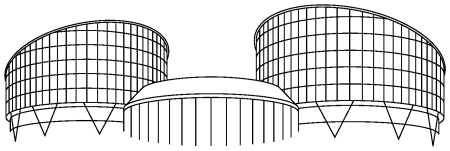

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF BERGMANN v. GERMANY

(Application no. 23279/14)

JUDGMENT

STRASBOURG

7 January 2016

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Bergmann v. Germany,

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

Ganna Yudkivska, *President,*
Angelika Nußberger,
Khanlar Hajiyev,
Faris Vehabović,
Yonko Grozev,
Síofra O'Leary,
Carlo Ranzoni, *judges,*
and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 1 December 2015,

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

PROCEDURE

1. The case originated in an application (no. 23279/14) 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 Karl-Heinz Bergmann ("the applicant"), on 18 March 2014.

2. The applicant, who had been granted legal aid, was represented by Mr A. Sommerfeld, a lawyer practising in Soest (Germany). 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 the retrospective prolongation of his preventive detention, in the Rosdorf centre for persons in preventive detention, beyond the former statutory ten-year maximum duration 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.

4. On 17 June 2014 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1943 and is currently detained in the centre for persons in preventive detention on the premises of Rosdorf Prison (hereinafter the "Rosdorf preventive detention centre").

A. The applicant's previous convictions, the order for his preventive detention and its enforcement

6. Between 1966 and 1984, the applicant was convicted by the criminal courts five times. He was found guilty of sexual assault of a seven-year-old girl and attempted rape of a fourteen-year-old girl, committed under the influence of alcohol, and of attempted sexual acts with a thirteen-year-old boy. He was found to have committed other unlawful acts, including arson and strangulating a ten-year-old boy during a burglary, but was not held criminally liable because he had been drunk. He was sentenced, in particular, to terms of imprisonment ranging from six months to ten years.

7. On 18 April 1986 the Hanover Regional Court convicted the applicant of two counts of attempted murder, combined with attempted rape in one case, and of two counts of dangerous assault. It sentenced him to fifteen years' imprisonment and ordered his preventive detention under Article 66 § 2 of the Criminal Code (see paragraph 46 below).

8. The Regional Court found that between 7 July 1985 and 3 October 1985, the applicant had stabbed a nineteen-year-old female cyclist in the back in a life-threatening manner for sexual gratification; had stabbed a male cyclist he had mistaken for a woman twice in the back and at the temple, again for sexual gratification; and had stabbed a twenty-three -year-old woman three times in a life-threatening manner in an attempt to rape her. He had committed those offences under the influence of alcohol in a park in Hanover. Still drunk, he had then broken into a house, strangulated a four-year-old girl and had injured her with a knife below the waist for sexual gratification. He was arrested on 9 October 1985.

9. Having consulted two medical experts, the Regional Court found that at the time of committing the offences, the applicant had been in a state of diminished criminal responsibility (Article 21 of the Criminal Code, see paragraph 62 below). He was diagnosed with sexual deviance, a personality disorder and psycho-organic syndrome, which was probably a consequence of his longstanding alcohol abuse. As long as the applicant did not drink alcohol, those abnormalities did not affect his criminal responsibility as he was able to control his aggression. However, combined with the consumption of alcohol, they led to his criminal responsibility being diminished.

10. The Regional Court decided to order the applicant's preventive detention under Article 66 § 2 of the Criminal Code. It considered that as a result of his personality disorder, the applicant had a propensity to commit serious offences which seriously harmed the victims both physically and mentally. As confirmed by the two medical experts, there was a high risk that if released, the applicant would commit further violent offences for sexual gratification under the influence of alcohol, similar to those of which he had been found guilty. He therefore presented a danger to the general public.

11. Lastly, the Regional Court decided not to order the applicant's detention in a psychiatric hospital under Article 63 of the Criminal Code (see paragraph 63 below). The court endorsed the experts' finding that the applicant's personality disorder could no longer be treated because his sexually deviant aggressive behaviour had lasted for decades and because he would be unable to pursue psychotherapy in view of his limited intellectual capacity. Public security could therefore be better safeguarded by placing the applicant in preventive detention.

12. The applicant served his full term of imprisonment, and on 12 June 2001 he was placed for the first time in preventive detention, for which he was held in a wing of Celle prison. By 11 June 2011 he had served ten years in preventive detention.

13. The courts responsible for the execution of sentences ordered the continuation of the applicant's preventive detention at regular intervals. In particular, the Lüneburg Regional Court ordered the continuation of his detention on 13 May 2011 and 5 October 2012.

B. The proceedings at issue

1. The decision of the Lüneburg Regional Court

14. On 26 July 2013 the Lüneburg Regional Court, sitting as a chamber responsible for the execution of sentences, ordered the continuation of the applicant's preventive detention. The Regional Court further ordered the Rosdorf Prison authorities to offer the applicant, within three months of the date on which its decision became final, a specific anti-hormonal therapy with medication aimed at reducing his sadistic fantasies and his libido, and thus his dangerousness. The court had consulted the Celle Prison authorities and the prosecution and had heard the applicant in person as well as his counsel, who represented him throughout the proceedings before the domestic courts.

15. The Regional Court considered that the requirements for ordering the continuation of the applicant's preventive detention laid down in the second sentence of section 316f(2) of the Introductory Act to the Criminal Code (see paragraph 53 below) had been met.

16. The Regional Court confirmed that the said transitional provision was applicable to the applicant's case. It noted that at the time of his last offence on 3 October 1985, the applicant's first placement in preventive detention could not exceed ten years. It was only following the entry into force of the Combating of Sexual Offences and Other Dangerous Offences Act on 31 January 1998 (see paragraph 51 below) that the courts responsible for the execution of sentences could prolong preventive detention without any maximum duration. The applicant therefore fell within the category of detainees whose preventive detention had been prolonged retrospectively, as defined by the Federal Constitutional Court in its judgment of 4 May 2011 (see paragraphs 66-72 below). The Regional Court further noted that the second sentence of section 316f(2) of the Introductory Act to the Criminal Code had regard to, and had taken up, the standards set up by the Federal Constitutional Court in the above-mentioned judgment for the continuation of retrospectively ordered or retrospectively prolonged preventive detention.

17. The Regional Court considered that, in accordance with section 316f(2) of the Introductory Act to the Criminal Code, the applicant suffered from a mental disorder for the purposes of section 1(1) of the Therapy Detention Act (see paragraph 64 below). It endorsed the findings made on that point by W., an external psychiatric expert it had consulted, in his report dated 8 June 2013. The expert had been obliged to draw up his report on the basis of the case files as the applicant had refused to be examined. Expert W. had confirmed that the applicant suffered from sexual sadism, a sexual deviance, and was addicted to alcohol, even though he had not drunk since being detained. The Regional Court stressed that expert W.'s assessment confirmed the findings made by a number of previous experts, notably those made in January and May 2011 by two experts who had diagnosed the applicant with a sexual preference disorder with sadomasochistic, fetishist and paedophiliac elements and with an alcohol addiction without current consumption of alcohol.

18. Furthermore, the Regional Court found that, as required by section 316f(2), second sentence, of the Introductory Act to the Criminal Code, there was still a very high risk that, owing to specific circumstances relating to his personality and his conduct, the applicant would if released commit the most serious sexually motivated violent offences, similar to those of which he had been convicted. Endorsing the findings of expert W., in accordance with the above-mentioned previous expert reports, the court noted that the applicant had admitted to his sadistic fantasies but had been unable to address them through therapy. In Celle Prison, he had stopped participating in any activities for persons in preventive detention. The Regional Court stressed that, in his assessment of the applicant's dangerousness, the expert had taken into consideration his advanced age of sixty-nine years. However, he had convincingly explained that the applicant's sexual deviance had not yet been considerably alleviated

thereby. Furthermore, his alcohol addiction had not yet been treated adequately. However, the consumption of alcohol further increased the high risk that the applicant would commit sexual or violent offences again if released.

19. The Regional Court considered that the prolongation of the preventive detention of the applicant, who had been detained for almost thirty years, was still proportionate in view of the considerable threat he posed to the public. It noted in that context that the applicant's detention in a supervised residence, which it had suggested in its previous decision, was not possible in practice.

20. As regards the order issued by the Regional Court, based on Article 67d § 2 of the Criminal Code, read in conjunction with Article 66c § 1 sub-paragraph 1 of the Criminal Code (see paragraphs 49 and 54 below), that the Rosdorf Prison authorities offer the applicant specific anti-hormonal therapy, the court found that that order was necessary to guarantee the applicant sufficient care while in preventive detention. Expert W. had stressed – as he had already done in 2012 – that the prison authorities must at least attempt to treat the applicant, who was willing to undergo treatment with medication. The anti-hormonal therapy to be offered had proved to diminish sadistic fantasies and the libido, and could therefore reduce the applicant's dangerousness.

2. The decision of the Celle Court of Appeal

21. On 1 August 2013 the applicant lodged an appeal against the Regional Court's decision, for which he submitted reasons on 14 August 2013. He argued, in particular, that his preventive detention, a penalty which had been prolonged retrospectively, failed to comply with the Convention.

22. On 2 September 2013 the Celle Court of Appeal dismissed the applicant's appeal. Endorsing the reasons given by the Regional Court, it confirmed that the requirements laid down in section 316f(2), second sentence, of the Introductory Act to the Criminal Code for ordering the continuation of the applicant's preventive detention had been met.

23. Taking into account the report submitted by expert W., the Court of Appeal held that the applicant was suffering from a mental disorder as defined in section 1(1) of the Therapy Detention Act. Referring to the Federal Constitutional Court's case-law (see paragraphs 73-76 below), it found that a mental disorder under that Act did not require that the disorder was such as to diminish or exclude the criminal responsibility of the person concerned for the purposes of Articles 20 and 21 of the Criminal Code (see paragraphs 61-62 below). Specific disorders affecting a person's personality, conduct, sexual preference and control of impulses were covered by the notion of "mental disorder" in section 1(1) of the Therapy Detention Act. The applicant's sexual sadism and his alcohol addiction

without current consumption of alcohol amounted to a mental disorder within the meaning of that provision.

24. Moreover, there was still a very high risk that, if released, the applicant would commit the most serious violent and sexual offences, similar to those of which he had been convicted, owing to specific circumstances relating to his personality and his conduct. The applicant's dangerousness had not been reduced through therapy; nor had he become less dangerous by his advancing age. He currently did not participate in any serious therapeutic activities and kept trivialising his offences. Moreover, expert W. had confirmed that his mental illness was difficult to treat. The Court of Appeal further endorsed the Regional Court's finding that the applicant's continued detention was still proportionate, despite the considerable overall length of his detention.

3. The decision of the Federal Constitutional Court

25. On 24 September 2013 the applicant lodged a constitutional complaint with the Federal Constitutional Court against the decisions of the Lüneburg Regional Court and the Celle Court of Appeal. He claimed that the order for the continuation of his preventive detention violated his constitutional right to liberty, read in conjunction with the constitutional right to protection of legitimate expectations guaranteed in a State governed by the rule of law.

26. The applicant argued that under the European Court of Human Rights' well-established case-law (he referred to *M. v. Germany*, no. 19359/04, ECHR 2009), the retrospective prolongation of a person's preventive detention – a penalty – beyond the former ten-year time-limit breached the prohibition on retrospective punishment under Article 7 of the Convention and did not comply with sub-paragraph (a) of Article 5 § 1 of the Convention. Moreover, his continuing preventive detention could not be justified under sub-paragraph (e) of Article 5 § 1 either. He did not suffer from a mental disease as required by that provision. In addition, the notion and scope of "mental disorder" under the applicable provisions of domestic law and in the domestic courts' case-law was unclear.

27. The applicant further stressed that the Regional Court had recommended his placement in a supervised residence. In those circumstances, his continued preventive detention on the premises of Rosdorf Prison was no longer proportionate. He conceded, however, that his detention in the new preventive detention centre on the premises of Rosdorf Prison complied with the constitutional requirement to differentiate between preventive detention and detention for serving a term of imprisonment.

28. On 29 October 2013 the Federal Constitutional Court declined to consider the applicant's constitutional complaint without giving reasons (file no. 2 BvR 2182/13). The decision was served on the applicant's counsel on 7 November 2013.

C. Parallel and further developments

29. On 5 December 2011 the Lüneburg Regional Court, civil section, ordered the applicant's placement in Moringen Psychiatric Hospital under the Therapy Detention Act. It found that the applicant suffered from a mental disorder for the purposes of section 1 of that Act and that there was a high risk that, if released, he would commit further serious offences. On 31 January 2012 the Celle Court of Appeal quashed that decision on the grounds that detention under the Therapy Detention Act could only be ordered once the preventive detention of the person concerned had been terminated by a final decision.

30. On 25 April 2014 the Göttingen Regional Court, in a decision reviewing the continuation of the applicant's preventive detention, ordered the continuation of the applicant's preventive detention. It noted that the applicant had repeatedly refused treatment with medication to diminish his libido.

31. On 15 January 2015 the Göttingen Regional Court, having consulted medical expert J., again ordered the continuation of the applicant's preventive detention under Article 67d § 3 of the Criminal Code, read in conjunction with section 316f(2), second sentence, of the Introductory Act to the Criminal Code (see paragraphs 51 and 53 below). On 24 April 2015 the Braunschweig Court of Appeal dismissed an appeal lodged by the applicant against the decision of the Regional Court.

D. The conditions of the applicant's preventive detention

1. Conditions prior to the period of detention at issue

32. Until 20 February 2012 the applicant had been held in preventive detention in a wing of Celle Prison. He had participated in therapy with a psychologist between 2005 and 2010, but had then stopped that therapy. He had refused to participate in the alcohol addiction treatment programme offered to him or any other treatment measures.

33. On 20 February 2012 the applicant was transferred with his consent to a wing of Celle Prison for persons in preventive detention where a transitional concept had been adopted. The aim was to improve the available treatment options in the light of the duty to differentiate preventive detention and detention for serving a term of imprisonment, by reference to the European Court of Human Rights' judgment in *M. v. Germany* (cited above) and the Federal Constitutional Court's judgment of 4 May 2011 (see paragraphs 66-72 below). The applicant participated in group therapy sessions run by a doctor and in a social skills training course. He stopped attending the group for addicts and refused to take medication to reduce his libido for fear of side effects.

2. Conditions of detention at the relevant time

34. Since 2 June 2013 the applicant has been detained in the new Rosdorf centre for persons in preventive detention, a separate building constructed on the premises of Rosdorf Prison.

35. The conception of preventive detention in the centre was developed in order to comply with the constitutional requirement to differentiate between preventive detention and imprisonment, as defined in the Federal Constitutional Court's judgment of 4 May 2011 (see paragraphs 67 and 70 below) and as further specified in the newly enacted Article 66c of the Criminal Code and in the Lower Saxony Preventive Detention Act (see paragraphs 54, 56-57 and 59-60 below).

36. Up to forty-five persons can be detained in the Rosdorf centre. Detainees are placed in apartment units measuring some 23 square metres containing two furnished rooms and a bathroom. With the exception of detainees posing a particular security risk, the detainees can move freely within the preventive detention building and on its outdoor premises from 6 a.m. to 9.45 p.m. They may furnish and paint their rooms, to which they have their own keys. The rooms are equipped with a controlled access to the internet including e-mail, telephone, television, CD and DVD player and radio. There are common rooms for residential groups consisting of some seven detainees, which include a kitchen, a dining room, a television room and rooms for games, handicraft work and exercise. The outdoor premises, measuring some 1,600 square metres, can be used for sports, recreation or gardening.

37. Persons in preventive detention in the Rosdorf centre may wear their own clothes. They can either take meals prepared by the centre's staff or prepare their own meals (in which case they receive an allowance for purchasing food in the centre's supermarket). Persons in preventive detention may work, but are not obliged to do so. They may receive visits regularly.

38. According to information furnished by the Government, at the relevant time the applicant was one of some thirty persons detained in the Rosdorf preventive detention centre. In order to comply with the duty to provide the necessary therapy and care and to motivate detainees to participate in the relevant therapies and treatment, the centre's staff comprised one psychiatrist, four psychologists, five social workers and twenty-five members of the general prison service. The staffing situation was similar to that of Moringen Psychiatric Hospital, situated in the same *Land* and where persons were detained under Article 63 of the Criminal Code.

39. Detainees are examined at the beginning of preventive detention in order to determine the necessary therapy and care. A personal treatment plan (*Vollzugsplan*) is then drawn up.

40. According to the personal treatment plan drawn up for the applicant by the Rosdorf centre on 28 November 2014, it was noted that in the past, from July 2013 until August 2014, the applicant participated in group sessions aimed at preventing detainees from relapsing into excessive alcohol consumption. He then stopped attending the meetings. He also regularly participated in group sessions at which detainees discussed their experiences during leave from detention. He stopped participating in those meetings in August 2014 too, arguing that the participants were not granted sufficient additional leave. In addition, he had motivation meetings with a psychologist fortnightly until March 2014, when he stopped attending the meetings, alleging that the psychologist lacked experience. He took part in weekly residential group meetings from June 2013 until February 2014, when he stopped attending the meetings, arguing that his treatment plan did not meet his expectations. He did not take part in any structured leisure activities and spent most of his day alone watching television. He declined repeated invitations to take part in group sessions of the treatment programme for offenders. Thus, as from August 2014 the applicant no longer participated in any therapy measures. He proved reliable during leave from the detention centre under escort on a number of occasions.

41. According to the Rosdorf centre's treatment plan for the applicant of 28 November 2014 and an internal note from a staff member of the centre, the applicant has refused regular and repeated offers to start a treatment with medication to reduce his libido, which had been recommended by expert W. in 2013, for fear of side effects. In December 2014 he showed willing for the first time to take up such treatment.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Provisions on preventive detention and its enforcement

1. General legal framework

42. 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, under the twin-track system of sanctions in German criminal law and the issuing, review and practical implementation 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).

43. The provisions on preventive detention, notably in the Criminal Code, have been amended since then, in particular, by the Act on establishment, at federal level, of a difference between the provisions on preventive detention and those on prison sentences (*Gesetz zur bundesrechtlichen Umsetzung des Abstandsgebotes im Recht der*

Sicherungsverwahrung, hereinafter the "Preventive Detention (Distinction) Act") of 5 December 2012, which entered into force on 1 June 2013. In that Act, the legislator adopted new rules on the enforcement of preventive detention orders and on the execution of prior prison sentences, having regard to the requirements laid down in the Federal Constitutional Court's leading judgment on preventive detention of 4 May 2011 (see paragraphs 66-72 below).

44. The provisions referred to in the present case provide as follows.

2. The preventive detention order issued by the sentencing court

45. When convicting an offender, the sentencing court may, under certain circumstances, order his preventive detention (a so-called measure of correction and prevention) in addition to his prison sentence (a penalty), if the offender has been shown to be a danger to the public (Article 66 of the Criminal Code).

46. In particular, the sentencing court could order preventive detention in addition to a penalty under Article 66 § 2 of the Criminal Code, as in force at the relevant time, if the person concerned had committed three intentional offences, each incurring a term of imprisonment of at least one year and if he was sentenced to at least three years' imprisonment for committing one or more of those offences. In addition, a comprehensive assessment of the person and his acts had to reveal that, owing to his propensity to commit serious offences, notably those which seriously harm their victims physically or mentally or which cause serious economic damage, the person presented a danger to the general public. It was not necessary under that provision that the perpetrator had been previously convicted or detained.

3. Judicial review of preventive detention

47. Pursuant to Article 67e of the Criminal Code, the court (that is, the chamber responsible for the execution of sentences) may review at any time whether the preventive detention should be suspended and a measure of probation applied or whether it should be terminated. The court is obliged to carry out such a review within fixed time-limits (paragraph 1 of Article 67e).

48. Under Article 67e § 2 of the Criminal Code, as in force since 1 June 2013, the time-limit for review of preventive detention was one year; the time-limit is reduced to nine months once the person has been in preventive detention for ten years.

4. Duration of preventive detention

(a) General provision

49. Article 67d § 2 of the Criminal Code provides that if there is no provision for a maximum duration or if the time-limit has not yet expired, the court will suspend on probation further enforcement of the detention order as soon as it is to be expected that the person concerned will not commit any further unlawful acts after release. Since 1 June 2013, Article 67d § 2 provides, in addition, that the court will also suspend on probation the further enforcement of the detention order if it finds that continuation of the detention would be disproportionate because the person concerned had not been offered, within a time-limit fixed by the court of six months at the most, sufficient care within the meaning of Article 66c § 1 sub-paragraph 1 of the Criminal Code (see paragraph 54 below). If sufficient care has not been offered, it is for the court to fix that time-limit when it reviews the continuation of the detention and to specify the measures which have to be offered. Suspension of the detention automatically entails supervision of the conduct of the person concerned.

(b) Provision in force prior to 31 January 1998

50. Under Article 67d § 1 of the Criminal Code, as in force prior to 31 January 1998, the first period of preventive detention could not exceed ten years. If the maximum duration had expired, the detainee was to be released (Article 67d § 3 of the Criminal Code).

(c) Amended provision in force since 31 January 1998

51. Article 67d of the Criminal Code was amended by the Combating of Sexual Offences and Other Dangerous Offences Act of 26 January 1998, which entered into force on 31 January 1998. Article 67d § 3, as amended and still in force, provides that if a person has spent ten years in preventive detention, the court will declare the measure terminated (only) if there is no danger that the detainee will, owing to his criminal tendencies, commit serious offences resulting in considerable psychological or physical harm to the victims. Termination automatically entails supervision of the offender's conduct. The former maximum duration of a first period of preventive detention was abolished. Pursuant to section 1a (3) of the Introductory Act to the Criminal Code, the amended version of Article 67d § 3 of the Criminal Code was to be applied without any restriction *ratione temporis*.

(d) Transitional provision

52. Section 316f of the Introductory Act to the Criminal Code, which entered into force on 1 June 2013, contains a transitional provision introduced by the Preventive Detention (Distinction) Act.

53. Section 316f(1) of the Introductory Act provides that the provisions on preventive detention in the Criminal Code, as in force since 1 June 2013, are applicable if at least one of the offences owing to which preventive detention is to be ordered was committed after 31 May 2013. In all other cases, as a rule, the provisions on preventive detention in force until 31 May 2013 have to be applied (first sentence of section 316f(2) of the Introductory Act to the Criminal Code). However, the imposition of, or order for the continuation of preventive detention on the basis of a legislative provision which had not yet entered into force at the time of the last offence at issue, or the imposition of, or order for the continuation of retrospective preventive detention is only authorised in the following circumstances. The person concerned must be suffering from a mental disorder and, owing to specific circumstances relating to his personality or conduct, it must be highly likely that he will commit a serious crime of violence or sexual offence as a result of his mental disorder (second sentence of section 316f(2) of the Introductory Act to the Criminal Code). If those additional requirements for the continuation of preventive detention are no longer met, the court declares the preventive detention terminated; supervision of the offender's conduct starts when the offender is released from detention (fourth sentence of section 316f(2) of said Act).

5. Practical implementation of preventive detention

54. Article 66c of the Criminal Code provides for the manner in which preventive detention and prior terms of imprisonment are implemented. It was introduced by the Preventive Detention (Distinction) Act (and thus entered into force on 1 June 2013). Article 66c, in so far as relevant, provides as follows:

> "1. Detainees held in preventive detention are placed in institutions which
>
> (1) offer the detainee, on the basis of a comprehensive examination and a personal treatment plan which is to be updated regularly, care that is
>
> (a) individual and intensive as well as suitable for raising and furthering his readiness to participate in particular psychiatric, psychotherapeutic or sociotherapeutic treatment, tailored to the detainee's needs if standardised offers do not have prospects of success, and
>
> (b) aimed at reducing the threat he poses to the public to such an extent that the measure may be suspended and probation granted or that it may be terminated as soon as possible,
>
> (2) guarantee a form of detention that
>
> (a) places as small a burden as possible on the detainee, complies with the requirements for care under sub-paragraph 1 and is assimilated to general living conditions in so far as security concerns allow, and
>
> (b) is separate from detainees serving terms of imprisonment in special buildings or departments in so far as the treatment within the meaning of sub-paragraph 1 does not exceptionally require otherwise, and

(3) in order to attain the aim laid down in sub-paragraph 1 (b)

(a) grant relaxations in the enforcement of the detention and make preparations for release unless there are compelling reasons not to do so, in particular if there are concrete facts constituting a risk that the detainee might abscond or abuse the measures in order to commit considerable offences, and

(b) allow for follow-up care once at liberty in close cooperation with public or private institutions."

55. Under section 316f(3) of the Introductory Act to the Criminal Code, the new Article 66c of the Criminal Code is also applicable to persons who committed offence(s) with regard to which preventive detention was ordered prior to 31 May 2013.

56. The manner in which preventive detention is implemented is regulated in more detail by the different *Länder*. In Lower Saxony, where the applicant has been detained, the Parliament of the *Land* has adopted an Act reforming the implementation of preventive detention in Lower Saxony (*Gesetz zur Neuregelung des Vollzuges der Unterbringung in der Sicherungsverwahrung in Niedersachsen,* hereinafter the "Lower Saxony Preventive Detention Act") of 12 December 2012, which entered into force on 1 June 2013. It contains a total of 126 sections.

57. Section 2 of the Lower Saxony Preventive Detention Act defines the aims of preventive detention. Pursuant to section 2(1), preventive detention aims at reducing the risks to the public posed by the detainee to such an extent that the preventive detention can be suspended and probation granted, or can be terminated as soon as possible. Persons in preventive detention must learn to live a socially responsible life without reoffending (section 2(2)). Preventive detention equally serves to protect the public from further serious offences (section 2(3)).

58. In comparison, section 5 of the Lower Saxony Execution of Sentences Act (*Niedersächsisches Justizvollzugsgesetz*), which governs, in particular, the execution of prison sentences in Lower Saxony, deals with the purpose of prison sentences. It provides that during their prison sentence detainees must learn to lead a socially responsible life without reoffending (first sentence). At the same time imprisonment is aimed at protecting the public from further offences (second sentence).

59. Section 3 of the Lower Saxony Preventive Detention Act provides, in particular, that preventive detention must promote individual liberty and focus on the therapy required by the detainees (section 3(1)). Life in preventive detention must be adapted to general living conditions in so far as detainees are not subjected to the restrictions of their liberty provided for by the Act (section 3(2)).

60. Section 4(1) of the Lower Saxony Preventive Detention Act stipulates that detainees are to be offered without delay the necessary measures of care and other measures necessary to attain the aims laid down in section 2(1) and (2) and are to be continuously encouraged to participate

in reaching those aims. Measures of care comprise, in particular, psychiatry, psychotherapy and sociotherapy, which are to be modernised if standard therapies are insufficient or have no prospects of success (section 4(2)).

B. Provisions on criminal liability

61. Article 20 of the Criminal Code contains rules on the lack of criminal responsibility owing to mental disorders. It provides that a person who, having committed an offence, is incapable of appreciating the wrongfulness of the act or of acting in accordance with such appreciation owing to a pathological mental disorder, a profound consciousness disorder, a mental deficiency or any other serious mental abnormality must be deemed to have acted without guilt.

62. Article 21 of the Criminal Code governs diminished criminal responsibility. It provides that punishment may be mitigated if the perpetrator's capacity to appreciate the wrongfulness of the act or to act in accordance with such appreciation is substantially diminished upon commission of the act owing to one of the reasons indicated in Article 20 of the Criminal Code.

C. Detention of mentally ill persons

63. The detention of mentally ill persons is provided for, primarily, in the Criminal Code as a measure of correction and prevention if the detention is ordered in relation to an unlawful act committed by the person concerned. Article 63 of the Criminal Code provides that if someone commits an unlawful act without criminal responsibility or with diminished criminal responsibility, the court will order his placement – without any maximum duration – in a psychiatric hospital. A comprehensive assessment of the defendant and his acts must have revealed that, as a result of his condition, he is likely to commit further serious unlawful acts and that he is therefore a danger to the general public.

64. Furthermore, on 1 January 2011, following the Court's judgment in the case of *M. v. Germany* (cited above), the Act on Therapy and Detention of Mentally Disturbed Violent Offenders (*Gesetz zur Therapierung und Unterbringung psychisch gestörter Gewalttäter*, the "Therapy Detention Act") entered into force. Under sections 1(1) and 4 of that Act, the civil sections of the Regional Court may order the placement in a suitable institution of persons who may no longer be kept in preventive detention in view of the prohibition on retrospective aggravations in relation to preventive detention. Such detention for therapy may be ordered if the person concerned has been found guilty by final judgment of certain serious offences for which preventive detention may be ordered under Article 66 § 3 of the Criminal Code. The person must also be suffering

from a mental disorder as a result of which it is highly likely that, if at liberty, he would considerably impair the life, physical integrity, personal liberty or sexual self-determination of another person. The person's detention must be deemed necessary for the protection of the public.

65. Under section 2(1) of the Therapy Detention Act, institutions suitable for "therapy detention" are only those that can guarantee, by the medical care and therapy on offer, adequate treatment of the mental disorder of the person concerned on the basis of an individualised treatment plan aimed at keeping the confinement to a minimum duration (subsection (1)). Furthermore, the institutions concerned must allow detention to be effected in the least burdensome manner possible for the detainee, taking into account therapeutic aspects and the interests of public security (subsection (2)). They must be separated, geographically and organisationally, from institutions in which terms of imprisonment are enforced (subsection (3)). Under section 2(2) of the Therapy Detention Act, as in force since 1 June 2013, institutions within the meaning of Article 66c § 1 of the Criminal Code are also suitable for therapy detention if they comply with the requirements of section 2(1)subsections (1) and (2) of that Act.

D. Recent case-law of the Federal Constitutional Court

1. The Federal Constitutional Court's leading judgment on preventive detention of 4 May 2011

66. 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.

67. 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 differentiating between preventive detention and imprisonment (*Abstandsgebot*). These provisions included, in

particular, Article 66 of the Criminal Code as in force since 27 December 2003.

68. The Federal Constitutional Court held 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, the courts responsible for the execution of sentences had to examine without delay whether the persons concerned, owing to specific circumstances relating to their personality 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 143-56 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 applied in the transitional period subject to a strict review of proportionality; as a general rule, proportionality was respected where there was a danger of the person concerned committing serious crimes of violence or sexual offences if released.

69. In its judgment, the Federal Constitutional Court stressed that the fact that the Constitution stood above the Convention in the domestic hierarchy of norms was not an obstacle to an international and European dialogue between the courts, but was, on the contrary, its normative basis in view of the fact that the Constitution was to be interpreted in a manner that was open to public international law (*völkerrechtsfreundliche Auslegung*; ibid., § 89). It stressed that, in line with that openness of the Constitution to public international law, it attempted to avoid breaches of the Convention in the interpretation of the Constitution (ibid., §§ 82 and 89).

70. 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 et seq. of the Federal Constitutional Court's judgment). It stressed, in particular, that the constitutional requirement to differentiate between preventive detention and 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 had no prospects of success (see § 113 of the Federal Constitutional Court's judgment).

71. The Federal Constitutional Court confirmed its constant case-law that the absolute ban on the retrospective application of criminal law under Article 103 § 2 of the Basic Law did not cover preventive detention. The latter was a measure of correction and prevention, which was not aimed at punishing criminal guilt, but was a purely preventive measure aimed at protecting the public from a dangerous offender (see §§ 100-01 and 141-42 of the Federal Constitutional Court's judgment). The Federal Constitutional Court noted that the European Court of Human Rights had considered preventive detention to be a "penalty" within the meaning of Article 7 § 1 of the Convention (ibid., §§ 102 and 140). It considered that it was not necessary schematically to align the meaning of the constitutional notion of "penalty" with that under the Convention. Recourse should rather be had to the value judgments (*Wertungen*) under the Convention in a result-oriented manner in order to prevent breaches of public international law (ibid., §§ 91 and 141 et seq.).

72. Taking account of the constitutional right to protection of legitimate expectations in a State governed by the rule of law and the value judgments of Article 5 and Article 7 of the Convention, the prolongation of the complainants' preventive detention beyond the former ten-year maximum period, in particular, was only constitutional in practice if, *inter alia*, the requirements of Article 5 § 1 (e) were met (ibid., §§ 143 and 151-56). The Federal Constitutional Court expressly referred in that context to the case-law of the European Court of Human Rights, according to which the detention of a person as a mental-health patient would only be lawful for the purposes of Article 5 § 1 (e) of the Convention if effected in a hospital, clinic or other appropriate institution (ibid., § 155).

2. The decision of 15 September 2011

73. In a decision of 15 September 2011 (file no. 2 BvR 1516/11), the Federal Constitutional Court, referring to its judgment of 4 May 2011 (cited above), reiterated that the prolongation of a person's preventive detention beyond the former ten-year time-limit applicable at the time of the person's conviction was only possible if the requirements of Article 5 § 1 (e) of the Convention were met.

74. The Federal Constitutional Court further clarified that the notion of persons "of unsound mind" in Article 5 § 1 (e) of the Convention had been taken up by the legislator in section 1(1) of the Therapy Detention Act. In that Act, the legislator had created a new category of "mental disorder" which did not require that the disorder was such as to diminish or exclude the criminal responsibility of the person concerned for the purposes of Articles 20 and 21 of the Criminal Code. Specific disorders affecting a person's personality, conduct, sexual preference and control of impulses

were covered by the notion of "mental disorder" in section 1(1) of the Therapy Detention Act. This notion therefore was not limited to mental illnesses which could be treated clinically, but extended also to dissocial personality disorders.

3. The decision of 11 July 2013 concerning the compatibility with the Basic Law of section 1(1) of the Therapy Detention Act

75. By a decision dated 11 July 2013 the Federal Constitutional Court found that section 1(1) of the Therapy Detention Act (see above) was compatible with the Basic Law on condition that it was interpreted in the following restrictive manner (file no. 2 BvR 2302/11 and 2 BvR 1279/12). Detention or its prolongation under that Act could only be ordered if there was a difference between such detention and imprisonment. Furthermore, there had to be a high risk that if released, the person concerned, owing to specific circumstances relating to his personality or conduct, would commit the most serious crimes of violence or sexual offences. In addition, the requirements of Article 5 § 1 (e) of the Convention had to be met. The principles developed in respect of preventive detention which had been ordered or prolonged retrospectively (see above) thus equally applied to detention under the Therapy Detention Act.

76. The Federal Constitutional Court reiterated in that context that in view of the standards flowing from Article 5 § 1 (e), the notion of "mental disorder" in section 1(1) of the Therapy Detention Act did not require that the disorder was so serious as to diminish or exclude the criminal responsibility of the person concerned for the purposes of Articles 20 and 21 of the Criminal Code. The court further referred to the Court's case-law relating to Article 5 § 1 (e) (in particular, to *Kronfeldner v. Germany*, no. 21906/09, 19 January 2012, and *B v. Germany*, no. 61272/09, 19 April 2012) and found that the detention of a person for being "of unsound mind" could be justified provided that the detention was effected in an appropriate psychiatric institution, which, in turn, necessitated a corresponding intensity of the mental disorder.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

77. The applicant complained that the court order in the proceedings at issue extending his preventive detention beyond the period of ten years, which was the maximum for such detention under the legal provisions applicable at the time of his offences and conviction, had breached his right

to liberty. He relied on Article 5 § 1 of the Convention, which, in so far as relevant, reads as follows:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (a) the lawful detention of a person after conviction by a competent court;
>
> ...
>
> (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants; ..."

78. The Government contested that argument.

A. Admissibility

79. The Government submitted that the applicant had failed to exhaust domestic remedies in respect of the extension of his preventive detention by the domestic courts prior to the Regional Court's impugned decision of 26 July 2013. The applicant did not comment on that point.

80. The Court observes that in his application, the applicant complained (only) about the domestic court decisions prolonging his preventive detention in the proceedings at issue, that is, the decision of the Lüneburg Regional Court of 26 July 2013, upheld by the Celle Court of Appeal on 2 September 2013 and by the Federal Constitutional Court on 29 October 2013 (see paragraphs 14-28 above). No objection of non-exhaustion of domestic remedies has been raised in this respect by the Government.

81. 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

82. In the applicant's submission, his preventive detention failed to comply with Article 5 § 1 of the Convention. In particular, under the Court's case-law (he referred to *M. v. Germany*, cited above), his detention could not be justified under sub-paragraph (a) of that provision. He submitted that it could equally not be justified under sub-paragraph (e) thereof.

83. The applicant argued that he was not "of unsound mind" within the meaning of Article 5 § 1 (e). This term covered only mentally ill persons who could not be held criminally responsible for their acts, whereas he did

not suffer from a mental disease. Relying on the Court's findings in the case of *Glien v. Germany* (no. 7345/12, § 87, 28 November 2013), he submitted that persons who suffered only from a personality disorder were, as a rule, not covered by that notion. The domestic courts' interpretation of the term "mental disorder" was too wide in this respect (he referred, in particular, to the Federal Constitutional Court's decision of 15 September 2011, file no. 2 BvR 1516/11, see paragraphs 73-74 above).

84. The applicant further submitted that justifying his detention as that of a person "of unsound mind" would amount to authorising his preventive detention beyond the former statutory ten-year time-limit, contrary to the Court's findings in the case of *M. v. Germany* (cited above), without any change in the circumstances. The order for his preventive detention by the sentencing court had been based only on the threat he posed to the public. Whether or not his dangerousness was the result of a mental disorder had been irrelevant for the court. Detaining him now as a person "of unsound mind" was therefore an obvious circumvention of the Court's case-law, under which his preventive detention was no longer justified under Article 5 § 1 (a).

85. Moreover, in the applicant's submission, the conditions of his detention in the preventive detention centre on the premises of Rosdorf Prison were the same as those in Celle Prison, where he had previously been detained.

86. Furthermore, the applicant argued that in view of his advancing age, the continuation of his preventive detention – he had already been in detention since 2001 – was disproportionate.

(b) The Government

87. In the Government's submission, the applicant's preventive detention complied with Article 5 § 1 of the Convention. It had been justified under sub-paragraph (e) of that provision.

88. In the Government's view, the applicant was "of unsound mind" for the purposes of Article 5 § 1 (e) of the Convention as defined by the Court in its judgment in the case of *Winterwerp v. the Netherlands* (24 October 1979, § 37, Series A no. 33). The applicant was also an alcoholic and the danger he represented to the public due to his mental disorders was exacerbated whenever he consumed alcohol.

89. The Government argued that the domestic courts had found the applicant to be suffering from a mental disorder as required by the second sentence of section 316f(2) of the Introductory Act to the Criminal Code, interpreted in the light of Article 5 § 1 (e) of the Convention. Having consulted a medical expert, W., and having taken account of several previous expert reports which had reached the same conclusion, the courts had found the applicant to be suffering from a sexual deviance, sexual

sadism, since his conviction in 1986 and to be an alcoholic. Those disorders had to be classified as illnesses in the medical sense.

90. Moreover, at the time of the applicant's conviction, the sentencing court had considered the applicant's mental disorders as being so serious as to diminish his criminal liability for the purposes of Article 21 of the Criminal Code. Due to his sexual preference disorder alone, there was a high risk that if released, he would commit the most serious violent and sexual offences, similar to those of which he had been found guilty. As a result of his alcohol abuse, the danger resulting from his sexual preference disorder was exacerbated. His continued preventive detention was therefore necessary in order to protect the public.

91. In the Government's submission, the applicant was also detained in an institution suitable for mental-health patients and alcoholics. The Rosdorf preventive detention centre had met this requirement at least since June 2013. The forms of treatment available in the centre were comparable to those available in psychiatric clinics, and each detainee was offered individualised treatment.

92. The Government explained that the experts in the centre's psychology and social service held individual meetings with the detainees in order to encourage them to undergo treatment. There were group therapy measures for sex offenders and violent offenders, and relapse prevention training for offenders with addiction problems. It was also possible to treat sex offenders with medication to reduce their libido. Detainees could be offered one-to-one psychotherapy and leave from detention. Moreover, there were therapeutic, sports pedagogic and leisure-time activities to improve detainees' communication skills and to motivate them to undergo therapy.

93. In the Government's view, as shown in detail by the Rosdorf centre's treatment plan for the applicant (see paragraphs 39-41 above), all therapeutic measures which were suitable for the applicant in the view of the medical experts who had examined him had been available in Rosdorf and had been offered to him. These comprised, in particular, treatment with medication to reduce the libido, therapy to address the applicant's sexual sadism and addiction therapy to overcome his alcoholism. The centre staff had managed to get the applicant to participate in group therapy to prevent him from relapsing into excessive alcohol consumption. However, he still refused to take decisive steps, notably by starting the repeatedly offered treatment with medication to reduce his libido and by taking part in the treatment programme for sex offenders.

94. The Government further argued that the applicant's preventive detention was the least intrusive way of protecting the public. The experts consulted by the domestic courts had confirmed that the applicant's dangerousness had not diminished as a result of his age because, in order to commit his offences, he had used force against considerably weaker women

or children. Moreover, the applicant's transfer to a supervised residence run as a closed facility would not have constituted a less intrusive measure as it would equally have entailed deprivation of liberty.

2. The Court's assessment

(a) Recapitulation of the relevant principles

95. The Court reiterates that Article 5 § 1 sub-paragraphs (a) to (f) contain an exhaustive list of permissible grounds for deprivation of liberty, and no deprivation of liberty will be lawful unless it falls within one of those grounds (see *Del Rio Prada v. Spain* [GC], no. 42750/09, § 123, 21 October 2013 with further references). The applicability of one ground does not necessarily preclude that of another; detention may, depending on the circumstances, be justified under more than one sub-paragraph (see *Kharin v. Russia*, no. 37345/03, § 31, 3 February 2011 with further references). Only a narrow interpretation of the exhaustive list of permissible grounds for deprivation of liberty is consistent with the aim of Article 5, namely to ensure that no one is arbitrarily deprived of his liberty (see, among many others, *Winterwerp v. the Netherlands*, 24 October 1979, § 37, Series A no. 33; and *Shimovolos v. Russia*, no. 30194/09, § 51, 21 June 2011).

96. The Court further reiterates that the term "persons of unsound mind" in sub-paragraph (e) of Article 5 § 1 does not lend itself to precise definition since its meaning is continually evolving as research in psychiatry progresses (see *Winterwerp*, cited above, § 37, and *Rakevich v. Russia*, no. 58973/00, § 26, 28 October 2003). An individual cannot be deprived of his liberty as being of "unsound mind" unless the following three minimum conditions are satisfied: firstly, he must reliably be shown to be of unsound mind, that is, a true mental disorder must be established before a competent authority on the basis of objective medical expertise; secondly, the mental disorder must be of a kind or degree warranting compulsory confinement; thirdly, the validity of continued confinement depends upon the persistence of such a disorder (see *Winterwerp*, cited above, § 39, and *Stanev v. Bulgaria* [GC], no. 36760/06, § 145, ECHR 2012).

97. A mental disorder may be considered as being of a degree warranting compulsory confinement if it is found that the confinement of the person concerned is necessary as the person needs therapy, medication or other clinical treatment to cure or alleviate his condition, but also where the person needs control and supervision to prevent him from, for example, causing harm to himself or other persons (compare, for example, *Witold Litwa v. Poland*, no. 26629/95, § 60, ECHR 2000-III, and *Hutchison Reid v. the United Kingdom*, no. 50272/99, § 52, ECHR 2003-IV).

98. In deciding whether an individual should be detained as a person "of unsound mind", the national authorities are to be recognised as having a certain discretion, in particular on the merits of clinical diagnoses, since it is in the first place for the national authorities to evaluate the evidence adduced before them in a particular case; the Court's task is to review under the Convention the decisions of those authorities (see *Winterwerp*, cited above, § 40; *X v. the United Kingdom*, 5 November 1981, § 43, Series A no. 46; *H.L. v. the United Kingdom*, no. 45508/99, § 98, ECHR 2004-IX; and *S. v. Germany*, no. 3300/10, § 81, 28 June 2012). The relevant time at which a person must be reliably established to be of unsound mind, for the requirements of sub-paragraph (e) of Article 5 § 1, is the date of the adoption of the measure depriving that person of his liberty as a result of that condition (compare *Luberti v. Italy*, 23 February 1984, § 28, Series A no. 75, and *B v. Germany*, no. 61272/09, § 68, 19 April 2012).

99. Furthermore, there must be some relationship between the grounds of permitted deprivation of liberty relied on and the place and conditions of detention. In principle, the "detention" of a person as a mental-health patient will only be "lawful" for the purposes of sub-paragraph (e) of Article 5 § 1 if effected in a hospital, clinic or other appropriate institution (see *Hutchison Reid*, cited above, § 49; *Brand v. the Netherlands*, no. 49902/99, § 62, 11 May 2004; *Kallweit v. Germany*, no. 17792/07, § 46, 13 January 2011; and *Glien v. Germany*, no. 7345/12, § 75, 28 November 2013 with further references).

100. As to the meaning to be given to the term "alcoholics" in the light of the object and purpose of Article 5 § 1 (e) of the Convention, the Court reiterates the following. The object and purpose of this provision cannot be interpreted as only allowing the detention of "alcoholics" in the limited sense of persons in a clinical state of "alcoholism". Persons who are not medically diagnosed as "alcoholics", but whose conduct and behaviour under the influence of alcohol pose a threat to public order or themselves, can be taken into custody for the protection of the public or their own interests, such as their health or personal safety. It does not, however, permit the detention of an individual merely because of his alcohol intake (see *Witold Litwa*, cited above, §§ 61-62; *Hilda Hafsteinsdóttir v. Iceland*, no. 40905/98, § 42, 8 June 2004; *Kharin*, cited above, § 34; and *S. v. Germany*, cited above, § 83).

101. Any deprivation of liberty must, in addition to falling within one of the exceptions set out in sub-paragraphs (a) to (f) of Article 5 § 1, be "lawful". Where the "lawfulness" of detention is in issue, including the question whether "a procedure prescribed by law" has been followed, the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules thereof (see, among many other authorities, *Erkalo v. the Netherlands*, 2 September 1998, § 52, *Reports* 1998-VI; *Baranowski v. Poland*, no. 28358/95, § 50,

ECHR 2000-III; and *Saadi v. the United Kingdom* [GC], no. 13229/03, § 67, ECHR 2008).

102. Compliance with national law is not, however, sufficient: Article 5 § 1 requires in addition that any deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness (see, among many other authorities, *Winterwerp*, cited above, §§ 37 and 45; *Saadi*, cited above, § 67; and *Reiner v. Germany*, no. 28527/08, § 83, 19 January 2012).

(b) Application of these principles to the present case

(i) Grounds for deprivation of liberty

103. The Court is called upon to determine whether the applicant's preventive detention in the period at issue was justified under any of the sub-paragraphs (a) to (f) of Article 5 § 1.

104. The Court observes at the outset that the applicant was held in preventive detention, which had been ordered by the sentencing Hanover Regional Court in 1986 together with his criminal conviction, beyond the statutory maximum duration of ten years applicable at the time of his offences and conviction (Article 67d § 1 of the Criminal Code as then in force, see paragraph 50 above). Having regard to its findings in the case of *M. v. Germany* (cited above, §§ 97-101), the Court considers that the applicant's preventive detention therefore could not be justified under sub-paragraph (a) of Article 5 § 1. It was no longer detention "after conviction" by a competent court for lack of a sufficient causal connection between the applicant's conviction in 1986 and his continued deprivation of liberty.

105. The Court must therefore examine whether, as submitted by the Government and as contested by the applicant, the applicant's preventive detention was justified under sub-paragraph (e) of Article 5 § 1.

(α) Detention of a person "of unsound mind"/of an "alcoholic"

106. The Court will initially examine whether the applicant's detention at issue could be justified as detention of a person "of unsound mind" for the purposes of Article 5 § 1 (e). Under the Court's well-established case-law (see paragraphs 96 and 98 above), this requires, in the first place, that, at the time of the decision ordering the continuation of his preventive detention, the applicant was reliably shown to be of unsound mind. In other words, a true mental disorder must have been established before a competent authority on the basis of objective medical expertise.

107. The Court notes that the Lüneburg Regional Court and the Celle Court of Appeal endorsed the expert's finding that the applicant suffered from sexual sadism and found that this was a mental disorder for the purposes of the second sentence of section 316f(2) of the Introductory Act

to the Criminal Code and section 1(1) of the Therapy Detention Act (see paragraphs 17 and 23 above).

108. In determining whether the domestic courts can be said to have established thereby that the applicant suffered from a mental disorder for the purposes of Article 5 § 1 (e), the Court observes that under the new section 316f(2), second sentence, of the Introductory Act to the Criminal Code, the courts responsible for the execution of sentences could order the continuation of the applicant's preventive detention only if, among other requirements, they found him to be suffering from a mental disorder. That requirement had in fact been adopted following the stricter standards set by the Federal Constitutional Court in its judgment of 4 May 2011 for retrospectively prolonged preventive detention to continue (see paragraph 68 above).

109. The domestic courts were therefore no longer only called upon to determine under Article 67d § 3 of the Criminal Code (see paragraph 51 above) whether there was a risk that if released, the person concerned would reoffend owing to his criminal tendencies, irrespective of whether this was a result of his mental condition or not (see in this respect *Kallweit*, cited above, § 56; *O.H. v. Germany*, no. 4646/08, § 86, 24 November 2011; and *Kronfeldner v. Germany*, no. 21906/09, § 79, 19 January 2012). They were obliged to positively establish that the detainee was suffering from a mental disorder, as a result of which it was highly likely that he would commit the most serious crimes of violence or sexual offences (see in this respect also *Glien*, cited above, § 80).

110. The Court is therefore satisfied that the domestic courts in the proceedings at issue were competent authorities which established that the applicant had a mental disorder at least as defined by the applicable domestic law. The courts' conclusion was based on a recent report of 8 June 2013 drawn up by the external psychiatric expert consulted by them and thus on objective medical expertise.

111. It remains to be determined whether the domestic courts can be said also to have established that the applicant was "of unsound mind", that is, that he suffered from a true mental disorder, for the purposes of Article 5§ 1 (e) of the Convention. It notes in this regard that the applicant contested this, arguing that the domestic courts' interpretation of the term "mental disorder" was wider than the term "of unsound mind" and that he did not suffer from a mental illness.

112. The Court notes that in the proceedings at issue the domestic courts, endorsing the findings of the psychiatric expert they had consulted, found that the applicant suffered, at that time, from sexual sadism, a sexual deviance, which necessitated medical treatment and therapy. They further stressed that this diagnosis confirmed the findings previously made by a number of experts that the applicant was suffering from a sexual preference disorder with sadomasochistic, fetishist and paedophiliac elements.

The Court further observes in that context that the applicant had already been found to have, in particular, a sexual deviance at the time of the offences in respect of which his preventive detention had been ordered. His mental abnormality, combined with the consumption of alcohol, had led to the diminution of his criminal responsibility at the time of the acts (see paragraph 9 above). It appears that the applicant's condition has remained essentially unchanged since his criminal conviction in 1986.

113. The Court reiterates that the permissible grounds for deprivation of liberty listed in Article 5 § 1 are to be interpreted narrowly (see paragraph 95 above). A mental disorder must be so serious as to necessitate treatment in a hospital, clinic or other appropriate institution in order to be considered as a true mental disorder for the purposes of sub-paragraph (e) of Article 5 § 1 (see *Glien*, cited above, § 85). The Court has already observed in this regard that it appeared that the notion of "persons of unsound mind" ("*aliéné*" in the French version) in Article 5 § 1 (e) of the Convention might be more restrictive than the notion of "mental disorder" ("*psychische Störung*") referred to in section 1(1) of the Therapy Detention Act (see *Glien*, cited above, § 87).

114. However, the Court considers in the present case that the mental disorder the domestic courts found the applicant to suffer from was sufficiently serious as to amount to a true mental disorder for the purposes of Article 5 § 1 (e). The specific sexual deviance, sexual sadism, from which the applicant was found to be suffering, necessitated both treatment with medication under medical supervision and therapy. When combined with the consumption of alcohol, his disorder was found to be so serious as to have diminished his criminal responsibility at the time of his offences. The sentencing court also considered the applicant's detention in a psychiatric hospital under Article 63 of the Criminal Code, but refrained from ordering such detention in view of its doubts as to whether the applicant's condition, which in principle necessitated treatment, could still be treated (see paragraph 11 above).

115. The Court is further satisfied that, as required by its case-law (see paragraph 96 above), the applicant's mental disorder was of a kind or degree warranting compulsory confinement. The domestic courts found that there was a very high risk that he would commit the most serious sexually motivated violent offences, similar to those of which he had been convicted – that is, in particular, two counts of attempted murder, combined with attempted rape in one case – if released. Moreover, the validity of the applicant's continued confinement depended upon the persistence of his mental disorder. Under section 316f(2) of the Introductory Act to the Criminal Code, the continuation of the applicant's preventive detention could be ordered only if, and as long as, there was a high risk that if released, he would reoffend as a result of that disorder.

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

117. In view of this finding, the Court considers that it can leave open the question whether the applicant, who was diagnosed as being addicted to alcohol without having drunk since his arrest in 1985 and who committed the offences of which he was found guilty under the influence of alcohol, also falls within the category of "alcoholics" for the purposes of Article 5 § 1 (e).

(β) Appropriate institution for a mental-health patient

118. The Court reiterates that, under its well-established case-law, the detention of a person as a mental-health patient will, in principle, only be "lawful" for the purposes of sub-paragraph (e) of Article 5 § 1 if effected in a hospital, clinic or other appropriate institution (see paragraph 99 above).

119. The Court observes that throughout the period covered by the impugned proceedings, that is, from 26 July 2013 (date of the decision of the Regional Court) until 25 April 2014 (when the Regional Court again prolonged the applicant's preventive detention in fresh review proceedings), the applicant was detained in the newly constructed Rosdorf preventive detention centre, a separate building on the premises of Rosdorf Prison.

120. The Court notes that the applicant's situation therefore differs from that of a number of applicants before this Court who, following the Court's judgment in the case of *M. v. Germany* (cited above), continued to be detained as "persons of unsound mind" in separate wings for persons in preventive detention within different prisons. The Court repeatedly found that those applicants were not detained in institutions suitable for the detention of mental-health patients (see, in particular, *Kallweit*, cited above, § 57; *O.H. v. Germany*, cited above, §§ 87-92; *Kronfeldner*, cited above, §§ 80-85; and *Glien*, cited above, §§ 92-106).

121. The Court observes that the Rosdorf preventive detention centre was constructed following, and in order to comply with, the Federal Constitutional Court's leading judgment on preventive detention of 4 May 2011 (see paragraphs 66-72 above). In that judgment, which was adopted following this Court's judgment of 17 December 2009 in the case of *M. v. Germany* (cited above) on retrospectively prolonged preventive detention, the Federal Constitutional Court declared all the relevant provisions of the Criminal Code on the imposition and duration of preventive detention as being incompatible with the fundamental right to liberty of persons in preventive detention. The court found that those provisions did not satisfy the constitutional requirement to differentiate between preventive detention and imprisonment. It ordered that new legislation was to enter into force on 1 June 2013 at the latest.

122. In view of this requirement, the legislator enacted new rules on the enforcement of preventive detention at federal level in the Preventive

Detention (Distinction) Act, which entered into force on 1 June 2013. In particular, Article 66c of the Criminal Code now stipulates that preventive detention must be executed in institutions that offer the detainee individual and intensive care. Detainees must be encouraged to participate, in particular, in psychiatric, psychotherapeutic or sociotherapeutic treatment aimed at reducing the risk they pose to the public. The *Länder* equally adopted legislation regulating those aspects in more detail (see paragraphs 56-57 and 59-60 above). In order to comply with these judicial and legislative conditions in practice and to bring the accommodation for persons in preventive detention in line with them, substantial construction works were completed on the premises of a number of prisons in Germany.

123. Having regard to those developments, the Court welcomes the extensive measures which have been taken in the defendant State on judicial, legislative and executive levels with a view to adapting preventive detention to the requirements, in particular, of the fundamental right to liberty (see also *Glien*, cited above, § 99).

124. In order to determine whether the applicant's place of detention can be said to have been suitable for a mental-health patient, the Court must assess the specific conditions of detention in the Rosdorf preventive detention centre. It notes in that context that the new regime of preventive detention applies to all detainees in that form of detention, irrespective of whether or not their detention was prolonged retrospectively and with regard to the mental disorder of the detainee concerned.

125. Regarding the staffing situation in the Rosdorf centre for persons in preventive detention, the Court observes that, as submitted by the Government (see paragraph 38 above) and not contested by the applicant, the prison staff comprised one psychiatrist, four psychologists, five social workers and twenty-five members of the general prison service for a total of thirty detainees at the time. It considers that this staffing situation, which was similar to that in a psychiatric hospital run in the same *Land*, put the authorities in a position to address the applicant's mental disorder.

126. As to the particular care offered to the applicant in view of his mental disorder, the Court observes that the Regional Court, in line with the repeated finding by expert W., considered it essential that the applicant be offered treatment to reduce his sadistic fantasies and his libido, and thus his dangerousness. In line with that finding, the court, making use of the additional competences attributed to it under the new version of Article 67d § 2, read in conjunction with Article 66c § 1 sub-paragraph 1 of the Criminal Code, ordered the Rosdorf centre authorities to offer the applicant such treatment within three months (see paragraphs 14, 20, 49 and 54 above). It was further documented in the Rosdorf centre's treatment plan for the applicant (see paragraph 41 above) that the latter had regularly and repeatedly been offered such treatment. The applicant had, however, refused

the treatment during the period at issue for fear of side effects. Furthermore, the applicant declined repeated offers to take part in group sessions of the treatment programme for offenders.

127. The Court further observes that it transpires from the Rosdorf centre's treatment plan that the applicant was successfully encouraged to participate in group therapy aimed at preventing detainees from relapsing into excessive alcohol consumption from July 2013 until August 2014. He was also granted leave from detention under escort a number of times and regularly participated in group sessions in which detainees discussed their experiences during leave from detention at the relevant time. Moreover, at least at the beginning of the period at issue, the applicant had fortnightly motivation meetings with a psychologist and took part in weekly residential group meetings, but subsequently chose to stop attending those meetings.

128. Having assessed the applicant's particular conditions of detention in the Rosdorf preventive detention centre and, in particular, the treatment offered to him with a view to addressing his mental disorder, the Court considers that there was a substantial change in the medical and therapeutic care which was offered to the applicant after his transfer to that centre. 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 detention of such patients.

(ii) "Lawful" detention "in accordance with a procedure prescribed by law"

129. The Court must further determine whether the applicant's preventive detention was "lawful" and "in accordance with a procedure prescribed by law" as required by Article 5 § 1 (e). It is satisfied that the order for the applicant's continued preventive detention, made under Article 67d of the Criminal Code read in conjunction with the second sentence of section 316f(2) of the Introductory Act to the Criminal Code, was in compliance with the substantive and procedural rules of domestic law.

130. Detention must, however, also be in conformity with the purpose of Article 5 § 1, which is to prevent individuals from being deprived of their liberty in an arbitrary manner (see paragraph 102 above). The Court notes in this connection that at the time the domestic courts ordered the continuation of the applicant's preventive detention in view of his dangerousness, the applicant was sixty-nine years old and had already been detained for more than twenty-seven years.

131. The Court observes, however, that the domestic courts expressly addressed the question whether the applicant, in view of his advanced age, could still be considered as a risk to the public because of his sexual deviance. Taking into account the findings of the psychiatric expert they had

consulted, they found that the applicant's sexual sadism had not yet been considerably alleviated as a result of his age. Moreover, the domestic courts took into account that the applicant had already been detained for almost thirty years. However, they found that there was a very high risk that he would attempt to commit further violent and sexual crimes if released. In view of the considerable threat the applicant therefore posed to the public, they considered the prolongation of his detention as proportionate. Moreover, the domestic courts explained that the applicant's detention in a supervised residence – which would equally have entailed deprivation of liberty – had proven impossible in practice.

132. In view of these arguments, which it considers pertinent, the Court is satisfied that the applicant's preventive detention was not arbitrary. It was therefore "lawful" and "in accordance with a procedure prescribed by law" for the purposes of Article 5 § 1.

(iii) Conclusion

133. In view of the foregoing, the Court concludes that the applicant's preventive detention at issue was justified under sub-paragraph (e) of Article 5 § 1 as lawful detention, ordered in accordance with a procedure prescribed by law, of a person "of unsound mind".

134. There has accordingly been no violation of Article 5 § 1 of the Convention.

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

135. The applicant further claimed that the retrospective extension of his preventive detention beyond the former ten-year maximum duration had violated the prohibition on retrospective punishment under 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."

136. The Government contested this allegation.

A. Admissibility

137. 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, having also regard to its above findings (see paragraph 80 above), that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

138. The applicant took the view that a heavier penalty had been imposed on him retrospectively by virtue of the order for the continuation of his preventive detention beyond the former ten-year maximum duration, in breach of the second sentence of Article 7 § 1 of the Convention.

139. The applicant argued that his situation was comparable to that of the applicant in the case of *M. v. Germany* (cited above), in which the Court had found that the retrospective prolongation of preventive detention beyond the former ten-year time-limit violated Article 7 § 1. This had subsequently been confirmed in the case of *Glien* (cited above). The Court's findings, which he endorsed, therefore applied also to his case.

140. The applicant submitted that he had continued to be detained in a prison. His treatment was no different from the treatment he had been offered in Celle Prison. There were only very limited offers of therapy. He further stressed that he had agreed to take medication reducing his libido.

(b) The Government

141. In the Government's submission, the extension of the applicant's preventive detention beyond the former ten-year maximum duration complied with Article 7 § 1 of the Convention.

142. The Government argued that the penalty initially imposed on the applicant had been replaced by a different measure, the sole purpose of which was the applicant's treatment as a mentally ill person and the protection of the public. In view of the factual and legal form of the applicant's preventive detention, that measure no longer constituted a penalty for the purposes of Article 7 § 1, at least during the period at issue, since July 2013.

143. In the Government's view, preventive detention had been classified as a penalty by the Court in its judgment in the case of *M. v. Germany* (cited above, § 127), in particular, because there had been no substantial difference between imprisonment and preventive detention. That finding was not valid in respect of the impugned prolongation of the applicant's preventive detention ordered in July 2013. Referring to their reasoning submitted in respect of Article 5 § 1, they argued that the applicant's preventive detention in the preventive detention centre on the premises of Rosdorf Prison now complied with the constitutional requirement to differentiate between preventive detention and imprisonment. All treatment measures which were necessary for the applicant had been available and been offered to him.

144. Moreover, preventive detention was now governed by rules distinct from the rules governing imprisonment. Under sections 2 and 3 of the Lower Saxony Preventive Detention Act (see paragraphs 57 and 59 above), which entered into force on 1 June 2013, the sole objective of preventive detention was to reduce the dangerousness of the detainee as far as possible by exhausting all available treatment options so that the detainee could be released as soon as possible. No mention was made, in particular, of redressing criminal guilt. Such a measure did not constitute a penalty within the meaning of Article 7 § 1.

145. The Government conceded that the preventive detention facility in Rosdorf was run on the premises of Rosdorf Prison. However, this was done in order to allow persons in preventive detention to use the sports and leisure facilities available in the prison and to facilitate group therapy measures, which necessitated a sufficient number of participants.

146. The Government further conceded that decisions on the continuation of preventive detention were still taken by the courts responsible for the execution of sentences, which were part of the criminal justice system, and not by the civil courts. However, this was based on considerations of practicability. The courts responsible for the execution of sentences also dealt with decisions concerning detention in a psychiatric hospital under Article 63 of the Criminal Code. Those courts were therefore particularly experienced in assessing the necessity of confining mental-health patients.

147. As to the severity of the measure of preventive detention, the Government stressed that detainees had real prospects of being released. Not only was there a presumption, under Article 67d § 3 of the Criminal Code, that a person who had served ten years in preventive detention was no longer dangerous, which had to be rebutted, but the detainee also had to be proven to suffer from a mental disorder, owing to which there was a high risk that if released, he would commit the most serious violent or sexual offences.

148. The Government submitted that in practice, in twenty-one per cent of cases in 2011 the termination of preventive detention was based on either the application of more restrictive legislation or the stricter standards set by the Federal Constitutional Court in its judgment of 4 May 2011. The average duration of preventive detention in 2011 was 6.2 years.

2. The Court's assessment

(a) Recapitulation of the relevant principles

149. The Court reiterates that the guarantee enshrined in Article 7, which is an essential element of the rule of law, occupies a prominent place in the Convention system of protection, as is underlined by the fact that no derogation from it is permissible under Article 15 of the Convention in time

of war or other public emergency. It should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment (see *M. v. Germany*, cited above, § 117 with further references).

150. 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 *Del Río Prada*, cited above, § 81). The wording of the second sentence of Article 7 § 1 indicates that the starting-point – and thus a very weighty factor (see *Glien*, cited above, § 121) – in any assessment of the existence of a penalty is whether the measure in question was 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; *Van der Velden v. the Netherlands* (dec.), no. 29514/05, ECHR 2006-XV; and *Kafkaris v. Cyprus* [GC], no. 21906/04, § 142, ECHR 2008). The severity of the measure is not, however, in itself decisive, since many non-penal measures of a preventive nature may, just as measures which must be classified as a penalty, have a substantial impact on the person concerned (see *Welch*, cited above, § 32; *M. v. Germany*, cited above, § 120, and *Del Río Prada*, cited above, § 82).

(b) Application of these principles to the present case

(i) Whether the measure was "heavier" than the one applicable at the time of the offence

151. In determining whether the applicant's detention resulting from the impugned decisions complied with the prohibition on retrospective penalties under the second sentence of Article 7 § 1 of the Convention, the Court must examine, first, whether that prolonged detention constituted a heavier measure than the one that was applicable at the time the applicant committed his criminal offences.

152. The Court observes that the domestic courts ordered the applicant's preventive detention to continue beyond ten years. It further notes that the applicant committed the offences in respect of which his preventive detention was ordered – attempted murder combined with attempted rape, and dangerous assault – between 7 July and 3 October 1985. At that time, a preventive detention order made by a sentencing court for the first time, read in conjunction with Article 67d § 1 of the Criminal Code then in force (see paragraph 50 above), meant that the applicant could be kept in preventive detention for ten years at the most. Based on the subsequent

amendment in 1998 of Article 67d of the Criminal Code, read in conjunction with section 1a(3) of the Introductory Act to the Criminal Code (see paragraph 51 above), which abolished that maximum duration with immediate effect, and section 316f(2), second sentence, of the same Act, the courts responsible for the execution of sentences then ordered, in the proceedings at issue, the applicant's continued preventive detention beyond the ten-year limit. Thus, the applicant's preventive detention – like that of the applicant in the case of *M. v. Germany* (cited above) – was extended with retrospective effect, under a law enacted after the applicant had committed his offences.

(ii) Whether the measure was a "penalty"

153. When examining whether the applicant's preventive detention at issue should be classified as a "penalty" for the purposes of Article 7 § 1, second sentence, the Court observes that it concluded in the case of *M. v. Germany* (cited above, §§ 124-33) that preventive detention ordered and enforced in accordance with the German Criminal Code as it stood at the relevant time had to be classified as a "penalty". In the case of *Glien* (cited above, §§ 120-30) it found that that applicant's preventive detention as enforced in the transitional period following the Federal Constitutional Court's judgment of 4 May 2011, but prior to the entry into force, at federal level, of the Preventive Detention (Distinction) Act on 1 June 2013, still constituted a "penalty" for the purposes of Article 7 § 1. It found that there had not been substantial changes in the implementation of that applicant's preventive detention compared with the situation at issue in *M. v. Germany*.

154. The Court takes note of the Government's argument that the applicant's preventive detention, given the substantial changes in its legal form and in its practical implementation, no longer constituted a penalty for the purposes of Article 7 § 1, at least in the period after June 2013 at issue. This was contested by the applicant, who considered that the implementation of his preventive detention, particularly with regard to his therapy, had remained essentially unchanged.

(α) Measure imposed following conviction for a criminal offence

155. In determining whether the applicant's preventive detention at issue, which was effected in accordance with the new legislative framework of the Preventive Detention (Distinction) Act, was a "penalty", the Court notes that the starting-point, and a very weighty factor, in the assessment of the existence of a penalty is whether the measure in question was imposed following conviction for a "criminal offence" (see paragraph 150 above).

156. The Court observes that the applicant's preventive detention was initially imposed by the Hanover Regional Court in its judgment of 18 April 1986 under Article 66 § 2 of the Criminal Code, together with his conviction for several criminal offences, including attempted murder

combined with attempted rape. Under the above-mentioned provision, a preventive detention order could be made by the sentencing court only against someone who, like the applicant, among other requirements, was sentenced to at least three years' imprisonment for at least three intentional criminal offences.

157. The Court further observes that the applicant continued to be remanded in preventive detention as a result of the preventive detention order imposed by the Hanover Regional Court in its 1986 judgment. The additional requirements under section 316f(2), second sentence, of the Introductory Act to the Criminal Code which had to be met in order for the applicant's preventive detention at issue to be prolonged do not alter the fact that it was the initial preventive detention order made in 1986 which kept being extended, albeit under additional restrictive conditions.

158. Moreover, no use was made of the possibility provided for by the Therapy Detention Act (see paragraphs 64-65 above) to base the applicant's detention on an order of a civil section of the competent Regional Court, placing him in a suitable institution for mental-health patients in view of his current dangerousness. The Court notes that unlike preventive detention under the Criminal Code, confinement under the Therapy Detention Act is not a measure imposed following and together with conviction for a criminal offence, despite the fact that it can be ordered only in respect of persons who have committed certain serious offences and have previously been kept in preventive detention. It is a measure ordered by the civil courts, outside the criminal law context, and aimed at the medical and therapeutic treatment of persons suffering from a mental disorder, who previously manifested that they posed a high risk to the public by committing a serious criminal offence (see *Glien*, cited above, § 122).

159. The Court therefore finds that the applicant's preventive detention was imposed following his conviction for a "criminal offence". His situation thus does not differ in this respect from that at issue in the cases of *M. v. Germany* (cited above, § 124) and *Glien* (cited above, § 121).

160. The Court will proceed to assess the other relevant factors in determining whether the applicant's preventive detention was a "penalty" for the purposes of Article 7 § 1.

(β) Characterisation of the measure under domestic law

161. As regards the characterisation of preventive detention under domestic law, the Court notes that in Germany such detention is not, and has never been, considered as a penalty to which the constitutional absolute ban on retrospective punishment applies (see *M. v. Germany*, cited above, §§ 125-26, and *Glien*, cited above, § 124). In its leading judgment of 4 May 2011, the Federal Constitutional Court again confirmed that preventive detention, contrary to this Court's findings in respect of Article 7 of the Convention, was not a penalty for the purposes of the absolute prohibition

on the retrospective application of criminal law under the Basic Law (see paragraph 71 above). It further found that the former provisions of the Criminal Code on the imposition and duration of preventive detention failed, however, to meet the constitutional requirement of differentiating between purely preventive measures of correction and prevention, such as preventive detention, and penalties, such as prison sentences (see paragraph 67 above). The court therefore ordered the legislator to amend the provisions on preventive detention in the Criminal Code so as to reflect that difference.

162. In line with this requirement, the legislative amendments to the Criminal Code introduced by the Preventive Detention (Distinction) Act serve to clarify and extend the differences between the way in which preventive detention and prison sentences are enforced (see in particular the new Article 66c of the Criminal Code). They thus confirm and expand the differences between measures of correction and prevention, such as preventive detention, under the provisions of the Criminal Code and measures which are classified as penalties under the long-established twin-track system of sanctions in German criminal law (see *M. v. Germany*, cited above, §§ 45 et seq. and 125).

163. In that context, the Court agrees with the Federal Constitutional Court's finding that a schematic alignment of the meaning of the constitutional notion of "penalty" with that under the Convention was not mandatory if, in substance, the minimum standards set by the Convention were complied with (see paragraph 71 above). As laid down in its case-law, the Court, for its part, must interpret the notion of "penalty" in Article 7 § 1 autonomously, bearing in mind also the classification of comparable measures in other Contracting Parties to the Convention (see *M. v. Germany*, cited above, § 126, and *Glien*, cited above, § 124).

(γ) Nature of the measure

164. The Court will further examine the nature of the measure of preventive detention. It notes at the outset, as it has done in the cases of *M. v. Germany* (cited above, § 127) and *Glien* (cited above, § 125) that, like a prison sentence, preventive detention entails deprivation of liberty. However, the Court observes that, unlike in the above-mentioned cases, the applicant's preventive detention was not effected in an ordinary prison in a separate wing for persons in preventive detention. At the relevant time, the applicant was detained as a person "of unsound mind" in the preventive detention centre on the premises of Rosdorf Prison, where he was offered treatment with a view to addressing his mental disorder (compare also *Berland v. France*, no. 42875/10, § 44, 3 September 2015).

165. In determining whether there were, therefore, unlike in the above-mentioned cases, substantial differences between the manner in which the applicant's preventive detention was effected and a prison

sentence, the Court observes that preventive detention is now governed by specific provisions contained notably in Article 66c of the Criminal Code and in the Lower Saxony Preventive Detention Act. In accordance with the constitutional requirement to differentiate between preventive detention and imprisonment, preventive detention is now effected in a separate building on the premises of Rosdorf Prison.

166. The material conditions of detainees in preventive detention in that centre are much better than those of detainees serving a prison sentence. The former are detained in larger and well-equipped apartment units, are provided with common rooms and equipment to occupy themselves and are granted more individual freedom, including freedom of movement. More importantly, substantive means have been made available in order to provide detainees in preventive detention with individual and intensive psychiatric, psychotherapeutic or sociotherapeutic treatment aimed at reducing the risk they pose to the public, as prescribed by Article 66c of the Criminal Code and section 4(2) of the Lower Saxony Preventive Detention Act. Despite the fact that preventive detention has remained a State reaction to a criminal offence depriving the persons concerned of their liberty, the Court is satisfied that the manner in which the measure is now enforced has considerably changed.

167. In the Court's view, the changes to the nature of preventive detention are fundamental for persons who are detained, as is the applicant, as mental-health patients. The Court considers it of particular importance that, under section 316f(2), second sentence, of the Introductory Act to the Criminal Code, a new additional condition must be met if the preventive detention of a person is to be prolonged retrospectively, namely that the person concerned must be found to suffer from a mental disorder. This element was not relevant under domestic law for the court issuing the preventive detention order in 1986 and alters the nature of the detention of the persons concerned. Despite the fact that the link of the measure to the offences in respect of which it was ordered is not completely severed, the focus of the measure then lies on the medical and therapeutic treatment of the person concerned.

168. Moreover, the individualised and reinforced medical and therapeutic care that is now provided, including psychiatry and psychotherapy, is particularly relevant for mental-health patients.

169. The Court observes that, in accordance with the new concept of preventive detention as regulated from 2013 onwards, the applicant in the present case was offered, and partly accepted, treatment with a view to addressing his mental disorder. The treatment comprised, in particular, medication, a treatment programme for offenders, regular meetings with a psychologist, and treatment aimed at preventing detainees from relapsing into excessive alcohol consumption. The Court therefore considers that there was a substantial change in the medical and therapeutic care offered to

the applicant after his transfer to the Rosdorf centre. The nature of the preventive detention thus changed in the case of the applicant, whose detention was extended because he was considered to pose a particular danger to the public as a result of his mental disorder.

(δ) Purpose of the measure

170. As regards the purpose of the preventive detention ordered against the applicant, the Court observes that in the cases of *M. v. Germany* (cited above, §§ 128-30) and *Glien* (cited above, §§ 126-27), it could not subscribe to the Government's argument that preventive detention, in its legal form and its practical implementation at the relevant time, served a purely preventive, and not punitive purpose. In reaching its conclusion, the Court had regard to the situation of persons in preventive detention and, in particular, the lack of special measures aimed at reducing the risk they posed to the public.

171. The Court takes note of the Government's argument that preventive detention was now governed by distinct legal rules and in the instant case served to provide the applicant with treatment as a mentally ill person and for preventive purposes, namely to protect the public. This was contested by the applicant, who alleged that he was not offered any different treatment from that he had received in prison.

172. The Court observes that pursuant to both section 2(2) of the Lower Saxony Preventive Detention Act and section 5, first sentence, of the Lower Saxony Execution of Sentences Act, detainees must learn to lead a socially responsible life without reoffending. Furthermore, both section 2(3) of the Lower Saxony Preventive Detention Act and section 5, second sentence, of the Lower Saxony Execution of Sentences Act provide that both preventive detention and imprisonment are aimed at protecting the public from further offences.

173. As has been found in the case of *M. v. Germany* (cited above, § 130) in respect of the applicable provisions then in force, the aim of both penalties and measures of correction and prevention therefore still partly overlap.

174. However, the legislator, as required by the Federal Constitutional Court in its leading judgment of 4 May 2011, further developed and strengthened the preventive and therapeutic aspect of preventive detention. In line with section 2(1) of the Lower Saxony Preventive Detention Act, preventive detention centres have been created in which a number of specific measures are offered to detainees in order to help them reduce their dangerousness to such an extent that they may be released. As a result of the changes, adequate treatment of persons in preventive detention with a view to reducing their dangerousness is now at the heart of preventive detention.

175. The Court is nevertheless mindful of the fact that preventive detention can be imposed only if the person concerned was found guilty of

several intentional criminal offences of certain gravity. When a trial court orders preventive detention together with punishment for an offence, the person concerned may well understand it as an additional punishment. It clearly entails also a deterrent element, which is not eclipsed by the additional treatment measures in better material conditions of detention. In prison sentences and preventive detention alike, these serve the purpose of allowing detainees to become capable of leading a socially responsible life without committing new offences.

176. In line with its above findings concerning the nature of the measure (see paragraphs 167-169 above), the Court considers, however, that, contrary to the situation prevailing when the applicant's preventive detention was ordered, and contrary to the situation for persons whose preventive detention was not prolonged (or ordered) retrospectively, it was a new precondition for the prolongation of the applicant's detention that he was found to suffer from a mental disorder. The Court finds that the preventive purpose pursued by the amended preventive detention legislation attains decisive weight in these circumstances. The applicant's preventive detention could only be prolonged because of his dangerousness as a result of his mental disorder. That mental disorder was not a precondition for the sentencing court's order for preventive detention and is thus a new, additional element which is independent of the initial sanction imposed and clearly distinguishes the nature of his detention for medical treatment purposes. Moreover, as stated above, the applicant's medical treatment is central to the specific measures of care offered to him. In the Court's view, this focus on the applicant's medical treatment in order to reduce his dangerousness distinguishes his situation and that of detainees in a similar situation from detainees in preventive detention who are offered treatment which, in a less extensive form, is also offered to ordinary prisoners serving a term of imprisonment.

177. Having regard to the specific therapies offered to the applicant in the Rosdorf preventive detention centre (see paragraphs 40-41 above), the Court considers that, in contrast to its findings in the case of *M. v. Germany* (cited above, §§ 128-29), the applicant has been offered a high level of individualised care, including continuous attempts to encourage him to participate in treatment, by a team of multi-disciplinary staff within a coherent framework for progression towards release.

(ε) Procedures involved in the making and implementation of the measure

178. In examining the procedures involved in the making and implementation of orders for preventive detention such as that imposed on the applicant, the Court observes that, just as in the case of *M. v. Germany* (cited above, § 131) and *Glien* (cited above, § 128), the applicant's preventive detention was ordered by the (criminal) sentencing courts. Its implementation was determined by the courts responsible for the

execution of sentences, that is, courts also belonging to the criminal justice system, in a separate procedure. The procedure differs in this respect from that under sections 1 and 4 of the Therapy Detention Act, which provides that the civil sections of the Regional Court decide on the confinement of particularly dangerous offenders suffering from a mental disorder (see paragraph 64 above). However, the Court takes account of the Government's argument in that respect (see paragraph 146 above) that the courts dealing with the execution of sentences were particularly experienced in assessing the necessity of confining mental-health patients as they also dealt with decisions concerning detentions in psychiatric hospitals under Article 63 of the Criminal Code.

(ζ) Severity of the measure

179. Lastly, as regards the severity of a preventive detention order which, as reiterated above (at paragraph 150), is not in itself decisive – the Court observes that that measure, just as in the cases of *M. v. Germany* (cited above, § 132) and *Glien* (cited above, § 129), still entailed detention which, following the change in the law in 1998, no longer had a maximum duration. The applicant's release was not to be ordered simply after the lapse of a certain time. However, it must equally be noted that, other than for prison sentences, there was also no minimum duration of detention. The duration of detention thus depended to a considerable extent on the applicant's cooperation. However, even though he was put in a better position, by the new framework in which his preventive detention was implemented, in order to work towards the reduction of his dangerousness, his release was still subject to a court finding that it was no longer highly likely that he would again commit serious crimes of violence or sexual offences as a result of his mental disorder.

180. The latter requirements, initially set up by the Federal Constitutional Court and taken up by the legislator in section 316f(2), second sentence, of the Introductory Act to the Criminal Code, are stricter than those at issue in the case of *M. v. Germany* (ibid.). Preventive detention, however, still remains among the most severe measures which may be imposed under the Criminal Code. It is noted in that context that at the time of the proceedings at issue, the applicant had already been in preventive detention for more than twelve years, following his term of imprisonment of fifteen years.

(η) Conclusion

181. In view of the foregoing, the Court, having assessed in their entirety the relevant factors to determine whether the measure constitutes a penalty and making its own assessment, considers that preventive detention implemented in accordance with the new legislative framework as a rule still constitutes a "penalty" for the purposes of Article 7 § 1. It finds that the

more preventive nature and purpose of the revised form of preventive detention do not suffice to eclipse the fact that the measure, which entails a deprivation of liberty without a maximum duration, was imposed following conviction for a criminal offence and it is still determined by courts belonging to the criminal justice system.

182. However, in cases such as that of the applicant, where preventive detention is extended because of, and with a view to the need to treat his mental disorder, the Court accepts that both the nature and the purpose of his preventive detention substantially changed and that the punitive element, and its connection with his criminal conviction, is eclipsed to such an extent that the measure is no longer to be classified as a penalty within the meaning of Article 7 § 1.

183. There has accordingly been no violation of Article 7 § 1 of the Convention.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been no violation of Article 5 § 1 of the Convention;

3. *Holds* that there has been no violation of Article 7 § 1 of the Convention.

Done in English, and notified in writing on 7 January 2016, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Ganna Yudkivska
President