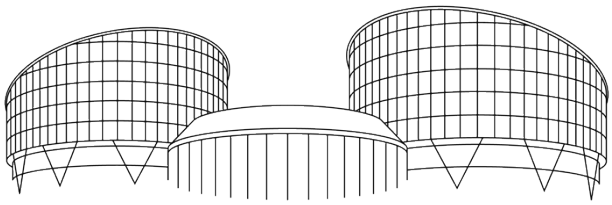

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

**CASE OF G v. GERMANY**

*(Application no. 65210/09)*

JUDGMENT

STRASBOURG

7 June 2012

**FINAL**

*07/09/2012*

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

**In the case of** G v. Germany**,**

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

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

and Stephen Phillips, *Deputy Section Registrar,*

Having deliberated in private on 10 May 2012,

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

# PROCEDURE

1. The case originated in an application (no. 65210/09) against the Federal Republic of Germany lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a German national, Mr G ("the applicant"), on 9 December 2009. On 5 January 2011 the President of the Section acceded to the applicant's request not to have his identity disclosed (Rule 47 § 3 of the Rules of Court). He further decided that documents deposited with the Registry in which the applicant's name appeared or which could otherwise easily lead to his identification should not be accessible to the public (Rule 33 § 1).

2. The applicant was represented by Mr H. Korte, a lawyer practising in Kassel. 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 and its execution had breached Article 7 § 1 of the Convention.

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

# THE FACTS

## I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1968. When lodging his application with the Court, he was detained in Schwalmstadt Prison. Since February 2012 he has been detained in Straubing Prison.

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

6. On 6 February 1992 the Frankfurt am Main Regional Court convicted the applicant, a first offender, of three counts of murder and one count of attempted murder committed between October 1988 and March 1990. The applicant was found to have killed or have attempted to kill in his car four young women he had not previously known treacherously and in order to satisfy his sexual desires. He had strangulated a seventeen-year-old hitchhiker during his lunch-break, had strangulated two prostitutes during or after sexual intercourse with them and had attempted to strangulate a third prostitute in the same manner. The Frankfurt am Main Regional Court sentenced the applicant to fifteen years' imprisonment and ordered his placement in a psychiatric hospital (Article 63 of the Criminal Code, see paragraph 44 below). The court, having consulted a psychiatric and a psychological expert who had diagnosed the applicant with a sadist sexual deviation, lack of empathy and a brain damage, found that the applicant suffered from a serious mental abnormality and had acted with diminished criminal responsibility. Furthermore, owing to that condition, the applicant was liable to reoffend and was therefore dangerous to the public.

7. The Regional Court further considered that the conditions for the applicant's preventive detention under Article 66 of the Criminal Code (see paragraph 35 below) were equally met. However, even though it did not appear very likely that the applicant's condition could be treated, it could not be wholly excluded that a therapy might prove successful. Therefore, the court decided, by reference to Article 72 § 1 of the Criminal Code (see paragraph 37 below), to order the applicant's placement in a psychiatric hospital and not in preventive detention as the former was the more suitable measure of correction and prevention in these circumstances.

8. On 11 March 1992 the applicant was accordingly transferred to Heina psychiatric hospital.

9. On 14 March 1994 the Marburg Regional Court ordered that the applicant serve his prison sentence prior to his continued placement in a psychiatric hospital as a therapy of the applicant had not proven successful. The applicant then served his full sentence in Kassel Prison. On 13 February 2006 the applicant requested his release, arguing that he had served his full

sentence on 20 March 2005. Thereupon, he was again transferred to Haina Psychiatric Hospital in April 2006 on the basis of his conviction in 1992.

10. On 5 April 2007 the Kassel Regional Court terminated the applicant's placement in a psychiatric hospital pursuant to Article 67d § 6 of the Criminal Code (see paragraph 41 below). That decision became final on 25 April 2007. Having regard to the findings of an expert it had consulted, it found that the applicant had in fact not suffered from a disorder which had made him act with diminished criminal responsibility at the time he had committed his offences and which had warranted his placement in a psychiatric hospital. By a decision of the same day, the Kassel Regional Court ordered the applicant's provisional detention pending the competent court's decision whether or not he was to be placed in preventive detention retrospectively. The latter order became final on 17 July 2007. The applicant was then detained in Weiterstadt Prison since August 2007.

## B. The proceedings at issue

### *1. The proceedings before the Frankfurt am Main Regional Court*

11. On 13 March 2008 the Frankfurt am Main Regional Court, relying on Article 66b § 3 of the Criminal Code (see paragraphs 38 and 40 below), ordered the applicant's preventive detention retrospectively (*nachträgliche Sicherungsverwahrung*).

12. The Frankfurt am Main Regional Court found that, as required by Article 66b § 3 (1) of the Criminal Code, the applicant had been placed in a psychiatric hospital pursuant to Article 63 of the Criminal Code after having committed several of the offences listed in Article 66 § 3, first sentence, namely several murders. On 5 April 2007 the Kassel Regional Court had terminated the applicant's placement in a psychiatric hospital pursuant to Article 67d § 6 of the Criminal Code as the condition diminishing the applicant's criminal responsibility on which the placement order had been based had never existed and thus did not persist at the time of the decision terminating the placement. It was irrelevant whether or not the placement in a psychiatric hospital had been based on a wrong diagnosis from the outset.

13. The Frankfurt am Main Regional Court further considered that a comprehensive assessment of the applicant, his offences and, in addition, his development during the execution of his placement in a psychiatric hospital revealed that it was very likely that he would again commit serious offences resulting in considerable psychological or physical harm to the victims (Article 66b § 3 (2)). Having regard to the convincing findings of two psychiatric experts it had consulted and to the statements made by the doctors who had attempted to motivate the applicant to undergo therapy in prison and in the psychiatric hospital, the court found that it was very likely that the applicant, if released, would commit offences similar to those which

he had been convicted of in 1992. Less restrictive measures, in particular the supervision of the applicant's conduct, would be insufficient to protect the public from him.

14. The psychiatric experts L. and H., who had been obliged to draw up their reports on the basis of the case files as the applicant had refused to have himself examined by them, had considered that there was a high risk that the applicant would commit further murders for sexual motives or in order to cover up previous violent sexual offences if released. He had committed a series of murders without any comprehensible motives arising from his personal situation. Even though he did not suffer from a true sadistic deviation, his acts had disclosed a combination of aggressive and sadistic sexual elements. He was particularly dangerous for his lack of empathy and his refusal to reflect on his offences and to undergo treatment.

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

15. On 14 March 2008 the applicant lodged an appeal on points of law. He took the view that Article 66b § 3 of the Criminal Code was incompatible with the Basic Law.

16. On 10 September 2008 the Federal Court of Justice dismissed the applicant's appeal on points of law as ill-founded. On 18 September 2008 the applicant was transferred to Schwalmstadt Prison.

*3. The proceedings before the Federal Constitutional Court*

17. On 13 October 2008 the applicant, represented by counsel, lodged a constitutional complaint with the Federal Constitutional Court. He argued that Article 66b § 3 of the Criminal Code and the decisions of the lower courts, based on that provision, to order his preventive detention retrospectively were incompatible with the Basic Law. He stressed that the sentencing court in 1992, in a final judgment, had deliberately declined to place him in preventive detention. The said provision and decisions therefore breached the prohibition to increase a penalty retrospectively (Article 103 § 2 of the Basic Law) as well as the constitutional protection of legitimate expectations in a State governed by the rule of law and the prohibition to be punished twice for the same offence. The failure to release him following the termination of his placement in a psychiatric hospital further violated his right to liberty under the Basic Law (Article 2 § 2).

18. On 5 August 2009 a chamber of three judges of the Federal Constitutional Court declined to consider the applicant's constitutional complaint – as well as that of another applicant who lodged application no. 61827/09 before the Court – on the grounds that it was ill-founded (file no. 2 BvR 2098/08).

19. The Federal Constitutional Court noted that Article 67d § 6 and Article 66b § 3 had been inserted into the Criminal Code because, under the

Federal Court of Justice's well-established case-law, a person could no longer be detained in a psychiatric hospital under Article 63 of the Criminal Code and had to be released if that person no longer suffered from a condition excluding or diminishing his criminal responsibility. This was considered problematic in cases in which the person concerned, without suffering or without ever having suffered from the said condition, was still dangerous to the public.

20. The Federal Constitutional Court found that Article 66b § 3 of the Criminal Code and the lower courts' decision to order the applicant's placement in preventive detention retrospectively were compatible with the Basic Law. Article 66b § 3 of the Criminal Code did not breach the ban on the retrospective application of criminal laws imposed by Article 103 § 2 of the Basic Law. That Article applied only to State measures which expressed sovereign censure of illegal and culpable conduct and involved the imposition of a sanction to compensate for guilt. Unlike such a penalty, preventive detention was not aimed at punishing criminal guilt, but was a purely preventive measure aimed at protecting the public from a dangerous offender. For the same reason, Article 66b § 3 of the Criminal Code did not breach the right not to be punished twice for the same offence under the Basic Law.

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

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

conditions, by the ordering of a different such measure of indefinite duration, namely preventive detention. Any remaining disadvantages for the offender in the protection of his legitimate expectations were outweighed by the paramount interest of the public pursued by the provisions in question.

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

## C. The execution of the preventive detention order in practice

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

25. When transferred to Schwalmstadt Prison on 18 September 2008, the applicant refused to discuss the planning of the execution of the preventive detention order with the prison staff, which therefore considered his transfer to a social therapeutic institution as lacking prospects of success. He worked in prison from 1 November 2008 until 28 February 2009 and has been out of work since then. In October 2010 the applicant participated in a three-day social training course in prison.

## D. Subsequent developments

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

#### (a) First set of proceedings

26. On 10 March 2009 the Marburg Regional Court refused to suspend the applicant's further preventive detention and to grant probation. It found that it could not be expected that the applicant would not commit any further offences if released (Article 67d § 2 of the Criminal Code; see paragraph 43 below). It noted that the applicant still considered it

unnecessary to reflect on his offences or to undergo a therapy. The decision became final on 1 April 2009.

**(b) Second set of proceedings**

27. On 15 July 2011 the Marburg Regional Court declined to terminate the applicant's preventive detention. It found again that it could not be expected that the applicant would not commit any further offences if released (Article 67d § 2 of the Criminal Code). On the contrary, there was a danger that if released, the applicant, owing to specific circumstances relating to his person and his conduct in prison, would commit serious crimes of violence as defined by the Federal Constitutional Court's judgment of 4 May 2011 (see paragraph 47 below), namely treacherous murders to satisfy his sexual desires.

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

29. On 22 August 2011 the Frankfurt am Main Court of Appeal, endorsing the reasons given by the Regional Court, dismissed the applicant's appeal. It agreed with the Regional Court that the stricter standards set up by the Federal Constitutional Court in its judgment of 4 May 2011 (see paragraph 47 below) for a continuation of preventive detention which had been ordered retrospectively under paragraph 2 of Article 66b of the Criminal Code did not apply to preventive detention ordered under paragraph 3 of that provision.

30. The applicant subsequently lodged a constitutional complaint with the Federal Constitutional Court against these decisions. The proceedings before that court are apparently still pending.

*2. Reopening of the proceedings*

31. On 13 September 2010 the Darmstadt Regional Court dismissed as inadmissible the applicant's request for a reopening of the proceedings in which his retrospective preventive detention had been ordered in 2008. In particular, a reopening on the ground that the European Court of Human Rights had found a domestic court's judgment to be in breach of the Convention applied only to applicants who had themselves obtained a judgment of that court in their favour. Moreover, the facts at issue in the

*M. v. Germany* case (cited above) were not sufficiently comparable to those in the present case.

32. On 11 November 2010 the Frankfurt am Main Court of Appeal, endorsing the reasons given by the Regional Court, dismissed the applicant's appeal.

## II. RELEVANT DOMESTIC LAW AND PRACTICE

33. 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*

34. 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).

35. 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.

36. 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.

37. Article 72 of the Criminal Code governs the combination of different measures of correction and prevention. If the conditions for several such measures are met, yet the desired objective may be attained by one or a part of these measures, then only those latter measures shall be ordered (see Article 72 § 1). Otherwise, such measures shall be ordered cumulatively unless the law provides otherwise (Article 72 § 2).

*2. Retrospective preventive detention orders*

38. 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).

39. 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).

40. 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."

41. 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. ..."

42. 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 of preventive detention

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

### C. The detention of mentally ill persons

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

hospital if a comprehensive assessment of the defendant and his acts reveals that, as a result of his condition, he can be expected to commit serious unlawful acts and that he is therefore a danger to the general public.

### D. Recent case-law of the Federal Constitutional Court

45. 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.

46. 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.

47. 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.

48. In its reasoning, the Federal Constitutional Court relied on the interpretation of Article 5 and Article 7 of the Convention made by this Court in its judgment in the case of *M. v. Germany* (cited above; see §§ 137 ss. of the Federal Constitutional Court's judgment). It stressed, in particular, that the constitutional requirement of establishing a difference between preventive detention and detention for serving a term of imprisonment and the principles laid down in Article 7 of the Convention required an individualised and intensified offer of therapy and care to the persons concerned. In line with the Court's findings in the case of *M. v. Germany* (cited above, § 129), it was necessary to provide a high level of care by a team of multi-disciplinary staff and to offer the detainees an individualised therapy if the standard therapies available in the institution did not have prospects of success (see § 113 of the Federal Constitutional Court's judgment).

# THE LAW

## I. ALLEGED VIOLATION OF ARTICLE 7 § 1 OF THE CONVENTION

49. The applicant complained that the retrospective order for and execution of his preventive detention violated the prohibition on increasing a penalty retrospectively. He invoked 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."

50. The Government contested that argument.

## A. Admissibility

### *1. The parties' submissions*

51. 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 45-48 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.

52. 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.

53. 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 on 13 March 2008 here at issue prior to lodging his application with the Court. Furthermore, the Federal Constitutional Court's leading judgment of 4 May 2011 did not cover preventive detention under paragraph 3 of Article 66b of the Criminal Code. In any event, in the subsequent statutory proceedings for judicial review, the continuation of his preventive detention had been ordered.

54. The applicant further submitted that he was still a victim of unlawful detention in breach of the Convention. He stressed that his situation had remained unchanged and that he was still in preventive detention following the judgment of the Federal Constitutional Court of 4 May 2011. The latter had ordered all provisions it had declared incompatible with the Basic Law to remain applicable during a transitional period and had considered retrospective preventive detention to be compatible with the Basic Law under certain restrictive conditions. Moreover, that judgment had neither addressed his past preventive detention nor the issue of compensation for non-pecuniary damage.

### *2. The Court's assessment*

55. The Court notes that the applicant in the present case complained about his retrospective preventive detention resulting from the Frankfurt am Main Regional Court's judgment of 13 March 2008, confirmed by the Federal Court of Justice (10 September 2008) and by the Federal

Constitutional Court (5 August 2009). Any remedies introduced subsequently by the Federal Constitutional Court's judgment of 4 May 2011 for review of the applicant's continued preventive detention are not, therefore, capable of affording redress to the applicant in relation to the prior period of preventive detention here at issue.

56. 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.

57. 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

58. The applicant took the view that his preventive detention, ordered retrospectively, had breached Article 7 § 1 of the Convention. Referring to the case of *M. v. Germany* (cited above), he argued that preventive detention had to be classified as a penalty for the purposes of that Article. He stressed that at the time he had committed his offences between 1988 and 1990, a retrospective order for preventive detention was not possible after the judgment of the sentencing court had become final. The legal basis for his retrospective preventive detention, Article 66b of the Criminal Code, had only been enacted subsequently, in 2004.

59. In the applicant's submission, he had been imposed a "heavier" penalty by the retrospective order for his preventive detention than the one that was applicable at the time he had committed his offences. He argued that the fact alone that a retrospective order of preventive detention had not been possible at the time of his offences and conviction was sufficient to conclude that he had had imposed upon him a "heavier" penalty by the judgment of the Frankfurt am Main Regional Court of 13 March 2008 ordering his preventive detention retrospectively.

60. The applicant argued that he could not be considered to have been simply transferred from the execution of one measure of correction and prevention of indefinite duration (placement in a psychiatric hospital) to another such measure of indefinite duration (preventive detention).

His placement in a psychiatric hospital had been terminated in 2007 as he had never suffered from a condition warranting his placement in such a hospital. His detention in that hospital had therefore already been illegal. At no point in time, a simple transfer of persons detained in a psychiatric hospital into preventive detention had been authorised under German law. On the contrary, prior to the entry into force of Article 66b § 3 of the Criminal Code, it had been the well-established case-law of the German courts that a person had to be released from a psychiatric hospital when he no longer suffered from a condition excluding or diminishing his criminal responsibility, even if that person was still dangerous to the public (see also paragraph 39 above). Without the entry into force of Article 66b § 3 of the Criminal Code, he would have been released on 20 March 2005.

61. Moreover, the applicant stressed that the sentencing court had expressly declined to order his preventive detention under Article 66 of the Criminal Code in addition to his placement in a psychiatric hospital at the time of his conviction in 1992, despite the fact that this had been authorised by the law applicable at that time (Article 72 § 2 of the Criminal Code, see paragraph 37 above). He had therefore legitimately relied on the fact that he would not be placed in preventive detention since the judgment convicting him, without ordering his preventive detention, had become final in 1992. Therefore, the retrospective order for his preventive detention in 2008 amounted to a subsequent change to his detriment in the penalty imposed on him, in the absence of any new facts having arisen after his conviction and many years after his criminal conviction had become final.

62. The applicant further submitted that he had not been made any individualised offers of therapy.

**(b) The Government**

63. The Government took the view that the applicant's retrospective preventive detention had complied with the principle of *nullum crimen, nulla poena sine lege* laid down in Article 7 § 1 of the Convention. They stressed that preventive detention was not a "penalty" under domestic law. This had repeatedly been confirmed by the Federal Constitutional Court.

64. The Government further argued that the applicant's preventive detention could not be classified as a penalty under the Convention at least in the circumstances of the present case. They referred in general to their observations made in the case of *M. v. Germany* (cited above) to support their view. Furthermore, the applicant had been offered different therapies for many years and the only reason why he had not undergone therapy was that he had vigorously refused to do so. He had only recently agreed to take part in a social training course in prison.

65. In any event, the applicant's preventive detention in the present case, ordered under Article 66b § 3 of the Criminal Code and thus lawful, could not be classified as a "heavier" penalty for the purposes of Article 7 § 1. The

applicant's detention for an unlimited period had not been ordered retrospectively for the first time after his criminal conviction. The applicant had only been transferred from one measure of correction and prevention depriving him of his liberty for an indefinite duration – his placement in a psychiatric hospital under Article 63 of the Criminal Code – to a different measure of correction and prevention entailing deprivation of liberty for an indefinite time, preventive detention. He was no longer considered to suffer from a mental disorder diminishing or excluding his criminal responsibility but was still dangerous to the public. Therefore, it was adequate to terminate his placement in a psychiatric hospital and to place him in preventive detention instead. Both measures served to protect the public from dangerous offenders.

66. The Government stressed in that context that the applicant's placement in a psychiatric hospital had been lawful until its termination in 2007. It had been based on the final judgment of the Frankfurt am Main Regional Court in 1992 which, having consulted two experts, had ordered the applicant's placement in a psychiatric hospital. The fact that the Regional Court had found in 2007 that the applicant had not suffered from a condition diminishing his criminal responsibility at the time of his offences did not alter that conclusion. Had the sentencing court considered the applicant to have acted with full criminal responsibility, it would have ordered his preventive detention under Article 66 of the Criminal Code. It had not ordered that measure only because it had considered that the aim of measures of correction and prevention could be better achieved by the applicant's placement in a psychiatric hospital than by his preventive detention (Article 72 § 1 of the Criminal Code; see paragraph 37 above).

67. The applicant's preventive detention therefore could not be classified as an additional deprivation of liberty, but only as the execution of a deprivation of liberty ordered by the sentencing Frankfurt am Main Regional Court in 1992 in a different institution owing to the applicant's persisting dangerousness. This was not prohibited under Article 7 § 1, second sentence. The fact that a fresh judgment was necessary, ordering the applicant's preventive detention retrospectively if the restrictive conditions of Article 66b § 3 of the Criminal Code were met, which the legislator had introduced for reasons of proportionality, did not alter that conclusion. The applicant had been aware at the time of his conviction that he would be detained as long as his dangerousness had not considerably diminished. Without the change in the law in 2004, inserting Articles 67d § 6 and 66b § 3 into the Criminal Code, the applicant would have been further detained in a psychiatric hospital 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.

68. The Government finally submitted that by ordering the applicant's release they would have breached their positive obligation under Article 2 of the Convention to protect potential victims from further murders for sexual motives. According to the findings of the domestic courts, it was very likely that the applicant would commit such offences if released.

*2. The Court's assessment*

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

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

> "119. When speaking of "law" Article 7 alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which implies qualitative requirements, including those of accessibility and foreseeability (see *Cantoni v. France*, 15 November 1996, § 29, *Reports* 1996-V; *Coëme and Others v. Belgium*, nos. 32492/96, 32547/96, 32548/96, 33209/96 and 33210/96, § 145, ECHR 2000-VII; and *Achour*, cited above, § 42). These qualitative requirements must be satisfied as regards both the definition of an offence and the penalty the offence in question carries (see *Achour*, cited above, § 41, and *Kafkaris*, cited above, § 140). ...
>
> 120. The concept of "penalty" in Article 7 is autonomous in scope. To render the protection afforded by Article 7 effective the Court must remain free to go behind appearances and assess for itself whether a particular measure amounts in substance to a "penalty" within the meaning of this provision (see *Welch v. the United Kingdom*, 9 February 1995, § 27, Series A no. 307-A; *Jamil v. France*, 8 June 1995, § 30, Series A no. 317-B; and *Uttley*, cited above). The wording of Article 7 paragraph 1, second sentence, indicates that the starting-point in any assessment of the existence of a penalty is whether the measure in question is imposed following conviction for a "criminal offence". Other relevant factors are the characterisation of the measure under domestic law, its nature and purpose, the procedures involved in its making and implementation, and its severity (see *Welch*, cited above, § 28; *Jamil*, cited above, § 31; *Adamson v. the United Kingdom* (dec.), no. 42293/98, 26 January 1999; *Van der Velden v. the Netherlands* (dec.), no. 29514/05, ECHR 2006-XV; and *Kafkaris*, cited above, § 142). The severity of the measure is not, however, in itself decisive, since, for instance, many non-penal measures of a preventive nature may have a substantial impact on the person concerned (see *Welch*, cited above, § 32; compare also *Van der Velden*, cited above).
>
> 121. Both the Commission and the Court in their case-law have drawn a distinction between a measure that constitutes in substance a "penalty" and a measure that concerns the "execution" or "enforcement" of the "penalty". In consequence, where the nature and purpose of a measure relates to the remission of a sentence or a change in a regime for early release, this does not form part of the "penalty" within the meaning of Article 7 (see, *inter alia*, *Hogben v. the United Kingdom*, no. 11653/85, Commission decision of 3 March 1986, DR 46, p. 231; *Grava v. Italy*, no. 43522/98,

§ 51, 10 July 2003; and *Kafkaris*, cited above, § 142). However, in practice, the distinction between the two may not always be clear-cut (see *Kafkaris*, ibid., and *Monne v. France* (dec.), no. 39420/06, 1 April 2008)."

**(b) Application of these principles to the present case**

70. In determining whether the applicant's retrospective preventive detention violated the prohibition of retrospective punishment under Article 7 § 1, second sentence, the Court notes at the outset that the present case only concerns the initial order for the applicant's retrospective preventive detention made by the Frankfurt am Main Regional Court on 13 March 2008 and confirmed on appeal and by the Federal Constitutional Court on 5 August 2009. Neither the applicant's previous placement in a psychiatric hospital (see paragraphs 6-10 above) nor the subsequent review of whether his preventive detention was to continue (see paragraphs 26-32 above) are, therefore, at issue in the present application before this Court. As a consequence, the Court's findings in the present case are without prejudice to the Convention compliance of the applicant's current detention, which is at present being reviewed by the domestic courts.

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

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

73. In particular, the Court is not convinced that the conditions of the applicant's preventive detention in Schwalmstadt Prison, where he had been detained at the relevant time, in the circumstances of the present case differed substantially from the situation of the applicant in the above case of *M. v. Germany* (cited above), whose preventive detention was, moreover, executed in that same prison. The applicant was detained in Schwalmstadt Prison in a separate building for persons in preventive detention. Minor alterations to the detention regime compared with that of an ordinary prisoner serving his sentence (see paragraphs 24-25 above), cannot, in the Court's view, mask the fact that there has been no substantial difference between the execution of the prison sentence and that of the preventive detention order against the applicant. The Court refers in this connection also to the findings of the Federal Constitutional Court in its leading judgment of 4 May 2011 on preventive detention. In that judgment, the

Federal Constitutional Court equally found that the provisions of the German Criminal Code on preventive detention at issue did not satisfy the constitutional requirement of establishing a difference between preventive detention and detention for serving a term of imprisonment (see paragraph 46 above).

74. As regards, furthermore, the Government's argument that the existing offers for therapeutic measures (see paragraphs 24-25 above) which the applicant refused to accept, had been such as to distinguish the applicant's detention from a penalty, the Court again refers to its findings made in the case of *M. v. Germany* (cited above, §§ 128-129). There is nothing to indicate that the applicant had been offered a higher level of care, including an individualised and intensified offer of therapy, than that generally offered to persons in preventive detention at that time. That offer had equally been considered as insufficient by the Federal Constitutional Court in order to distinguish that measure from a prison sentence (see paragraph 48 above).

75. The Court must then determine whether, by the order for and execution of his retrospective preventive detention, a "heavier" penalty was imposed on the applicant than the one that had been applicable at the time he committed his offences. The Court notes that at the time of the applicant's offences committed between October 1988 and March 1990, it was not possible to place the applicant in preventive detention by a retrospective order, made after his conviction by the sentencing court – which, in any event, had not ordered his preventive detention – had become final. Article 66b § 3 of the Criminal Code, on which the applicant's preventive detention was based, had only been inserted into that Code in July 2004, some fourteen years after the applicant's crimes. The applicant's preventive detention was therefore ordered with retrospective effect.

76. The Court must next address the Government's argument that the applicant had not been imposed a "heavier" penalty for the purposes of Article 7 § 1 because he had in substance only been transferred from one measure of correction and prevention of indefinite duration, detention in a psychiatric hospital, to a different such measure, preventive detention. The Court notes at the outset, however, that the sentencing Frankfurt am Main Regional Court, in its final judgment of 1992, had expressly declined to order the applicant's preventive detention (under Article 66 of the Criminal Code) in addition to his placement in a psychiatric hospital (see paragraph 7 above). That judgment, therefore, cannot be said to have covered the applicant's subsequent placement in preventive detention.

77. Moreover, under the well-established case-law of the domestic courts dealing with the execution of sentences prior to the change in the law in 2004, a person could no longer be detained in a psychiatric hospital under Article 63 of the Criminal Code and had to be released if he no longer suffered – or had in fact never suffered – from a condition excluding or

diminishing his criminal responsibility, irrespective of whether the person was still considered as dangerous to the public (see paragraphs 19 and 39 above). It had not, therefore, been possible at the relevant time to transfer the applicant, against whom only an order under Article 63 of the Criminal Code had been made, from detention in a psychiatric hospital to preventive detention in prison. Consequently, the retrospective order for the applicant's preventive detention constituted a new, additional penalty, and thus a heavier penalty within the meaning of Article 7 § 1 than the one applicable at the time of his offences as he would have been released from the psychiatric hospital and his detention would have been terminated otherwise.

78. For the same reasons, the order for and execution of the applicant's retrospective preventive detention cannot be classified as a measure concerning only the execution of his initial penalty (a prison sentence and his placement in a psychiatric hospital), as opposed to a fresh additional penalty (see for the Court's case-law on that point paragraph 69 above).

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

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

## II. OTHER ALLEGED VIOLATION OF THE CONVENTION

81. The applicant further complained that the retrospective order for his preventive detention had violated his right not to be punished twice for the same offence laid down in Article 4 of Protocol no. 7 to the Convention.

82. The Court notes that Germany has not ratified Protocol no. 7 to the Convention. This part of the application must therefore be dismissed for being incompatible *ratione personae* with the provisions of the Convention, pursuant to Article 35 §§ 3 (a) and 4 of the Convention.

## III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

83. 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

84. The applicant claimed 220,000 euros (EUR), plus any tax that may be chargeable, in respect of non-pecuniary damage. He argued that he had been in detention in breach of the Convention since 21 March 2005, which had caused him considerable mental strain and frustration. Moreover, he had suffered from the media attention during the proceedings at issue. He should therefore be paid at least EUR 100 per day of detention in breach of the Convention. The applicant's lawyer requested the Court to order the payment of any amounts due into his fiduciary bank account. He referred to his power of attorney authorising him to accept any payment of costs and expenses to be made by the other party to the proceedings.

85. The Government considered the applicant's claim in respect of non-pecuniary damage to be excessive. They stressed that the applicant in the case of *M. v. Germany* (cited above) had been in preventive detention in breach of the Convention for more than eight years. Conversely, the applicant in the present case, if at all, could only claim compensation for damage caused by his detention after 25 April 2007, when the decision of the Kassel Regional Court terminating his placement in a psychiatric hospital had become final (see paragraph 10 above).

86. The Court takes into consideration that the applicant has been detained in breach of Article 7 § 1 of the Convention in connection with the proceedings here at issue from 25 April 2007 (when the applicant's provisional preventive detention became effective) at least until the final conclusion of the subsequent fresh proceedings for review of his preventive detention (see paragraph 26 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 5,000, plus any tax that may be chargeable, in respect of non-pecuniary damage. Having regard to the power of attorney presented by the applicant's lawyer, it orders this sum, awarded to the applicant, to be paid into his lawyer's fiduciary bank account.

## B. Costs and expenses

87. Submitting documentary evidence, the applicant also claimed EUR 10,921.35 for costs and expenses incurred in the proceedings before the domestic courts. These comprised, firstly, lawyer's fees incurred for lodging a complaint with the Federal Constitutional Court in the proceedings here at issue, amounting to EUR 3,570 (including VAT). Secondly, the applicant claimed the reimbursement of lawyer's fees incurred in further related proceedings. These included lawyer's fees for lodging a constitutional complaint against the order for his provisional preventive detention (EUR 4,165, including VAT), fees paid in relation to the first set of subsequent judicial review proceedings in 2009 (EUR 500), fees incurred in the reopening proceedings (EUR 2,500, including VAT) and in proceedings claiming relaxations in the conditions of his detention in 2009 (EUR 186.35, including VAT).

88. The applicant further claimed at least EUR 3,570 for the costs and expenses incurred before the Court. He had paid lawyer's fees of that amount, including VAT, to his counsel.

89. The Government considered that the lawyer's fees for the constitutional complaint against the order for the applicant's provisional preventive detention, having regard to the applicable provisions of German law, should not have exceeded EUR 4,000. Likewise, the lawyer's fees for the constitutional complaint in the proceedings here at issue appeared excessive as the lawyer had already been in charge of the previous proceedings raising a similar subject-matter.

90. 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. The Court observes that the present case only concerns the retrospective order for the applicant's preventive detention made in 2008 and confirmed on appeal and the applicant may therefore only claim the reimbursement of costs and expenses in this respect. It is satisfied that the lawyer's fees claimed by the applicant in relation to the constitutional complaint of 13 October 2008 were actually and necessarily incurred and reasonable as to quantum. It therefore awards him the sum of EUR 3,570, which includes VAT, plus any other tax that may be chargeable to the applicant, for costs and expenses in the domestic proceedings.

91. As for the applicant's claim for costs and expenses incurred in the proceedings before the Court, the Court, having regard to the complexity of the proceedings, considers it reasonable to award the sum of EUR 3,570 (including VAT) claimed by the applicant under this head. The total amount awarded to the applicant in respect of costs and expenses of EUR 7,140, including VAT, plus any other tax that may be chargeable to the applicant, shall equally be paid into his lawyer's fiduciary bank account.

### C. Default interest

92. 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 7 § 1 of the Convention concerning the applicant's retrospective preventive detention admissible and the remainder of the application inadmissible;

2. *Holds* that there has been a violation of Article 7 § 1 of the Convention;

3. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts into his lawyer's fiduciary bank account:
      (i) EUR 5,000 (five thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 7,140 (seven thousand one hundred and forty 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 7 June 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stephen Phillips
Deputy Registrar

Dean Spielmann
President