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

FIFTH SECTION

CASE OF S. v. GERMANY

(Application no. 3300/10)

JUDGMENT

STRASBOURG

28 June 2012

FINAL

28/09/2012

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

In the case of S. v. Germany,

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

Dean Spielmann, *President,*
Mark Villiger,
Karel Jungwiert,
Boštjan M. Zupančič,
Ann Power-Forde,
Angelika Nußberger,
André Potocki, *judges,*
and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 5 June 2012,

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

PROCEDURE

1. The case originated in an application (no. 3300/10) 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 Romanian national, Mr S. (“the applicant”), on 11 January 2010.

2. The applicant was represented by Mr I.-J. Tegebauer, a lawyer practising in Trier. 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 the order for his retrospective preventive detention had breached his right to liberty under Article 5 § 1 of the Convention.

4. On 23 August 2010 the application was communicated to the Government. The Government of Romania, having been informed of their right to intervene in the proceedings (Article 36 § 1 of the Convention and Rule 44 of the Rules of Court), indicated that they did not wish to exercise that right. On 5 June 2012 the President of the Chamber granted the applicant anonymity of his own motion (Rule 47 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1961 and is currently detained in Straubing Prison.

A. The order for and the execution of the applicant's placement in a psychiatric hospital

6. On 23 February 1996 the Munich I Regional Court acquitted the applicant of, *inter alia*, six counts of assault, nine counts of dangerous assault, of sexual assault and of procuring for lack of criminal responsibility and ordered his placement in a psychiatric hospital under Article 63 of the Criminal Code (see paragraph 46 below).

7. The Regional Court found that between 1991 and 1995 the applicant, who had previously been convicted, in particular, of several counts of assault in Romania and Germany, had committed the offences he had been charged with. The applicant was found, in particular, to have violently threatened with a gun and knife, hit and attempted to strangulate his wife, partly using dangerous instruments or teargas, on a number of occasions. He inflicted on his wife multiple injuries including fractures of her jaw, cheekbones, nose and skull, snags to her nose and genitals as well as lacerations, bruises and swellings all over her body. He had further forced his wife to prostitution for his own material benefit, had forced her to dance naked for an acquaintance and had chased her naked in a forest. Moreover, he had assaulted and sexually assaulted his female friend and a relative of his wife with whom he had an intimate relationship (fettering the latter naked to a tree, urinating on her and introducing fir cones into her rectum and vagina).

8. The Regional Court, having consulted three medical experts, found that the applicant suffered from a brain disorder, a borderline personality disorder manifesting itself in emotional instability and a paranoiac jealousy and had partly been drunk during his acts. Owing to his pathological mental disorder, it could not be excluded that he had acted without criminal responsibility. The Regional Court further considered that the applicant was to be placed in a psychiatric hospital as he was liable to commit further serious offences and was therefore dangerous to the public.

9. Following the Regional Court's judgment, the applicant was placed in different psychiatric hospitals. From 23 February 1996 onwards, he was in Haar psychiatric hospital, from 7 February 1997 onwards in Straubing psychiatric hospital, from 26 October 1999 onwards in Düren psychiatric hospital and from 5 April 2000 onwards in Bedburg-Hau psychiatric

hospital. Following his escape from that clinic in October 2002, he was again detained in Düren psychiatric hospital from 18 December 2002 onwards and subsequently in Lippstadt psychiatric hospital. His detention in a psychiatric hospital was confirmed yearly by the competent Regional Court.

10. On 22 November 2005 the city of Düren ordered the applicant's expulsion to Romania after he had renounced German nationality in February 2004. The decision became final.

11. On 9 February 2007 the Paderborn Regional Court terminated the applicant's detention in a psychiatric hospital ordered by the Munich I Regional Court on 23 February 1996 (Article 67d § 6 of the Criminal Code, see paragraph 42 below). It further delivered its decision, taken the day before, to order the applicant's provisional detention pending the competent court's decision whether or not he was to be placed in preventive detention retrospectively.

12. Having heard evidence from a psychiatric expert, K., who had examined the applicant in person, the Paderborn Regional Court found that the applicant suffered from a personality disorder with paranoiac and dissocial elements. However, that disorder did not exclude or diminish his criminal responsibility. His continued dangerousness for women, in particular for his ex-wife, did not result from a pathological mental disorder but from his chosen attitude towards women.

13. The applicant was accordingly transferred from the psychiatric hospital to prison.

B. The proceedings at issue

1. *The proceedings before the Munich I Regional Court*

14. On 30 July 2008 the Munich I Regional Court, relying on Article 66b § 3 of the Criminal Code (see paragraph 41 below), which it considered compatible with the Basic Law, ordered the applicant's preventive detention retrospectively (*nachträgliche Sicherungsverwahrung*).

15. The Munich I Regional Court noted that, as required by Article 66b § 3 of the Criminal Code, the Paderborn Regional Court had terminated the applicant's placement in a psychiatric hospital on 9 February 2007 pursuant to Article 67d § 6 of the Criminal Code.

16. The Regional Court further found that the requirements of Article 66b § 3 (1) of the Criminal Code were met. The Munich I Regional Court had ordered the applicant's placement in a psychiatric hospital in February 1996 as the applicant had committed, *inter alia*, several counts of dangerous assault, an offence listed in Article 66 § 3 of the Criminal Code.

17. Furthermore, the Regional Court considered that a comprehensive assessment of the applicant, his offences and his development during his

placement in the psychiatric hospitals revealed that it was very likely that, if released, he would again commit serious offences, similar to those following which he had been placed in a psychiatric hospital, against women related to him, resulting in considerable psychological and physical harm to the victims (Article 66 b § 3 (2) of the Criminal Code). It noted that both psychiatric experts it had consulted had convincingly diagnosed the applicant with a dissocial personality disorder necessitating therapy, and one of them, in addition, with sexual sadism, without his criminal responsibility being diminished or excluded thereby. Expert H., in particular, had considered that the applicant suffered from a combined personality disorder with dissocial, psychopathic, paranoiac and emotionally unstable elements and had formerly abused alcohol. Expert S. had found, in particular, that the applicant was a psychopath.

18. The Regional Court considered that the applicant's offences disclosed a violent, degrading and partly sadist attitude towards women which had not changed during his placement in different psychiatric hospitals. The preventive detention of the applicant, who had a propensity to commit serious violent offences, was proportionate. In particular, the applicant's planned departure to Romania was irrelevant in that respect because Article 66b § 3 of the Criminal Code served to protect potential victims not only in Germany, but also in other States including Romania.

2. *The proceedings before the Federal Court of Justice*

19. On 1 August 2008 the applicant lodged an appeal on points of law which he reasoned on 13 October 2008. He argued that Article 66b § 3 of the Criminal Code and the decisions ordering his preventive detention retrospectively, which were based on that provision, violated his right to liberty and were thus incompatible with the Basic Law and with Article 5 § 1 of the Convention.

20. On 13 May 2009 the Federal Court of Justice dismissed the applicant's appeal on points of law as ill-founded.

3. *The proceedings before the Federal Constitutional Court*

21. On 4 June 2009 the applicant, represented by counsel, lodged a constitutional complaint with the Federal Constitutional Court. He argued that the retrospective order for his preventive detention, based on Article 66b § 3 of the Criminal Code, violated his right to liberty under Article 2 § 2 of the Basic Law. It also disproportionately interfered with that right because his expulsion to Romania would have been as effective as his detention in order to protect potential victims in Germany while interfering less with his fundamental rights.

22. On 4 November 2009 a chamber of three judges of the Federal Constitutional Court, without giving reasons, declined to consider the applicant's constitutional complaint (file no. 2 BvR 1237/09).

C. The execution of the preventive detention order in practice

23. According to the Government, in Straubing Prison, five doctors, five psychologists, four educationists and nine social workers offer help to detainees (it has not been specified for how many detainees these staff members were responsible). Sexual and violent offenders may be transferred to a suitable social therapeutic institution if their reintegration into society may be better furthered thereby. If a group therapy proves unsuitable, they may be offered an individual therapy. There are additional courses aimed at preventing further offences on release, including anti-aggression, anti-violence and reasoning and rehabilitation training. Furthermore, detainees who committed their offences under the influence of alcohol or drugs are offered addiction counselling.

24. The applicant had initially not been ready to apply for his transfer to Straubing Prison's social therapeutic institution which, according to the prison therapists, would offer him a suitable social therapy for sexual offenders. He claimed to be a violent offender in the first place and to have undergone a sexual therapy already in the psychiatric hospitals. The Erlangen prison authorities later refused the applicant's request dated 14 September 2009 to be admitted to its social therapeutic institution for violent offenders. It argued that he did not fit into the institution's therapeutic concept targeted at offenders sentenced for offences of an average gravity. The applicant did not apply to be admitted to another social therapeutic institution in Kaisheim Prison. He further did not apply for any training courses or addiction counselling.

25. The applicant has been working in Straubing Prison. He received a visit from his sister once, spoke to his mother on the phone regularly and exchanged letters with her and with two other acquaintances. He has not received any relaxations in the conditions of his detention in view of the enforceable expulsion order against him.

D. Subsequent developments

1. *Review of the applicant's preventive detention*

(a) First set of proceedings

26. On 29 October 2009 the Regensburg Regional Court dismissed the applicant's request to declare his preventive detention unlawful. On

11 December 2009 the Nuremberg Court of Appeal dismissed the applicant's appeal.

(b) Second set of proceedings

27. On 4 November 2010 the Regensburg Regional Court dismissed the applicant's request of 5 June 2010 to declare the execution of his preventive detention unlawful. It found, in particular, that the judgment of the European Court of Human Rights of 17 December 2009 in the case of *M. v. Germany* (no. 19359/04, ECHR 2009) did not constitute a bar to the execution of the judgment in the applicant's case. That court's judgments were only binding between the parties to the proceedings in the case of *M. v. Germany*, which had, moreover, concerned a different subject-matter.

28. On 13 December 2010 the Nuremberg Court of Appeal dismissed the applicant's appeal. It 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 had to be dealt with in review proceedings under Article 67e of the Criminal Code (see paragraph 45 below). In those proceedings, it had to be examined whether, owing to specific circumstances relating to his person or his conduct, it was highly likely that the applicant would commit the most serious crimes of violence or sexual offences if released.

(c) Third set of proceedings

29. On 13 October 2011 the Regensburg Regional Court, in review proceedings under Articles 67d § 2 and 67e of the Criminal Code (see paragraphs 44-45 below), declared the applicant's preventive detention ordered by the Munich I Regional Court on 30 July 2008 terminated and ordered the applicant's supervision of conduct.

30. The Regional Court noted that in her report dated 15 August 2011, psychiatric expert L. had considered that the applicant suffered from a personality disorder with paranoiac, dissocial and narcissistic elements and from emotional instability. There was a risk of 44 per cent that the applicant would commit further violent offences against a person related to him in the seven years to come if released. The applicant therefore suffered from a mental disorder within the meaning of the Therapy Detention Act. However, in the Regional Court's view, there was not a high risk, owing to specific circumstances relating to the applicant's person or conduct, that he would commit the most serious crimes of violence or sexual offences if released. The requirements set up in the Federal Constitutional Court's judgment of 4 May 2011 for a continuation of the applicant's retrospective preventive detention, which applied *a fortiori* in a case like that of the applicant who had initially been acquitted for lack of criminal responsibility, had therefore not been met.

31. On 19 December 2011 the Nuremberg Court of Appeal, allowing the prosecution's appeal, quashed the decision of the Regensburg Regional Court and ordered the applicant's preventive detention to continue. Contrary to the Regional Court, it considered that under the Federal Constitutional Court's judgment of 4 May 2011, it was sufficient for preventive detention ordered under Article 66b § 3 to continue if there was a risk, owing to specific circumstances relating to the applicant's person or conduct, that the person concerned would commit serious crimes of violence or sexual offences. These requirements were met in the applicant's case. It was not necessary that there was a high risk of the most serious crimes of violence or sexual offences or that the applicant suffered from a mental disorder. These requirements applied only to the (different) cases of preventive detention with retrospective effects which had been at issue in the Federal Constitutional Court's judgment.

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

32. On 4 November 2010 the Straubing District Court, having heard the applicant in person, dismissed the request made by the city of Straubing to order the applicant's placement in a psychiatric hospital under the Bavarian (Mentally Ill Persons') Placement Act (see paragraph 47 below). It found that the disorder the applicant suffered from was not so serious as to affect the applicant's free will. Consequently, the requirements for his detention under Article 1 § 1 of the Bavarian (Mentally Ill Persons') Placement Act were not met. It was not the purpose of the said Act to authorise the detention of all persons suffering from a mental disease or to close gaps in the provisions on preventive detention.

3. Proceedings under the Therapy Detention Act

33. On 3 January 2011 the Straubing Prison authorities lodged a request with the Regensburg Regional Court to order the applicant's detention under Article 1 of the Therapy Detention Act (see paragraph 48 below).

34. On 24 October 2011 the Regensburg Regional Court ordered the applicant's provisional detention for a maximum period of three months under the Therapy Detention Act from the moment the termination of the applicant's retrospective preventive detention became final. It noted that the psychiatric experts H. and L. had found in their reports, drawn up on the basis of the case-file alone, that the applicant suffered from a personality disorder with dissocial, psychopathic / narcissistic and paranoiac elements and emotional instability. He had previously abused alcohol. He might suffer, in addition, from sexual sadism. The experts had considered that there was a high and a medium to high risk respectively that the applicant would commit further violent offences, in particular against persons closely

related to him, if released. The court, endorsing the experts' findings, therefore considered that there were grounds for concluding that the requirements for the applicant's detention under the Therapy Detention Act were met.

II. RELEVANT DOMESTIC LAW AND PRACTICE

35. 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

36. 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). They may be ordered for offenders in addition to their punishment (compare Articles 63 et seq. of the Criminal Code). They must, however, be proportionate to the gravity of the offences committed by, or to be expected from, the defendants as well as to their dangerousness (Article 62 of the Criminal Code).

37. 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.

38. Under Article 66 § 3, first sentence, of the Criminal Code, in its version in force at the time of the order for the applicant's retrospective preventive detention, preventive detention may 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.

2. *Retrospective preventive detention orders*

39. 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 (including cases in which they had never been met from the outset), but who were still dangerous to the public (see German Federal Parliament documents (*BTDrucks*), no. 15/2887, pp. 10, 13/14).

40. 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, or had in fact never 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).

41. 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."

42. Article 67d § 6 of the Criminal Code, in its version in force at the relevant time, provided:

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. On termination of the measure, the conduct of the person concerned shall be supervised. ..."

43. 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 by the said Act, the former paragraph 3, slightly amended, became the only provision of that Article.

B. Judicial review and duration of preventive detention

44. 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.

45. 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

46. 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.

47. 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).

48. 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 Therapierung 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. Recent case-law of the Federal Constitutional Court

49. 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.

50. 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.

51. 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 retrospectively, 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.

52. 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

53. The applicant complained that the retrospective order for his 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; ..."

54. The Government contested that argument.

A. Admissibility

1. The parties' submissions

55. 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 49-52 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.

56. 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.

57. The applicant contested that view. He argued that he had exhausted domestic remedies as required by Article 35 of the Convention in relation to the initial order for his retrospective preventive detention. In its judgment of 4 May 2011, the Federal Constitutional Court had not created a new remedy, but had only laid down conditions for the usual periodic review of preventive detention under Article 67e of the Criminal Code.

58. The applicant further submitted that he was still a victim of unlawful detention in breach of the Convention within the meaning of Article 34 of the Convention. The German authorities had neither acknowledged a breach of his Convention rights nor had they afforded him compensation. The fact that following his possible release from preventive detention, he might be detained under the Therapy Detention Act, which served to circumvent the Court's findings of violations of Articles 5 and 7 of the Convention, could obviously not be considered as such compensation.

2. The Court's assessment

59. The Court notes that the applicant in the present case complained about his retrospective preventive detention resulting from the Munich I Regional Court's judgment of 30 July 2008, confirmed by the Federal Court of Justice (13 May 2009) and by the Federal Constitutional Court (4 November 2009). Any remedies introduced subsequently by the Federal Constitutional Court's judgment of 4 May 2011 in relation to the 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.

60. 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.

61. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

62. The applicant argued that his retrospective preventive detention had violated Article 5 § 1 of the Convention. It was not justified under any of the sub-paragraphs (a) to (f) of that provision.

63. The applicant submitted, first, that his detention was not justified under sub-paragraph (a) of Article 5 § 1 for lack of a "conviction". Referring to the Court's decision in the case of *Frank v. Germany* ((dec.), no. 32705/06, 28 September 2010), he claimed that there had not been a finding of guilt of an offence in his case as he had been acquitted for lack of criminal responsibility by the Munich I Regional Court in 1996.

64. Moreover, there was, in any event, no sufficient causal connection between the judgment of the Munich I Regional Court of 23 February 1996 and his subsequent preventive detention ordered by the same court on 30 July 2008, as required by Article 5 § 1 (a). His preventive detention, ordered retrospectively under Article 66b § 3 of the Criminal Code in 2008, could not be classified as a special form of his placement in a psychiatric hospital which had been ordered in 1996, but was a different measure of correction and prevention and thus an additional penalty.

65. The applicant stressed in that context that his placement in preventive detention had not been an automatic or necessary consequence following the termination of his placement in a psychiatric hospital. The court ordering his preventive detention retrospectively had been obliged to assess anew, on the basis of two fresh expert reports, whether it was very likely that he would commit serious offences if released. Moreover, at the time of the Munich I Regional Court's judgment in 1996 it had not been foreseeable that his subsequent preventive detention could be ordered following the termination of his placement in a psychiatric hospital. On the contrary, under the well-established case-law of the courts dealing with the execution of sentences at that time (see paragraph 40 above), a person who no longer suffered from a mental disorder diminishing or excluding his criminal responsibility had to be released from the psychiatric hospital, even if it was expected that the person would commit further offences after release. Therefore, he had legitimately expected to be released as soon as he no longer suffered from a condition excluding or diminishing his criminal responsibility.

66. In the applicant's submission, his preventive detention was also not justified under sub-paragraph (e) of Article 5 § 1 as detention of a person "of unsound mind". He stressed that the Paderborn Regional Court had based its decision of 9 February 2007 to terminate his detention in a

psychiatric hospital on the finding of expert K. that his dangerousness did not result from his personality disorder, but from his attitude, which did not have a pathological cause. The experts consulted by the Munich I Regional Court prior to its judgment of 30 July 2008 had also confirmed that his personality disorder did not affect his criminal responsibility and that his dangerousness to the public therefore was not caused by a disease.

67. The applicant further took the view that his preventive detention had been unlawful under German law for lack of compliance with the principle of proportionality laid down in Article 62 of the Criminal Code (see paragraph 36 above). His deportation to Romania, ordered by the city of Düren on 22 November 2005, would have been an effective means to protect the German public from him and would not have interfered with his right to liberty. It was not for the German criminal law to protect aliens residing outside the territory of Germany.

68. The applicant finally submitted that his deprivation of liberty could not be justified by reference to the State's positive obligations under Articles 2 and 3 of the Convention. Referring, *inter alia*, to the Court's findings in the cases of *M. v. Germany* (cited above, § 86) and *Jendrowiak v. Germany* (no. 30060/04, §§ 36-38, 14 April 2011), he stressed that Article 5 § 1 of the Convention contained an exhaustive list of permissible grounds for deprivation of liberty, and no deprivation of liberty was lawful unless it fell within one of those grounds. Furthermore, as he would be expelled to Romania on his release from preventive detention to reside with his parents, it would no longer be necessary to protect the German public from him.

(b) The Government

69. The Government argued that the applicant's preventive detention in prison had not violated Article 5 § 1 of the Convention.

70. 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.

71. In the Government's view, the applicant's detention had been justified under sub-paragraph (a) of Article 5 § 1 as detention "after conviction" by a competent court. They stressed that the fact that the applicant had been acquitted in the criminal proceedings against him for lack of criminal responsibility did not alter the fact that he had been found to have committed the offences he had been charged with. There had thus been a detention following a "conviction" for the purposes of Article 5 § 1. There was also a causal connection between the applicant's conviction in 1996 and his preventive detention at issue. The applicant's continued

detention was consistent with the objective of his initial placement in a psychiatric hospital, namely to protect the public from further violent acts committed by him.

72. Moreover, the fact that Article 66b § 3 of the Criminal Code, on which the applicant's preventive detention had been based, had only been inserted in the Criminal Code in 2004 had not broken the causal connection between his conviction and the deprivation of liberty. The applicant had been aware at the time of his conviction in 1996 that he would be detained for an indefinite duration and 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 under the applicable legal provisions 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 dealing with the execution of sentences 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. They stressed that this case-law had not been codified at the relevant time.

73. The Government further argued that 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 as suffering from a mental disorder 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. 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.

74. 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". In the judgment of the Munich I Regional Court of 23 February 1996 the applicant had already been found to suffer from a brain damage, a borderline personality disorder manifesting itself in emotional instability and a paranoiac jealousy. He had further been found to have abused alcohol. When terminating the applicant's placement in a psychiatric hospital, the Paderborn Regional Court, having consulted an expert, had found that the applicant still suffered from a personality disorder with paranoiac and

dissocial elements. The fact that, in the court's view, that disorder no longer attained an extent excluding or diminishing the applicant's criminal responsibility did not affect the court's conclusion that the applicant suffered from a mental disorder which warranted his compulsory confinement. That 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.

75. Furthermore, when ordering the applicant's preventive detention retrospectively on 30 July 2008 the Munich I Regional Court, having consulted two experts, had found that the applicant, a psychopath, suffered from sexual sadism and from a combined personality disorder with dissocial, psychopathic, paranoiac and emotionally unstable elements and had abused alcohol. That court had based the applicant's preventive detention also on these disorders which warranted the applicant's detention.

76. The Government further stressed that the fact that a person's criminal responsibility was not diminished or excluded 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 48 above). A person may be fully capable of appreciating the wrongfulness of his act and of acting accordingly at the time of his offence and thus be 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 Article 5 § 1 (e). Such persons would disturb the proper working of those institutions to the detriment of other patients.

77. In the Government's view, the deprivation of liberty, ordered under Article 66b § 3 of the Criminal Code, had also been lawful and in accordance with a procedure prescribed by law, as required by Article 5 § 1. In particular, it had not been disproportionate in view of the fact that the applicant could have been expelled to Romania. His expulsion had not been a suitable means to protect potential victims in Romania or, after an illegal return, in Germany from him.

78. The Government finally submitted that by ordering the applicant's release they would have breached their positive obligation under Article 3 and possibly even under Article 2 of the Convention to protect potential victims from further violent offences. According to the findings of the domestic courts, it was very likely that the applicant would commit similar offences as those at issue in the 1996 proceedings before the Munich I Regional Court against his ex-wife or other persons if released.

2. *The Court's assessment*

(a) Recapitulation of the relevant principles

79. 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-...). ..."

80. 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; *Shtukaturov v. Russia*, no. 44009/05,

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

81. 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).

82. 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).

83. 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

84. The Court is therefore called upon to determine, first, 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 there was a sufficient causal connection between the 1996 judgment of the Munich I

Regional Court finding that the applicant had committed, *inter alia*, several dangerous and sexual assaults, and his preventive detention. The measure of correction and prevention of indefinite duration ordered in 1996 – the applicant's placement in a psychiatric hospital – had only been replaced by a more suitable measure of indefinite duration, his preventive detention.

85. The Court considers that the applicant's preventive detention was justified under Article 5 § 1 (a) only if it occurred "after" a "conviction" of the said offences by the sentencing Munich I Regional Court in February 1996. Even assuming that the Munich I Regional Court could be said to have "convicted" the applicant, there must therefore have been a sufficient causal connection between that conviction and the applicant's preventive detention since 9 February 2007.

86. The Court notes, however, that in the said sentencing court's judgment, no order was made for the applicant's preventive detention in addition to his prison sentence. As the applicant had been acquitted of the offences he had been charged with because it could not be excluded that he had acted without criminal responsibility, the requirements of a preventive detention order under Article 66 of the Criminal Code (see paragraph 37 above) had in fact not been met. The Court 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 § 3, had only been inserted in the Criminal Code in July 2004 (see paragraphs 39 and 41 above), after his offences and conviction.

87. 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 – as the applicant in the present case – could no longer be detained in a psychiatric hospital under Article 63 of the Criminal Code and had to be released if he no longer suffered from a condition excluding or diminishing his criminal responsibility, irrespective of whether that person was still considered as dangerous to the public (see paragraph 40 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.

88. In view of the foregoing, the retrospective order for the applicant's preventive detention cannot be said to have been covered by the initial order of the sentencing court in 1996 to place the applicant in a psychiatric hospital. It is therefore not relevant in the circumstances of the present case whether the judgment of the sentencing Munich I Regional Court – which found that the applicant had committed the offences he had been charged with, but had acquitted him (only) for lack of criminal responsibility – could at all be classified as a "conviction" within the meaning of sub-paragraph (a) of Article 5 § 1.

89. Moreover, as a "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 79 above), the judgment of the Munich I Regional Court of 30 July 2008 does not meet that requirement. That new judgment, by which the applicant's preventive detention was ordered retrospectively in relation to his previous offences at issue in the previous 1996 judgment, no longer involved a finding of guilt of a (new) offence (see in this respect already *M. v. Germany*, cited above, §§ 95-96; and *Haidn*, cited above, §§ 84-88).

90. It follows that there was no sufficient causal connection between a "conviction" of the applicant and his – retrospective – preventive detention since February 2007. His detention was not, therefore, justified under sub-paragraph (a) of Article 5 § 1.

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

91. The Court considers that the applicant's retrospective preventive detention was also not justified under sub-paragraph (c) of Article 5 § 1 as detention "reasonably considered necessary to prevent his committing an offence". The further offences against women related to him the applicant might commit were not sufficiently concrete and specific, as required by the Court's case-law, as regards, in particular, the place and time of their commission and their victims. In particular, it has not been shown that the applicant had planned and was about to commit further violent offences against his ex-wife, more than thirteen years after his last offences. The offences the applicant might commit in the future do not, therefore, fall within the ambit of Article 5 § 1 (c) (compare, *mutatis mutandis*, *M. v. Germany*, cited above, § 102).

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

92. 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 80 above), the detention of the applicant 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.

93. The Court notes in this connection that in the proceedings here at issue, the domestic courts based their decision to order the applicant's preventive detention retrospectively on the reports of two psychiatric experts (see paragraph 17 above). The experts had found that the applicant suffered from a dissocial personality disorder necessitating therapy. One of them had further considered that he suffered from sexual sadism.

94. 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).

95. The Court further cannot overlook that the Paderborn Regional Court had previously ended the applicant's detention in a psychiatric hospital in 2007 finding that the applicant's dangerousness did not result from a pathological mental disorder, but from a chosen attitude towards women, although it added that the applicant suffered from a personality disorder with paranoiac and dissocial elements (see paragraph 12 above). Furthermore, it equally observes that the Regensburg Regional Court found subsequently, in 2011, that there were grounds for concluding that the applicant suffered from a mental disorder within the meaning of the Therapy Detention Act (see paragraph 34 above).

96. 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 82 above).

97. Having regard to the applicant's conditions of detention in Straubing Prison (see paragraphs 23-25 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 that connection that the applicant did not apply for a social therapy for sexual offenders in Straubing 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 applied for a social therapy for violent offenders in a different prison, but had not been admitted.

98. 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 52 above).

99. 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.

100. 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 to a relevant extent on the fact that his conduct under the influence of alcohol posed a threat to the public.

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

(iv) Conclusion

102. 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.

103. Furthermore, the Court must address 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 70 and 78 above). The Court acknowledges that in detaining the applicant, the defendant State's authorities acted in order to protect women related to the applicant from physical and psychological harm amounting to inhuman or degrading treatment or even to attacks on their life which might be caused by the applicant. However, the Court cannot but reiterate that 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 (see *Jendrowiak v. Germany*, no. 30060/04, §§ 36-38, 14 April 2011; see also *O.H. v. Germany*, cited above, §§ 93-94). 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 84-102), 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.

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

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

105. The applicant complained that the retrospective order for his preventive detention further violated the prohibition on increasing a penalty retrospectively enshrined in 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."

106. The Government contested that argument.

A. The parties' submissions

1. The Government

107. The Government argued that the applicant had not exhausted domestic remedies in relation to his complaint under Article 7 of the Convention, 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 raised a breach of his constitutional right to liberty.

108. In the Government's view, a complaint to the Federal Constitutional Court would have been an effective remedy which the applicant had been obliged to exhaust prior to his complaint to this Court. In particular, the applicant could not rely on the Federal Constitutional Court's judgment of 5 February 2004 (file no. 2 BvR 2019/01), which had been at issue in the case of *M. v. Germany* (cited above), as that case had not concerned a retrospective order of preventive detention, which was the subject-matter of the present case. Moreover, the said judgment did not constitute well-established case-law in respect of the non-applicability of the constitutional prohibition of retrospective criminal laws on preventive detention orders. Five years after the said judgment, the applicant, who had lodged a constitutional complaint alleging a breach of his right to liberty, had been obliged to lodge a constitutional complaint also in respect of his allegation of a breach of Article 7 of the Convention in order to have the compatibility of his detention with the Constitution verified.

109. In any event, were a constitutional complaint to be regarded as an ineffective remedy, it would have to be considered as ineffective both in relation to the applicant's complaint under Article 7 and in relation to his complaint under Article 5 of the Convention. In that case, the applicant had

to be considered as having lodged his application with the Court outside the six-month time-limit, which would have started with the impugned decision of the Federal Court of Justice.

2. The applicant

110. The applicant contested that view. He claimed that he had not been obliged to complain about a breach of Article 7 § 1 of the Convention or about a violation of the absolute ban on the retrospective application of criminal laws enshrined in Article 103 § 2 of the Basic Law in his complaint to the Federal Constitutional Court. That remedy had not offered any real chances of success and had thus been ineffective. He submitted that under the Federal Constitutional Court's case-law at the relevant time, which had been at issue in the case of *M. v. Germany* (cited above, §§ 31-33), the absolute ban on the retrospective application of criminal laws did not apply to preventive detention.

B. The Court's assessment

111. 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).

112. 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).

113. The Court notes that it is uncontested between the parties that in his constitutional complaint of 4 June 2009, the applicant, represented by counsel, complained neither expressly nor in substance about a breach of the prohibition of retrospective punishment enshrined in Article 103 § 2 of the Basic Law and in Article 7 § 1 of the Convention by the retrospective order for his preventive detention (see paragraph 21 above). It sees no grounds for taking a different view.

114. As regards the effectiveness of a complaint to the Federal Constitutional Court in the applicant's case, the Court notes that in its

judgment of 5 February 2004 (file no. 2 BvR 2019/01), which was at issue in the case of *M. v. Germany* (cited above), that court had found that the absolute ban on the retrospective application of criminal laws imposed by Article 103 § 2 of the Basic Law did not cover measures of correction and prevention, such as preventive detention. These measures could not be classified as penalties imposed in order to compensate for guilt (compare *M. v. Germany*, cited above, §§ 31-33). In that judgment, the Federal Constitutional Court had further found that the retrospective prolongation of preventive detention beyond the maximum duration applicable at the time of a person's offence and conviction was a proportionate restriction to that person's right to liberty (compare *M. v. Germany*, cited above, §§ 28-30). That prolongation also complied with the protection of legitimate expectations guaranteed in a State governed by the rule of law (compare *M. v. Germany*, cited above, §§ 34-37).

115. However, the Federal Constitutional Court subsequently substantially amended that case-law following constitutional complaints which had partly been lodged prior to the applicant's constitutional complaint of 4 June 2009 (see paragraphs 49-52 above). Moreover, in its judgment of 5 February 2004 relied on by the applicant, the Federal Constitutional Court considered the preventive detention at issue to comply both with the ban on retrospective application of criminal laws – and also with the protection of legitimate expectations guaranteed in a State governed by the rule of law – and with the constitutional right to liberty. The applicant did not explain why, having regard to these findings, 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.

116. 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 46 OF THE CONVENTION

117. The applicant requested the Court to indicate under Article 46 of the Convention that he was to be released immediately in view of the fact that his detention was in breach of Articles 5 and 7 of the Convention.

118. Article 46 of the Convention, in so far as relevant, provides:

> "1. The High Contracting Parties undertake to abide by the final judgment of the Court in any case to which they are parties.

> 2. The final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution.”

119. The Government did not comment on the applicant’s request.

120. The Court refers to its well-established case-law on the scope of the legal obligations on respondent States under Article 46 of the Convention, summarised in a case concerning preventive detention in Germany, for instance, in *O.H. v. Germany* (cited above, §§ 113-116). It notes, first, that the present application only concerns the applicant’s preventive detention related to the proceedings in 2008/2009 here at issue (see paragraphs 14-22 above). The Court was therefore not called upon to determine whether the applicant’s Convention rights in subsequent proceedings reviewing the legality of his ongoing detention had been respected (see paragraphs 26-34 above).

121. The Court further observes that the Federal Constitutional Court, in a leading judgment of 4 May 2011, substantially amended its previous case-law, setting stricter standards for preventive detention of persons, including the applicant, to continue (see paragraphs 49-52 above). The continuation of the applicant’s preventive detention is currently under review in the light of the Federal Constitutional Court’s findings. The Court has already considered that these findings make it possible to put an end to ongoing Convention violations (see, in particular, *O.H. v. Germany*, cited above, § 118).

122. In the light of the foregoing, the Court does not consider it necessary to indicate any specific or general measures to the respondent State which are called for in the execution of this judgment. It understands that the above-mentioned judgment of the Federal Constitutional Court will be executed and the new review proceedings be concluded in the light of that court’s and this Court’s case-law.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

123. Article 41 of the Convention provides:

> “If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

1. *The parties’ submissions*

124. The applicant claimed 2,000 euros (EUR) per month of preventive detention since 9 February 2007 in respect of pecuniary damage for loss of

earnings. At the time of the submission of his just satisfaction claims (Rule 60 § 2), his claim amounted to a total of EUR 92,000. He argued that, having regard to his previous salary as a mechanic, he could have earned some EUR 2,000 per month had he been released on 9 February 2007, when his placement in a psychiatric hospital had been terminated. He stressed that following his expulsion from Germany, he could have sought employment not only in Romania, but also in other EU Member States in which he could have had a higher income.

125. The applicant further claimed compensation amounting to EUR 25 per day of unlawful detention in respect of non-pecuniary damage. At the time of the submission of his just satisfaction claims, his claim amounted to EUR 35,000. He argued that his preventive detention in breach of the Convention from 9 February 2007, when his placement in a psychiatric hospital had been terminated, until the present day had caused him distress and frustration.

126. The Government contested the amount claimed by the applicant in respect of pecuniary damage for loss of earnings. They stressed that it was uncertain whether the applicant would have found a job after his long detention and that, in view of the final expulsion order against him, he could only legally have worked in Romania where he could have earned only a much lower salary.

127. The Government further took the view that the applicant's claim in respect of non-pecuniary damage, parting from the assumption that he had been detained in breach of the Convention since 9 February 2007 only and having regard to the awards made in previous cases concerning preventive detention, was excessive.

2. *The Court's assessment*

128. As for the applicant's claim concerning pecuniary damage having arisen from a loss of earnings the Court, having regard to the material before it, considers that the applicant failed to demonstrate that he would have searched for and obtained employment as a mechanic had he been released on 9 February 2007. Therefore, no clear causal connection between the Convention violation found and the applicant's loss of estimated earnings has been established. The Court therefore rejects the applicant's claim in this respect.

129. As for 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 in connection with the proceedings here at issue from 9 February 2007 (when the applicant's provisional preventive detention became effective) at least until the final conclusion of the subsequent fresh proceedings for periodic review of his preventive detention (see paragraphs 29-31 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 12,000, plus any tax that may be chargeable, in respect of non-pecuniary damage.

B. Costs and expenses

130. Submitting documentary evidence, the applicant also claimed EUR 3,570 for the costs and expenses, namely lawyer's fees, including value-added tax (VAT), incurred in the proceedings before the Court.

131. The Government did not comment on that point.

132. 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. In the present case, regard being had to the documents in its possession and the above criteria, the Court, in view of the complexity of the proceedings, considers it reasonable to award the sum of EUR 3,570 (including VAT) claimed by the applicant, plus any other tax that may be chargeable to him, for costs and expenses incurred in the proceedings before the Court.

C. Default interest

133. 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 order for the applicant's retrospective 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 12,000 (twelve thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 3,570 (three thousand five hundred and seventy euros), 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 28 June 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek	Dean Spielmann
Registrar	President