



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

FIFTH SECTION

CASE OF K v. GERMANY

(Application no. 61827/09)

JUDGMENT

STRASBOURG

7 June 2012

FINAL

07/09/2012

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

In the case of K v. Germany,

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

Dean Spielmann, *President*,

Karel Jungwiert,

Boštjan M. Zupančič,

Mark Villiger,

Ann Power-Forde,

Angelika Nußberger,

André Potocki, *judges*,

and Stephen Phillips, *Deputy Section Registrar*,

Having deliberated in private on 10 May 2012,

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

PROCEDURE

1. The case originated in an application (no. 61827/09) 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 K (“the applicant”), on 16 November 2009. On 5 January 2011 the President of the Section acceded to the applicant’s request not to have his identity disclosed (Rule 47 § 3 of the Rules of Court). He further decided that documents deposited with the Registry in which the applicant’s name appeared or which could otherwise easily lead to his identification should not be accessible to the public (Rule 33 § 1).

2. The applicant, who had been granted legal aid, was represented by Mr B. Schroer, a lawyer practising in Marburg. 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 that the retrospective order for and execution of his preventive detention violated his right under Article 7 § 1 of the Convention not to have a heavier penalty imposed on him than the one applicable at the time of his offence.

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 1957 and is currently detained in Schwalmstadt Prison.

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

6. On 26 January 1979 the Frankfurt am Main Regional Court convicted the applicant, *inter alia*, of repeated rape and of two counts of attempted rape, together with dangerous assault respectively, committed against three young women he did not previously know and whom he had seriously beaten or injured with weapons, and sentenced him to three years' imprisonment. The court found that owing to a sadistic sexual deviation, the applicant had acted with diminished criminal responsibility.

7. On 20 May 1983 the Frankfurt am Main Regional Court convicted the applicant of dangerous assault and sentenced him to two years and six months' imprisonment. It found that the applicant had caused a knife injury to a prostitute who had resisted sexual intercourse with him. It considered that the sadistic sexual deviation the applicant suffered from had not diminished his criminal responsibility.

8. On 28 August 1987 the Frankfurt am Main Regional Court convicted the applicant, in particular, of four counts of rape, sexual assault and assault and of one count of attempted rape, attempted sexual assault and assault, committed against five drug-addicted prostitutes in 1985 and 1986. It found that the applicant had raped or attempted to rape the five women, had beaten and mistreated them in a torture-like manner and had partly urinated on them or forced them to have obscene photographs taken of them. It sentenced him to eight years and six months' imprisonment and ordered his placement in a psychiatric hospital (Article 63 of the Criminal Code, see paragraph 51 below). It considered that the applicant suffered from a serious personality disorder and from a sadistic sexual deviation and had committed his offences with diminished criminal responsibility.

9. The Regional Court further found that the applicant was liable to reoffend and was therefore dangerous to the public as long as he was not undergoing therapy. The therapy in question was only possible in a psychiatric hospital. The court considered that the conditions for the applicant's preventive detention under Article 66 § 1 of the Criminal Code (see paragraphs 41-42 below) were also met. However, owing to the fact that preventive detention only entailed a person's safe custody, without offering any specific medical and psychological treatment, this measure was

clearly less suitable in the applicant's case than his placement in a psychiatric hospital. Therefore, the court did not order the applicant's preventive detention in addition to his placement in a psychiatric hospital.

10. The judgment became final in March 1988 and from August 1988 onwards the applicant was initially detained in a psychiatric hospital in Giessen.

11. On 19 February 1992 the Marburg Regional Court ordered that the applicant serve his prison sentence prior to his continued placement in a psychiatric hospital. It argued that the applicant denied the offences he had been found guilty of and refused to undergo therapy. Furthermore, doubts had arisen as to whether he had actually acted with diminished criminal responsibility.

12. The applicant was retransferred to prison on 8 April 1993 and then served his full sentence mainly in Schwalmstadt Prison.

13. In 1994 an expert, C., confirmed that the applicant, who suffered from a borderline personality disorder, had originally been wrongly placed in a psychiatric hospital from a present-day perspective.

14. From 20 October 1995 onwards the applicant, having served his full sentence, was again detained in a psychiatric hospital, initially in Giessen and subsequently in Hanau, on an order of the Frankfurt am Main Regional Court, based on the Regional Court's judgment of 28 August 1987. In these proceedings, expert L., who had already examined the applicant prior to the Regional Court's judgment in 1987, confirmed that the applicant, an autistic psychopath, had acted with diminished criminal responsibility and that his placement in a psychiatric hospital had therefore been justified.

15. On 24 July 2007 the Marburg Regional Court terminated the applicant's detention in a psychiatric hospital (Article 67d § 6 of the Criminal Code, see paragraph 48 below). Having heard evidence from another expert, F., it found that the applicant did not suffer from a serious personality disorder or from a sadistic sexual deviation which diminished his criminal responsibility. It further ordered the applicant's provisional detention pending the competent court's decision whether or not he was to be placed in preventive detention retrospectively as the applicant still had a propensity to commit serious offences. The applicant was accordingly detained in Weiterstadt Prison since August 2007.

16. On 8 January 2008 the Frankfurt am Main Court of Appeal quashed the Regional Court's order for the applicant's detention. The applicant was released on that day. Shortly afterwards, he harassed a young woman and threatened her presumed partner.

17. Following the applicant's failure to appear at the hearing before the Frankfurt am Main Regional Court on 22 January 2008 in the proceedings at issue, that court ordered the applicant's arrest in order to secure the conduct of the proceedings. The applicant has been in detention since that

date, first in Weiterstadt Prison and subsequently, since December 2008, in Schwalmstadt Prison.

B. The proceedings at issue

1. The proceedings before the Frankfurt am Main Regional Court

18. On 9 April 2008 the Frankfurt am Main Regional Court, relying on Article 66b § 3 of the Criminal Code (see paragraph 47 below), ordered the applicant's preventive detention retrospectively (*nachträgliche Sicherungsverwahrung*).

19. The Frankfurt am Main Regional Court found that, in accordance with Article 66b § 3 of the Criminal Code, the Marburg Regional Court had terminated the applicant's placement in a psychiatric hospital on 24 July 2007 pursuant to Article 67d § 6 of the Criminal Code as the requirements for placing him in such a hospital had not been met at the time of that court's decision. The court further noted that the requirements of Article 66b § 3 (1) of the Criminal Code were met. The order for the applicant's placement in a psychiatric hospital had been made in the judgment of the Frankfurt am Main Regional Court of 28 August 1987 convicting him, *inter alia*, of four counts of rape and one count of attempted rape and sentencing him to eight years and six months' imprisonment. Moreover, the applicant had already been convicted of rape and sentenced to three years' imprisonment by a judgment of the Frankfurt am Main Regional Court of 26 January 1979.

20. The Regional Court further found that a comprehensive assessment of the applicant, his offences and his development during his placement in a psychiatric hospital revealed that it was very likely that, if released, he would again commit serious sexual offences resulting in considerable psychological or physical harm to the victims (Article 66b § 3 (2) of the Criminal Code). It based its findings on the reports submitted by a psychological expert, D.-S., and a psychiatric external expert, S. Both experts had considered that the applicant was a psychopath suffering from a serious dissocial personality disorder and from a sexual deviation, sadism. There was a high risk that the applicant would commit further violent sexual offences if released. The experts and all the witnesses confirmed that the applicant had not changed throughout his detention and placement in a psychiatric hospital and had not made any serious effort to reflect on his offences.

2. The proceedings before the Federal Court of Justice

21. On 21 November 2008 the Federal Court of Justice dismissed the applicant's appeal on points of law as ill-founded. It found that Article 66b

§ 3 of the Criminal Code was compatible with the Basic Law and applied also to cases in which a person's placement in a psychiatric hospital was terminated because the person concerned had not been suffering from a disorder warranting his or her placement from the outset.

3. The proceedings before the Federal Constitutional Court

22. On 30 December 2008 the applicant lodged a constitutional complaint with the Federal Constitutional Court. He complained, in particular, that the retrospective order for his preventive detention had violated the prohibition of retrospective punishment under the Basic Law (Article 103 § 2). He argued that Article 66b of the Criminal Code had been applied with retrospective effect to him as, at the time of his conviction, ordering preventive detention retrospectively had not been authorised. In view of the manner in which preventive detention orders were executed in practice, there was no material difference compared to the execution of a prison sentence. Preventive detention therefore had to be treated as a penalty to which the prohibition of retrospective punishment applied.

23. The applicant further submitted that the retrospective order for his preventive detention amounted to the correction of a final judgment of a criminal court without any new facts having emerged. Even though the Frankfurt am Main Regional Court had considered, in its judgment of 1987, that the requirements of Article 66 § 1 of the Criminal Code had been met, it had not ordered his preventive detention.

24. On 5 August 2009 a chamber of three judges of the Federal Constitutional Court declined to consider the applicant's constitutional complaint – as well as that of another applicant, G., who lodged application no. 65210/09 before this Court – on the grounds that it was ill-founded (file no. 2 BvR 2633/08).

25. The Federal Constitutional Court noted that Article 67d § 6 and Article 66b § 3 had been inserted into the Criminal Code because, under the Federal Court of Justice's well-established case-law, a person could no longer be detained in a psychiatric hospital under Article 63 of the Criminal Code and had to be released if that person no longer suffered from a condition excluding or diminishing his criminal responsibility. This was considered problematic in cases in which the person concerned, without suffering from the said condition, was still dangerous to the public.

26. The Federal Constitutional Court found that Article 66b § 3 of the Criminal Code and the courts' decision to order the applicant's placement in preventive detention retrospectively were compatible with the Basic Law. Article 66b § 3 of the Criminal Code did not breach the ban on the retrospective application of criminal laws imposed by Article 103 § 2 of the Basic Law. That Article applied only to State measures which expressed sovereign censure of illegal and culpable conduct and involved the imposition of a sanction to compensate for guilt. Unlike such a penalty,

preventive detention was not aimed at punishing criminal guilt, but was a purely preventive measure aimed at protecting the public from a dangerous offender. For the same reason, Article 66b § 3 of the Criminal Code did not breach the right not to be punished twice for the same offence under the Basic Law.

27. The Federal Constitutional Court further took the view that Article 66b § 3 of the Criminal Code was in conformity with the protection of legitimate expectations guaranteed in a State governed by the rule of law, even if applied to a case such as that of the applicant, who had committed his offences and had been convicted and sentenced prior to the entry into force of the said provision. It considered as compatible with the Basic Law the legislator's decision whereby the effective protection of the public from very dangerous offenders who were liable to commit serious offences resulting in considerable psychological or physical harm to the victims – which was a paramount public interest – outweighed the offender's interest in protection of his legitimate expectations.

28. The Federal Constitutional Court noted that the impugned provisions allowed the courts in a case like that of the applicant to amend retrospectively a sanction fixed in a previous final judgment in the light of new evidence (in particular new expert reports), without new facts having come up. It emphasised that the sentencing criminal courts' decision not to order preventive detention became final even if it later emerged that the courts had erred in considering the offender not to be dangerous. Nevertheless, the retrospective preventive detention order under Article 66b § 3 of the Criminal Code, read in conjunction with Article 67d § 6 of the Criminal Code, entailed only very limited disadvantages of constitutional relevance. In substance, the ordering of a measure of indefinite duration depriving the person concerned of his or her liberty – namely, placement in a psychiatric hospital – was merely replaced, under certain qualified conditions, by the ordering of a different such measure of indefinite duration, namely preventive detention. Any remaining disadvantages for the offender in the protection of his legitimate expectations were outweighed by the paramount interest of the public pursued by the provisions in question.

29. The Federal Constitutional Court further found that Article 66b § 3 of the Criminal Code was compatible with the applicant's right to liberty under the Basic Law (Article 2 § 2). In order to protect the right to life, physical integrity and liberty of citizens the legislator was authorised, within the limits set by the principle of proportionality, to deprive of his liberty a person who could be expected to violate the citizens' said rights.

C. The execution of the preventive detention order in practice

30. In Schwalmstadt Prison, persons in preventive detention are placed in a separate building from prisoners serving their sentence. They have

certain minor privileges compared with convicted offenders serving their sentence (see, for instance, *M. v. Germany*, no. 19359/04, § 41, ECHR 2009). As regards therapeutic measures, persons held in preventive detention in Schwalmstadt Prison are offered a weekly discussion group proposing ideas for recreational activities and for structuring daily life. They are further offered discussions with an external psychiatrist once per month as well as psychological or psychotherapeutic measures and social training considered suitable for them.

31. When placed in preventive detention, the applicant was not motivated to undergo therapy. He denied the offences he had been convicted of and considered himself to be detained unlawfully. Therefore, he had not been transferred to a social therapeutic department of another prison. He worked in prison in 2009 and has been out of work since then. In 2010 he participated in a social training course.

D. Subsequent developments

1. Review of the applicant's preventive detention

(a) First set of proceedings

32. On 15 April 2010 the Marburg Regional Court dismissed the applicant's request to suspend the execution of his preventive detention and to grant probation.

33. On 1 July 2010 the Frankfurt am Main Court of Appeal dismissed the applicant's appeal against that decision. It found that there was a risk that the applicant would commit further violent sexual offences if released (Article 67d § 2 of the Criminal Code; see paragraph 50 below). Having regard to this Court's judgment in the case of *M. v. Germany* (cited above), the Court of Appeal took the view that the question of whether the applicant's preventive detention breached the prohibition of retrospective punishment could not be examined in the present proceedings concerning the execution of the applicant's preventive detention. That issue could only be dealt with following a reopening of the proceedings in which that detention had been ordered.

(b) Second set of proceedings

34. Following the Federal Constitutional Court's judgment of 4 May 2011 (see paragraphs 52-55 below), the applicant again requested the Marburg Regional Court to order his release. On 30 August 2011 the Marburg Regional Court refused to suspend the applicant's preventive detention, ordered retrospectively on 9 April 2008, and to grant probation. Having regard to the expert reports obtained in those proceedings, it found

that it could not be expected that the applicant would not commit any further unlawful acts on his release (Article 67d § 2 of the Criminal Code). There was, on the contrary, a risk that the applicant, owing to specific circumstances relating to his person and his conduct in prison, would commit the most serious crimes of violence or sexual offences soon after his release from prison. The stricter standards for a prolongation of his preventive detention set up by the Federal Constitutional Court in its judgment of 4 May 2011 were therefore met.

35. The Regional Court considered, in particular, that according to the pertinent findings of the Federal Constitutional Court in the said judgment, a retrospective order of preventive detention following the termination of a person's placement in a psychiatric hospital did not breach the protection of legitimate expectations guaranteed in a State governed by the rule of law or the prohibition of retrospective punishment. As the judgments of the European Court of Human Rights only had the force of Federal legislation in Germany, the fact that that Court had considered, in its judgment of 17 December 2009, that retrospective preventive detention was in breach of human rights, did not alter that conclusion.

36. On 15 November 2011 the Frankfurt am Main Court of Appeal, endorsing the reasons given by the Regional Court, dismissed the applicant's appeal.

2. Reopening of the proceedings

37. On 8 October 2010 the Darmstadt Regional Court dismissed the applicant's request of 6 July 2010 for a reopening of the proceedings in which his preventive detention had been ordered as inadmissible as there was currently no ground for reopening. In particular, a reopening on the ground that the European Court of Human Rights had found a domestic court's judgment to be in breach of the Convention applied only to applicants who had themselves obtained a judgment of that Court in their favour.

38. On 26 November 2010 the Frankfurt am Main Court of Appeal, endorsing the reasons given by the Regional Court, dismissed the applicant's appeal.

II. RELEVANT DOMESTIC LAW AND PRACTICE

39. 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). 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

40. Measures of correction and prevention (see Articles 61 et seq. of the Criminal Code) cover, in particular, placement in a psychiatric hospital (Article 63 of the Criminal Code) or in preventive detention (Article 66 of the Criminal Code).

41. 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.

42. In particular, under Article 66 § 1 of the Criminal Code, in its version in force at the relevant time, the sentencing court had to order preventive detention in addition to the penalty if someone was sentenced for an intentional offence to at least two years' imprisonment and if the following further conditions were 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 (Article 66 § 1 (1)). 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 (Article 66 § 1 (2)). 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 (Article 66 § 1 (3)).

43. Under Article 66 § 3, first sentence, of the Criminal Code, preventive detention may further be ordered in addition to a prison sentence if the perpetrator is sentenced for certain serious offences, including murder, rape and dangerous assault, to at least two years' imprisonment, if he has previously been convicted (only) once of one or more such offences to at least three years' imprisonment and if the remaining requirements laid down in Article 66 § 1 (2) and (3) are met.

44. Article 72 of the Criminal Code governs the combination of different measures of correction and prevention. If the conditions for several such measures are met, yet the desired objective may be attained by one or a part

of these measures, then only those latter measures shall be ordered (see Article 72 § 1). Otherwise, such measures shall be ordered cumulatively unless the law provides otherwise (Article 72 § 2).

2. Retrospective preventive detention orders

45. The Retrospective Preventive Detention Act (*Gesetz zur Einführung der nachträglichen Sicherungsverwahrung*) of 23 July 2004, which entered into force on 29 July 2004, inserted Articles 66b and 67d § 6 into the Criminal Code; the latter provision was amended by an Act of 13 April 2007. The provisions in question were aimed at preventing the release of persons who could no longer be detained in a psychiatric hospital because the conditions for placement under Article 63 of the Criminal Code were no longer met, but who were still dangerous to the public (see German Federal Parliament documents (*BTDrucks*), no. 15/2887, pp. 10, 13/14).

46. In fact, under the case-law previously established by the courts dealing with the execution of sentences, a person's placement in a psychiatric hospital had to be terminated and the person concerned had to be released if he no longer suffered from a condition excluding or diminishing his criminal responsibility, even if that person was still dangerous to the public (see Hamm Court of Appeal, no. 4 Ws 389/81, decision of 22 January 1982, *Neue Zeitschrift für Strafrecht* (NStZ) 1982, p. 300; Karlsruhe Court of Appeal, no. 1 Ws 143/82, decision of 30 June 1982, *Monatsschrift für Deutsches Recht* (MDR) 1983, p. 151; Federal Court of Justice, no. 3 StR 317/96, judgment of 27 November 1996, *Collection of decisions of the Federal Court of Justice in Criminal Matters* (BGHSt) no. 42, p. 310; see also Federal Constitutional Court, nos. 2 BvR 1914/92 and 2105/93, decision of 28 December 1994, *Neue Juristische Wochenschrift* (NJW) 1995, p. 2406; and Federal Court of Justice, no. 4 StR 577/09, decision of 12 May 2010, § 13 with further references).

47. Article 66b § 3 of the Criminal Code, in its version in force at the relevant time, provided:

Article 66b Retrospective order for placement in preventive detention

“(3) If an order for placement in a psychiatric hospital has been declared terminated pursuant to Article 67d § 6 because the conditions excluding or diminishing criminal responsibility on which the order was based no longer persisted at the time of the decision terminating the placement, the court may order preventive detention retrospectively if

1. the placement of the person concerned under Article 63 was ordered on the basis of several of the offences listed in Article 66 § 3, first sentence, or if the person concerned had either already been sentenced to at least three years' imprisonment or had been placed in a psychiatric hospital because of one or more such offences, committed prior to the offence having led to that person's placement under Article 63, and

2. a comprehensive assessment of the person concerned, his offences and, in addition, his development during the execution of the measure revealed that it was very likely that he would again commit serious offences resulting in considerable psychological or physical harm to the victims.”

48. Article 67d § 6 of the Criminal Code provides:

Article 67d Duration of detention

“(6) If, after enforcement of an order for placement in a psychiatric hospital has started, the court finds that the conditions for the measure no longer persist or that the continued enforcement of the measure would be disproportionate, it shall declare the measure terminated. The release of the person concerned from the psychiatric hospital shall entail supervision of his or her conduct. ...”

49. The said two provisions remained valid also under 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, for offences committed after the entry into force of that Act. As a result of the abolition of paragraphs 1 and 2 of Article 66b of the Criminal Code, the former paragraph 3, slightly amended, became the only provision of that Article.

B. Judicial review of preventive detention

50. Article 67d of the Criminal Code governs the duration of preventive detention. Paragraph 2, first sentence, of that Article 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.

C. The detention of mentally ill persons

51. Article 63 of the Criminal Code governs the detention of mentally ill persons as a measure of correction and prevention if the detention is ordered in relation to an unlawful act committed by the person concerned. It provides that if someone commits an unlawful act without criminal responsibility or with diminished criminal responsibility, the court shall 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.

D. Recent case-law of the Federal Constitutional Court

52. 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 concerned, both 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.

53. 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 and Article 66b § 3 of the Criminal Code in its version of 23 July 2004.

54. 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 (but not preventive detention ordered under Article 66b § 3 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 newly enacted Therapy Detention Act. As regards the notion of mental disorder, the Federal Constitutional Court explicitly referred to the interpretation of the notion of "persons of unsound mind" in Article 5 § 1 sub-paragraph (e) of the Convention made in this Court's case-law (see §§ 138 and 143-156 of the Federal Constitutional Court's judgment). If the above pre-conditions were not met, those detainees had to be released no later than 31 December 2011. The other provisions on the imposition and duration of preventive detention could only be further applied in the transitional period subject to a strict review of proportionality; as a general

rule, proportionality was only respected where there was a danger of the person concerned committing serious crimes of violence or sexual offences if released.

55. 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 7 § 1 OF THE CONVENTION

56. The applicant complained 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:

“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.”

57. The Government contested that argument.

A. Admissibility

1. *The parties' submissions*

58. 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 52-55 above), the Federal Constitutional Court had introduced a

new domestic remedy for review of the ongoing preventive detention of persons concerned by that judgment. That court had set stricter standards for these persons' preventive detention to continue. The applicant had been obliged to avail himself of that new domestic remedy.

59. 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.

60. The applicant contested that view. He argued that he had exhausted domestic remedies as required by Article 35 of the Convention prior to lodging his application with the Court. The new proceedings for judicial review of his preventive detention following the Federal Constitutional Court's leading judgment could not be considered as a remedy he had to avail himself of to complain about the initial order of his retrospective preventive detention under Article 66b § 3 of the Criminal Code. That order had not been addressed in the said judgment.

61. The applicant further stressed that his situation had remained unchanged and he was still in preventive detention following the judgment of the Federal Constitutional Court of 4 May 2011. In particular, the latter had ordered all provisions it had declared incompatible with the Basic Law to remain applicable during a transitional period. He was therefore still a victim of unlawful detention in breach of the Convention.

2. The Court's assessment

62. The Court notes that the applicant in the present case complained about his retrospective preventive detention resulting from the Frankfurt am Main Regional Court's judgment of 9 April 2008, confirmed by the Federal Court of Justice (21 November 2008) and by the Federal Constitutional Court (5 August 2009). 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.

63. 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 dismissed.

64. The Court notes that the application 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

65. The applicant argued that his preventive detention, ordered retrospectively, had violated the prohibition on increasing a penalty retrospectively (*nulla poena sine lege*) under Article 7 § 1 of the Convention. Referring to the applicant's submissions and the Court's findings in the case of *M. v. Germany* (cited above), he stressed, in particular, that preventive detention had to be classified as a penalty. As prison sentences preventive detention served both to protect the public from offenders (prevention) and to reintegrate them into society. The execution in ordinary prisons of preventive detention orders, governed by the Execution of "Sentences" Act, did not differ significantly from that of a prison sentence. There had not been a marked difference between the execution of his prison sentence and that of the preventive detention order against him in Schwalmstadt Prison.

66. The applicant further submitted that a heavier penalty had been imposed on him than the one that was applicable at the time of his offence. When he had committed his offences and at the time of his conviction in 1987, a retrospective order of preventive detention had not been possible. Such orders had only been authorised subsequently, by the Retrospective Preventive Detention Act of 23 July 2004 by which Article 66b had been inserted into the Criminal Code. He was thus remanded in preventive detention for an indefinite duration retrospectively, on the basis of a legal provision which entered into force seventeen years after his conviction.

67. In the applicant's submission, this conclusion was not altered by the fact that his (indefinite) placement in a psychiatric hospital had initially been ordered together with his conviction. The fact that a penalty, preventive detention, was imposed on him after his conviction, at the time when a retrospective order for preventive detention was not possible, was sufficient to conclude that a heavier penalty had been imposed on him retrospectively. Moreover, the order for his preventive detention had been made following the finding of the Marburg Regional Court on 24 July 2007 that he had been placed in a psychiatric hospital without ever having been of unsound mind. He had thus already been deprived of his liberty unlawfully for many years during his placement in a psychiatric clinic. His detention in a psychiatric hospital having been considered illegal, it could not be argued

that he had not had imposed upon him a heavier penalty by being placed, also illegally, in a different form of detention, preventive detention, for an indefinite period of time.

68. Furthermore, the applicant stressed that he had not simply been transferred from the execution of one measure of correction and prevention, placement in a psychiatric hospital, to a different measure of correction and prevention, preventive detention. He had been released after he had served his full sentence imposed on him in 1987 by the Frankfurt am Main Regional Court and after the Marburg Regional Court had declared his placement in a psychiatric hospital terminated. Moreover, the sentencing Frankfurt am Main Regional Court had considered the possibility to order preventive detention (under Article 66 § 1 of the Criminal Code) against him, which it could have done in addition to his placement in a psychiatric clinic (Article 72 § 2 of the Criminal Code, see paragraph 44 above), but had decided not to do so. He had therefore legitimately relied on the fact that he would not be placed in preventive detention since the judgment of 1987 convicting him, without ordering his preventive detention, had become final in March 1988. The retrospective order for his preventive detention was therefore akin to a subsequent change of the initial sentence imposed on him in the final judgment of a criminal court in 1987 to his detriment and was clearly an additional penalty.

69. The applicant further submitted that he had not been unwilling to undergo therapy. As he had been found not to be of unsound mind, he had not needed a therapy in a psychiatric hospital. He had participated in a course aimed at obtaining social competences and at conflict management on his own initiative in October 2010.

70. The applicant finally argued that it was true that Article 3 of the Convention permitted the respondent State to implement legal provisions aimed at protecting its citizens. However, that provision did not authorise that State to act in breach of other Convention Articles. Moreover, it had been possible to place him in preventive detention at the time of his conviction, but the sentencing court decided not to do so.

(b) The Government

71. The Government took the view that the applicant's retrospective preventive detention had complied with Article 7 § 1 of the Convention. They stressed that preventive detention was not a "penalty" under domestic law. The Federal Constitutional Court had confirmed that view in the proceedings at issue.

72. The Government further argued that the applicant's preventive detention could not be classified as a penalty under the Convention at least in the circumstances of the present case. They referred in general to their observations made in the case of *M. v. Germany* (cited above) to support their view. The applicant had been offered different therapies for many

years and the only reason why he had not undergone therapy was that he had vigorously refused to do so. He had only recently agreed to take part in a social training course in prison.

73. In any event, the applicant's preventive detention in the present case, ordered under Article 66b § 3 of the Criminal Code, could not be classified as a "heavier" penalty for the purposes of Article 7 § 1. The applicant's detention had not been ordered retrospectively for the first time after his criminal conviction. The applicant had only been transferred from one measure of correction and prevention depriving him of his liberty for an indefinite duration – his placement in a psychiatric hospital under Article 63 of the Criminal Code – to a different measure of correction and prevention entailing deprivation of liberty for an indefinite time, preventive detention. He was no longer considered to suffer from a mental disorder diminishing or excluding his criminal responsibility but was still dangerous to the public. Therefore, it was adequate to terminate his placement in a psychiatric hospital and to place him in preventive detention instead. Both measures served to protect the public from dangerous offenders.

74. The Government stressed in that context that the applicant's placement in a psychiatric hospital had been lawful until its termination in 2007. The fact that the Regional Court had found in 2007 that the applicant suffered from a dissocial personality disorder and sexual sadism, but did not suffer from a condition diminishing his criminal responsibility at the time of the termination of his placement in a psychiatric clinic did not alter that conclusion. As the sentencing court had considered that the aim of a measure of correction and prevention could better be achieved by the applicant's placement in a psychiatric hospital than by his preventive detention, it had been lawful, under Article 72 § 1 of the Criminal Code (see paragraph 44 above), to order his placement in a psychiatric clinic only.

75. The applicant's preventive detention therefore could not be classified as an additional deprivation of liberty, but only as the execution of a deprivation of liberty ordered by the sentencing Frankfurt am Main Regional Court in 1987 in a different institution. The fact that a fresh judgment was necessary, ordering the applicant's preventive detention retrospectively if the restrictive conditions of Article 66b § 3 of the Criminal Code were met, which the legislator had introduced for reasons of proportionality, did not alter that conclusion. The applicant had been aware at the time of his conviction that he would be detained as long as his dangerousness had not considerably diminished. Without the change in the law in 2004, inserting Articles 67d § 6 and 66b § 3 into the Criminal Code, the applicant would have been further detained in a psychiatric hospital as long as he was dangerous to the public, even if he no longer suffered from a mental disorder diminishing or excluding his criminal responsibility. The Government conceded, however, that a majority of German courts would have ordered the applicant's release prior to the change in the law if it had

been proven that he no longer suffered from a condition diminishing his criminal responsibility.

76. The Government further stressed that the Marburg Regional Court, when terminating the applicant's placement in a psychiatric hospital, had ordered his provisional placement in preventive detention at the same time. The fact that the applicant had been at liberty for a short time as the Frankfurt am Main Court of Appeal had quashed that detention order did not alter the conclusion that the applicant was simply transferred from the execution of one measure of correction and prevention of indefinite duration to another such measure.

77. The Government finally submitted that by ordering the applicant's release they would have breached their positive obligations under Article 3 of the Convention to protect potential victims from further violent sexual offences which the applicant, according to the findings of the domestic courts, was very likely to commit.

2. *The Court's assessment*

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

78. The Court reiterates the relevant principles laid down in its case-law on Article 7 of the Convention, which were summarised in relation to another application concerning preventive detention in Germany in its judgment in the case of *M. v. Germany* (cited above) as follows:

"119. When speaking of "law" Article 7 alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which implies qualitative requirements, including those of accessibility and foreseeability (see *Cantoni v. France*, 15 November 1996, § 29, *Reports* 1996-V; *Coëme and Others v. Belgium*, nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, § 145, ECHR 2000-VII; and *Achour*, cited above, § 42). These qualitative requirements must be satisfied as regards both the definition of an offence and the penalty the offence in question carries (see *Achour*, cited above, § 41, and *Kafkaris*, cited above, § 140). ...

120. The concept of "penalty" in Article 7 is autonomous in scope. To render the protection afforded by Article 7 effective the Court must remain free to go behind appearances and assess for itself whether a particular measure amounts in substance to a "penalty" within the meaning of this provision (see *Welch v. the United Kingdom*, 9 February 1995, § 27, Series A no. 307-A; *Jamil v. France*, 8 June 1995, § 30, Series A no. 317-B; and *Uttley*, cited above). The wording of Article 7 paragraph 1, second sentence, indicates that the starting-point in any assessment of the existence of a penalty is whether the measure in question is imposed following conviction for a "criminal offence". Other relevant factors are the characterisation of the measure under domestic law, its nature and purpose, the procedures involved in its making and implementation, and its severity (see *Welch*, cited above, § 28; *Jamil*, cited above, § 31; *Adamson v. the United Kingdom* (dec.), no. 42293/98, 26 January 1999; *Van der Velden v. the Netherlands* (dec.), no. 29514/05, ECHR 2006-XV; and *Kafkaris*, cited above, § 142). The severity of the measure is not, however, in itself decisive, since, for instance, many non-penal measures of a preventive nature may have a substantial

impact on the person concerned (see *Welch*, cited above, § 32; compare also *Van der Velden*, cited above).

121. Both the Commission and the Court in their case-law have drawn a distinction between a measure that constitutes in substance a “penalty” and a measure that concerns the “execution” or “enforcement” of the “penalty”. In consequence, where the nature and purpose of a measure relates to the remission of a sentence or a change in a regime for early release, this does not form part of the “penalty” within the meaning of Article 7 (see, *inter alia*, *Hogben v. the United Kingdom*, no. 11653/85, Commission decision of 3 March 1986, DR 46, p. 231; *Grava v. Italy*, no. 43522/98, § 51, 10 July 2003; and *Kafkaris*, cited above, § 142). However, in practice, the distinction between the two may not always be clear-cut (see *Kafkaris*, *ibid.*, and *Monne v. France* (dec.), no. 39420/06, 1 April 2008).’’

(b) Application of these principles to the present case

79. In determining whether the applicant’s retrospective preventive detention violated the prohibition of retrospective punishment under Article 7 § 1, second sentence, the Court notes at the outset that the present case only concerns the initial order for the applicant’s retrospective preventive detention made by the Frankfurt am Main Regional Court on 9 April 2008 and confirmed on appeal and by the Federal Constitutional Court on 5 August 2009. Neither the applicant’s previous placement in a psychiatric hospital (see paragraphs 10, 14-15 above) nor the subsequent review of whether his preventive detention was to continue (see paragraphs 32-38 above) are, therefore, at issue in the present application before this Court. As a consequence, the Court’s findings in the present case are without prejudice to the Convention compliance of the applicant’s current detention, which is at present being reviewed by the domestic courts.

80. The Court shall examine, first, whether the applicant’s preventive detention at issue has to be classified as a “penalty” for the purposes of Article 7 § 1. This is contested by the Government both in general and in the specific circumstances of the present case.

81. The Court, for its part, cannot but refer to its conclusions in the case of *M. v. Germany* (cited above, §§ 124-133). Preventive detention under the German Criminal Code, having regard to the fact that it is ordered by the criminal courts following – or by reference to – a conviction for a criminal offence and that it entails a deprivation of liberty of indefinite duration, is to be qualified as a “penalty” for the purposes of the second sentence of Article 7 § 1 of the Convention. It sees no reason to depart from that finding in the present case.

82. In particular, the Court is not convinced that the conditions of the applicant’s preventive detention in Schwalmstadt Prison in the circumstances of the present case differed substantially from the situation of the applicant in the above case of *M. v. Germany* (cited above), whose preventive detention was, moreover, executed in that same prison. The

applicant was detained in Schwalmstadt Prison in a separate building for persons in preventive detention. Minor alterations to the detention regime compared with that of an ordinary prisoner serving his sentence (see paragraphs 30-31 above), cannot, in the Court's view, mask the fact that there has been no substantial difference between the execution of the prison sentence and that of the preventive detention order against the applicant. The Court refers in this connection also to the findings of the Federal Constitutional Court in its leading judgment of 4 May 2011 on preventive detention. In that judgment, the Federal Constitutional Court equally found that the provisions of the German Criminal Code on preventive detention at issue did not satisfy the constitutional requirement of establishing a difference between preventive detention and detention for serving a term of imprisonment (see paragraph 53 above).

83. As regards, furthermore, the Government's argument that the existing offers for therapeutic measures (see paragraphs 30-31 above) which the applicant refused to accept, had been such as to distinguish the applicant's detention from a penalty, the Court again refers to its findings made in the case of *M. v. Germany* (cited above, §§ 128-129). There is nothing to indicate that the applicant had been offered a higher level of care, including an individualised and intensified offer of therapy, than that generally offered to persons in preventive detention at that time. That offer had equally been considered as insufficient by the Federal Constitutional Court in order to distinguish that measure from a prison sentence (see paragraph 55 above).

84. The Court must then determine whether, by the order for and execution of his retrospective preventive detention, a "heavier" penalty was imposed on the applicant than the one that had been applicable at the time he committed his offence. The Court notes that at the time of the applicant's offences committed in 1985 and 1986, it was not possible to place the applicant in preventive detention by a retrospective order, made after his conviction by the sentencing court – which, in any event, had not ordered his preventive detention – had become final. Article 66b § 3 of the Criminal Code, on which the applicant's preventive detention was based, had only been inserted into that Code in July 2004, some eighteen years after the applicant's offences. The applicant's preventive detention was therefore ordered with retrospective effect.

85. The Court must next address the Government's argument that the applicant had not been imposed a "heavier" penalty for the purposes of Article 7 § 1 because he had in substance only been transferred from one measure of correction and prevention of indefinite duration, detention in a psychiatric hospital, to a different such measure, preventive detention. The Court notes at the outset, however, that the sentencing Frankfurt am Main Regional Court, in its final judgment of 1987, had expressly declined to order the applicant's preventive detention (under Article 66 § 1 of the

Criminal Code) in addition to his placement in a psychiatric hospital (see paragraph 9 above). That judgment, therefore, cannot be said to have covered the applicant's subsequent placement in preventive detention.

86. Moreover, under the well-established case-law of the domestic courts dealing with the execution of sentences prior to the change in the law in 2004, a person could no longer be detained in a psychiatric hospital under Article 63 of the Criminal Code and had to be released if he or she no longer suffered from a condition excluding or diminishing his criminal responsibility, irrespective of whether the person was still considered as dangerous to the public (see paragraphs 25 and 45-46 above). It had not, therefore, been possible at the relevant time to transfer the applicant, against whom only an order under Article 63 of the Criminal Code had been made, from detention in a psychiatric hospital to preventive detention in prison. Consequently, the retrospective order for the applicant's preventive detention constituted a new, additional penalty, and thus a heavier penalty within the meaning of Article 7 § 1 than the one applicable at the time of his offence as he would have been released from the psychiatric hospital and his detention would have been terminated otherwise.

87. For the same reasons, the order for and execution of the applicant's retrospective preventive detention cannot be classified as a measure concerning only the execution of his initial penalty (a prison sentence and his placement in a psychiatric hospital), as opposed to a fresh additional penalty (see for the Court's case-law on that point paragraph 78 above).

88. Finally, the Court must address the Government's argument that by ordering the applicant's release they would have breached their positive obligations under Article 3 of the Convention to protect potential victims from further violent sexual offences the applicant would most likely commit. The Court acknowledges that they thus acted in order to protect the public from physical and psychological harm amounting to inhuman or degrading treatment which might be caused by the applicant. However, the Court cannot but reiterate that the Convention neither obliges nor authorises State authorities to protect individuals from criminal acts of a person by such measures which are in breach of that person's right under Article 7 § 1 not to have imposed upon him a heavier penalty than the one applicable at the time he committed his criminal offence. No derogation is allowed from that provision even in time of public emergency threatening the life of the nation (Article 15 §§ 1 and 2 of the Convention) (see, *inter alia*, *Jendrowiak v. Germany*, no. 30060/04, § 48, 14 April 2011; and *O.H. v. Germany*, cited above, § 107).

89. There has accordingly been a violation of Article 7 § 1 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

90. 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

91. The applicant claimed 50,000 euros (EUR) in respect of non-pecuniary damage. He argued that the Convention violation at issue was comparable to that the Court had found in the case of *M. v. Germany* (cited above) and that, therefore, the same award in respect of non-pecuniary damage should be made.

92. The Government considered the applicant’s claim in respect of non-pecuniary damage to be excessive. They stressed that the applicant in the case of *M. v. Germany* (cited above) had been in preventive detention in breach of the Convention for more than eight years. Conversely, the applicant in the present case had only been in retrospective preventive detention after 24 July 2007.

93. The Court takes into consideration that the applicant has been detained in breach of Article 7 § 1 of the Convention in connection with the proceedings here at issue from 24 July 2007 and, except for the period from 8 to 22 January 2008 during which he was at liberty, until the final conclusion of the subsequent proceedings for review of his preventive detention (see paragraphs 32-33 above). This must have caused him distress and frustration. Having regard to the specific circumstances of the case, which differ from other cases concerning preventive detention, and making its assessment on an equitable basis, the Court awards the applicant EUR 7,000, plus any tax that may be chargeable, in respect of non-pecuniary damage.

B. Costs and expenses

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

C. Default interest

95. 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 application admissible;
2. *Holds* that there has been a violation of Article 7 § 1 of the Convention;
3. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 7,000 (seven thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 7 June 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stephen Phillips
Deputy Registrar

Dean Spielmann
President