



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

FIFTH SECTION

CASE OF H.W. v. GERMANY

(Application no. 17167/11)

JUDGMENT

STRASBOURG

19 September 2013

FINAL

17/02/2014

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

In the case of H.W. v. Germany,

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

Mark Villiger, *President*,

Angelika Nußberger,

Ann Power-Forde,

André Potocki,

Paul Lemmens,

Helena Jäderblom,

Aleš Pejchal, *judges*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 27 August 2013,

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

PROCEDURE

11. The case originated in an application (no. 17167/11) 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 H.W. (“the applicant”), on 10 March 2011. On 22 September 2011 the President of the Section acceded to the applicant’s request not to have his name disclosed (Rule 47 § 3 of the Rules of Court).

2. The German Government (“the Government”) were represented by one of their Agents, Mr H.-J. Behrens, *Ministerialrat*, of the Federal Ministry of Justice. The applicant was granted leave on 13 January 2012 by the President of the Section to present his own case before the Court under Rule 36 § 2 *in fine*.

3. The applicant alleged, in particular, that the domestic courts’ failure to comply with the statutory time-limit for review of the necessity of his preventive detention and their refusal to consult a medical expert on his dangerousness had violated Article 5 § 1 of the Convention.

4. On 10 October 2011 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1959 and is currently detained in Berlin-Tegel Prison.

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

6. In 1995 the Braunschweig District Court convicted the applicant of attempted coercion and attempted extortion of a fourteen-year-old girl and three counts of sexual abuse of children by exhibitionist acts. It sentenced him to one year and three months' imprisonment and granted probation.

7. On 26 November 1997 the Berlin Regional Court convicted the applicant, *inter alia*, of rape of a woman and of sexual coercion and sexual abuse of a nine-year-old girl and of two ten-year-old girls in their respective apartments, combined with aggravated extortion in one case and aggravated robbery in the remaining three cases. It sentenced him to nine years and six months' imprisonment and ordered his preventive detention under Article 66 § 2 of the Criminal Code (see paragraph 40 below).

8. The Regional Court, having consulted a neurologic and psychiatric expert, K., found that the applicant, who had confessed to the offences, had acted with full criminal responsibility, but suffered from a dissocial and narcissistic personality disorder and a sexual deviation which necessitated psycho-therapeutic treatment. He had a propensity to commit serious offences, in particular sexual offences, and was therefore dangerous to the public.

9. On 1 November 2007 the Berlin Regional Court ordered the execution of the preventive detention order in respect of the applicant. As regards the applicant's continuing dangerousness, it referred to the report dated 29 May 1997 drawn up by psychiatric expert K. in the 1997 criminal proceedings. It considered the conclusions in that report to be still valid as there had not been any significant changes in the applicant's personality and attitude, the applicant having refused to make any therapy in prison addressing his offences and the deficiencies in his character. As, in these circumstances, the preventive detention order could clearly not be suspended, it was unnecessary to obtain a new expert report (Article 463 § 3, third sentence, read in conjunction with Article 454 § 2 of the Code of Criminal Procedure; see paragraph 44 below). The Berlin Court of Appeal, endorsing the reasons given by the Regional Court, confirmed that decision on 21 December 2007.

10. Since 24 December 2007 the applicant, having served the full sentence imposed on 26 November 1997 by the Berlin Regional Court and the sentence imposed in 1995 by the Braunschweig District Court (the

suspension on probation having been revoked), has been in preventive detention in Berlin-Tegel Prison.

11. On 18 May 2009 the Berlin Regional Court dismissed a request made by the applicant under Article 458 § 1 of the Code of Criminal Procedure (see paragraph 43 below) to be released from preventive detention. The applicant had argued that his preventive detention was based on unconstitutional legal provisions.

12. On 9 July 2009 the Berlin Court of Appeal dismissed the applicant's appeal against that decision.

B. The proceedings at issue

1. The decision of the Berlin Regional Court

13. By two letters dated 29 September 2009 the applicant asked the Berlin Public Prosecutor's Office and the Berlin Regional Court to inform him on the progress of the proceedings under Article 67e of the Criminal Code (see paragraph 42 below) for review of whether the further execution of the preventive detention order against him was necessary. He requested to appoint him a lawyer and to consult an expert on his dangerousness. He repeated his inquiry with the Regional Court by letter dated 7 November 2009.

14. On 9 November 2009 the Berlin Regional Court asked the Berlin Public Prosecutor's Office to obtain the information necessary for the conduct of the review proceedings.

15. On 11 November 2009 the Berlin Public Prosecutor's Office, having received the case-file containing documents on the execution of the applicant's penalty from the Berlin Regional Court, asked the Berlin-Tegel Prison authority to make a statement on the applicant's situation and development in preventive detention. That request was not received by the said authority.

16. On 17 November 2009 the Berlin Public Prosecutor's Office informed the applicant that it would submit the case-file to the Regional Court once the Berlin-Tegel Prison authority had made their necessary statement.

17. By letter dated 2 December 2009, which was received by the Berlin-Tegel Prison authority on 17 December 2009, the Public Prosecutor's Office reiterated its request for a statement. It further made a copy of the file containing documents pertinent to the execution of the penalty for its own further use and sent the case-file to the Berlin Regional Court. The Regional Court received the file on 14 December 2009; the file was transferred to the competent chamber of the Regional Court on 29 December 2009.

18. In the meantime, on 23 December 2009 the Berlin Court of Appeal dismissed a request made by the applicant in parallel proceedings to release him on 24 December 2009. The applicant had argued that the proceedings under Article 67e of the Criminal Code for review of whether his preventive detention was to continue had not been concluded within the statutory two-year time-limit, which had expired on that day. Referring to the Federal Constitutional Court's case-law (see paragraph 46 below), the Court of Appeal found that a potential violation of the constitutional right to liberty did not automatically warrant the applicant's release from preventive detention. The interruption of the applicant's preventive detention could only be ordered in proceedings under Article 458 of the Code of Criminal Procedure. The court therefore transferred the applicant's request to the Public Prosecutor's Office, before whom such proceedings had to be instituted.

19. By letter dated 28 December 2009 the Berlin-Tegel Prison authority submitted its statement to the Berlin Public Prosecutor's Office. It recommended not suspending the further execution of the applicant's preventive detention and not granting probation. As the applicant had not reflected on his offences and had not made any therapy, there was nothing to indicate that he was no longer dangerous to the public. It submitted that necessary therapeutic measures had not been carried out because the applicant did not trust the prison staff and had explained to be ready for treatment only with a therapist in whom he could trust fully. In 2002 the applicant had not been transferred to a social therapeutic institution because it appeared that the applicant, who had to be and could be treated, lacked sufficient motivation to undergo treatment. In 2006 the applicant had started monthly conversations with the psychological counselling service in prison. However, in view of the duty to treat information given by the applicant confidentially, it was unknown whether there had been any resulting positive developments. As the last report by expert K. had been drawn up in 1997 and the applicant had become older since then, the prison authority considered it useful to obtain a fresh expert report in order to examine whether there had been any changes in the applicant's personality, even though such changes had not been observed in prison.

20. On 30 December 2009 the Berlin Regional Court ordered that the file containing documents pertinent to the execution of the penalty be sent to the Berlin Constitutional Court on the latter's request as the applicant had requested his release by way of an interim measure by that court. The Berlin Regional Court further appointed the applicant a counsel whom it granted access to the case-file. The applicant's counsel consulted the file in early January 2010.

21. On 8 January 2010 the Berlin Public Prosecutor's Office dismissed the applicant's request under Article 458 of the Code of Criminal Procedure to be released from preventive detention. The applicant had claimed that his

preventive detention was no longer lawful and thus violated his right to liberty. He had complained that the courts dealing with the execution of sentences had failed to review the necessity of his continuing detention within the statutory time-limit under Article 67e of the Criminal Code. The Public Prosecutor's Office stated that the applicant could only be released pending the review proceedings before the Regional Court if these proceedings had been delayed contrary to the rule of law and if interests of public security did not outweigh the applicant's interests. Having regard to the serious offences the applicant had committed, the public interest in being protected from dangerous offenders outweighed his interest in personal liberty.

22. In its statement of the same day, the Berlin Public Prosecutor's Office requested the Regional Court to order the continuation of the applicant's preventive detention and sent the Berlin-Tegel Prison authority's statement to that court.

23. On 14 January 2010 the Regional Court, having been returned the case-file from the Berlin Constitutional Court and having consulted the applicant's counsel, fixed the hearing for review of the necessity of the applicant's continuing preventive detention for 20 January 2010.

24. The applicant subsequently asked the Regional Court to examine his request for release under Article 458 § 1 of the Code of Criminal Procedure in the hearing scheduled on 20 January 2010.

25. On 20 January 2010 the Berlin Regional Court, having heard the applicant and his counsel in person, ordered the applicant's preventive detention to continue and dismissed his request to interrupt the execution of that detention.

26. The Regional Court found that the execution of the preventive detention order against the applicant could not be suspended on probation as 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; see paragraph 41 below). Having regard to the applicant's conduct in prison and his written and oral statements before the court, it was likely that he would reoffend on his release. The applicant kept questioning the lawfulness of his preventive detention and of the underlying proceedings, considered the prison staff and the psychiatric expert consulted in the criminal proceedings as incompetent liars and was persistently unwilling to reflect on his offences. It was therefore not justified to make him start a social therapy. Having regard to these circumstances, the Regional Court did not consider it necessary to consult a psychiatric expert on the applicant's dangerousness.

27. Having regard to the foregoing, the Regional Court further declined to order an interruption of the execution of the preventive detention order against the applicant (Article 458 §§ 1 and 3 of the Code of Criminal Procedure). Relying on the Federal Constitutional Court's case-law (see paragraphs 45-46 below), it found that the fact that the time-limit for review

of the applicant's detention under Article 67e §§ 1 and 2 of the Criminal Code had been exceeded by 27 days did not automatically warrant the applicant's release. It considered that after receipt of the case-file, it had conducted the review proceedings speedily, having regard to the applicant's constitutional right to liberty. It therefore had not displayed an unjustifiable disrespect in relation to the applicant's procedural rights under Article 67e of the Criminal Code, which safeguarded his right to liberty, within the meaning of the Federal Constitutional Court's case-law. It noted that the delays had in part been caused by the fact that the first request of 11 November 2009 for a statement sent by the Public Prosecutor's Office to the Berlin-Tegel Prison had not been received by the latter.

2. The decision of the Berlin Court of Appeal

28. By letter dated 1 February 2010 the applicant, represented by counsel, lodged an appeal against the Regional Court's decision, which he reasoned by submissions dated 12 March 2010. He complained about the Regional Court's failure to draw any consequences from the fact that the time-limit under Article 67e of the Criminal Code for review of his preventive detention had been exceeded as a result of delays caused by the Public Prosecutor's Office.

29. On 17 June 2010 the Berlin Court of Appeal dismissed the applicant's appeal. It endorsed the Regional Court's finding that it could not be expected that the applicant would not commit any further unlawful acts on his release. Therefore, the continuation of his preventive detention had to be ordered (Article 67d § 2 of the Criminal Code). It found that the applicant had committed serious offences against the sexual self-determination of others. The execution of the preventive detention order could therefore only be suspended and probation be granted if it was shown that the applicant had reflected on deficits in his personality and on his offences so that there was little risk that he reoffended. The statement of the Berlin-Tegel Prison authority and the applicant's submissions to the court showed, however, that this was not the case and that he kept minimizing his crimes. As the applicant's statements had clearly disclosed his continuing dangerousness, it was not yet necessary to consult an expert. The court referred to its decision of 21 December 2007 on that point.

30. The Court of Appeal further found that the applicant's appeal against the Regional Court's decision under Article 458 of the Code of Criminal Procedure not to interrupt the execution of his preventive detention for failure to comply with the time-limit under Article 67e § 2 of the Criminal Code had become devoid of purpose. The Regional Court had ordered the continuation of his preventive detention in the meantime. The applicant's preventive detention had also not become unlawful prior to the said decision of the Regional Court. It was based on the Berlin Regional Court's judgment of 26 November 1997 convicting the applicant and ordering his

preventive detention and on the Berlin Regional Court's decision dated 1 November 2007 ordering the execution of that preventive detention order.

31. The Court of Appeal conceded that the time-limit for review of the necessity of the applicant's further preventive detention under Article 67e §§ 1 and 2 of the Criminal Code had been exceeded by 27 days. The delay had been caused by the belated submission of a statement by the Berlin-Tegel Prison authority following a late reminder of the Berlin Public Prosecutor's Office, whose first request for a statement had not been received by the prison authority. The procedure followed did not disclose a flagrant irregularity. It did not, therefore, entail the unlawfulness of the applicant's preventive detention between the deadline for review of the applicant's preventive detention on 24 December 2009 and the Regional Court's decision on 20 January 2010.

32. Relying on the Federal Constitutional Court's case-law (see paragraphs 45-46 below), the Court of Appeal further found that the failure to comply with the time-limit under Article 67e of the Criminal Code had not violated the applicant's constitutional right to liberty. Having regard to the procedure followed and the fact that the time-limit had been exceeded only by several days, the Regional Court had not unjustifiably disrespected the said provision of the Criminal Code, which safeguarded the constitutional right to liberty. That court thus had not displayed a fundamentally wrong view on the importance of that constitutional right. In any event, even a breach of the constitutional right to liberty would not have warranted the applicant's release. Having regard to the seriousness of the applicant's offences, the public interest in being protected from such offences would have outweighed the applicant's interest in his personal liberty.

3. The decision of the Federal Constitutional Court

33. The applicant, who was no longer represented by counsel, subsequently lodged a constitutional complaint with the Federal Constitutional Court against the decisions of the Berlin Regional Court dated 20 January 2010 and of the Berlin Court of Appeal dated 17 June 2010. He argued, in particular, that his constitutional right to liberty had been violated. Since 24 December 2009 there was no longer a legal basis for his preventive detention, the deadline under Article 67e of the Criminal Code for review of the necessity of his continuing preventive detention having expired. He further complained that the proceedings before the courts dealing with the execution of sentences had been unfair as the courts had not sufficiently established the facts on which they had based their conclusion that he was still dangerous to the public. In particular, they had been unable to make a prognosis on his dangerousness without having consulted a psychiatric expert recently, the last expert report drawn up by expert K. dating from 1997.

34. On 16 September 2010 the Federal Constitutional Court, without giving reasons, declined to consider the applicant's constitutional complaint (file no. 2 BvR 1566/10).

C. Subsequent developments

35. In subsequent review proceedings under Article 67e of the Criminal Code instituted in August 2011, the Berlin Regional Court appointed an expert in October 2011 in order to assess the applicant's dangerousness. The applicant refused to have himself examined by the expert in these proceedings and lodged several motions for bias.

36. On 22 March 2012 the Berlin Regional Court ordered the applicant's preventive detention to continue.

II. RELEVANT DOMESTIC LAW AND PRACTICE

37. A comprehensive summary of the provisions of the Criminal Code and of the Code of Criminal Procedure governing the distinction between penalties and measures of correction and prevention, in particular preventive detention, and the making, review and execution in practice of preventive detention orders, is contained in the Court's judgment in the case of *M. v. Germany* (no. 19359/04, §§ 45-78, 17 December 2009). The provisions relevant to the present case can be summarised as follows.

A. The order of preventive detention by the sentencing court

38. A sentencing court may, at the time of an offender's conviction, order his preventive detention, known as a measure of correction and prevention, under certain circumstances in addition to his prison sentence, a penalty, if the offender has been shown to be dangerous to the public (Article 66 of the Criminal Code).

39. In particular, under Article 66 § 1 of the Criminal Code (in its version in force at the relevant time) the sentencing court orders preventive detention in addition to the penalty if someone is convicted of an intentional offence and sentenced to at least two years' imprisonment and if the following further conditions are satisfied: firstly, the perpetrator must have been sentenced twice already, to at least one year's imprisonment in each case, for intentional offences committed prior to the new offence. Secondly, the perpetrator must previously have served a prison sentence or must have been detained pursuant to a measure of correction and prevention for at least two years. Thirdly, a comprehensive assessment of the perpetrator and his acts must reveal that, owing to his propensity to commit serious offences, notably those which seriously harm their victims physically or mentally or

which cause serious economic damage, the perpetrator presents a danger to the general public.

40. Pursuant to Article 66 § 2 of the Criminal Code, the sentencing court may also order preventive detention in addition to a penalty under the following conditions. The person concerned must have committed three intentional offences for which he or she incurred at least one year's imprisonment respectively. He or she must be sentenced to at least three years' imprisonment for one or more of these acts. Furthermore, owing to a propensity to commit serious offences, the person must present a danger to the general public within the meaning of Article 66 § 1. It is not necessary in this case that the person concerned was previously sentenced to a term of imprisonment or previously served a prison sentence as stipulated in Article 66 § 1.

B. Duration and judicial review of preventive detention

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

42. 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 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).

43. Article 458 § 1 of the Code of Criminal Procedure provides that if objections are raised to the lawfulness of the execution of a penalty, a court decision shall be obtained. The further execution of the penalty shall not be suspended thereby; the court may, however, order a suspension of execution (Article 458 § 3 of the Code of Criminal Procedure). Pursuant to Article 463 § 1 of the Code of Criminal Procedure, Article 458 of that Code applies, *mutatis mutandis*, to the execution of measures of correction and prevention.

44. Under Article 463 § 3, third sentence, read in conjunction with Article 454 § 2, of the Code of Criminal Procedure, the courts dealing with the execution of sentences have to consult an expert on the convicted person's dangerousness in proceedings under Article 67d § 2 of the Criminal Code for review of a person's preventive detention if they consider

suspending the execution of the preventive detention order and granting probation.

C. Relevant case-law of the domestic courts

1. Compliance with statutory time-limits for the review of detention

45. The Federal Constitutional Court established the following principles in relation to the lawfulness of the further execution of a preventive detention order in cases in which the courts dealing with the execution of sentences failed to comply with the two-year time-limit under Article 67e of the Criminal Code for review of the question whether the preventive detention of the person concerned was still necessary in view of its objective (Article 67d of the Criminal Code). Disrespecting the said provisions on the periodic review of the execution of the preventive detention order may violate the constitutional right to liberty if there has been an unjustifiably wrong attitude towards the said procedural right which discloses a fundamentally wrong view on the importance of the right to liberty (see Federal Constitutional Court, file no. 2 BvR 2004/04, decision of 16 November 2004, *Neue Zeitschrift für Strafrecht – Rechtsprechungs-Report (NStZ-RR)* 2005, pp. 92-94, § 20 with further references; Federal Constitutional Court, file no. 2 BvR 1615/07, decision of 5 May 2008, § 17; see also Brandenburg Court of Appeal, file no. 1 Ws 34/09, decision of 12 March 2009). The Federal Constitutional Court further stressed that the provisions on periodic review of the execution of a preventive detention order served to safeguard the proportionality of restrictions to the constitutional right to liberty (see Federal Constitutional Court, file no. 2 BvR 2004/04, decision of 16 November 2004, *ibid.*, § 20 with further references; and file no. 2 BvR 1615/07, decision of 5 May 2008, § 17).

46. The Federal Constitutional Court further established that a violation of the constitutional right to liberty by the inaction of the courts dealing with the execution of sentences in the review proceedings did not automatically warrant the detainee's release. At least if the public interest in being protected from serious unlawful acts outweighed the interests of the detainee because the review proceedings had only been delayed for a couple of months, the detainee's release was not called for (see Federal Constitutional Court, file no. 2 BvR 2004/04, decision of 16 November 2004, *ibid.*, § 28).

2. Establishment of the facts in proceedings for judicial review of the necessity of further detention

47. The Federal Constitutional Court reiterated that in proceedings for review of the necessity of a person's further detention, the proportionality of

restrictions to the constitutional right to liberty was further protected by the requirements of hearing the detainee in person and of the consultation of an expert on the detainee's dangerousness in case the courts considered the suspension on probation of the detention order (see Federal Constitutional Court, file no. 2 BvR 2004/04, decision of 16 November 2004, *ibid.*, § 20; file no. 2 BvR 1615/07, decision of 5 May 2008, § 17).

48. The Federal Constitutional Court further found that in such proceedings, the courts dealing with the execution of sentences had to satisfy high standards in relation to the establishment of the truth (see Federal Constitutional Court, file no. 2 BvR 2004/04, decision of 16 November 2004, *ibid.*, § 20; and file no. 2 BvR 1334/10, decision of 22 November 2011, § 13). It was, as a rule, for the competent judges to decide in which manner they sufficiently established the relevant facts. However, for decisions necessitating a prognosis in which mental abnormalities were at issue, the judges were, as a rule, under a duty to consult an experienced expert (see, *inter alia*, Federal Constitutional Court, file no. 2 BvR 2380/06, decision of 23 January 2008, § 26; file no. 2 BvR 2413/10, decision of 19 July 2011, § 15; file no. 2 BvR 1334/10, decision of 22 November 2011, § 15; and file no. 2 BvR 2521/11, decision of 19 June 2012, § 16, all concerning the review of a person's detention in a psychiatric hospital; see also file no. 2 BvR 1615/07, decision of 5 May 2008, § 22).

49. The Federal Constitutional Court further stressed that the longer a deprivation of liberty lasted, the stricter became the constitutional requirements for a sufficient reasoning and for a sufficient establishment of the relevant facts on which a decision to prolong a person's deprivation of liberty was based. If a person was detained in the same institution for a long time, it was necessary to consult an external expert from time to time in order to prevent repetitive routine medical reports (see, *inter alia*, Federal Constitutional Court, file no. 2 BvR 983/04, decision of 14 January 2005, § 13; file no. 2 BvR 2413/10, decision of 19 July 2011, § 17; and file no. 2 BvR 2521/11, decision of 19 June 2012, § 17, all in relation to a person's placement in a psychiatric hospital).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION ON ACCOUNT OF THE NON-COMPLIANCE WITH THE TIME-LIMIT FOR JUDICIAL REVIEW

50. The applicant complained that the courts dealing with the execution of sentences had breached his right to liberty and to a fair trial because they

had failed to comply with the two-year time-limit under Article 67e of the Criminal Code for reviewing whether his preventive detention was still necessary. He relied on Articles 5, 6, 7 and 13 of the Convention in this respect.

51. The Court considers that this complaint falls to be examined under Article 5 § 1 of the Convention alone, 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; ...”

52. The Government contested that argument.

A. Admissibility

53. 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

54. In the applicant's submission, his preventive detention had breached his right to liberty under Article 5 of the Convention, in particular, because the Regional Court had failed to comply with the two-year time-limit laid down in Article 67e of the Criminal Code. He stressed that he had himself alerted the domestic authorities already in September 2009 that the time-limit would expire soon, but the authorities had apparently started the review proceedings only in December 2009. It had been only after expiry of the time-limit on 23 December 2009 that he had been appointed a counsel, that the prison authority had sent a statement and that a hearing had been held by the Regional Court. He argued that the fact that correspondence between the authorities had not functioned properly did not justify their failure and unwillingness to comply with the two-year time-limit. The period of two years for review had not been used to conduct the proceedings in a timely manner.

55. The applicant argued that Article 67e of the Criminal Code laid down a binding statutory time-limit. In a state governed by the rule of law, only the most serious emergency situations – which had not existed in his case – could justify the non-compliance with that time-limit. As the

deprivation of his liberty was at issue, exceeding the time-limit by four weeks was unacceptable. Moreover, it was not foreseeable for how long the time-limit could be exceeded. There was therefore no longer a causal connection between his conviction and his continued preventive detention since 24 December 2009 and his detention was no longer lawful for the purposes of Article 5 § 1 of the Convention. Consequently, he should have been released on that day. The order of 20 January 2010 prolonging his preventive detention amounted to a retrospective order of preventive detention.

56. The applicant further submitted that it happened regularly that the statutory time-limit for review of the necessity of a person's continued preventive detention was not complied with. The time-limit in the subsequent review proceedings, which were currently pending, had again not been respected.

(b) The Government

57. The Government took the view that the applicant's preventive detention had complied with Article 5 § 1 of the Convention also after expiry of the two-year time-limit on 23 December 2009. The detention had been justified under sub-paragraph (a) of Article 5 § 1 as being detention after conviction by a competent court. There remained a sufficient causal connection between the applicant's conviction on 26 November 1997 by the Berlin Regional Court and his preventive detention at issue. The Regional Court had ordered the applicant's preventive detention following his conviction of rape and sexual assault without any maximum duration. Therefore, the fact that the time-limit for review of the applicant's preventive detention had been exceeded by 27 days did not break the causal connection between the applicant's conviction and his continued preventive detention.

58. The Government further argued that the applicant's preventive detention had been lawful under Article 5 § 1. The applicant's preventive detention had been ordered by the Berlin Regional Court on 26 November 1997 under Article 66 § 2 of the Criminal Code. On 1 November 2007 that court had ordered the execution of the preventive detention order from 24 December 2007 onwards, when the applicant would have served his prison sentence.

59. In the Government's submission, the applicant's preventive detention had remained lawful also from 24 December 2009 onwards, despite the fact that the time-limit under Article 67e §§ 1 and 2 of the Criminal Code for review of the applicant's detention had been exceeded by 27 days. They stressed that under domestic law, the applicant's preventive detention had remained lawful. As the time-limit had only been slightly exceeded and as the authorities and courts had taken that time-limit seriously and had made all efforts to comply with it, they had not had an

unjustifiably wrong attitude towards the said procedural right which would have disclosed a fundamentally wrong view on the importance of the constitutional right to liberty. They referred to the Federal Constitutional Court's case-law on that point (see paragraph 45 above).

60. The Government stressed that the non-compliance with the time-limit under Article 67e of the Criminal Code had occurred as a result of a number of unfavourable circumstances and misunderstandings between those involved in the proceedings. In particular, the Berlin-Tegel Prison authority had not received the prosecution's first request to make a statement on the applicant's situation and development in preventive detention, which had caused delay. Moreover, the Berlin Regional Court, when sending the case-file containing documents pertinent to the execution of the penalty, instead of a copy of that file, to the Berlin Constitutional Court, had not yet known that the Berlin-Tegel Prison authority had sent their statement to the Public Prosecutor's Office two days earlier. Despite this, the domestic authorities took the deadline laid down in Article 67e of the Criminal Code seriously: the Public Prosecutor's Office made doubles of the file and the Berlin Regional Court set a date for a hearing of the applicant's case speedily. In view of that, the applicant's detention remained lawful under domestic law, as interpreted by the Federal Constitutional Court, despite the fact that the time-limit in Article 67e of the Criminal Code had been exceeded by a couple of days.

61. In the Government's submission, the applicant's preventive detention at issue was also lawful for the purposes of Article 5 § 1 of the Convention. In particular, the deprivation of liberty had been foreseeable for the applicant. Since the judgment of 26 November 1997 has become final, the applicant had known that he would be remanded in preventive detention after having served his prison sentence if, and as long as, he did not fulfil the requirements for suspending the preventive detention order, namely that it was to be expected that he would not commit further unlawful acts on his release. The fact that Article 67e of the Criminal Code provided for a review of the necessity of the applicant's continued preventive detention after two years did not mean that his preventive detention, ordered without any maximum duration, had been ordered for two years only.

62. The Government further argued that the applicant's deprivation of liberty between 24 December 2009 and 20 January 2010 had not been arbitrary. A delay of only 27 days between the expiry of the time-limit for review and the fresh decision in the review proceedings, having regard to the Court's case-law, could not yet be considered as rendering the detention at issue unreasonable. The Government referred, in particular, to the Court's judgment in the case of *Rutten v. the Netherlands* (no. 32605/96, 24 July 2001), and argued that the Court had considered in that judgment that a similar delay of one month did not render that applicant's detention arbitrary. They stressed in that context that there had been a valid order for

the applicant's preventive detention also in the interim period, that detention having been ordered without a maximum duration.

63. Finally, the Government conceded that in the review proceedings following the proceedings at issue in the present application, the time-limit of Article 67e of the Criminal Code had, regrettably, again been exceeded by some two months. The applicant had not, however, exhausted domestic remedies yet in respect of these new proceedings; in particular, he had not yet obtained a decision of the Federal Constitutional Court.

2. *The Court's assessment*

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

64. The Court reiterates that any deprivation of liberty must, in addition to falling within one of the exceptions set out in sub-paragraphs (a) to (f) of Article 5 § 1, be "lawful". Where the "lawfulness" of detention is in issue, including the question whether "a procedure prescribed by law" has been followed, the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules thereof (see, among many other authorities, *Erkalo v. the Netherlands*, 2 September 1998, § 52, *Reports of Judgments and Decisions* 1998-VI; *Baranowski v. Poland*, no. 28358/95, § 50, ECHR 2000-III; and *Saadi v. the United Kingdom* [GC], no. 13229/03, § 67, ECHR 2008).

65. While it is normally in the first place for the national authorities, notably the courts, to interpret and apply domestic law, it is otherwise in relation to cases where, as under Article 5 § 1, failure to comply with that law entails a breach of the Convention. In such cases the Court can and should exercise a certain power to review whether national law has been observed (see *Winterwerp v. the Netherlands*, 24 October 1979, § 46, Series A no. 33; *Benham v. the United Kingdom*, 10 June 1996, § 41, *Reports* 1996-III; and *Baranowski*, cited above, § 50).

66. Compliance with the rules of national law primarily requires any arrest or detention to have a legal basis in domestic law but also relates to the quality of the law, requiring it to be compatible with the rule of law, a concept inherent in all the Articles of the Convention (see *Stafford v. the United Kingdom* [GC], no. 46295/99, § 63, ECHR 2002-IV; and *Kafkaris v. Cyprus* [GC], no. 21906/04, § 116, ECHR 2008). "Quality of the law" in this sense implies that where a national law authorises deprivation of liberty it must be sufficiently accessible, precise and foreseeable in its application, in order to avoid all risk of arbitrariness (see *Amuur v. France*, 25 June 1996, § 50, *Reports* 1996-III; *Nasrulloev v. Russia*, no. 656/06, § 71, 11 October 2007; and *Mooren v. Germany* [GC], no. 11364/03, § 76, ECHR 2009-...).

67. Compliance with national law is not, however, sufficient: Article 5 § 1 requires in addition that any deprivation of liberty should be in keeping

with the purpose of protecting the individual from arbitrariness (see, among many other authorities, *Winterwerp*, cited above, §§ 37, 45; *Erkalo*, cited above, §§ 52, 56; *Saadi*, cited above, § 67; and *Mooren*, cited above, § 72).

68. The Court has acknowledged that one of the relevant elements in assessing whether a person's detention must be considered arbitrary for the purposes of Article 5 § 1 is the speed with which the domestic courts replaced a detention order which had either expired or had been found to be defective (see *Koendjiharie v. the Netherlands*, 25 October 1990, § 27, Series A no. 185-B; *Mooren*, cited above, §§ 80-81; and *Schönbrod v. Germany*, no. 48038/06, § 85, 24 November 2011).

69. The Court thus found in the context of sub-paragraphs (a) and (e) of Article 5 § 1 that, for instance, a delay of eighty-two days between the expiry of the initial order of detention in a psychiatric institution and its renewal and the lack of adequate safeguards to ensure that the applicant's detention would not be unreasonably delayed was inconsistent with the purpose of Article 5 § 1 to protect individuals from arbitrary detention (see *Erkalo*, cited above, §§ 56-60). The applicant's detention during the period between the expiry of the initial detention order and the date on which the first-instance court extended his placement in a psychiatric institution was therefore considered unlawful for the purposes of Article 5 § 1 (see *Erkalo*, cited above, § 60).

70. The Court further found that a delay of some nine and a half months between the date on which the applicant had fully served his term of imprisonment and the decision that the preventive detention order made in the sentencing court's judgment should be executed had rendered the applicant's detention arbitrary and thus unlawful for the purposes of Article 5 § 1 in the interim period (see *Schönbrod*, cited above, §§ 103-109).

71. In contrast, the Court considered that an interval of two weeks between the expiry of the earlier order of detention in a psychiatric hospital and the making of the succeeding renewal order could not be regarded as unreasonable or excessive, so that this delay did not involve an arbitrary deprivation of liberty (see *Winterwerp*, cited above, § 49, in the context of sub-paragraph (e) of Article 5 § 1 alone).

72. Likewise, a delay of approximately one month between the expiry of an order to confine the applicant to a secure institution and its extension was found not to render arbitrary the deprivation of liberty at issue in the particular circumstances of the case (see *Rutten v. the Netherlands*, no. 32605/96, §§ 39-47, 24 July 2001).

73. In addition to the speed with which the domestic courts replaced a detention order which had either expired or had been found to be defective, the Court has previously considered, *inter alia*, the following elements to be relevant in assessing whether a person's detention must be considered as arbitrary for the purposes of Article 5 § 1 in the circumstances of the case. It

notably took into account whether there had been adequate safeguards to ensure that the applicant's release from detention would not be unreasonably delayed (see, *Erkalo*, cited above, §§ 57, 59). Moreover, it considered whether the applicant contributed in any way to the delays caused in the procedure (see *Schönbrod*, cited above, § 107) or objected to a foreseeable delay in the proceedings (see *Rutten*, cited above, § 45). The Court further took into account whether the delay could be attributed to the complexity of the proceedings (see *Schönbrod*, cited above, § 107).

(b) Application of these principles to the present case

74. In determining whether the applicant, during his preventive detention at issue, was deprived of his liberty in accordance with Article 5 § 1 of the Convention, the Court notes that the applicant's preventive detention was ordered by the Berlin Regional Court on 26 November 1997 together with his conviction, in particular, of rape and sexual coercion and abuse of children. It therefore fell within the ambit of sub-paragraph (a) of Article 5 § 1.

75. Having regard to the applicant's argument that his preventive detention had violated Article 5 because the domestic courts had failed to comply with the two-year time-limit under Article 67e of the Criminal Code for reviewing whether that detention was still necessary, the Court shall examine, first, whether the applicant's detention was "lawful" and "in accordance with a procedure prescribed by law" as required by Article 5 § 1.

76. The Court observes that on 24 December 2009, when the two-year time-limit under Article 67e of the Criminal Code for review of whether the execution of the applicant's preventive detention should be suspended expired, the Berlin Regional Court had not yet taken its decision under Article 67d § 2 of the Criminal Code. It was only 27 days later, on 20 January 2010, that the Regional Court ordered the applicant's preventive detention to continue at first instance; that decision was confirmed by the Berlin Court of Appeal on 17 June 2010.

77. The Court further notes that under the wording of Article 67e of the Criminal Code, the domestic courts dealing with the execution of sentences did not have any discretion as regards the compliance with the two-year time-limit. Whereas they could review at any time whether the further execution of a person's preventive detention was necessary, they were obliged to take a new decision on the continuation of a person's preventive detention at least every two years.

78. However, the Court equally observes that, despite this non-compliance with the statutory time-limit for review of the applicant's detention under Article 67e of the Criminal Code, the domestic courts, having regard to a well-established case-law, were unanimous in their finding that the applicant's preventive detention had not become unlawful

under domestic law, neither from 24 December 2009 onwards nor at least in the period between 24 December 2009 and 20 January 2010. The applicant's preventive detention in that latter period remained based on the sentencing Berlin Regional Court's judgment of November 1997 ordering the applicant's preventive detention and on the said court's decision taken in November 2007 to order the execution of the preventive detention order (see paragraphs 27, 30-32 and 34 above).

79. Moreover, the domestic courts, having regard to the Federal Constitutional Court's case-law, found that the applicant's preventive detention from 24 December 2009 to 20 January 2010 had not breached his constitutional right to liberty. They considered that, by exceeding the applicable time-limit by several days only, the Regional Court, having regard to the procedure followed, had not unjustifiably disrespected Article 67e of the Criminal Code, which safeguarded the applicant's right to liberty (see paragraphs 27, 30-32 and 34 above).

80. In view of the foregoing, the Court is prepared to accept that the applicant's preventive detention between 24 December 2009 and 20 January 2010, as well as his detention after that date, remained lawful under domestic law. However, it reiterates that national law must also be of a certain quality: It must contain clear and accessible rules governing the circumstances in which deprivation of liberty is permissible and must notably satisfy the test of foreseeability (see paragraph 66 above).

81. The Court finds that the domestic courts' case-law, which authorises the courts dealing with the execution of sentences to take their decision on a person's continued preventive detention within a certain, not clearly defined time after the expiry of the statutory time-limit of Article 67e of the Criminal Code introduces an element of uncertainty in the application of that provision. That case-law therefore raises an issue in relation to the foreseeability of the application of the domestic law at issue.

82. However, the Court can leave open the question of the foreseeability of the application of the domestic law in the present case. Under its well-established case-law, no detention which must be considered arbitrary can be compatible with Article 5 § 1. One of the relevant elements in assessing whether a person's detention, despite its compliance with domestic law, must be considered arbitrary and thus contrary to Article 5 § 1 is the speed with which domestic courts issued a fresh detention order after the expiry of a previous one. Further relevant elements include the existence of adequate safeguards against unreasonable delays, the complexity of the proceedings and the applicant's conduct of these (see paragraphs 68-73 above).

83. The Court notes in this respect that the applicant was remanded in preventive detention without the necessary decision on the continuation of his detention having been taken for 27 days, and thus for a not negligible period of time. Having regard to the strict standards laid down in its

case-law on the question of State compliance with the requirement for a speedy replacement of expired detention orders (see paragraphs 68-72 above), the Court considers that a delay of almost one month is at the upper limit of what it could still consider as reasonable, depending on all the circumstances of the case.

84. The Court notes in that context that the Government relied on the case of *Rutten v. the Netherlands* (cited above) in support of their view that a delay of one month between the expiry of the time-limit for review of the applicant's detention and the fresh decision in the review proceedings did not render an applicant's detention arbitrary. The Court considers, however, that the facts of that case can be distinguished from those of the present case in several respects. Most importantly, unlike the applicant in the present case, the applicant in the case of *Rutten* could be considered to have accepted the foreseeable delay in the examination of his case by the domestic courts (which was caused by the fact that the date for a hearing of his case was fixed only some two months after the summons was issued).

85. Having regard to further elements relevant to the question whether the applicant's preventive detention in the interim period at issue must be considered as arbitrary for the purposes of Article 5 § 1, the Court observes that the applicant cannot be said to have contributed to the delays in the review procedure. He even inquired about the progress of the review proceedings at an earlier stage and clearly did not accept that the review proceedings be prolonged beyond the two-year time-limit under Article 67e of the Criminal Code.

86. It is true that the applicant lodged two requests aimed at his release in parallel proceedings before the Court of Appeal and before the Berlin Constitutional Court (see paragraphs 18, 20-21 and 23 above). However, possible delays caused thereby could be – and, as the Government pointed out, had partly been – avoided by making a copy of the pertinent documents of the file prior to sending the file to another court. Moreover, the applicant's requests were, in any event, dealt with only on or after expiry of the time-limit laid down in Article 67e of the Criminal Code.

87. In the Court's view, the delays in the review proceedings were mainly caused by the fact that the Berlin Regional Court, assisted by the Berlin Public Prosecutor's Office, initiated the review proceedings belatedly, only some six weeks before the expiry of the statutory time-limit for review. In these circumstances, delays caused, in particular, by the fact that a letter to the Berlin-Tegel Prison authority was lost, could no longer be made up. Essential procedural steps, notably the appointment of a counsel for the applicant, the grant of access to the case-file to the latter and the fixing and holding of a hearing were taken only after expiry of the time-limit under Article 67e of the Criminal Code.

88. The Court further does not consider that the delays in the procedure were caused by an unforeseeable complexity of the proceedings. Moreover,

the relevant deadline in the review proceedings has been known to the domestic authorities since the beginning of the applicant's preventive detention on 24 December 2007 at the latest and thus long in advance. Furthermore, the applicant had been in prison and thus under the authorities' supervision already for a long time.

89. Finally, the Court cannot discern sufficiently clear safeguards to ensure that a decision on the applicant's release from detention would not be unreasonably delayed. It notes in this connection that the threshold applied by the domestic courts, which examined whether the procedure followed in the review proceedings disclosed a "flagrant irregularity" (see paragraph 31 above), was too high and thus failed to afford the applicant sufficient protection from excessive delays. Considering only such an "unjustifiable disrespect" of the applicant's procedural rights (see paragraph 27 above) sufficient to outweigh the applicant's individual interests does not take his fundamental right to liberty sufficiently seriously, in particular as he cannot be said to have contributed to the delays at issue. The lack of adequate safeguards was again demonstrated by the fact that, as was uncontested between the parties, the time-limit under Article 67e of the Criminal Code was again exceeded – by some two months – in the fresh review proceedings following those at issue in the present application.

90. In view of the foregoing, the Court concludes that the applicant's detention between 24 December 2009 and 20 January 2010 must be considered as arbitrary and thus unlawful for the purposes of Article 5 § 1.

91. Accordingly, the applicant's detention during that period violated Article 5 § 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION ON ACCOUNT OF THE FAILURE TO OBTAIN A RECENT MEDICAL EXPERT REPORT

92. In his application to the Court, the applicant further complained that the hearing before the Regional Court following which his continuing preventive detention had been ordered had been deficient and unfair in many respects. He submitted, in particular, that the domestic courts had taken their decision without any recent expert report and thus on the basis of insufficient reasons. He invoked Articles 5, 6 and 13 of the Convention in this respect.

93. The Court considers that this complaint equally falls to be examined under Article 5 § 1 of the Convention alone.

94. The Government contested that argument.

A. Admissibility

95. 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

96. In the applicant's submission, it had been unlawful to order his preventive detention to continue without ordering a new psychiatric expert report. In particular, the domestic courts could not abstain from obtaining an expert report because it had been clear, without expert advice being necessary, that his preventive detention was to continue. The domestic courts had not proven him to be dangerous, but had based their allegation that he was a danger to the public on wrong allegations on his personality and character in the 1997 judgment of the Berlin Regional Court.

97. The applicant argued that the report drawn up by expert K. in the criminal proceedings and dating back 13 years should no longer have been used against him. By doing so, the domestic courts had failed to take the necessary evidence to establish the facts relevant to their decision. There had not been any facts which had shown that he was dangerous to the public at the relevant time.

(b) The Government

98. The Government took the view that the applicant's continued preventive detention had complied with Article 5 of the Convention also in this respect. In particular, the domestic courts' failure to obtain a recent expert report on the applicant's dangerousness had not rendered his preventive detention unlawful for the purposes of Article 5 § 1.

99. The Government submitted that the domestic courts' decision not to consult an expert in order to determine whether, as required by Article 67d § 2 of the Criminal Code, it was to be expected that the applicant would not commit any further unlawful acts on his release had complied with domestic law. In taking this prognosis-based decision, the courts only had to consult an expert under Article 463 § 3, third sentence, read in conjunction with Article 454 § 2 of the Code of Criminal Procedure (see paragraph 44 above) if they considered suspending the preventive detention order and granting probation.

100. Conversely, obtaining a new expert report was unnecessary if the domestic courts, as in the present case, having regard to a previous expert

report and the applicant's subsequent development, could clearly conclude that the applicant's preventive detention had to be prolonged. The Berlin Regional Court and the Court of Appeal had taken note of the report of expert K. drawn up in 1997, finding that it was likely that the applicant would reoffend and was dangerous to the public. They had further explained in detail that the lack of any positive development in the applicant's personality, diminishing his dangerousness, since then led to the conclusion that the suspension of the applicant's preventive detention order could not even be considered.

101. The Government submitted that the domestic courts' refusal to obtain fresh expert advice in such circumstances complied with the purpose of Article 5 to protect the applicant from arbitrariness. It was clear from the outset that such advice would not lead to the courts' suspending the preventive detention order. Moreover, the Court of Appeal and the Federal Constitutional Court had reviewed the reasonableness of the Regional Court's assessment that a suspension of that order could not even be considered.

2. The Court's assessment

(a) Recapitulation of the relevant principles

102. The Court reiterates that the word "after" in sub-paragraph (a) does not simply mean that the "detention" must follow the "conviction" in point of time. There must be a sufficient causal connection between the conviction and the deprivation of liberty at issue (see, *inter alia*, *Kafkaris*, cited above, § 117). The causal link required by sub-paragraph (a) might eventually be broken if a position were reached in which a decision not to release or to re-detain was based on grounds that were inconsistent with the objectives of the initial decision (by a sentencing court) or on an assessment that was unreasonable in terms of those objectives (see *M. v. Germany*, no. 19359/04, § 88, ECHR 2009 with further references).

(b) Application of these principles to the present case

103. The Court notes that the applicant's preventive detention at issue was ordered by the Berlin Regional Court on 26 November 1997 together with his convictions, in particular, of rape and of sexual coercion and abuse of children. His detention fell under sub-paragraph (a) of Article 5 § 1 if it occurred "after conviction", in other words if there was a sufficient causal connection between the applicant's criminal conviction by the sentencing Berlin Regional Court in 1997 and his continued deprivation of liberty in preventive detention ordered by that court on 20 January 2010.

104. Having regard to its findings in the case of *M. v. Germany* (cited above, §§ 96-105), the Court considers that the preventive detention of the applicant, who was not detained for a period beyond the statutory maximum

period applicable at the time of his offences and conviction as a result of the proceedings at issue, could, in principle, be based on his “conviction”, for the purposes of Article 5 § 1 (a), by the Berlin Regional Court in November 1997.

105. The Court further notes that the reason for the domestic courts for prolonging the applicant’s preventive detention in 2010 was to prevent the applicant from committing further sexual offences similar to those he had previously been found guilty of. The domestic courts’ decision not to release the applicant was therefore consistent with the objectives of the decision taken by the sentencing Berlin Regional Court, which had ordered the applicant’s preventive detention in 1997 because the applicant was dangerous to the public owing to his propensity to commit serious sexual offences.

106. In determining whether the domestic courts’ decision not to release the applicant was based, in addition, on an assessment that was reasonable in terms of those objectives, the Court takes note of the applicant’s argument that the domestic courts had taken their decision to prolong his preventive detention without any recent expert report and on the basis of insufficient reasons.

107. The Court has previously found that a situation in which the domestic courts based their decision not to release a person from preventive detention essentially on an outdated expert report on his dangerousness or refrained from obtaining indispensable expert advice in this respect raises an issue under Article 5 § 1. The reasonableness of the decision to prolong a person’s preventive detention is called into question where the domestic courts plainly disposed of insufficient elements warranting the conclusion that the person concerned was still dangerous to the public (see *Dörr v. Germany* (dec.), no. 2894/08, 22 January 2013).

108. The Court notes that, in the review proceedings at issue in the present case, the domestic courts had before them a number of elements for concluding that it was still likely that the applicant would reoffend if released and was still dangerous to the public. The applicant was convicted of several very serious sexual offences. The psychiatric expert, K., who had examined the applicant in the 1997 criminal proceedings, had diagnosed the applicant in his report dated 29 May 1997 with a dissocial and narcissistic personality disorder and a sexual deviation which necessitated psycho-therapeutic treatment. Moreover, it is uncontested that the applicant did not undergo the therapy considered necessary by the expert and the domestic courts as he had only started monthly conversations with the psychological counselling service in prison, but no adequate therapy. It was further clear from the documents before the courts and the applicant’s written and oral submissions that the applicant confessed to his offences already in the criminal proceedings, but did not appear to reflect on these offences or on deficits in his personality.

109. However, the Court cannot but note that the only psychiatric expert report available to the domestic courts examining whether the applicant was dangerous to the public because it was likely that he would reoffend was more than twelve and a half years old at the time of the courts' decisions and was drawn up during the criminal proceedings against the applicant (see, *a contrario*, *Dörr*, cited above, concerning an expert report dating back six years drawn up during the execution of the preventive detention order). Throughout his ensuing detention, the applicant was not re-examined by an external psychiatric expert. The domestic courts considered the findings in the 1997 psychiatric expert report concerning the applicant's dangerousness still to be valid as the applicant had not completed a therapy in prison (see paragraphs 29 and 9 above).

110. The Court further observes in that context that the applicant, as was confirmed by the report of the prison authorities to the domestic courts, was not entirely unwilling to undergo therapy (see, *a contrario*, *Dörr*, cited above). The applicant had explained to be willing to work with a therapist he could trust. It was clear, however, that he globally did not trust in the staff of Berlin Tegel Prison, in which he had been detained throughout his preventive detention. He had only taken up regular conversations with the psychological counselling service in that prison, which was under an obligation to keep information given by him confidential. In these circumstances, the domestic courts, just as the prison authorities, had considered it not to be justified to make the applicant start a – necessary – social therapy (see paragraphs 19 and 26 above).

111. The Court finds that considerable time – more than twelve and a half years – elapsed since the domestic courts assessed the applicant's dangerousness with the help of a medical expert. In such circumstances, a sufficient establishment of the relevant facts concerning a person's current dangerousness, which resulted from personality disorders and a sexual deviation and thus from a condition the persistence of which is difficult to evaluate by persons without medical expertise, will, as a rule, necessitate obtaining recent expert advice (see for the – similar – standards set up by the Federal Constitutional Court in cases concerning a person's detention in a psychiatric hospital paragraph 48 above). Moreover, the Court notes that further elements relevant to the development of the applicant's personality in prison, and thus of his dangerousness, remained unclear. There had, in particular, not been any examination of the question, raised by the prison authorities, whether the applicant's advancing age or his conversations with the psychological counselling service had initiated any changes in his personality which could be taken up in a new therapy.

112. The Court also cannot but note in that context that the applicant has been detained in the same prison for a considerable time. There appears to be a "deadlock situation" as, apparently, no means of cooperation between the applicant and the prison staff in order to work towards reducing

significantly the applicant's dangerousness could be found in the past and no significant progress appears to have been made since a long time. In such a situation it is particularly important to consult an external expert also in order to obtain fresh propositions for initiating the necessary therapeutic treatment. The Court would recall in this respect that a decision not to release a detainee as he still posed a threat to the public may become inconsistent with the objectives of the sentencing court's order for preventive detention if the person concerned is placed and remanded in detention as there was a risk that he would reoffend, but is, at the same time, deprived of the necessary means, such as a suitable therapy, to demonstrate that he was no longer dangerous. In such circumstances, a detention which complied with Article 5 § 1 (a) at the outset would be transformed into a deprivation of liberty that was arbitrary and, hence, incompatible with that provision (see *Ostermüchner v. Germany*, no. 36035/04, § 74, 22 March 2012).

113. The Court concludes that in the circumstances of the present case, the domestic courts, by failing to – at least attempt to – obtain fresh advice from an external medical expert on the necessity of the applicant's continuing preventive detention, did not sufficiently establish the relevant facts in this respect. Their decision not to release the applicant, therefore, was not based on an assessment that was reasonable in terms of the objectives pursued by the sentencing Berlin Regional Court when ordering the applicant's preventive detention.

114. Consequently, there was no longer a sufficient causal connection, for the purposes of sub-paragraph (a) of Article 5 § 1 of the Convention, between the applicant's criminal conviction by the sentencing Berlin Regional Court in 1997 and his continued deprivation of liberty in preventive detention ordered by that court on 20 January 2010.

115. The Court further takes the view – and this is uncontested by the parties – that the applicant's preventive detention, executed in prison, cannot be justified under any of the other sub-paragraphs (b) to (f) of Article 5 § 1.

116. There has accordingly been a violation of Article 5 § 1 of the Convention also in this respect.

III. OTHER ALLEGED VIOLATIONS OF THE CONVENTION

117. In the applicant's submission, his preventive detention also violated his rights under Articles 5 and 7 of the Convention and Article 4 of Protocol no. 7 to the Convention as it was a penalty.

118. The applicant further complained under Articles 5, 6 and 13 of the Convention that the hearing before the Regional Court following which his continuing preventive detention had been ordered had been deficient and unfair because the domestic courts had taken their decision on the basis of

wrong written statements on his personality made by the prison staff and by the Public Prosecutor's Office. The persons having made these statements had also not been present at the hearing and he had therefore been unable to cross-examine them. As the decision to order the continuation of his preventive detention had been confirmed on appeal, he had not had an effective remedy to complain about the unfairness of the review proceedings.

119. Moreover, the applicant claimed that the Regional Court had based its decision to prolong his preventive detention on critical remarks he had made in previous proceedings before the courts dealing with the execution of sentences and had thereby violated Articles 9 and 10 of the Convention, read in conjunction with Article 14 of the Convention.

120. Lastly, the applicant complained under Articles 6 and 13 of the Convention that the prison authorities had handed over correspondence of the Court with several weeks' delay and had thereby breached his right to an effective application with the Court.

121. The Court has examined the remainder of the applicant's complaints as submitted by him. However, having regard to all the material in its possession, the Court finds that these complaints do not disclose any appearance of a violation of the rights and freedoms set out in the Convention or its Protocols. It follows that the remainder of the application must be rejected as manifestly ill-founded, pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

122. 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

123. The applicant claimed at least 4.047.373 euros (EUR) in respect of the damage suffered as a result of his unlawful preventive detention since 24 December 2007 (calculated on a basis of EUR 250 per hour of preventive detention).

124. The Government argued that the applicant's claim was excessive. They stressed that, if at all, the applicant could only claim compensation for damage occurred during the period from 24 December 2009 to 20 January 2010, in which the time-limit laid down in Article 67e of the Criminal Code had not been complied with. Moreover, having regard to the Court's

previous awards of damages in preventive detention cases, compensation should amount to some EUR 500 per month.

125. The Court refers to its above finding that Article 5 § 1 of the Convention was not complied with as a result of the domestic courts' failure to comply with the statutory time-limit for review of the applicant's preventive detention (period between 24 December 2009 and 20 January 2010). Moreover, Article 5 § 1 was breached in that the domestic courts, in the proceedings here at issue, failed sufficiently to establish the relevant facts by at least attempting to obtain fresh advice from an external medical expert on the necessity of the applicant's continuing preventive detention (period between 20 January 2010 and 22 March 2012, when the period of detention covered by the proceedings at issue ended).

126. Having regard to the circumstances of the case as a whole, and, in particular, to the procedural nature of the Convention violations found, and making its assessment on an equitable basis, the Court awards the applicant EUR 5,000 in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

127. The applicant did not submit a claim for the costs and expenses incurred in the proceedings before the domestic courts and before the Court. Accordingly, the Court does not make any award under this head.

C. Default interest

128. 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 two complaints under Article 5 § 1 of the Convention concerning the domestic courts' failure to comply with the statutory time-limit for review of the necessity of the applicant's preventive detention and the domestic courts' refusal to consult a medical expert on the applicant's dangerousness admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 5 § 1 of the Convention in these two respects;

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 5,000 (five thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
- (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 19 September 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Mark Villiger
President