

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

FIFTH SECTION

CASE OF ILNSEHER v. GERMANY

(Applications nos. 10211/12 and 27505/14)

JUDGMENT

STRASBOURG

2 February 2017

THIS CASE WAS REFERRED TO THE GRAND CHAMBER
WHICH DELIVERED JUDGMENT IN THE CASE ON
04/12/2018

This judgment may be subject to editorial revision.



In the case of Ilnseher v. Germany,

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

Erik Møse, *President,*
Angelika Nußberger,
Ganna Yudkivska,
Faris Vehabović,
Yonko Grozev,
Síofra O'Leary,
Mārtiņš Mits, *judges,*

and Milan Blaško, *Deputy Section Registrar*,

Having deliberated in private on 10 January 2017,

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

PROCEDURE

1. The case originated in two applications (nos. 10211/12 and 27505/14) 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 Daniel Ilnseher ("the applicant"), on 24 February 2012 and 4 April 2014 respectively.

2. The applicant, who had been granted legal aid in both applications, was initially represented in application no. 10211/12 by Mr A. Ahmed, a lawyer practising in Munich, and subsequently in both applications by Mr I.-J. Tegebauer, a lawyer practising in Trier. The German Government ("the Government") were represented by two of their Agents, Mr H.- J. Behrens and Mrs K. Behr, of the Federal Ministry of Justice and Consumer Protection.

3. The applicant alleged that both his provisional preventive detention (at issue in application no. 10211/12) and his retrospective preventive detention (*nachträgliche Sicherungsverwahrung*) ordered in the main proceedings (at issue in application no. 27505/14) had violated Article 5 § 1 and Article 7 § 1 of the Convention. He further stated that the domestic courts had not decided speedily on the lawfulness of his provisional preventive detention, in breach of Article 5 § 4 of the Convention. Moreover, in the applicant's submission, Judge P. had been biased against him in the main proceedings concerning the order for his retrospective preventive detention, in breach of Article 6 § 1 of the Convention.

4. On 26 November 2013 application no. 10211/12 was communicated to the Government. On 22 December 2014 the complaints concerning the retrospective order for the applicant's preventive detention and the

complaint about the partiality of Judge P. made in application no. 27505/14 were communicated to the Government and the remainder of that application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1978 and is currently detained in the centre for persons in preventive detention on the premises of Straubing Prison (hereinafter "the Straubing Prison preventive detention centre").

A. Background to the case: the applicant's conviction and the first order for his retrospective preventive detention

6. On 29 October 1999 the Regensburg Regional Court convicted the applicant of murder and, applying the criminal law relating to young offenders, sentenced him to ten years' imprisonment. It found that in June 1997 the applicant, then aged nineteen, had strangled a woman who had been jogging on a forest path, had partly undressed the dead or dying victim and had then masturbated. The court found that the applicant had acted with full criminal responsibility.

7. From 17 July 2008 onwards, after he had served his full prison sentence, the applicant was remanded in provisional preventive detention under Article 275a § 5 of the Code of Criminal Procedure (see paragraph 41 below).

8. On 22 June 2009 the Regensburg Regional Court, with Judge P. sitting on the bench, ordered the applicant's retrospective preventive detention under Article 7 § 2 no. 1 of the Juvenile Courts Act, read in conjunction with Article 105 § 1 of the Juvenile Courts Act (see paragraphs 38-39 below). The court, having regard to the reports made by a criminological expert (Bo.) and a psychiatric expert (Ba.), found that the applicant was still harbouring violent sexual fantasies and that there was a high risk that he would again commit serious sexual offences, including murder for sexual gratification, if released. On 9 March 2010 the Federal Court of Justice dismissed the applicant's appeal on points of law.

9. On 4 May 2011 the Federal Constitutional Court, in a leading judgment, allowed the applicant's constitutional complaint. It quashed the Regional Court's judgment of 22 June 2009 and the Federal Court of Justice's judgment of 9 March 2010 and remitted the case to the Regional Court. It further found that the order for the applicant's provisional

preventive detention – which had become devoid of purpose once the order for the applicant's retrospective preventive detention in the main proceedings had become final – to be unconstitutional (file no. 2 BvR 2333/08 and no. 2 BvR 1152/10). The Federal Constitutional Court found that the impugned judgments and decisions had violated the applicant's right to liberty and the constitutional protection of legitimate expectations guaranteed in a State governed by the rule of law (see paragraph 43 below).

B. The proceedings at issue in application no. 10211/12 concerning the applicant's provisional preventive detention

1. The proceedings before the Regional Court

10. On 5 May 2011 the applicant requested the Regensburg Regional Court to order his immediate release. He claimed that following the Federal Constitutional Court's judgment of 4 May 2011, which had quashed the judgment ordering his retrospective preventive detention, there was no longer any legal basis for his detention.

11. On 6 May 2011 the Regensburg Regional Court, allowing the Public Prosecutor's request of 5 May 2011, again ordered the applicant's provisional preventive detention under Articles 7 § 4 and 105 § 1 of the Juvenile Courts Act, read in conjunction with Article 275a § 5, first sentence, of the Code of Criminal Procedure (see paragraphs 39 and 41 below). The court found that the applicant's provisional preventive detention was necessary because there were weighty grounds for expecting that his retrospective preventive detention would be ordered under Article 7 § 2 no. 1 of the Juvenile Courts Act, read in the light of the judgment of the Federal Constitutional Court of 4 May 2011.

2. The proceedings before the Court of Appeal

12. By submissions dated 27 June 2011, received by the Regional Court on 29 June 2011, the applicant lodged an appeal against the Regional Court's decision, for which he submitted further statements of grounds on 15, 19, 22, 25 and 26 July 2011. He claimed, in particular, that his provisional preventive detention was unlawful.

13. On 4 July 2011 the Regensburg Regional Court refused to amend its decision of 6 May 2011.

14. On 16 August 2011 the Nuremberg Court of Appeal dismissed the applicant's appeal as ill-founded. It had regard to (i) a request lodged by the Nuremberg General Public Prosecutor on 20 July 2011 requesting that the applicant's appeal be dismissed, (ii) the findings of fact made by the Regensburg Regional Court in its judgment of 22 June 2009, (iii) the findings of two medical experts in the proceedings leading to the judgment

of 22 June 2009, (iv) the findings of two other experts in previous proceedings regarding the applicant's mental condition and the level of danger that he posed, and (v) the new restrictive standards set by the Federal Constitutional Court in its judgment of 4 May 2011.

15. On 29 August 2011 the Nuremberg Court of Appeal dismissed the applicant's complaint regarding a breach of his right to be heard and his objection to the decision of 16 August 2011. The decision was served on the applicant's counsel on 6 September 2011.

3. The proceedings before the Federal Constitutional Court

16. On 7 September 2011 the applicant lodged a constitutional complaint with the Federal Constitutional Court against the decision of the Regensburg Regional Court dated 6 May 2011, as confirmed by the Nuremberg Court of Appeal. He further requested that the execution of these decisions be stayed by way of an interim measure until the Federal Constitutional Court delivered its decision. The applicant claimed, in particular, that his right to a speedy decision, enshrined in his constitutional right to liberty, had not been respected in the proceedings concerning the review of his provisional preventive detention.

17. On 18 October 2011 the Federal Constitutional Court communicated the applicant's constitutional complaint to the regional Government of Bavaria, to the President of the Federal Court of Justice and to the General Public Prosecutor at the latter court.

18. On 25 October 2011 the Federal Constitutional Court, in a reasoned decision, refused to stay the order for the applicant's provisional preventive detention by way of an interim measure.

19. By submissions dated 1 January 2012 the applicant replied to the submissions of the regional Government of Bavaria, of the President of the Federal Court of Justice and of the General Public Prosecutor at the latter court dated 28, 24 and 25 November 2011 respectively.

20. On 22 May 2012 the Federal Constitutional Court, without giving reasons, declined to consider the applicant's constitutional complaint (file no. 2 BvR 1952/11). The decision was served on the applicant's counsel on 30 May 2012.

C. The proceedings at issue in application no. 27505/14, concerning the main proceedings on the applicant's retrospective preventive detention

1. The proceedings before the Regensburg Regional Court

(a) The decision on the applicant's motion for bias

21. In the resumed proceedings before the Regensburg Regional Court following the remittal of the case to it, the applicant lodged a motion for bias against Judge P. The latter had been a member of the bench of the Regensburg Regional Court, which had ordered the applicant's retrospective preventive detention on 22 June 2009 (see paragraph 8 above). The applicant claimed that Judge P. had remarked to the applicant's female defence counsel on 22 June 2009, immediately after the delivery of the Regional Court's judgment ordering the applicant's retrospective preventive detention, in reference to the applicant: "Be careful that after he is released, you don't find him standing in front of your door waiting to thank you." He claimed that the remark had been made in the course of a discussion between the judges and the applicant's two lawyers in camera concerning the applicant's possible transfer to a psychiatric hospital following the Regional Court's judgment.

22. In a comment of 13 December 2011 on the applicant's motion for bias, Judge P. explained that he remembered having a discussion about the applicant's possible transfer to a psychiatric hospital at a later stage, after the delivery of the judgment. However, given the amount of time that had elapsed, he neither recalled the exact context in which he had allegedly made the impugned remark nor the precise contents of the discussion.

23. On 2 January 2012 the Regensburg Regional Court dismissed the motions for bias lodged by the applicant. The court considered in particular that, even assuming that the applicant had established to the satisfaction of the court that Judge P. had made the remark in question, there were no objectively justified doubts as to P.'s impartiality as a result thereof. Even assuming that the applicant could reasonably consider the sense of the words "thank you" in the above context as meaning that the applicant could commit a violent offence, it had to be noted that the Regional Court, including Judge P., had just established that the applicant still suffered from fantasies of sexual violence and that there was at that time a high risk that he would again commit serious offences against the life and sexual self-determination of others. Assuming that Judge P. had indeed made the remark in question, his "advice" had therefore constituted in substance nothing more than the application of the Regional Court's said findings to a particular case. The remark had further been made within the context of a confidential exchange between the participants in the proceedings in the absence of the applicant. Judge P. could have expected that the applicant's

female counsel would interpret his remark in the above-mentioned manner within that context.

24. Furthermore, Judge P.'s remark had reflected his view as it had been on the day of the Regional Court's judgment of 22 June 2009. It did not suggest in any way that Judge P. had not been ready to take an impartial decision in the present proceedings, some two years after the impugned remark and following the conclusion of a new main hearing. The fact that Judge P. had previously dealt with the applicant's case did not in itself render him biased.

(b) The new order for the applicant's retrospective preventive detention

25. On 3 August 2012 the Regensburg Regional Court, having held hearings over twenty-four days, again ordered the applicant's retrospective preventive detention.

26. The Regional Court found, in particular, that, as required by Articles 7 § 2 no. 1 and 105 § 1 of the Juvenile Courts Act, read in conjunction with the Federal Constitutional Court's judgment of 4 May 2011, a comprehensive assessment of the applicant, his offence and, in addition, his development during the execution of the sentence relating to young offenders revealed that there was a high risk that the applicant, owing to specific circumstances relating to his person or his conduct, could commit the most serious crimes of violence and sexual offences, similar to the one he had been found guilty of, if released.

27. The Regional Court further found that the applicant suffered from a mental disorder for the purposes of section 1 § 1 of the Therapy Detention Act (see paragraph 43 below). Having regard to the case-law of the Federal Court of Justice and the Federal Constitutional Court, it considered that, whereas a mere "accentuation of the personality" was not sufficient to constitute a mental disorder within the meaning of the said Act, such disorder did not have to be so serious as to exclude or diminish the criminal responsibility of the person concerned for the purposes of Articles 20 and 21 of the Criminal Code (see paragraph 43 below). Given that the sexual sadism the applicant suffered from was of a serious nature and had substantially affected the applicant's development since his adolescence, it amounted to a mental disorder within the meaning of the Therapy Detention Act.

28. The Regional Court based its view on the reports of two external psychiatric experts, K. and F., whom it had consulted. Having regard to the findings of these experts, as well as to the findings of several experts who had previously examined the applicant since his arrest following his offence, the Regional Court was satisfied that the applicant has had violent sexual fantasies involving the strangulation of women since the age of seventeen. He was suffering from a sexual preference disorder, namely sexual sadism, as described by the relevant tool for the classification of

diseases, the International Statistical Classification of Diseases and Related Health Problems in its current version (ICD-10); this disorder had caused and been manifested in his brutal offence and still persisted. The therapy the applicant had undergone until 2007, in particular social therapy, had not been successful. Even though he appeared ready, in principle, to participate in further therapy, he was not currently undergoing any.

2. The proceedings before the Federal Court of Justice

29. In an appeal on points of law against the Regional Court's judgment of 3 August 2012, the applicant complained of the unlawfulness of his retrospective preventive detention and of the fact that the judgment had been determined with the participation of a biased judge, P.

30. On 5 March 2013 the Federal Court of Justice dismissed the applicant's appeal on points of law as ill-founded.

3. The proceedings before the Federal Constitutional Court

31. On 11 April 2013 the applicant lodged a constitutional complaint with the Federal Constitutional Court. He complained, in particular, that the retrospective order for his preventive detention had not complied with the prohibition on retrospective penalties under the Constitution and Article 7 § 1 of the Convention, with the right to liberty and the protection of legitimate expectations in a State governed by the rule of law, or with Article 5 § 1 of the Convention. He further argued that his constitutional right to a tribunal established by law had been violated because Judge P. had been biased against him.

32. On 5 December 2013 the Federal Constitutional Court declined to consider the applicant's constitutional complaint without giving reasons (file no. 2 BvR 813/13).

D. The conditions of the applicant's detention during the execution of the preventive detention order

33. On 7 May 2011, following the order for the applicant's provisional preventive detention, the applicant was transferred from the wing for persons in preventive detention in Straubing Prison to a wing for persons in detention on remand. As a consequence, the applicant lost the privileges reserved for persons in preventive detention. In particular, there was no longer the possibility to undergo therapy. On 13 September 2011 he was transferred back to and again detained in the wing for persons in preventive detention in Straubing Prison until 20 June 2013.

34. Since 20 June 2013 the applicant has been detained in the newly built Straubing Prison preventive detention centre. In that institution, which can house up to 84 detainees, one psychiatrist, seven psychologists, one

general practitioner, seven social workers, one lawyer, one teacher, one prison inspector, four nurses, forty-four members of general prison staff and four members of the administrative staff are in charge of the detainees. Inmates can stay outside their cells, which these days measure 15 square metres, between 6 a.m. and 11.30 p.m. The applicant has refused any offers of therapy at that centre, in particular, one-to-one or group social therapy, participation in an intensive treatment programme for sex offenders, or therapy administered by an external psychiatrist.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. General legal framework

35. A comprehensive summary of the provisions of the Criminal Code and of the Code of Criminal Procedure governing preventive detention and the issuing, review and practical implementation of preventive detention orders, including the legislative amendments made in these respects during the relevant time, is notably contained in the Court's judgments in the cases of *M. v. Germany* (no. 19359/04, §§ 45-78, ECHR 2009), *Glien v. Germany* (no. 7345/12, §§ 32-52, 28 November 2013); and *Bergmann v. Germany* (no. 23279/14, §§ 42-76, 7 January 2016). The provisions referred to in the present case provide as follows (see paragraphs 36-42 below).

B. Preventive detention orders against juveniles and young adults

36. Initially, the Juvenile Courts Act did not authorise orders for preventive detention in respect of juveniles or young adults, to whom the criminal law relating to young offenders was applied.

37. By the Act on the introduction of retrospective preventive detention for convictions under the criminal law relating to young offenders (*Gesetz zur Einführung der nachträglichen Sicherungsverwahrung bei Verurteilungen nach Jugendstrafrecht*) of 8 July 2008, which entered into force on 12 July 2008, Article 7 § 2 was inserted into the Juvenile Courts Act.

38. The wording of Article 7 § 2 of the Juvenile Courts Act, as in force until 31 May 2013, provided:

> "If, following the imposition of a sentence applicable to young offenders of at least seven years for ... a felony
>
> 1. against life, physical integrity or sexual self-determination, or
>
> 2. ...
>
> through which the victim either suffered grave mental or physical damage or was exposed to the risk of suffering such damage, there is evidence prior to the end of the sentence applicable to young offenders indicating that the convicted person poses a

> significant danger to the general public, the court may order preventive detention retrospectively if a comprehensive assessment of the convicted person, his offence or offences and ... his development during the serving of the sentence applicable to young offenders determines that it is very likely that he will again commit offences of the nature described above."

39. Article 105 § 1 of the Juvenile Courts Act provides that the court shall apply certain provisions of that Act relating to juveniles (persons aged between fourteen and eighteen) if a young adult aged between eighteen and twenty-one commits an offence and if, in particular, a comprehensive assessment of the perpetrator's personality, taking into account his living environment, has determined that the perpetrator had the moral and intellectual development of a juvenile at the time of his offence.

40. Under Article 7 § 4 of the Juvenile Courts Act, in the wording in force until 31 May 2013, the courts were obliged to examine at yearly intervals whether a particular preventive detention order might be suspended and a measure of probation applied; in its judgment of 4 May 2011, the Federal Constitutional Court ordered that this time-limit be reduced from one year to six months.

41. Under Article 7 § 4 of the Juvenile Courts Act, read in conjunction with Article 275a § 5, first sentence, of the Code of Criminal Procedure, in the wording in force at the relevant time under the applicable transitional provision, a court could order a person's provisional preventive detention (until the relevant judgment on retrospective preventive detention became final) if there were weighty grounds for expecting that that person's retrospective preventive detention would be ordered.

42. Under Articles 304 § 1 and 305 of the Code of Criminal Procedure there is a possibility (which is not subject to any time-limit) to lodge an appeal with the Court of Appeal against a regional court's ordering a person's provisional preventive detention; under Article 310 of the Code of Criminal Procedure there is no possibility of a further appeal before the ordinary courts against the Court of Appeal's decision. A detainee may lodge a fresh appeal with the appropriate regional court against an order for his provisional preventive detention following the Court of Appeal's decision.

C. Further relevant domestic law provisions and practice

43. The additional provisions referred to in the present case, as worded at the relevant time, are as follows. The provisions on lack of and diminished criminal responsibility (Articles 20 and 21 of the Criminal Code) are set out in the case of *Bergmann* (cited above, §§ 61-62). The rules on the detention of mentally ill persons (Article 63 of the Criminal Code and section 1 of the Therapy Detention Act) are set out in the case of *Bergmann* (cited above, §§ 63-64). Lastly, a summary of the Federal

Constitutional Court's leading judgment on preventive detention of 4 May 2011 can be found in the case of *Bergmann* (cited above, §§ 66-72). That judgment, which was delivered, *inter alia*, in respect of the applicant in the present case, concerned retrospective preventive detention under Article 7 § 2 of the Juvenile Courts Act in the same manner as the retrospective preventive detention of adult offenders under the Criminal Code.

THE LAW

I. JOINDER OF THE APPLICATIONS

44. Given that the present two applications concern two related sets of proceedings, in one of which the provisional order, and in the other the final order for the applicant's preventive detention was at issue, the Court decides that the applications shall be joined (Rule 42 § 1 of the Rules of Court).

II. ALLEGED VIOLATION OF ARTICLES 5 § 1 AND 7 § 1 OF THE CONVENTION ON ACCOUNT OF THE APPLICANT'S PREVENTIVE DETENTION FROM 6 MAY 2011 UNTIL 20 JUNE 2013

45. The applicant complained that his retrospectively ordered preventive detention – which lasted from 6 May 2011 until 20 June 2013 on the basis of, initially, a provisional order for the applicant's preventive detention and subsequently a final preventive detention order made during the main proceedings – had breached his right to liberty under Article 5 § 1 of the Convention and the prohibition on retrospective punishment under Article 7 § 1 of the Convention.

46. After the failure of the Government's attempts to reach a friendly settlement directly with the applicant, by a letter of 23 May 2014 the Government informed the Court that, having regard to the Court's judgment in the case of *Glien* (cited above), they proposed to make a unilateral declaration with a view to resolving the issue raised by this part of application no. 10211/12. They further requested the Court to strike out the application, in accordance with Article 37 of the Convention.

47. The declaration provided as follows:

> "1. Attempts to reach a friendly settlement with the Applicant failed.
>
> 2. By way of unilateral declaration, the Federal Government recognises that the applicant's rights under Articles 5 and 7 of the Convention were violated as a result of his preventive detention being subsequently ordered provisionally by the committal order of 6 May 2011. The decisive factor is that – taking into account the particular

circumstances of his detention – the institution in which the applicant was detained at the beginning of the period in question was not a "suitable institution" for persons held in preventive detention.

3. Due to the particular circumstances of this individual case, the Government is prepared to pay compensation in the amount of EUR 12,500 to the applicant if the Court, upon payment of the amount, strikes the application out of the list of cases, pursuant to Article 37 (1) c) of the Convention. This would satisfy any and all claims, costs and expenses on the part of the applicant against the Federal Republic of Germany (that is to say against the Federation and/or the *Länder*) arising from [the applicant's] placement in preventive detention, in violation of the Convention.

The amount shall be payable within three months of the Court's decision to strike the case out of its list becoming final."

48. The Government further explained that in their view, the applicant had for some twenty-five months not been detained in an institution suitable for the detention of mental health patients – that is to say from 6 May 2011 until his transfer to the centre for persons in preventive detention on the premises of Straubing Prison on 20 June 2013. Following the communication of application no. 27505/14, they clarified at the Court's request that their declaration was meant to cover the applicant's detention until 20 June 2013 on the basis of both the provisional order and the order made in the main proceedings.

49. By a letter of 16 June 2014 the applicant indicated that he was not satisfied with the terms of the unilateral declaration on the ground that the declaration did not cover all breaches of the Convention which had occurred, that the sum proposed as compensation did not fully cover the damage he had suffered as a result of these breaches, and that he wished to obtain his immediate release from preventive detention.

50. The Court reiterates that Article 37 of the Convention provides that it may at any stage of proceedings decide to strike an application out of its list of cases where the circumstances lead to one of the conclusions specified, under (a), (b) or (c) of paragraph 1 of that Article. In particular, Article 37 § 1 (c) enables the Court to strike a case out of its list if:

"... for any other reason established by the Court, it is no longer justified to continue the examination of the application."

51. It also reiterates that in certain circumstances, it may strike out an application under Article 37 § 1 (c) on the basis of a unilateral declaration by a respondent Government, even if the applicant wishes the examination of the case to be continued.

52. To this end, the Court has examined the declaration in the light of the principles established in its case-law, in particular the *Tahsin Acar* judgment (see *Tahsin Acar v. Turkey* (preliminary objections) [GC], no. 26307/95, §§ 75-77, ECHR 2003-VI; *WAZA Spółka z o.o. v. Poland* (dec.), no. 11602/02, 26 June 2007; and *Herman v. the Netherlands* (dec.), no. 35965/14, §§ 15-18, 17 November 2015).

53. The Court has established in a number of cases its practice concerning complaints about a violation of Articles 5 § 1 and 7 § 1 of the Convention by the retrospective prolongation or imposition of preventive detention, executed in separate wings for persons in preventive detention in prison (see, for example, *M. v. Germany*, cited above, §§ 86-105 and §§ 117-137; *B. v. Germany*, no. 61272/09, §§ 66-89, 19 April 2012; *G. v. Germany*, no. 65210/09, §§ 69-80, 7 June 2012; and *Glien*, cited above, §§ 71-108 and §§ 118-131).

54. Having regard to the nature of the admissions contained in the Government's declaration, as well as the amount of compensation proposed – which is consistent with the amounts awarded in similar cases – the Court considers that it is no longer justified to continue the examination of this part of the applications (Article 37 § 1 (c)).

55. Moreover, in light of the above considerations, and in particular given the clear and extensive case-law on the topic, the Court is satisfied that respect for human rights, as defined in the Convention and the Protocols thereto, does not require it to continue the examination of this part of the applications (Article 37 § 1 *in fine*).

56. The Court considers that the amount stipulated in the Government's declaration should be paid within three months of the date of the notification of the Court's decision issued in accordance with Article 37 § 1 of the Convention. In the event of failure to settle within this period, simple interest shall be payable on the amount in question at a rate equal to the marginal lending rate of the European Central Bank, plus three percentage points.

57. Lastly, the Court emphasises that, should the Government fail to comply with the terms of their unilateral declaration, the applications could be restored to the list in accordance with Article 37 § 2 of the Convention (*Josipović v. Serbia* (dec.), no. 18369/07, 4 March 2008).

58. In view of the above, it is appropriate to strike the cases out of the list in so far as they relate to the above complaints.

III. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION ON ACCOUNT OF THE APPLICANT'S PREVENTIVE DETENTION FROM 20 JUNE 2013 ONWARDS

59. The applicant further complained that his retrospectively ordered preventive detention (in so far as it had been executed on the basis of the Regensburg Regional Court's judgment of 3 August 2012) from 20 June 2013 onwards in the Straubing Prison preventive detention centre had equally violated his right to liberty, as provided in Article 5 § 1 of the Convention, which, in so far as relevant, reads as follows:

"1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

...

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

60. The Government contested that argument.

A. Admissibility

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

B. Merits

1. The parties' submissions

62. In the applicant's submission, the detention at issue had breached Article 5 § 1 as, in particular, it had not been justified under sub-paragraph (e) of that provision. He submitted that he had not been "of unsound mind". Moreover, at least prior to his transfer to the Straubing Prison preventive detention centre on 20 June 2013 he had not been detained in an institution suitable for the treatment of mental health patients.

63. The Government took the view that the applicant's retrospective preventive detention ordered in the main proceedings had complied with Article 5 § 1 after his transfer, on 20 June 2013, to the Straubing Prison preventive detention centre. It had been justified under sub-paragraph (e) of Article 5 § 1 as detention of a person "of unsound mind". In particular, as confirmed by the two psychiatric experts consulted by the Regional Court, the applicant had been suffering from a true mental disorder for the purposes of that provision, namely a pathological sexual preference disorder. Moreover, the above-mentioned centre in which the applicant had been detained had been a suitable institution for persons "of unsound mind".

2. The Court's assessment

64. For a summary of the established relevant principles in respect of Article 5 § 1 (e) the Court refers to the recapitulation of those principles in its judgment in the case of *Bergmann* (cited above, §§ 95-99).

65. In determining whether the applicant's retrospectively ordered preventive detention had been justified under sub-paragraph (e) of Article 5 § 1 as detention of a person "of unsound mind", the Court observes that the Regensburg Regional Court found, in the main proceedings, that the

applicant at the relevant time was still suffering from a sexual preference disorder, namely sexual sadism, as defined by the ICD-10. The applicant's condition amounted to a mental disorder for the purposes of section 1 § 1 of the Therapy Detention Act. The court based its findings, which were confirmed on appeal, on the reports submitted by two external psychiatric experts (see paragraphs 25-28 above).

66. The Court, having regard to the elements before it, is satisfied that it was established before the competent domestic courts on the basis of objective medical expertise that the applicant suffered from a true mental disorder for the purposes of Article 5 § 1 (e). It notes, in particular, that the mental disorder the domestic courts found the applicant to suffer from – sexual sadism including fantasies of sexual violence entailing the strangulation of women – was of a serious nature, had caused and been manifested in the murder committed by the applicant, still persisted and necessitated psychiatric treatment.

67. The Court further considers that, as required under its case-law (see paragraph 64 above), the competent domestic courts were justified in considering that the applicant's mental disorder was of a kind or degree warranting compulsory confinement in view of the high risk, as established by those courts, that the applicant would again commit another serious offence similar to the one he had been found guilty of, if released (see paragraph 26 above). Moreover, the validity of the applicant's continued confinement depended upon the persistence of his mental disorder as, under domestic law, the continuation of his preventive detention could be ordered only if, and as long as, there was a high risk that he would reoffend as a result of that disorder if released (see paragraph 40 above).

68. It follows that the applicant was a person "of unsound mind" for the purposes of Article 5 § 1 (e).

69. As for the lawfulness of the applicant's detention at issue, ordered under Articles 7 § 2 no. 1 and 105 § 1 of the Juvenile Courts Act, read in conjunction with the Federal Constitutional Court's judgment of 4 May 2011 (see paragraphs 26 and 38, 39 and 43 above), the Court, having regard to the requirements established in its case-law (see paragraph 64 above), must examine whether that detention was effected in a hospital, clinic or other appropriate institution for mental health patients. It observes that during the period here at issue, from 20 June 2013 until the next periodic judicial review decision on the continuation of the applicant's preventive detention, the applicant has been detained in the newly established Straubing Prison preventive detention centre.

70. It is uncontested by the applicant that there was a substantial change in the medical and therapeutic care offered to him in that centre, compared to the conditions prevailing in Straubing Prison. Having regard to the staffing situation, the material conditions and notably the offers of therapy that he received (including one-to-one or group social therapy, an intensive

treatment programme for sex offenders, or therapy administered by an external psychiatrist), the Court is satisfied that the applicant was offered the therapeutic environment appropriate for a person detained as a mental health patient and was thus detained in an institution suitable for the purposes of Article 5 § 1 (e).

71. It follows that the applicant's retrospectively ordered preventive detention, in so far as it was executed as a result of the impugned decisions from 20 June 2013 onwards in Straubing Prison preventive detention centre, was justified under sub-paragraph (e) of Article 5 § 1 as the lawful detention of a person "of unsound mind".

72. There has accordingly been no violation of Article 5 § 1 of the Convention in respect of this part of the application.

IV. ALLEGED VIOLATION OF ARTICLE 7 § 1 OF THE CONVENTION ON ACCOUNT OF THE APPLICANT'S PREVENTIVE DETENTION FROM 20 JUNE 2013 ONWARDS

73. The applicant claimed that his retrospectively ordered preventive detention, executed on the basis of the Regensburg Regional Court's judgment of 3 August 2012 from 20 June 2013 onwards in the Straubing Prison preventive detention centre, had also breached his right not to have a heavier penalty imposed than the one applicable at the time of his offence in June 1997. He relied on Article 7 § 1 of the Convention, which, in so far as relevant, 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."

74. The Government contested that argument.

A. Admissibility

75. 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

76. In the applicant's view, the preventive detention at issue to which he had been subject had failed to comply with Article 7 § 1 of the Convention. Having regard to the criteria established by the Court in the case of

M. v. Germany (cited above), that detention, which had been ordered retrospectively, should have been classified as a "penalty". The fact that that detention had occurred in the Straubing Prison preventive detention centre, in accordance with the changes introduced by the Preventive Detention (Distinction) Act of 5 December 2012, did not alter that finding. Looking behind the appearances, preventive detention was still a "penalty" for the purposes of Article 7 § 1.

77. The Government argued that the retrospective order for the applicant's preventive detention made in the main proceedings had complied with Article 7 § 1 of the Convention since the applicant's transfer to the Straubing Prison preventive detention centre on 20 June 2013. From then on, the applicant's preventive detention could no longer be classified as a "penalty" for the purposes of the second sentence of Article 7 § 1. His detention was aimed at treating his mental disorder. A multi-disciplinary team of experts at that centre had since then made intensive efforts to motivate the applicant to undergo suitable treatment for his disorder.

2. The Court's assessment

78. For a summary of the relevant established principles in respect of Article 7 § 1, the Court refers to the recapitulation of those principles in its judgment in the case of *Bergmann* (cited above, §§ 149-150).

79. In determining whether, in the present case, the applicant's preventive detention, ordered retrospectively after his conviction for a murder committed in 1997, constituted a "penalty" for the purposes of the second sentence of Article 7 § 1, the Court has regard, firstly, to its findings in the case of *Bergmann* (cited above, §§ 153-183). In that case, the Court had to determine whether the preventive detention of the applicant concerned, which could only be prolonged retrospectively because he suffered from a mental disorder and which was being executed in a new centre for persons in preventive detention built in order to comply with the constitutional requirement to differentiate between preventive detention and imprisonment, had to be classified as a "penalty".

80. The Court found in that judgment that in cases where preventive detention was extended because of, and with a view to, the need to treat the mental disorder of the person concerned, both the nature and the purpose of the person's detention substantially changed compared to preventive detention executed irrespective of a mental disorder. Where preventive detention was, and could only be, extended in order to treat a mental disorder in a suitable institution, the punitive element of preventive detention, and its connection with the person's criminal conviction, was eclipsed to such an extent that the measure was no longer a penalty within the meaning of Article 7 § 1.

81. The Court considers that the same considerations apply to preventive detention which was not prolonged beyond a former statutory time-limit, as

in the case of *Bergmann* (cited above), but which was ordered retrospectively in a separate judgment, without a preventive detention order having been included in the sentencing court's judgment, as in the present case.

82. The Court observes that the preventive detention of the applicant was, and could equally only be, ordered as the applicant was found to suffer from a mental disorder (see paragraphs 27 and 43 above). It was equally executed in a newly built centre for persons in preventive detention. In that centre, the applicant was offered individualised care and comprehensive therapy addressing his mental condition in one-to-one or group social therapy, an intensive treatment programme for sex offenders, or therapy administered by an external psychiatrist.

83. Given these circumstances, the Court concludes that the applicant's preventive detention in the period at issue and as resulting from the impugned decisions could no longer be classified as a "penalty".

84. There has accordingly been no violation of Article 7 § 1 of the Convention in respect of this part of the application.

V. ALLEGED LACK OF A SPEEDY JUDICIAL REVIEW

85. The applicant further complained in application no. 10211/12 that the domestic courts had not decided speedily in the proceedings at issue. He relied on Article 6 § 1 of the Convention.

86. The Court notes that in the said proceedings the applicant sought to challenge the lawfulness of his provisional preventive detention. The applicant's complaint therefore falls to be examined under Article 5 § 4 of the Convention, which reads as follows:

> "4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful."

87. The Government contested that argument.

A. Admissibility

88. The Court observes that the applicant claimed that the guarantee of a speedy review had not been respected, *inter alia*, in the proceedings before the Federal Constitutional Court. It refers to its repeated finding that Article 5 § 4 is applicable to proceedings before domestic constitutional courts which, in their examination of the compliance of the impugned detention order with fundamental rights, have to assure themselves that the detention of the person concerned was lawful and have jurisdiction to quash the decisions of ordinary courts and, if appropriate, order the release of the detained person (see, in particular, *Smatana v. the Czech Republic*,

no. 18642/04, §§ 119-124, 27 September 2007, and *Žúbor v. Slovakia*, no. 7711/06, §§ 71-77, 6 December 2011 with further references). Having regard to the Federal Constitutional Court's jurisdiction (see in this respect as an example its leading judgment of 4 May 2011, paragraph 43 above), the Court finds that Article 5 § 4 equally applies to the proceedings before that court. This is indeed uncontested between the parties.

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

B. Merits

1. The parties' submissions

90. The applicant argued that the length of the proceedings by which he had contested the lawfulness of his provisional preventive detention had not complied with the "speediness" requirement of Article 5 § 4 of the Convention. He submitted that from the moment at which he had, on 27 June 2011, lodged his appeal against the decision of the Regensburg Regional Court of 6 May 2011 almost eleven months had passed before the Federal Constitutional Court, on 22 May 2012, had taken its final decision on the lawfulness of his provisional preventive detention. He claimed, in particular, that the Federal Constitutional Court, before which the proceedings had lasted from 7 September 2011 until 22 May 2012, had not taken its decision speedily.

91. The Government took the view that the proceedings at issue had been conducted speedily, as required by Article 5 § 4. The applicant applied on 29 June 2011 for judicial review of the Regional Court's decision of 6 May 2011 ordering his provisional preventive detention. Given the complexity of the case – the domestic courts had not only had to deal with a voluminous case file, but had also had to assess the lawfulness of the applicant's detention in the light of the new leading judgment of the Federal Constitutional Court of 4 May 2011 and the new criteria set up therein – both the Court of Appeal and the Federal Constitutional Court had to be considered to have taken their decisions speedily. Moreover, the applicant had had (and had availed himself of) the opportunity to lodge a new request with the Regional Court for judicial review of his provisional preventive detention while the proceedings at issue had been pending before the Federal Constitutional Court.

2. The Court's assessment

(a) Recapitulation of the relevant principles

92. The Court reiterates that Article 5 § 4 of the Convention, in guaranteeing to detained persons the right to institute proceedings to challenge the lawfulness of their detention, also proclaims their right, following the institution of such proceedings, to a speedy judicial decision concerning the lawfulness of detention and the ordering of its termination if it proves unlawful (see *Mooren v. Germany* [GC], no. 11364/03, § 106, 9 July 2009, and *Idalov v. Russia* [GC], no. 5826/03, § 154, 22 May 2012).

93. The question of whether the right to a speedy decision has been respected must – as is the case for the "reasonable time" stipulation in Articles 5 § 3 and 6 § 1 of the Convention – be determined in the light of the circumstances of each case, including the complexity of the proceedings, their conduct by the domestic authorities and by the applicant and what was at stake for the latter (see *Mooren*, cited above, § 106, with further references; *S.T.S. v. the Netherlands*, no. 277/05, § 43, ECHR 2011; and *Shcherbina v. Russia*, no. 41970/11, § 62, 26 June 2014).

94. Article 5 § 4 does not compel the Contracting Parties to set up more than one level of jurisdiction for the examination of the lawfulness of detention and for hearing applications for release. Nevertheless, a State which offers a second level of jurisdiction must in principle accord to the detainees the same guarantees on appeal as at first instance (see *Navarra v. France*, 23 November 1993, § 28, Series A no. 273-B; *Khudobin v. Russia*, no. 59696/00, § 124, ECHR 2006-XII (extracts); and *S.T.S. v. the Netherlands*, cited above, § 43).

95. In order to determine whether the requirement that a decision be given "speedily" has been complied with, it is necessary to effect an overall assessment where the proceedings were conducted at more than one level of jurisdiction (see *Navarra*, cited above, § 28, and *Mooren*, cited above, § 106). Where the original detention order was imposed by a court (that is to say by an independent and impartial judicial body) in a procedure offering appropriate guarantees of due process, and where the domestic law provides for a system of appeal, the Court is prepared to tolerate longer periods of review in proceedings before a second-instance court (see *Lebedev v. Russia*, no. 4493/04, § 96, 25 October 2007, and *Shcherbina*, cited above, § 65). These considerations equally apply in respect of complaints under Article 5 § 4 concerning proceedings before constitutional courts which were separate from proceedings before ordinary courts under the relevant provisions of the law on criminal procedure (see *Žúbor*, cited above, § 89).

96. The Court has laid down relatively strict standards in its case-law concerning the question of State compliance with the "speediness" requirement. An analysis of its case-law discloses that in appeal proceedings before the ordinary courts which follow a detention order imposed by a

court at first instance, delays exceeding three to four weeks for which the authorities must be held responsible are susceptible of raising an issue under the "speediness" requirement of Article 5 § 4 unless a longer period of review was exceptionally justified in the circumstances of the case (compare, *inter alia*, *G.B. v. Switzerland*, no. 27426/95, §§ 27 and 32-39, 30 November 2000 – which determined that a duration of thirty-two days for a federal attorney and a federal court to decide on the applicant's request for release constituted a breach of Article 5 § 4; *Lebedev*, cited above, §§ 98-102 – which determined the authorities' responsibility for twenty-seven days of the overall time it took the appeal court to decide on the applicant's request for release, which was incompatible with Article 5 § 4; *Lebedev*, cited above, § 97; and *Shcherbina*, cited above, § 65).

(b) Application of those principles to the present case

97. As regards the period to be taken into consideration in determining the respondent State's compliance with the "speediness" requirement, the Court observes that the applicant made a first request to the Regional Court to be released on 5 May 2011. He pointed out that after the Federal Constitutional Court's judgment of 4 May 2011 that quashed the judgment ordering his preventive detention, there was no longer a legal basis for depriving him of his liberty (see paragraph 10 above). The Regional Court then ordered his provisional preventive detention on the following day, 6 May 2011. In the proceedings before the Court, the applicant only complained that the domestic courts had failed to decide speedily on his appeals against that detention order (see paragraph 90 above). The period to be examined therefore started on 29 June 2011, when the Regional Court received the applicant's appeal against the detention order of 6 May 2011. It ended on 30 May 2012 when the Federal Constitutional Court's decision of 22 May 2012 was served on the applicant's counsel. It thus lasted eleven months and one day over three levels of jurisdiction.

98. The Court notes that following its receipt of the applicant's appeal on 29 June 2011, the Regional Court took its decision refusing to amend its detention order of 6 May 2011 five days later, on 4 July 2011 – that is to say speedily.

99. Following the Regional Court's decision, the Court of Appeal, having obtained the prosecution's and the defence's submissions, took its decision on the applicant's appeal on 16 August 2011; the proceedings before that court thus lasted forty-two days.

100. In assessing whether the applicant's right to a speedy decision was still respected given the circumstances of the case despite that relatively long duration, the Court considers that the proceedings before the Court of Appeal were relatively complex, both from a legal and a factual point of view. Following the Federal Constitutional Court's reversal of its case-law in a leading judgment, it was necessary for the Court of Appeal to examine

whether under the new restrictive standards set by the Constitutional Court there continued to be weighty grounds for expecting that the applicant's retrospective preventive detention would be ordered. It had become necessary, in particular, to determine whether there were sufficient grounds for assuming that the applicant suffered from a mental disorder, an assessment which had not been necessary under the previously worded provisions of the Juvenile Courts Act and previous case-law. In making that assessment in the applicant's case, the Court of Appeal had regard to the findings of fact made by the Regensburg Regional Court in its judgment of 22 June 2009, as well as to the reports of four medical experts ordered in the course of these and previous proceedings. It thoroughly reasoned its decision ordering the applicant's provisional preventive detention.

101. Despite the fact that it does not appear that the applicant, who supplemented his grounds for appeal on five occasions, substantially contributed to the duration of the proceedings, the Court therefore finds that the proceedings before the Court of Appeal, in view of their complexity, still complied with the "speediness" requirement in the particular circumstances of the case.

102. The Court further observes that the Court of Appeal took its decision on 29 August 2011 on the applicant's complaint regarding a breach of his right to be heard and his objection to the decision of 16 August 2011; that decision was served on the applicant's counsel on 6 September 2011. The proceedings thus lasted 21 days which, in the light of the above considerations, cannot be considered as excessive.

103. As for the proceedings before the Federal Constitutional Court, the Court notes that, following the lodging of the applicant's constitutional complaint on 7 September 2011, the Federal Constitutional Court decided on 25 October 2011 (that is to say within 47 days) to refuse the applicant's request for the detention order against him to be stayed. Its decision of 22 May 2012, declining to consider the complaint, was served on the applicant's counsel on 30 May 2012 (that is to say a total period of eight months and 22 days).

104. The Court observes in this respect that the proceedings before the Federal Constitutional Court were complex in that it had to assess for the first time following its leading judgment of 4 May 2011 in respect of the applicant whether the ordinary courts' interpretation and application of that leading judgment complied with the applicant's constitutional right to liberty. The complexity of the proceedings is equally reflected by the fact that the Federal Constitutional Court communicated the constitutional complaint to the regional Government of Bavaria, to the President of the Federal Court of Justice and to the General Public Prosecutor at the latter court. Furthermore, it rejected the applicant's request for interim measures in a reasoned decision.

105. The Court further considers that the special features of proceedings before constitutional courts such as the Federal Constitutional Court must be taken into account in assessing compliance with the "speediness" requirement of Article 5 § 4. Despite the fact that the Constitutional Court reviews, as do the lower courts, the lawfulness of a complainant's detention, it does not do so as an additional "fourth instance", but examines the detention order's compliance with the fundamental right to liberty alone. This different role of the Constitutional Court within the domestic legal order is reflected by the fact that a detainee may obtain a fresh judicial review of a detention order before the ordinary courts even while a previous set of proceedings before the Constitutional Court is still pending (see paragraph 42 above).

106. Moreover, the Court refers to the rationale behind its case-law, cited in paragraph 95 above, tolerating longer periods of review in proceedings before a second-instance court. Where a detention order was imposed by a court in a procedure offering appropriate guarantees of due process, subsequent proceedings are less concerned with arbitrariness, but provide additional guarantees aimed primarily at an evaluation of the appropriateness of continuing the detention (compare *Lebedev*, cited above, § 96). These considerations apply *a fortiori* to proceedings before a constitutional court as an additional instance charged with examining compliance with the fundamental right to liberty of a deprivation of liberty alone and during which fresh proceedings for judicial review before the ordinary courts can already be initiated.

107. The Court finds that the applicant, who replied to the submissions of the regional Government of Bavaria, of the President of the Federal Court of Justice and of the General Public Prosecutor dated 28, 24 and 25 November 2011 respectively by submissions dated 1 January 2012, cannot be said to have contributed considerably to the duration of the proceedings before the Federal Constitutional Court. Nevertheless, having regard to the special features of constitutional complaint proceedings, as described above in paragraph 105, to the complexity of the proceedings in the instant case before the Federal Constitutional Court and to the particular circumstances of this case, the Court considers that the requirement of speediness under Article 5 § 4 has been complied with.

108. There has accordingly been no violation of Article 5 § 4 of the Convention.

VI. ALLEGED LACK OF IMPARTIALITY OF JUDGE P.

109. The applicant complained that Judge P. had been biased against him in the main proceedings before the Regensburg Regional Court concerning the order for his retrospective preventive detention. He relied on

Article 6 § 1 of the Convention, which, in so far as relevant, reads as follows:

> "1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal ..."

110. The Government contested that argument.

A. Admissibility

111. The Court must determine at the outset whether, as claimed by the applicant, Article 6 § 1 is applicable to the proceedings at issue, which were aimed at determining whether the applicant's preventive detention should be ordered retrospectively under Articles 7 § 2 no. 1 and 105 § 1 of the Juvenile Courts Act on account of the danger that he posed (as manifested in a previous serious criminal offence) and of a mental disorder.

112. The Court notes, first, that the present proceedings must be distinguished from proceedings concerning judicial review of the continuation of an applicant's placement in preventive detention or in a psychiatric hospital previously ordered by a criminal court, which were at issue in previous applications against Germany. The latter proceedings, concerning the periodic review of the continued lawfulness of the applicants' previously ordered detention, fell to be examined under Article 5 § 4 of the Convention (see, for instance, *Homann v. Germany* (dec.), no. 12788/04, 9 May 2007, and *Puttrus v. Germany* (dec.), no. 1241/06, 24 March 2009). By contrast, the present proceedings do not concern the lawfulness of the ongoing detention of the applicant under Article 5 § 4, but the question of whether a retrospective preventive detention order should be made against him for the first time. Article 5 § 4 does not apply to such proceedings.

113. The Court further finds that the proceedings before the criminal courts concerning an order for the applicant's retrospective preventive detention no longer concerned "the determination ... of any criminal charge" within the meaning of Article 6 § 1. The applicant was convicted of murder by a final judgment in October 1999. The proceedings for the retrospective order of his preventive detention in view of that murder no longer involved a criminal charge against him in respect of a (new) offence and Article 6 § 1 is therefore not applicable under its criminal head (compare *Ganci v. Italy*, no. 41576/98, § 22, ECHR 2003-XI; *Homann*, cited above, with further references; and *B. v. Germany*, cited above, § 73).

114. However, the Court has repeatedly found that proceedings relating to a person's placement in a psychiatric wing of a prison or in a psychiatric hospital concerned, in substance, the lawfulness of a deprivation of liberty. The right to liberty being a "civil" right, Article 6 § 1 applied to such

proceedings under its civil limb (see, *inter alia*, *Aerts v. Belgium*, 30 July 1998, § 59, *Reports of Judgments and Decisions* 1998-V; *Laidin v. France (no. 2)*, no. 39282/98, §§ 75-76, 7 January 2003; and *Shulepova v. Russia*, no. 34449/03, § 59, 11 December 2008). The Court finds that the same considerations apply to the proceedings at issue here, which concerned the lawfulness of the retrospective order for the applicant's preventive detention and thus the determination of the applicant's civil right to liberty. Article 6 § 1 is therefore applicable under its civil head.

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

B. Merits

1. The parties' submissions

116. The applicant took the view that Judge P. had not been impartial in the proceedings at issue, as required by Articles 5 § 4 and 6 § 1 of the Convention. Judge P. had shown personal prejudice against him given that following the delivery of the Regional Court's judgment on 22 June 2009, that judge had warned the applicant's female former lawyer to be careful after the applicant's release not to find him standing in front of her door waiting to "thank" her in person. Judge P. had therefore indicated that he considered the applicant capable of committing a serious violent or sexual offence against his counsel.

117. The applicant stressed that Judge P. had not made his comment about the danger that applicant allegedly posed while giving reasons for the Regional Court's judgment of 22 June 2009, but within a context in which that danger had been completely irrelevant. There had been no reason for him to state that the applicant could possibly pose a threat to his lawyer in a conversation concerning the possibility of applicant being later transferred from preventive detention to a psychiatric hospital.

118. In the Government's submission, the proceedings at issue had complied with Article 5 § 4, taken in conjunction with Article 6 § 1 of the Convention. In particular, the remark that Judge P. had made to the applicant's then defence counsel had not raised objectively justified doubts about the judge's impartiality.

119. The Government conceded that the judge's impugned remark had to be understood as meaning that he considered the applicant to be dangerous. However, this assessment had been in line with the finding that the Regional Court, with Judge P.'s participation, had reached in its judgment of 22 June 2009 – just before Judge P. had made that remark. In that judgment, the court had ordered the applicant's retrospective preventive

detention in view of the high risk that the applicant would again commit criminal offences against life and sexual integrity. The remark did not, therefore, justify fears of a lack of impartiality on the part of Judge P. in the proceedings here at issue, in which the Regional Court, including Judge P., had delivered another judgment against the applicant on 3 August 2012 (more than three years later). At that time, moreover, the applicant's situation (in particular the legal situation) had changed as a result of the Federal Constitutional Court's judgment of 4 May 2011.

2. The Court's assessment

120. The Court reiterates that the existence of impartiality for the purposes of Article 6 § 1 must be determined according to (i) a subjective test, where regard must be had to the personal conviction and behaviour of a particular judge – that is to say whether the judge held any personal prejudice or bias in a given case; and (ii) an objective test, that is to say by ascertaining whether the tribunal itself and, among other aspects, its composition, offered sufficient guarantees to exclude any legitimate doubt in respect of its impartiality (see, *inter alia*, *Kleyn and Others v. the Netherlands* [GC], nos. 39343/98, 39651/98, 43147/98 and 46664/99, § 191, ECHR 2003-VI, and *Oleksandr Volkov v. Ukraine*, no. 21722/11, § 104, ECHR 2013).

121. As to the subjective test, the personal impartiality of a judge must be presumed until there is proof to the contrary (see *Morel v. France*, no. 34130/96, § 41, ECHR 2000-VI, and *Micallef v. Malta* [GC], no. 17056/06, § 94, ECHR 2009).

122. As to the objective test, it must be determined whether, quite apart from the judge's conduct, there are ascertainable facts which may raise doubts as to his impartiality. This implies that, in deciding whether in a given case there is a legitimate reason to fear that a particular judge or a body sitting as a bench lacks impartiality, the standpoint of the person concerned is important but not decisive. What is decisive is whether this fear can be held to be objectively justified (see *Wettstein v. Switzerland*, no. 33958/96, § 44, ECHR 2000-XII, and *Micallef*, cited above, § 96).

123. It cannot be stated as a general rule resulting from the obligation to be impartial that a superior court which sets aside an administrative or judicial decision is bound to send the case back to a different jurisdictional authority or to a differently composed branch of that authority (see *Ringeisen v. Austria*, 16 July 1971, § 97, Series A no. 13, and *Diennet v. France*, 26 September 1995, § 38, Series A no. 325-A).

124. As regards the alleged lack of impartiality of Judge P. in the present case, the Court observes that the domestic courts examined the case on the assumption that Judge P. could have made the statement in question (see paragraph 23 above) and it will therefore proceed on the basis of the same assumption. It further notes that Judge P. made the impugned statement in

the course of a confidential exchange between the judges of the Regional Court and the applicant's two defence lawyers. That discussion, which took place just after the Regional Court had delivered its first judgment ordering the applicant's retrospective preventive detention on 22 June 2009, concerned the applicant's possible future transfer to a psychiatric hospital. It appears uncontested between the parties, and the Court agrees with that interpretation, that the remark allegedly made by Judge P. within that context to the effect that the applicant's female counsel should be careful that the applicant would not visit and "thank" her when released was to be understood as meaning that Judge P. considered that there was a risk that the applicant would commit a serious violent or sexual offence against his lawyer (similar to the one he had been found guilty of) if released.

125. The Court would stress at the outset the importance of professional conduct in the discharge of judicial functions. In determining whether it was established in view of this alleged remark that Judge P. was personally prejudiced against the applicant (see the above-mentioned "subjective test"), the Court attaches decisive weight to the context in which Judge P.'s statement was made. Assuming, as the national courts did, that he actually made the alleged remark, he did so immediately after the Regional Court, of which he was a member, had ordered the applicant's retrospective preventive detention as it considered that the applicant was still suffering from violent sexual fantasies and that there was a high risk that the applicant would again commit serious sexual offences, including murder for sexual gratification, if released (see paragraph 8 above). In these circumstances, Judge P.'s alleged remark amounted in substance to a confirmation of the Regional Court's finding in the judgment it had just delivered. The Court therefore is not persuaded that, even assuming that the remark was made, there is sufficient evidence that Judge P. displayed hostility for personal reasons and was thus personally biased against the applicant.

126. The Court shall further examine whether Judge P.'s conduct may prompt objectively justified doubts as to his impartiality from the point of view of an external observer (see the above-mentioned "objective test"). It notes that in the proceedings at issue, the Regional Court, including Judge P., had to take a new decision on whether it was necessary to order the applicant's retrospective preventive detention after the Federal Constitutional Court had quashed its judgment of 22 June 2009 and remitted the case to the Regional Court.

127. The Court, having regard to its case-law (see paragraph 123 above), considers that the mere fact that Judge P. had already been a member of the bench which had made the first order for the applicant's retrospective preventive detention and moreover, following the quashing of that judgment, had been a member of the bench ordering the applicant's retrospective preventive detention anew on 3 August 2012, did not suffice to raise objectively justified doubts as to his impartiality.

128. The Court further finds that the fact that Judge P., in his impugned remark, allegedly confirmed that he considered the applicant to be dangerous on 22 June 2009 does not raise objectively justified doubts that the judge lacked impartiality in the proceedings at issue here. In these proceedings, which were terminated some three years after the impugned remark, the Regional Court heard fresh evidence in order to determine whether, at that time and under the law as modified by the Federal Constitutional Court's judgment reversing its previous case-law, the applicant's retrospective preventive detention had to be ordered. The impugned statement does not give any legitimate reason to fear that Judge P. would not have carried out that necessary fresh assessment of the level of danger that the applicant posed on the basis of the evidence produced and arguments heard in the new proceedings.

129. There has accordingly been no violation of Article 6 § 1 of the Convention.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Decides* to join the applications;

2. *Takes note* of the terms of the respondent Government's declaration under Articles 5 and 7 § 1 of the Convention relating to the applicant's preventive detention from 6 May 2011 to 20 June 2013 and of the modalities for ensuring compliance with the undertakings referred to therein;

3. *Decides* to strike that part of the applications out of its list of cases in accordance with Article 37 § 1 (c) of the Convention;

4. *Declares* the remainder of the applications admissible;

5. *Holds* that there has been no violation of Article 5 § 1 of the Convention on account of the applicant's preventive detention from 20 June 2013 onwards as a result of the impugned order for his retrospective preventive detention;

6. *Holds* that there has been no violation of Article 7 § 1 of the Convention on account of the applicant's preventive detention from 20 June 2013 onwards as a result of the impugned order for his retrospective preventive detention;

7. *Holds* that there has been no violation of Article 5 § 4 of the Convention on account of the duration of the proceedings for review of the applicant's provisional preventive detention;

8. *Holds* that there has been no violation of Article 6 § 1 of the Convention on account of the alleged lack of impartiality of Judge P. in the main proceedings concerning the order for the applicant's retrospective preventive detention.

Done in English, and notified in writing on 2 February 2017, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško	Erik Møse
Deputy Registrar	President