration into society could currently best be furthered by a social therapy; he was not, therefore, transferred to a psychiatric hospital for a sexual therapy.

13. The applicant subsequently attempted to be admitted to a social therapeutic institution in a different prison, with the help of the Straubing Prison authorities. However, on 1 August 1997 the social therapeutic institution of Baden-Württemberg refused to accept the applicant for treatment. It argued that in view of the enforceable expulsion order against him, it could not be guaranteed that the applicant could complete a five-year therapy in that institution. Likewise, on 6 November 1998 the Erlangen Prison refused to admit the applicant to its social therapeutic department. It was argued that under the administrative rules relating to section 9 of the Execution of Sentences Act (see paragraph 38 below), prisoners against whom an enforceable expulsion order had been made were excluded from transfer to a social therapeutic institution. Moreover, on 22 December 1998 the Munich Prison equally refused to admit the applicant to a social therapy. It was argued that its department offered treatment for young sexual offenders and was therefore not suitable for the then 45-year-old applicant.

14. In its decision of 13 January 2000, which was confirmed on appeal, the Regensburg Regional Court ordered the continuation of the applicant's preventive detention. It found that there was a risk that the applicant, who still suffered from a dissocial personality disorder, would commit further sexual offences if released (Article 67d § 2 of the Criminal Code, see paragraph 34 below). The court considered that the applicant had refused with good cause to participate in a psychoanalytical group therapy for sexual offenders in Straubing Prison. He had further made strenuous efforts, with the help of the prison authorities, to be admitted to a social therapy in a different prison, which had also been considered to be beneficial by the psychiatric expert A. heard by that court. However, he had not been allowed to take part in a social therapy in Germany because of his age and because he was a foreigner who was to be expelled from German territory. It should therefore be examined by the prosecution authorities whether he could be transferred to Austria for the continuation of his preventive detention and could be admitted to a social therapy there.

3. Proceedings under Article 456a of the Code of Criminal Procedure

15. On 17 December 1993, 19 July 1995, 20 October 1998, 2 August 2000 and 14 February 2003 the Munich I Public Prosecutor's Office, whose decisions were confirmed on appeal, dismissed the applicant's repeated requests under Article 456a of the Code of Criminal Procedure (see paragraph 37 below) to dispense with the further execution of his prison sentence and his preventive detention in view of his expulsion from German territory. It argued that there was still a public interest in the further execution of the preventive detention order made against the applicant, who was likely to reoffend and was dangerous to the public. It was noted in these proceedings that the applicant had not taken up the authorities' proposal that he should request his transfer to Austria for the further execution of his preventive detention.

B. The proceedings at issue

1. The decision of the Regensburg Regional Court

16. On 2 May 2003 the Regensburg Regional Court, having heard the applicant, his counsel and a psychiatric and psychotherapeutic expert, H., ordered the further execution of the applicant's preventive detention under Article 67d § 2 of the Criminal Code.

17. The Regional Court agreed with the findings of expert H. who had taken the view that the applicant's dissocial personality had not changed and that there was still a risk that he would commit further violent sexual offences if released. In his report of 25 October 2002 the expert had

considered that a therapy should be attempted despite its limited chances of success because the applicant had repeatedly stated that he was willing to undergo therapy and because there were no other means to reduce his dangerousness. He had proposed that the applicant participate in a discussion group for sexual offenders in Straubing Prison – which the applicant had, however, refused as he did not wish his offences to become known within that prison. The expert had further proposed that the applicant be admitted to a social therapeutic institution – for instance in Bayreuth, Amberg or Würzburg Prison or in that which was currently being built up in Straubing Prison itself.

2. The decision of the Nuremberg Court of Appeal

18. On 4 July 2003 the Nuremberg Court of Appeal dismissed the applicant's appeal. Endorsing the reasons given by the Regional Court, it found that it was not to be expected that the applicant would not commit further offences on his release (Article 67d § 2 of the Criminal Code). It equally referred to the findings of expert H., which it considered convincing. It noted, in particular, that the expert had considered that the applicant should first take part in a discussion group for sexual offenders in Straubing Prison; however, the applicant had vigorously refused to do so. In view of this, the court considered that the applicant's continued preventive detention was proportionate.

19. The Court of Appeal further noted that the prosecution authority's refusal to dispense with a further execution of the applicant's preventive detention under Article 456a of the Code of Criminal Procedure was not the subject-matter of the proceedings before it. It noted, however, that the applicant had not taken up the prosecution's proposal to make a (necessary) request for his transfer to Austria for the further execution of his preventive detention.

3. The decision of the Federal Constitutional Court

20. On 8 August 2003 the applicant, represented by counsel, lodged a constitutional complaint with the Federal Constitutional Court. He claimed that his right to liberty had been violated because his continued preventive detention, during which he had been refused any therapy in view of his impending expulsion, was disproportionate. Moreover, his continued preventive detention without a maximum duration, which had been abolished after his conviction (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 1998, see paragraph 36 below), breached the prohibition of retrospective punishment. The refusal to offer him any treatment because of the expulsion order against him also discriminated against him on account of his Austrian nationality.

21. By a decision of 25 March 2004, which was served on the applicant's counsel on 7 April 2004, the Federal Constitutional Court declined to consider the applicant's constitutional complaint (file no. 2 BvR 1355/03).

22. In so far as the applicant complained that the prohibition of retrospective punishment under the Basic Law had been breached, the Federal Constitutional Court found that his complaint was inadmissible. The applicant was not yet affected by the provisions of Article 67d § 3 of the Criminal Code, read in conjunction with Section 1a § 3 of the Introductory Act to the Criminal Code. The court further referred 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). Apart from that, the applicant's complaint was ill-founded as the impugned decisions of the courts dealing with the execution of sentences did not violate constitutional law.

C. Subsequent developments

1. Judicial review of the applicant's preventive detention

23. On 14 July 2005 the Regensburg Regional Court again ordered the applicant's preventive detention to continue (Article 67d § 2 of the Criminal Code). It noted that the applicant had not received any therapy. The applicant had confirmed this, stating that he had failed in his attempts to be admitted to a therapy in a different prison in view of his planned deportation. The applicant's appeal against this decision was to no avail.

24. On 27 April 2006 the Regensburg Regional Court decided that the applicant's preventive detention was not to be declared terminated on completion of ten years in such detention (20 March 2006). Having consulted a psychiatric expert, N., it found that there was still a risk that the applicant would commit further serious sexual offences resulting in considerable psychological or physical harm to the victims if released (Article 67d § 3 of the Criminal Code). It noted that the applicant had refused therapies for sexual offenders or social therapeutic treatment which had since been made available in Straubing Prison. On 4 July 2006 the Nuremberg Court of Appeal dismissed the applicant's appeal. On 10 January 2007 the Federal Constitutional Court declined to consider the applicant's constitutional complaint.

2. Proceedings concerning the applicant's transfer to Austria for the execution of his preventive detention and his expulsion respectively

25. On 15 September 2005 and on 28 September 2007 the Bavarian Ministry for Justice dismissed the applicant's requests to be transferred to Austria for the further execution of the preventive detention order against

him as the applicant would have to be released there after having served ten years in such detention, that is, in March 2006. The decisions became final.

26. Furthermore, on 13 May 2004, 13 April 2005 and 16 May 2007 the Munich I Public Prosecutor's Office, whose decisions were confirmed by the Munich General Public Prosecutor, dismissed the applicant's fresh requests under Article 456a of the Code of Criminal Procedure to dispense with the further execution of his prison sentence and his preventive detention in view of his expulsion from German territory. The latter decision was quashed on 4 December 2007 by the Munich Court of Appeal, which argued that it appeared that the prosecution authorities had failed to take all aspects relevant to their decision into account.

27. On 24 January 2008 the Munich I Public Prosecutor's Office dispensed with the further execution of the applicant's preventive detention at the date of his expulsion from Germany under Article 456a § 1 of the Code of Criminal Procedure.

28. On 16 April 2008 the applicant was released from Straubing Prison and expelled to Austria.

29. On 14 May 2008 the Vienna Regional Court revoked the suspension on probation of the applicant's placement in an institution for mentally disturbed offenders ordered in 1981 (see paragraph 7 above). Since 12 August 2008 the applicant has been detained in Vienna.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Provisions governing preventive detention

30. 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, ECHR 2009). The provisions referred to in the present case provide as follows:

1. The order of preventive detention by the sentencing court

31. 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).

32. 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).

2. The order for the execution of preventive detention by the court responsible for the execution of sentences

33. Article 67c § 1 of the Criminal Code provides that if a term of imprisonment is executed prior to a simultaneously ordered placement in preventive detention, the court responsible for the execution of sentences (that is, a special Chamber of the Regional Court composed of three professional judges, see sections 78a and 78b (1)(1) of the Court Organisation Act) must review, before completion of the prison term, whether the person's preventive detention is still necessary in view of its objective. If that is not the case, it suspends the execution of the preventive detention order and places the person on probation with supervision of the person's conduct which commences with the suspension.

3. Judicial review and duration of preventive detention

34. Article 67d of the Criminal Code governs the duration of preventive detention. Paragraph 2, first sentence, of that Article, in its version in force at the relevant time, provides that if there is no provision for a maximum duration or if the time-limit has not yet expired, the court shall suspend on probation the further execution of the detention order as soon as it is to be expected that the person concerned will not commit any further unlawful acts on his release.

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*.

B. Provision on the execution of sentences in case of expulsion

37. Pursuant to Article 456a § 1 of the Code of Criminal Procedure, the Public Prosecutor's Office may dispense with the execution of a prison sentence or a measure of correction and prevention if the convicted person is expelled from German territory. The execution of the sentence or measure may be continued if the expelled person returns to Germany territory (Article 456a § 2 of the Code of Criminal Procedure).

C. Provision of the Execution of Sentences Act

38. Section 9 § 2 of the Execution of Sentences Act provides that prisoners may be transferred to a socio-therapeutic institution with their consent if the special therapeutic measures and social aids of the institution are advisable for their rehabilitation. The transfer is conditional upon the consent of the head of the socio-therapeutic institution concerned.

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

39. 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 perpetrator against whom preventive detention was ordered to a psychiatric hospital if the perpetrator's reintegration into society can be better promoted thereby.

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

40. 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 also

concerning the retrospective order for the complainants' preventive detention (file nos. 2 BvR 2365/09, 2 BvR 740/10, 2 BvR 2333/08, 2 BvR 1152/10 and 2 BvR 571/10). Reversing its previous position, the Federal Constitutional Court held that all provisions on the retrospective prolongation of preventive detention and on the retrospective ordering 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.

41. The Federal Constitutional Court further held that all the relevant provisions of the Criminal Code on the imposition and duration of preventive detention were incompatible with the fundamental right to liberty of 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.

42. 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 latest. The provisions on the imposition and duration of preventive detention which did not concern the retrospective ordering or prolongation of preventive detention could only continue to be applied in the transitional period subject to a strict review of proportionality. As a general rule, proportionality was only observed where there was a danger of the person concerned committing serious violent crimes or sexual offences if released.

43. 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

44. The applicant complained that his continued preventive detention without admitting him to a therapy because of his impending expulsion to Austria and because of his age violated Article 5 § 1 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; ...”

45. The Government contested that argument.

A. Scope of the case before the Court

46. The Court observes that in the applicant’s submission, the present case concerned the prolongation of his preventive detention ordered in 2003 until his expulsion to Austria in April 2008. The Court notes, however, that the proceedings at issue, in respect of which the applicant lodged his application with the Court (in compliance with the six-month time-limit under Article 35 § 1 of the Convention), cover only the prolongation of his preventive detention as ordered by the Regensburg Regional Court on 2 May 2003 and as confirmed on appeal. The present application before the Court therefore concerns only the applicant’s preventive detention as a result of these proceedings. In particular, the applicant did not lodge a fresh application with the Court in respect of the Regensburg Regional Court’s decision of 27 April 2006, confirmed on appeal, not to declare his preventive detention terminated on completion of ten years in such detention. The Court further observes that, other than in the proceedings before the Federal Constitutional Court where he brought a separate complaint alleging discrimination, the applicant complained before this Court about his continued preventive detention without offering him treatment because of the expulsion order against him only under Article 5 of the Convention.

B. Admissibility

1. The parties' submissions

(a) The Government

47. The Government submitted that the applicant had failed to complain about the refusal of therapeutic measures before the Federal Constitutional Court and had therefore not exhausted domestic remedies as required by Article 35 § 1 of the Convention in that respect.

48. In their further observations dated 14 June 2011 the Government objected that the applicant had failed to exhaust domestic remedies also on another ground. They argued that in its leading judgment of 4 May 2011 on preventive detention (see paragraphs 40-43 above), the Federal Constitutional Court had introduced a new domestic remedy for the review of the ongoing preventive detention of persons concerned by that judgment. For persons in preventive detention which had not been ordered or prolonged retrospectively, as in the applicant's case, the Federal Constitutional Court had set stricter standards for their preventive detention to continue. The applicant had been obliged to avail himself of that new domestic remedy.

49. 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 preventive detention in Germany. The Convention violations found had thus been remedied in part by the Federal Constitutional Court in its transitional rules, and would be remedied as soon as possible as to the remaining part.

(b) The applicant

50. The applicant did not comment on these objections within the prescribed time-limit.

2. The Court's assessment

(a) Exhaustion of domestic remedies

51. The Court notes that the Government objected, first, that the applicant had not exhausted domestic remedies as he had failed to complain about the refusal of therapeutic measures before the Federal Constitutional Court. The Court notes that in his complaint to the Federal Constitutional Court in the proceedings here at issue, the applicant had claimed that his continued preventive detention had breached his right to liberty as he had been refused any therapy in view of his impending expulsion (see

paragraph 20 above). It is therefore satisfied that the applicant submitted the complaint about a breach of his right to liberty caused by a refusal of therapeutic measures here at issue to the domestic courts prior to bringing it before this Court. He thus exhausted domestic remedies in this respect.

52. As regards the Government's additional objection of non-exhaustion of domestic remedies, made in their further observations dated 14 June 2011, the Court notes, irrespective of the question whether the Government should be considered estopped from raising that objection (see Rule 55 of the Rules of Court), the following. According to its well-established case-law, 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 other authorities, *Akdivar and Others v. Turkey*, 16 September 1996, § 66, *Reports of Judgments and Decisions* 1996-IV).

53. As noted above, the proceedings here at issue concern the applicant's preventive detention ordered and confirmed in 2003/2004. The applicant was released from preventive detention and expelled to Austria on 16 April 2008. The new domestic remedy introduced subsequently, on 4 May 2011, by the Federal Constitutional Court for the review of ongoing preventive detention is not, therefore, capable of affording redress to the applicant in relation to his preventive detention at issue in the present case and which had previously already come to an end. The applicant thus did not have to avail himself of that remedy for the purposes of Article 35 § 1 of the Convention. Consequently, the Government's objection of non-exhaustion of domestic remedies must also be rejected in this respect.

(b) Loss of victim status

54. 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 within the meaning of Article 34 of the Convention as the Federal Constitutional Court had remedied the alleged Convention violation by its judgment of 4 May 2011 and, in particular, by the transitional rules it contained.

55. The Court refers to its well-established case-law on that issue (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). It agrees with the Government that by its said judgment, the Federal Constitutional Court implemented in the domestic legal order the Court's findings in its judgments on preventive detention in Germany (*M. v. Germany* (cited above) and the follow-up cases thereto).

56. Having regard to the scope of the Federal Constitutional Court's judgment, however, it appears doubtful whether that court intended to acknowledge a violation of Article 5 § 1 of the Convention in the

circumstances at issue in the present application. In any event, the Court, referring to its findings above (see paragraph 53), considers that the Federal Constitutional Court's judgment of 4 May 2011 cannot be deemed to have afforded redress for the alleged breach of Article 5 § 1 resulting from the applicant's preventive detention as ordered by the Regensburg Regional Court on 2 May 2003 and as confirmed on appeal and by the Federal Constitutional Court itself on 25 March 2004.

57. The Government's objection that the applicant has lost his victim status must therefore likewise be rejected.

(c) Conclusion

58. The Court further 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.

C. Merits

1. The parties' submissions

(a) The applicant

59. The applicant took the view that his preventive detention had violated Article 5 § 1 of the Convention. In particular, it had not been justified under sub-paragraph (a) of that provision. He argued, firstly, that the developments which had occurred after he had lodged his application in 2004 had to be taken into account. Since 21 March 2006 he had been in detention for a period exceeding ten years. His preventive detention as of that date had, in any event, breached Article 5 of the Convention for the reasons set out in the judgment in the case of *M. v. Germany* (cited above).

60. The applicant further submitted that Article 5 had been breached in that he had persistently been refused a social therapy in view of his impending expulsion as an Austrian national or in view of his age. He had therefore been refused any suitable therapy in Germany. At the same time, his preventive detention had not been suspended and he had not been expelled as the domestic courts had considered that there was a risk that he might reoffend as he had not completed a therapy. Under these circumstances, his continued preventive detention was disproportionate.

(b) The Government

61. The Government considered that the applicant's preventive detention had complied with Article 5 § 1 of the Convention. They stressed that at the time of the proceedings at issue in the present application, in 2003, the

preventive detention order against the applicant had been executed for less than ten years. Therefore, the present application was not a follow-up case to the application of *M. v. Germany* (cited above). During the period at issue, the applicant's preventive detention had been justified under sub-paragraph (a) of Article 5 § 1. In any event, the applicant's detention had been justified under sub-paragraph (e) of Article 5 § 1 as the applicant suffered from a dissocial personality disorder and alcoholism and was therefore "of unsound mind".

62. The Government further contested that the applicant had not been offered any suitable treatment in Straubing Prison in view of the enforceable expulsion order against him. Having regard to the findings of the experts consulted by the courts, in particular those made by expert A. in his reports dated 15 October 1996 and 20 June 1997, the applicant should first have completed a social therapy in prison in order to ensure that he was motivated to undergo further treatment before making a therapy for sexual offenders. The applicant, however, had repeatedly rejected offers for a suitable therapy made to him. In particular, between 1997 and 1999 he had refused participating in a psychoanalytic discussion group for sexual offenders offered in Straubing Prison which would have been appropriate to start his treatment. In March 2003 he had confirmed that he was unwilling to apply for a therapy for sexual offenders.

63. The Government further noted that the applicant had not been admitted to a social therapy in Erlangen Prison as that prison had considered that in view of the enforceable expulsion order against him, the applicant could not be accepted for treatment under the administrative rules relating to section 9 of the Execution of Sentences Act (see paragraph 38 above). A therapy could not attain its aims in those circumstances as its key elements comprised preparations of the detainee for release, including the search for a job, and an offer of care after his release which could not be realised if the detainee was not to reside in Germany after his release. In any event, given the applicant's dangerousness, relaxations in the conditions of his detention, which were also part of the social therapy, had not been possible, irrespective of his foreign nationality.

64. The Government further stressed that the applicant had persisted in refusing to participate in the discussion group for sexual offenders in Straubing Prison even after another expert, H., had considered in his report of October 2002 that this would be useful. Moreover, when a social therapeutic department was opened in Straubing Prison in 2003, the applicant repeatedly refused his transfer to that department.

2. *The Court's assessment*

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

(i) *Grounds for deprivation of liberty*

65. The Court reiterates the fundamental principles laid down in its case-law on Article 5 § 1 of the Convention, which have been summarised in relation to applications concerning preventive detention, in particular, in its judgment of 17 December 2009 in the case of *M. v. Germany* (cited above):

“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-...).

...

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-...). However, with the passage of time, the link between the initial conviction and a further deprivation of liberty gradually becomes less strong (compare *Van Droogenbroeck*, cited above, § 40, and *Eriksen*, cited above, § 78). The causal link required by sub-paragraph (a) might eventually be broken if a position were reached in which a decision not to release or to re-detain was based on grounds that were inconsistent with the objectives of the initial decision (by a sentencing court) or on an assessment that was unreasonable in terms of those objectives. In those circumstances, a detention that was lawful at the outset would be transformed into a deprivation of liberty that was arbitrary and, hence, incompatible with Article 5 (compare *Van Droogenbroeck*, cited above, § 40; *Eriksen*, cited above, § 78; and *Weeks*, cited above, § 49).”

(ii) *“Lawful” detention “in accordance with a procedure prescribed by law”*

66. Any deprivation of liberty must, in addition to falling within one of the exceptions set out in sub-paragraphs (a) to (f) of Article 5 § 1, be “lawful”. Where the “lawfulness” of detention is in issue, including the question whether “a procedure prescribed by law” has been followed, the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules thereof (see, among many other authorities, *Erkalo v. the Netherlands*, 2 September 1998, § 52, Reports 1998-VI; *Baranowski v. Poland*, no. 28358/95, § 50, ECHR 2000-III; and *Saadi*, cited above, § 67).

67. Compliance with national law is not, however, sufficient: Article 5 § 1 requires in addition that any deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness (see, among many other authorities, *Winterwerp*, cited above, §§ 37, 45; *Erkalo*, cited above, §§ 52, 56; *Saadi*, cited above, § 67; and *Mooren v. Germany* [GC], no. 11364/03, § 72, 9 July 2009).

(b) Application of these principles to the present case

68. The Court recalls at the outset its above finding that the present application concerns the compliance with Article 5 § 1 of the Convention of the applicant's preventive detention as ordered by the Regensburg Regional Court on 2 May 2003 and as confirmed on appeal (see paragraph 46).

69. In determining whether the applicant was deprived of his liberty in compliance with Article 5 § 1 during that period, the Court refers first to its judgment of 17 December 2009 in the case of *M. v. Germany* (cited above). In that judgment, it found that Mr *M.*'s preventive detention, which, as in the present case, was ordered by the sentencing court under Article 66 § 1 of the Criminal Code, was covered by sub-paragraph (a) of Article 5 § 1 in so far as it had not been prolonged beyond the statutory ten-year maximum period applicable at the time of that applicant's offence and conviction (see *ibid.*, §§ 96 and 97-105). The Court was thus satisfied that Mr *M.*'s preventive detention, in so far as it fell within that maximum period, occurred "after conviction" by the sentencing court for the purposes of Article 5 § 1 (a).

70. Having regard to these findings in its judgment in the application of *M. v. Germany*, the Court considers that the preventive detention under Article 66 § 1 of the Criminal Code of the applicant in the present case was based on his "conviction", for the purposes of Article 5 § 1 (a), by the Munich I Regional Court on 14 June 1991. The domestic court decisions here at issue cover a period from 2 May 2003 to 14 July 2005 (when a new order for the prolongation of the applicant's preventive detention was made, see paragraph 23 above). During that period, the applicant, having been placed in preventive detention for the first time on 21 March 1996, was in preventive detention for less than the statutory ten-year maximum period applicable at the time of his offence (see paragraph 35 above).

71. The Court must further determine whether the applicant's preventive detention at issue occurred "after" conviction, that is, whether there was still a sufficient causal connection between his conviction and his deprivation of liberty. That causal link may be broken, in particular, if the domestic courts' decision not to release the applicant were based on grounds that were inconsistent with the objectives of the decision of the sentencing court to order preventive detention (see paragraph 65 above). The Court observes in this respect that the order for the applicant's preventive detention by the sentencing Munich I Regional Court in June 1991 and the decision of the

Regensburg Regional Court in May 2003, confirmed on appeal, not to release the applicant, were, in principle, based on the same grounds. Both aimed at preventing the applicant from committing further violent sexual offences such as those he had been previously convicted of.

72. However, the Court notes in this connection that in the applicant's submission, the domestic courts' assessment in the proceedings at issue that there was still a risk that he might reoffend if released was based on the fact that he had not completed a therapy. The applicant claimed that he had not been admitted to a suitable social therapy either in view of his impending expulsion as a foreigner or in view of his age.

73. The Court observes that in the proceedings at issue, the domestic courts, having consulted a psychiatric and psychotherapeutic expert, have made clear that there was no other way for the applicant to reduce his dangerousness but the successful completion of a suitable therapy (see paragraphs 17 and 18 above). Otherwise, the courts would be unable to arrive at the conclusion that it was to be expected that the applicant would not commit further sexual offences and could thus be released. The Court therefore agrees that the successful completion of such a therapy as an essential precondition for the applicant's release was a reasonable one.

74. The Court considers that a decision not to release a detainee as he still posed a threat to the public may be inconsistent with the objectives of the sentencing court's order for preventive detention if the person concerned is placed and remanded in detention as there was a risk that he would reoffend, but is, at the same time, deprived of the necessary means, such as a suitable therapy, to demonstrate that he was no longer dangerous. In such circumstances, a detention which complied with Article 5 § 1 (a) at the outset would be transformed into a deprivation of liberty that was arbitrary and, hence, incompatible with that provision (see paragraph 65 above).

75. The Court is therefore called upon to determine whether, in the circumstances of the case, the applicant must be said to have been deprived of the possibility successfully to complete the necessary therapy / therapies to obtain his release. It notes in this connection that in the proceedings at issue, the psychiatric and psychotherapeutic expert H. consulted by the domestic courts, whose findings the latter had endorsed, had proposed that the applicant should first participate in a discussion group for sexual offenders in Straubing Prison. The expert had further proposed that the applicant then be admitted to a social therapeutic institution, either in a different prison or in that which was currently being built up in Straubing Prison itself (see paragraphs 17 and 18 above).

76. The Court further observes that according to the findings of the domestic courts, which have not been contested by the applicant, the applicant refused to take part in the discussion group for sexual offenders in Straubing Prison which he had been free to participate in, apparently because he did not wish his sexual offences against children to become

known within that prison. The applicant therefore has not been refused this therapy, considered as a suitable first step by the medical expert and the domestic courts, and neither his age nor his foreign nationality played a role in his not completing that therapy. In view of the applicant's failure to participate in that first therapy, the availability of social therapeutic treatment to the applicant in a different prison or in Straubing Prison itself was not, at that stage, decisive for the question whether the applicant had been offered the treatment necessary for him to prove that he was no longer dangerous to the public.

77. The Court does not overlook in that context that in the proceedings preceding those here at issue, the Regensburg Regional Court had considered, in its decision of 13 January 2000, that the applicant had refused with good cause to participate in a psychoanalytical group therapy for sexual offenders in Straubing Prison. Furthermore, that court had noted that, despite his efforts and the help of the Straubing Prison authorities, the applicant had not been admitted to a suitable social therapy in a different prison in Germany either because of his age or because he was a foreigner who was to be expelled from German territory (see paragraph 14 above).

78. However, the Court observes that the assessment of the domestic court in that set of proceedings that the applicant could refuse with good cause to participate in a group therapy addressing his sexual offences in Straubing Prison itself has not been shared by the domestic courts in the proceedings preceding those in 2000 (see paragraphs 11-12 above), nor in the present proceedings or in those succeeding them (see paragraphs 17 and 18 and paragraphs 23 and 24 above). It further considers that the domestic courts' assessment in the proceedings at issue that the applicant's readiness to change his personality should first be tested in a therapy in Straubing Prison and that such a therapy was therefore suitable for the applicant cannot be considered as arbitrary.

79. The Court further notes that the Straubing Prison authorities had previously nevertheless supported the applicant in his attempts to be admitted to a social therapeutic institution in a different prison. It refers in that context to its findings in its judgment of *M. v. Germany* (cited above, § 129) that the achievement of the objective of crime prevention requires a flexible approach aimed at providing persons in preventive detention with an individualised and intensified offer of therapy which had the best prospects of success (see also the findings of the Federal Constitutional Court in its leading judgment of 4 May 2011, cited in paragraph 43 above). It further notes that the applicant must be said to have been refused social therapeutic treatment in three different prisons either in view of the enforceable expulsion order against him or in view of his age (see paragraphs 13-14 above).

80. However, as set out above, the Court considers that the applicant was not, therefore, exempt from starting his therapeutic treatment by

participating in a group therapy for sexual offenders offered to him in Straubing Prison. Having regard to the material before it and the domestic courts' reasoning, it is also not convinced that in view of his status as a foreign national or his age, the applicant would not have been subsequently offered further suitable therapeutic treatment which, if completed successfully, might have been sufficient for the domestic courts to conclude that he was no longer dangerous to the public.

81. The Court notes that the administrative rules relating to section 9 of the Execution of Sentences Act (see paragraph 38 above) raise an issue of discrimination of foreign nationals in that context as under those rules, prisoners against whom an enforceable expulsion order had been made were excluded from transfer to a social therapeutic institution (see paragraphs 13 and 63 above). However, there was a wider range of suitable therapies which could be offered to the applicant as a sexual offender following a first therapy in prison to test his readiness to change his personality, such as a therapy for sexual offenders in a psychiatric hospital (see paragraphs 11-12 above). Furthermore, it appears that, despite the above-mentioned administrative rules, the applicant was considered eligible for social therapeutic treatment at least in Straubing Prison itself (see paragraph 24 above). The Court also notes in that context that at the relevant time, the applicant did not make a – necessary – request to be transferred to Austria for the further execution of his preventive detention, where a social therapy would have had more prospects of success (see paragraphs 14 and 15 above).

82. In view of the foregoing, the Court concludes that, in the circumstances of the present case, the applicant had not been deprived of the possibility successfully to complete the necessary therapy / therapies to obtain his release. It was the applicant's conduct and attitude, and not his status as a foreign national or his age, which were decisive for the fact that he did not complete a required therapy, enabling him to show that he was no longer dangerous to the public. The decision of the domestic courts in the proceedings at issue not to release the applicant were therefore not inconsistent with the objectives of the decision of the sentencing court to order preventive detention and thus not arbitrary, for the purposes of sub-paragraph (a) of Article 5 § 1. There is further nothing to indicate that the assessment that the applicant, who had not made any therapy, was likely to commit further violent sexual offences if released was unreasonable in terms of the objectives of the initial preventive detention order by the sentencing court.

83. The applicant's preventive detention was also lawful in that it was based on a foreseeable application of Article 66 § 1 and Article 67d § 2 of the Criminal Code. The Court takes note, in this connection, of the reversal of the Federal Constitutional Court's case-law concerning preventive detention in its leading judgment of 4 May 2011 (see paragraphs 40-43

above). In its said judgment, the Federal Constitutional Court considered, *inter alia*, Article 66 of the Criminal Code in its version in force since 27 December 2003 not to comply with the right to liberty of the persons concerned.

84. The Court notes, however, that the applicant's preventive detention here at issue was ordered and executed on the basis of a previous version of Article 66 of the Criminal Code. In any event, Article 66 of the Criminal Code in its version in force since 27 December 2003 was not declared void with retrospective effect, but remained applicable and thus a valid legal basis under domestic law, in particular, for the time preceding the Federal Constitutional Court's judgment. Therefore, the lawfulness of the applicant's preventive detention at issue for the purposes of Article 5 § 1 (a) is not called into question.

85. Furthermore, for the reasons set out above, the fact that the applicant was not admitted to a therapy he had wished to complete in view of either his impending expulsion or his age does not raise an issue in relation to the "lawfulness" of his detention, including the absence of arbitrariness, either.

86. There has accordingly been no violation of Article 5 § 1 of the Convention.

II. OTHER ALLEGED VIOLATION OF THE CONVENTION

87. The applicant further complained that his continued preventive detention violated Article 3 § 2 of Protocol no. 4 to the Convention as the German authorities had deprived him of his right to enter the territory of Austria of which he was a national.

88. The Court notes that the applicant failed to raise this complaint in the proceedings before the Federal Constitutional Court. Consequently, this part of the application must be dismissed for non-exhaustion of domestic remedies, in accordance with Article 35 §§ 1 and 4 of the Convention.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint under Article 5 § 1 of the Convention concerning the execution of the applicant's preventive detention ordered in 2003 admissible and the remainder of the application inadmissible;
2. *Holds* that there has been no violation of Article 5 § 1 of the Convention.

Done in English, and notified in writing on 22 March 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Dean Spielmann
President