



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

FIFTH SECTION

CASE OF B. v. GERMANY

(Application no. 61272/09)

JUDGMENT

STRASBOURG

19 April 2012

FINAL

19/07/2012

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

In the case of B. v. Germany,

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

Dean Spielmann, *President*,

Elisabet Fura,

Karel Jungwiert,

Boštjan M. Zupančič,

Mark Villiger,

Ganna Yudkivska,

Angelika Nußberger, *judges*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 27 March 2012,

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

PROCEDURE

1. The case originated in an application (no. 61272/09) 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 B. (“the applicant”), on 18 November 2009. On 2 February 2011 the President of the Section acceded to the applicant’s request not to have his name disclosed (Rule 47 § 3 of the Rules of Court).

2. The applicant, who had been granted legal aid, was initially represented before the Court by Ms U. Groos and was then represented by Mr J. Oelbermann, both lawyers practising in Berlin. 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 preventive detention, which had been ordered retrospectively after he had fully served his prison sentence, had violated his right to liberty as protected by Article 5 § 1 of the Convention.

4. On 23 August 2010 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1959 and is currently detained in Straubing Prison.

A. The applicant's convictions and the execution of his sentence

6. On 14 February 2000 the Coburg Regional Court convicted the applicant of sexual assault and rape of a hitchhiker with the aid of weapons, committed in August 1999, and sentenced him to nine years' imprisonment.

7. The Regional Court had regard to the fact that the applicant had previously been convicted of sexual offences committed against acquaintances of his on several occasions, partly under the influence of alcohol, namely of two counts of attempted rape in 1978, of rape in 1983 and of sexual assault and another rape in 1989.

8. Having consulted a psychiatric and a psychological expert, the Regional Court considered that the applicant had not suffered from a pathological personality disorder and that his criminal responsibility had not been diminished at the time of the offence. As the applicant had confirmed in the hearing that he was ready to undergo therapy, both experts considered that the applicant was not dangerous for the public as a therapy was likely to prove successful. The court, in its judgment, did not examine the question whether the applicant should be placed in preventive detention.

9. On 28 June 2000 the Federal Court of Justice, while qualifying the applicant's acts as rape with the aid of weapons alone, upheld the Regional Court's judgment.

10. Following his conviction in 2000, the applicant confirmed his willingness to undergo therapy in prison. He was admitted to the social-therapeutic department of Straubing Prison in November 2005 and initially participated with motivation in the therapy offered. In July 2006, having learnt that the Federal Court of Justice had considered that a co-detainee's preventive detention could not be ordered retrospectively only owing to the latter's refusal to continue therapy, the applicant discontinued the therapy, considering that he did no longer make any progress. According to the treating therapists, the applicant was unwilling to look into his offences. Thereupon, he was retransferred to an ordinary department of Straubing Prison.

11. The applicant served his full sentence in Straubing Prison until 10 July 2008. Thereafter, he was provisionally placed in preventive detention in that same prison on the basis of a detention order issued on

2 July 2008 pending the competent courts' decision whether or not his retrospective preventive detention was to be ordered.

B. The proceedings at issue

1. The proceedings before the Coburg Regional Court

12. On 8 October 2008 the Coburg Regional Court, relying on Article 66b § 2 of the Criminal Code (see paragraphs 33-35 below), ordered the applicant's preventive detention retrospectively (*nachträgliche Sicherungsverwahrung*).

13. The Coburg Regional Court found that, in accordance with Article 66b § 2 of the Criminal Code, a chamber of that same court had convicted the applicant on 14 February 2000 of an offence against sexual self-determination, namely rape, and had imposed a sentence exceeding five years' imprisonment.

14. Moreover, following the applicant's conviction, new facts within the meaning of Article 66b §§ 2 and 1 of the Criminal Code had emerged which disclosed the applicant's considerable dangerousness to the public. The applicant had given up the therapy addressing his sexual offences which he had been ready to undergo at the time of his conviction and which, according to the experts heard at that time, would have had good prospects of success.

15. Having heard two psychiatric experts, K. and S., whose findings the court endorsed, the Regional Court further considered that a comprehensive assessment of the applicant, his offences and his development during the execution of his sentence revealed that it was very likely that he would again commit sexual offences resulting in considerable psychological or physical harm to the victims. The applicant had a propensity to commit serious sexual offences. Ordering his preventive detention was proportionate as it was the only suitable way to prevent further offences. In particular, an individual therapy for sexual offenders outside prison which the applicant had declared to be ready to undergo, was not sufficient to protect the public from him.

16. In his report, expert K. had diagnosed the applicant with a personality disorder with narcissistic, paranoiac and dissocial elements. In the expert's view, there was a 95 to 100 per cent risk that the applicant would commit further serious sexual offences if released, as well as a very high risk that the applicant might kill future victims in order to evade punishment. Expert S. had assessed the risk that the applicant, whom he diagnosed with a dissocial personality with narcissistic elements, would commit further serious sexual offences at around 50 per cent.

2. The proceedings before the Federal Court of Justice

17. On 17 March 2009 the Federal Court of Justice dismissed the applicant's appeal on points of law as ill-founded. The decision was served on the applicant's counsel on 30 March 2009.

3. The proceedings before the Federal Constitutional Court

18. On 30 April 2009 the applicant, represented by counsel, lodged a constitutional complaint with the Federal Constitutional Court. He argued, in particular, that the decision of the criminal courts to order his preventive detention retrospectively violated his right to liberty under Article 2 § 2 of the Basic Law and Article 5 § 1 of the Convention and was disproportionate in view of the failure to offer him adequate therapy in due time. He claimed, in particular, that the principle of proportionality enshrined in the rule of law was violated as there were insufficient means in preventive detention to offer detainees adequate treatment. He stated in that context that it was dishonourable for a State governed by the rule of law to expose persons to a risk of live-long imprisonment by retrospective changes in the law and to deprive them at the same time of the necessary means enabling them to regain their liberty.

19. On 13 May 2009 the Federal Constitutional Court, without giving reasons, declined to consider the applicant's constitutional complaint (file no. 2 BvR 957/09). The decision was served on the applicant's counsel on 18 May 2009.

C. The execution in practice of the preventive detention order against the applicant

20. The judgment of the Coburg Regional Court having become final, the applicant was remanded in preventive detention in a separate wing of Straubing Prison for persons in preventive detention. He worked with success as a toolmaker in prison until October 2009 when he was suspended from work after having insulted a member of the prison staff. He does not receive any visits or letters in prison.

21. The prison staff's attempts to motivate the applicant to take up a social group therapy again were to no avail. Since January 2010 at the latest the applicant has declared to be ready to take up an individual therapy. However, the therapists of the prison's social-therapeutic department did not consider an individual therapy necessary in the applicant's case.

D. Subsequent developments

1. Proceedings under the Bavarian (Mentally Ill Persons') Placement Act

22. On 4 October 2010 the city of Straubing informed the applicant that, having consulted a psychiatric expert, U., it had decided not to apply for the applicant's placement in a psychiatric hospital under the Bavarian (Mentally Ill Persons') Placement Act (see paragraph 38 below). The expert, having examined the applicant in person, had diagnosed the applicant with an accentuated personality with dissocial and narcissistic elements and had found that he had previously abused alcohol, without having been addicted to alcohol, but had not been drinking since his imprisonment. He had concluded that the applicant's free will in relation to behaviour constituting a risk for public security and order was not restricted as a result of his condition. Despite the fact that there was a risk that the applicant would commit further serious offences, the conditions for his placement in a psychiatric hospital under Article 1 § 1 of the Bavarian (Mentally Ill Persons') Placement Act were therefore not met.

2. Proceedings concerning the lawfulness of the execution of the applicant's preventive detention

23. On 4 November 2010 the Regensburg Regional Court dismissed the objection made by the applicant by reference to the Court's judgment in the case of *M. v. Germany*, no. 19359/04, to the lawfulness of the execution of his preventive detention. On 6 December 2010 the Nuremberg Court of Appeal dismissed the applicant's appeal.

3. Proceedings for review of the applicant's preventive detention

24. On 7 December 2010 the applicant lodged a request under Article 67e of the Criminal Code (see paragraph 36 below) with the Regensburg Regional Court, requesting his release.

25. On 25 November 2011 the Regensburg Regional Court declared the applicant's preventive detention ordered by the Coburg Regional Court on 8 October 2008 terminated and ordered the supervision of his conduct. It had regard to the report dated 28 May 2011 of psychiatric expert L. it had consulted. The latter had found that the applicant suffered from a dissocial personality disorder and had displayed a problematic consumption of alcohol, but there was no proof for an abuse of alcohol entailing physical or mental damage. There was a high risk (of more than 50 per cent) that the applicant would commit serious sexual offences if released. In the expert's view, his dissocial personality disorder amounted to a mental disorder within the meaning of section 1 of the Therapy Detention Act and

contributed considerably to the applicant's dangerousness. The expert had proposed that the applicant should receive an individual therapy to prepare him for further therapeutic measures, preferably in a psychiatric hospital.

26. The Regensburg Regional Court, having regard to that report as well as to those drawn up in the proceedings under the Therapy Detention Act (see paragraph 29 below), found that the applicant suffered from a mental disorder within the meaning of section 1 § 1 of the Therapy Detention Act, but that it was not highly likely that he would commit the most serious crimes of violence or sexual offences as required by the Federal Constitutional Court in its judgment dated 4 May 2011 (see paragraph 46 below).

27. On 29 December 2011 the Nuremberg Court of Appeal quashed the Regional Court's decision and ordered the continued execution of the applicant's preventive detention. It considered that the applicant did not only suffer from a mental disorder within the meaning of section 1 § 1 of the Therapy Detention Act, but that it was also highly likely that he would commit the most serious crimes of violence or sexual offences if released.

4. Proceedings under the Therapy Detention Act

28. On 3 January 2011 the Straubing Prison authorities lodged a request with the Regensburg Regional Court to order the applicant's detention under the Therapy Detention Act (see paragraph 39 below).

29. Contrary to expert L. (see paragraph 25 above), psychiatric experts P. and La. consulted in these proceedings concluded that the applicant did not suffer from a "mental disorder" for the purposes of the Therapy Detention Act. There was a risk that he would reoffend if released, but he did not suffer from a dissocial personality disorder of a psycho-pathological nature. The proceedings are apparently still pending.

II. RELEVANT DOMESTIC LAW AND PRACTICE

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, 17 December 2009). A summary of the provisions of the Basic Law governing the right to liberty (Article 2 § 2) and the ban on retrospective application of criminal laws (Article 103 § 2) can also be found in that judgment (*ibid.*, §§ 57 and 61). The provisions referred to in the present case provide as follows:

A. The order of preventive detention

1. Preventive detention orders by the sentencing court

31. Article 66 of the Criminal Code governs orders for a person's preventive detention made by the sentencing court when finding the person guilty of an offence. That 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.

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. Retrospective preventive detention orders

33. The Retrospective Preventive Detention Act (*Gesetz zur Einführung der nachträglichen Sicherungsverwahrung*) of 23 July 2004, which entered into force on 29 July 2004, inserted Article 66b §§ 1 and 2 into the Criminal Code; the provision was amended by an Act of 13 April 2007. Article 66b §§ 1 and 2 was aimed at preventing the release of persons whose particular dangerousness came to light only during the execution of a prison sentence imposed on them (see German Federal Parliament documents (*BTDrucks*), no. 15/2887, p. 12).

34. The said Article, in so far as relevant and in its version applicable at the relevant time, provided:

Article 66b Retrospective order for placement in preventive detention

“1. If prior to the end of enforcement of a term of imprisonment imposed on conviction for a felony ... evidence comes to light which indicates that the convicted person presents a significant danger to the general public, the court may order preventive detention retrospectively if ...

2. If evidence of facts of the kind listed in paragraph 1 comes to light after a prison sentence of a term of not less than five years has been imposed for one or more felonies against life or limb, personal liberty, sexual self-determination or ..., the court may order preventive detention retrospectively if a comprehensive assessment of the convicted person, his offence or offences and, in addition, his development during the execution of his sentence revealed that it was very likely that he would again commit serious offences resulting in considerable psychological or physical harm to the victims.”

35. By the Reform of Preventive Detention Act (*Gesetz zur Neuordnung des Rechts der Sicherungsverwahrung*) of 22 December 2010, which entered into force on 1 January 2011, Article 66b §§ 1 and 2 of the Criminal Code were abolished for offences committed after the entry into force of that Act.

B. Judicial review and duration of preventive detention

36. 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 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).

C. The detention of mentally ill persons

37. 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.

38. 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).

39. 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.

D. Case-law of the Federal Constitutional Court

1. Previous case-law on retrospective preventive detention

40. In its decision of 23 August 2006, a chamber of three judges of the Federal Constitutional Court considered that Article 66b § 2 of the Criminal Code, which authorised the courts to order preventive detention retrospectively, was compatible with the Basic Law (file no. 2 BvR 226/06).

41. The Federal Constitutional Court, relying on its well-established case-law, found that the said legislative provision did not violate the ban on the retrospective application of criminal laws imposed by Article 103 § 2 of the Basic Law. That ban did not cover preventive detention, which was not a penalty to compensate for guilt, but a purely preventive measure aimed at protecting the public from an offender. Likewise, Article 66b § 2 of the Criminal Code was in conformity with the protection of legitimate expectations guaranteed in a State governed by the rule of law. The legislator's decision that the paramount public interest in an effective protection of the public from very dangerous offenders outweighed the reliance of the convicted offender on the fact that the law would not be changed to his detriment so as to allow his continued detention was compatible with the Basic Law.

42. The Federal Constitutional Court further considered that Article 66b § 2 of the Criminal Code did not violate the right to liberty of the person concerned as protected by Article 2 § 2 of the Basic Law. The legislator was authorised under that provision of the Basic Law to deprive of his liberty a person who had to be expected to commit offences against the life or limb or the liberty of the citizens, having regard to the principle of proportionality. As Article 66b § 2 of the Criminal Code applied only in

very exceptional cases, that provision had to be considered as a proportionate restriction on the right to liberty.

43. In the circumstances of the case before it, the Federal Constitutional Court found, however, that the application of Article 66b § 2 of the Criminal Code and the lower courts' order of preventive detention against the complainant had breached the complainant's right to liberty because the restrictive requirements of Article 66b § 2 of the Criminal Code had clearly not been met in his case.

2. Recent case-law on preventive detention

44. 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 a complainant's preventive detention under Article 66b § 2 of the Criminal Code (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.

45. 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.

46. 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. In relation to detainees whose preventive detention had been prolonged or ordered retrospectively under Article 66b § 2 of the Criminal Code, 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 39 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.

47. 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 § 1 OF THE CONVENTION

48. The applicant complained that his retrospective preventive detention violated his right to liberty as provided in 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; ...

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants; ...”

49. The Government contested that argument.

A. Admissibility

50. In their further observations dated 14 June 2011 the Government objected for the first time that the applicant had failed to exhaust domestic remedies as required by Article 35 § 1 of the Convention. They argued that in its leading judgment of 4 May 2011 on preventive detention (see

paragraphs 44-47 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 cases in which preventive detention had been ordered retrospectively, the courts 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, it was highly likely that they would 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 of the Therapy Detention Act and 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.

51. 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.

52. The applicant contested that view, stating that his situation had remained unchanged also after the Federal Constitutional Court's judgment of 4 May 2011.

53. The Court notes that the applicant in the present case complained about his retrospective preventive detention since 11 July 2008, resulting from the Coburg Regional Court's judgment of 8 October 2008, confirmed on appeal and by the Federal Constitutional Court. Any remedies introduced subsequently by the Federal Constitutional Court's judgment of 4 May 2011 for review of the applicant's 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.

54. The Court has examined the Government's above objections in similar cases and has rejected them (see, in particular, *O.H. v. Germany*, no. 4646/08, §§ 62-69, 24 November 2011). It does not see any reason to come to a different conclusion in the present case. Consequently, the Government's objection that the applicant failed to exhaust domestic remedies and lost his victim status must be rejected.

55. 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

56. The applicant claimed that his continued detention after he had fully served his prison sentence had violated Article 5 § 1.

57. In the applicant's submission, his preventive detention was not covered by any of the sub-paragraphs (a) to (f) of Article 5 § 1. Referring to the Court's findings in its judgment of 17 December 2009 in the case of *M. v. Germany* (cited above), and to those in the case of *Haidn v. Germany*, (no. 6587/04, 13 January 2011), he argued, in particular, that there was no causal connection, as required by sub-paragraph (a) of Article 5 § 1, between his preventive detention and his conviction in 2000 by the Coburg Regional Court. That court did not order – and under the applicable legal provisions could not have ordered – his preventive detention. At the time of his offence in 1999 and of his conviction in 2000, it would also not have been possible to make a preventive detention order retrospectively. Article 66b had only been inserted in the Criminal Code afterwards, in July 2004.

58. Moreover, in the applicant's view, the judgment of the Coburg Regional Court of October 2008 did not constitute a "conviction" for the purposes of Article 5 § 1 (a). That court did not find him guilty of a new offence, but imposed another penalty, namely preventive detention, for the offence of which he had already been found guilty and for which he had been sentenced to a long term of imprisonment in 2000.

59. The applicant further argued that his detention was also not justified as that of a person "of unsound mind" within the meaning of sub-paragraph (e) of Article 5 § 1 as he did not suffer from a "true mental disorder" within the meaning of the Court's case-law. He stressed that at no point in time, his detention in a psychiatric hospital had been ordered and that his preventive detention had always been executed in an ordinary prison. The applicant also contested that there had been sufficient offers of therapies to him in Straubing Prison. In particular, he had not been offered an adequate individual therapy.

(b) The Government

60. In the Government's view, the applicant's preventive detention complied with Article 5 § 1 of the Convention.

61. 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, originating in human rights and, in particular,

in Articles 2 and 3 of the Convention, to protect victims from further offences.

62. The applicant's detention had been justified under sub-paragraph (a) of Article 5 § 1 as detention "after conviction" by a competent court. In particular, the fact that Article 66b § 2 of the Criminal Code, on which the applicant's preventive detention had been based, had only been inserted in the Criminal Code in 2004 did not break the causal connection between his conviction and the deprivation of liberty. It was true that the Coburg Regional Court convicted the applicant in February 2000, that is, prior to the entry into force of the said provision. However, the fresh proceedings in which the applicant's preventive detention had been ordered retrospectively in 2008/2009 had to be qualified as akin to a reopening of the proceedings in relation to the assessment of the dangerousness of the perpetrator. New facts had been necessary which had only then disclosed the applicant's dangerousness. Therefore, the judgment of the Coburg Regional Court of October 2008 ordering the applicant's preventive detention retrospectively had to be qualified as a "conviction", for the purposes of Article 5 § 1 (a).

63. In the Government's submission, the applicant's preventive detention had also been justified under sub-paragraph (e) of Article 5 § 1. The applicant had to be considered as being "of unsound mind" and as an "alcoholic". Even though the applicant had not acted with diminished criminal responsibility at the time of his act, he suffered from a personality disorder with narcissistic, paranoiac and dissocial elements and had partly committed his previous offences while being drunk. This had been confirmed by two experts in the proceedings at issue. This 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. Furthermore, the applicant was an "alcoholic" within the meaning of sub-paragraph (e) of Article 5 § 1. These factors warranted his compulsory confinement for the protection of the public.

64. The Government further stressed that the fact that a person had committed an offence with full criminal responsibility did not warrant the conclusion that the person did not suffer from a mental disorder for the purposes of sub-paragraph (e) of Article 5 § 1 and section 1 of the Therapy Detention Act (see paragraph 39 above). 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, that person was very liable to commit serious violent or sexual offences in the future. It had not been necessary to place the applicant, who had been unwilling to undergo a therapy, in a psychiatric hospital. For persons who were unwilling to undergo therapy, psychiatric hospitals

were not a suitable institution for the purposes of the said provision. Those persons would disturb the proper working of those institutions to the detriment of other patients. The applicant further had not qualified for the individual therapy he had requested. The Government further noted that the applicant had refused to complete the therapy offered to him in prison.

65. The Government also took the view that the applicant had been deprived of his liberty lawfully and in accordance with a procedure prescribed by law. His detention had complied with Article 66b § 2 of the Criminal Code. Moreover, given the very high risk confirmed by the experts that the applicant would commit further serious sexual offences, possibly including the killing of his victims, on his release, the State had had a positive obligation under Articles 2 and 3 of the Convention to protect potential victims from the applicant.

2. *The Court's assessment*

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

66. 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-...). ...”

67. 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; *Shtukaturev v. Russia*, no. 44009/05, § 114, 27 March 2008; and *Kallweit v. Germany*, no. 17792/07, § 45, 13 January 2011).

68. 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).

69. 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).

70. As to the meaning which is to be given to the term “alcoholics” in the light of the object and purpose of Article 5 § 1 (e) of the Convention, the Court reiterates the following. The object and purpose of this provision cannot be interpreted as only allowing the detention of “alcoholics” in the limited sense of persons in a clinical state of “alcoholism”. Persons who are not medically diagnosed as “alcoholics”, but whose conduct and behaviour under the influence of alcohol pose a threat to public order or themselves, can be taken into custody for the protection of the public or their own interests, such as their health or personal safety. It does not, however, permit

the detention of an individual merely because of his alcohol intake (see *Witold Litwa*, cited above, §§ 61-62; and *Hilda Hafsteinsdóttir v. Iceland*, no. 40905/98, § 42, 8 June 2004).

(b) Application of these principles to the present case

(i) Sub-paragraph (a) of Article 5 § 1

71. The Court is therefore called upon to determine whether the applicant's preventive detention at issue was justified under any of the sub-paragraphs (a) to (f) of Article 5 § 1. In the Government's submission, that detention was covered by sub-paragraph (a) of that provision as having occurred "after conviction". They argued, in particular, that the judgment of the Coburg Regional Court of October 2008 ordering the applicant's preventive detention retrospectively was a "conviction" for the purposes of the said provision.

72. The Court refers to its well-established case-law in this connection according to which "conviction" under sub-paragraph (a) of Article 5 § 1 signifies a finding of guilt in respect of an offence and the imposition of a penalty or other measure involving deprivation of liberty (see paragraph 66 above). As has been clarified in the Court's judgment in the case of *M. v. Germany* (cited above, §§ 95-96) and again in the case of *Haidn* (cited above, §§ 84-88), it is only the judgment of a sentencing court finding a person guilty of an offence which meets the requirements of a "conviction" for the purposes of the said provision. By contrast, the decision of a court responsible for the execution of sentences to retain the person concerned in detention does not satisfy the requirement of a "conviction" for the purposes of Article 5 § 1 (a) as it no longer involves a finding that the person is guilty of a (new) offence. The same holds true for a judgment ordering a person's preventive detention retrospectively in relation to a previous offence that person had already been sentenced for.

73. Thus, in the present case, it is only the judgment of the Coburg Regional Court of 14 February 2000, convicting the applicant of rape with the aid of weapons, which can be characterised as a "conviction" for the purposes of the Convention. The judgment of the Coburg Regional Court of 8 October 2008 ordering the applicant's preventive detention retrospectively in relation to that same offence did not involve a finding of guilt in respect of a (new) offence and cannot, therefore, be qualified as a "conviction" within the meaning of sub-paragraph (a) of Article 5 § 1.

74. Therefore, the applicant's preventive detention was justified under Article 5 § 1 (a) only if it occurred "after" his "conviction" of rape with the aid of weapons by the Coburg Regional Court in February 2000. In other words, there must have been a sufficient causal connection between that conviction and the applicant's preventive detention since 11 July 2008.

75. The Court notes, however, that in the said sentencing court's judgment, no order had been made for the applicant's preventive detention in addition to his prison sentence. It would add that the applicant's conviction at that time did not even involve a possibility that he would be placed in preventive detention retrospectively. The provision on which the applicant's preventive detention at issue was based, Article 66b § 2, had only been inserted in the Criminal Code in July 2004 (see paragraph 33 above), after his offence and conviction.

76. It follows that there was no sufficient causal connection between the applicant's conviction in 2000 and his – retrospective – preventive detention since July 2008. His detention was not, therefore, justified under sub-paragraph (a) of Article 5 § 1.

(ii) Sub-paragraph (e) of Article 5 § 1

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" and of an "alcoholic". Under the Court's well-established case-law (see paragraph 67 above), a detention as a person "of unsound mind" 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 reports of two psychiatric experts, K. and S. (see paragraphs 15-16 above). The experts had found that the applicant suffered from a personality disorder with narcissistic, paranoid and dissocial elements.

79. The Court doubts, however, whether the domestic courts ordering the applicant's preventive detention retrospectively can be said to have established that the applicant suffered from a true mental disorder within the meaning of sub-paragraph (e) of Article 5 § 1 on the basis of the said objective medical expertise before them. It was not decisive for their decision whether the applicant should be placed in preventive detention retrospectively whether he suffered from a mental illness. The question before them was whether it was very likely that he would again commit serious offences resulting in considerable psychological or physical harm to the victims, be it because of his mental condition or not (compare in this respect also *Kallweit*, cited above, § 56; and *O.H. v. Germany*, cited above, § 86).

80. The Court further observes that the domestic courts apparently did not consider ordering the execution of the applicant's preventive detention in a psychiatric hospital. It would add that the applicant, who had acted with full criminal responsibility at the time of his offence, had apparently never

been treated in a psychiatric clinic. In subsequent proceedings under the Therapy Detention Act, two experts found that – contrary to earlier findings of another expert – the applicant’s apparently unchanged condition could not be qualified as a “mental disorder” for the purposes of that Act (see paragraph 29 above).

81. In any event, the Court cannot but note that at the time 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 69 above).

82. Having regard to the applicant’s conditions of detention in Straubing Prison (see paragraphs 20-21 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. The Court does not overlook in this connection that the applicant refused to restart a social therapeutic group therapy in prison. 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. Moreover, the applicant had declared to be ready to make a suitable individual therapy at the time of the order for his preventive detention (see paragraph 15 above) and had confirmed to be ready to do so subsequently (see paragraph 21 above).

83. 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 47 above).

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. As for the Government’s further argument that the applicant’s detention was justified under sub-paragraph (e) of Article 5 § 1 as that of an “alcoholic”, similar considerations apply. In particular, the Court cannot discern that the domestic courts based their decision in the proceedings at issue to order the applicant’s preventive detention retrospectively on the fact that his conduct under the influence of alcohol posed a threat to the public.

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

(iii) *Conclusion*

87. 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.

88. 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 paragraphs 61 and 65 above), refers to its findings in the case of *Jendrowiak v. Germany* (no. 30060/04, §§ 36-38, 14 April 2011; see also *O.H. v. Germany*, cited above, §§ 93-94). Articles 2 and 3 of the Convention do 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. 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 71-87), 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.

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

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

90. The applicant further claimed that the retrospective order for and execution of his preventive detention violated the prohibition on increasing a penalty retrospectively. He relied on Article 7 § 1 of the Convention, which reads as follows:

“1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.”

91. The Government contested that argument.

A. The parties’ submissions

92. The Government argued that the applicant had not exhausted domestic remedies in this respect, as required by Article 35 § 1 of the Convention. He had failed to complain either expressly or in substance about a breach of his right not to have a heavier penalty imposed on him than the one applicable at the time of his offence in his constitutional complaint to the Federal Constitutional Court. In that complaint, he had only alleged that his preventive detention had been disproportionate in view

of insufficient therapeutic measures. Having regard, *inter alia*, to the fact that the previous decision of the Federal Constitutional Court dated 23 August 2006 referred to by the applicant dated back a couple of years, a complaint to the Constitutional Court in this respect also had not been an ineffective remedy which the applicant had not been obliged to exhaust.

93. The applicant contested that view. He claimed that he had complained in substance about a breach of the prohibition of retrospective punishment by his preventive detention. He had set out in his constitutional complaint, in particular, that it was dishonourable for a State governed by the rule of law to expose persons to a risk of live-long punishment by retrospective changes in the law and to deprive them at the same time of the necessary means enabling them to regain their liberty. In any event, given the Federal Constitutional Court's well-established case-law on the issue (see paragraphs 40-43 above), it would not even have been necessary for the applicant to lodge a constitutional complaint in this respect, which did not have any prospects of success.

B. The Court's assessment

94. The Court reiterates that Article 35 § 1 of the Convention requires that the complaints intended to be made subsequently at Strasbourg should have been made to the appropriate domestic courts, at least in substance and in compliance with the formal requirements and time-limits laid down in domestic law (see *Cardot v. France*, 19 March 1991, § 34, Series A no. 200; and *Akdivar*, cited above, § 66). The applicant must have recourse to available remedies in the domestic system which are effective in respect of the breach of the Convention alleged (see *Akdivar*, cited above, §§ 65-67).

95. Therefore, an applicant cannot be regarded as having failed to exhaust domestic remedies if he or she can show, by providing relevant domestic case-law or any other suitable evidence, that an available remedy which he or she has not used was bound to fail. However, the existence of mere doubts as to the prospects of success of a particular remedy which is not obviously futile is not a valid reason for failing to exhaust domestic remedies (see, *inter alia*, *Kleyn and Others v. the Netherlands* [GC], nos. 39343/98, 39651/98, 43147/98 and 46664/99, § 156, ECHR 2003-VI; and *NA. v. the United Kingdom*, no. 25904/07, § 89, 17 July 2008).

96. The Court notes that it is uncontested between the parties that in his constitutional complaint of 30 April 2009, the applicant did not expressly complain about a breach of the prohibition of retrospective punishment enshrined in Article 103 § 2 of the Basic Law (see paragraph 30 above). It further observes that the submissions of the applicant, represented by counsel, concerning retrospective changes in the law were clearly made in the context of the applicant's complaint that his preventive detention, being disproportionate, violated his right to liberty under Article 2 § 2 of the Basic

Law and Article 5 § 1 of the Convention (see paragraph 18 above). In these circumstances, the applicant cannot be considered as having complained at least in substance before the Federal Constitutional Court about a breach of the prohibition on increasing a penalty retrospectively under Article 7 § 1 of the Convention by the retrospective order for and execution of his preventive detention.

97. As regards the effectiveness of a complaint to the Federal Constitutional Court in the applicant's case, the Court notes that in a previous decision of 23 August 2006, that court had found that Article 66b § 2 of the Criminal Code did not violate the ban on the retrospective application of criminal laws imposed by Article 103 § 2 of the Basic Law. Relying on its well-established case-law, it found that that ban did not cover preventive detention, which could not be qualified as a penalty to compensate for guilt (see paragraph 41 above).

98. However, the Federal Constitutional Court subsequently reversed that case-law following constitutional complaints which had partly been lodged prior to the applicant's constitutional complaint of 30 April 2009 (see paragraphs 44-47 above). Moreover, the Court notes that in its decision of 23 August 2006, the Federal Constitutional Court considered Article 66b § 2 of the Criminal Code as such to comply both with the ban on retrospective application of criminal laws and the constitutional right to liberty (see paragraphs 40-42). The applicant did not explain why, having regard to these principles, a constitutional complaint raising in substance a breach of Article 5 of the Convention – which he lodged – had prospects of success whereas a complaint under Article 7 of the Convention had to be considered as obviously futile. In these circumstances, the applicant failed to demonstrate that a complaint to the Federal Constitutional Court, raising the issue of the compliance of his retrospective preventive detention with the prohibition on increasing a penalty retrospectively or with the constitutional protection of legitimate expectations was necessarily bound to fail.

99. It follows that the Government's objection must be allowed and this part of the application be dismissed for non-exhaustion of domestic remedies, pursuant to Article 35 §§ 1 and 4 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

100. 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

101. The applicant claimed the reimbursement of costs for his detention which he had been charged with, amounting to 12.44 euros (EUR) per day, in respect of pecuniary damage. He submitted an invoice of Straubing Prison ordering him to pay EUR 783.92 in costs for detention for 2009 because he had been out of work as a result of his own fault since 29 October 2009.

102. The applicant further claimed EUR 100 per day of illegal preventive detention since 11 July 2008 in respect of non-pecuniary damage.

103. The Government submitted in relation to the applicant's claim in respect of pecuniary damage that the applicant had been charged with costs for his detention as he had lost his job in prison after having insulted a staff member. They further argued that the sum claimed by the applicant in respect of non-pecuniary damage, having regard to the Court's awards in other preventive detention cases, was excessive.

104. As regards the applicant's claim in respect of pecuniary damage the Court refers to its above finding that the applicant had been detained in breach of Article 5 § 1 since 11 July 2008 and throughout the year 2009. It considers that there was, therefore, a causal link between his detention in breach of the Convention and the costs for that detention he had been charged with. Having regard to the documentary evidence submitted by the applicant, it therefore awards him EUR 783.92 under this head, plus any tax that may be chargeable.

105. As regards the applicant's claim in respect of non-pecuniary damage, the Court takes into consideration that the applicant has been detained in breach of Article 5 § 1 of the Convention as a result of the proceedings here at issue since 11 July 2008 and until the final conclusion of the subsequent proceedings for review of his preventive detention (see paragraphs 24-27 above). This must have caused him distress and frustration. Having regard to all the circumstances of the case and making its assessment on an equitable basis, the Court awards the applicant EUR 20,000, plus any tax that may be chargeable, under this head.

B. Costs and expenses

106. Submitting documentary evidence, the applicant also claimed a total of EUR 29,622.52 for the costs and expenses incurred in the proceedings at issue before the domestic courts. These included lawyer's fees amounting to EUR 2,019.93 (including value-added tax (VAT)) in the proceedings before the Coburg Regional Court, lawyer's fees of EUR 1,145.14 (including VAT) in the proceedings before the Federal Court of Justice and lawyer's fees of EUR 949.14 (including VAT) in the

proceedings before the Federal Constitutional Court. Furthermore, the applicant claimed that he had been charged with court costs amounting to EUR 25,508.31 for the proceedings at issue, which were set off against the applicant's own savings. He submitted an invoice in that respect, referring to a previous invoice relating to matters concerning the execution of sentences and declaring that the claim for court costs should be set off against the applicant's claim against Straubing Prison for payment of own savings.

107. The applicant further requested the reimbursement of lawyer's fees of EUR 355.75 incurred in the proceedings for his placement under the Bavarian (Mentally Ill Persons') Placement Act (see paragraph 22 above). He also claimed the payment of the lawyer's fees he had incurred in the subsequent proceedings concerning his request to declare the execution of his preventive detention unlawful (EUR 2,060.84, see paragraph 23 above) and those for judicial review of his preventive detention (EUR 737.80, see paragraphs 24-27 above) as well as lawyer's fees of EUR 200 for proceedings aimed at a reopening of the proceedings here at issue. The amounts claimed include VAT.

108. The applicant further requested that the Government bear the costs of the proceedings before this Court.

109. The Government argued that the applicant had failed to explain what exactly the costs of the proceedings amounting to EUR 25,508.31 had been charged for, whether they had all been incurred in the proceedings at issue and to what extent they had actually been set off against the applicant's claims and had therefore failed to substantiate his claim. Moreover, the applicant could not claim the reimbursement of lawyer's fees incurred in different proceedings than those concerning his preventive detention ordered in 2008.

110. 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 are reasonable as to quantum. It observes that the present case only concerns the retrospective order for the applicant's preventive detention made in 2008 and confirmed on appeal and the applicant may therefore only claim the reimbursement of costs in this respect. It further notes that the applicant did not furnish details as regards the court costs amounting to EUR 25,508.31 he had claimed and as to whether he had actually paid those costs in so far as these were necessarily incurred in the proceedings here at issue.

111. Conversely, the Court is satisfied that the lawyer's fees claimed by the applicant in respect of the proceedings at issue were actually and necessarily incurred and reasonable as to quantum. Regard being had to the documents in its possession and the above criteria, the Court therefore awards the sum of EUR 4,114.21, which includes VAT, plus any other tax

that may be chargeable to the applicant, for costs and expenses in the domestic proceedings.

112. The Court further notes that the applicant, who was granted legal aid in the proceedings before this Court, did not submit a quantified claim for costs and expenses incurred in these proceedings. Accordingly, the Court does not make an award under this head.

C. Default interest

113. The Court considers it appropriate that the default interest rate 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 concerning the retrospective order of the applicant's preventive detention 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, the following amounts:
 - (i) EUR 783.92 (seven hundred and eight-three euros, ninety-two cents), plus any tax that may be chargeable, in respect of pecuniary damage;
 - (ii) EUR 20,000 (twenty thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (iii) EUR 4,114.21 (four thousand one hundred and fourteen euros, twenty-one cents), including VAT, plus any other tax that may be chargeable to the applicant, in respect of costs and expenses;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

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

Claudia Westerdiek
Registrar

Dean Spielmann
President