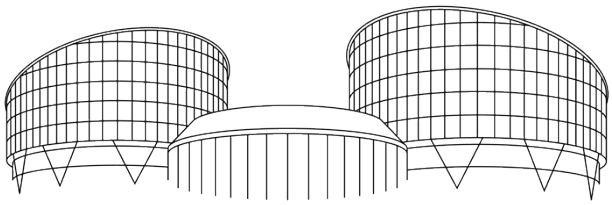

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF HAIDN v. GERMANY

(Application no. 6587/04)

JUDGMENT

STRASBOURG

13 January 2011

FINAL

13/04/2011

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

In the case of Haidn v. Germany,

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

Peer Lorenzen, *President,*
Renate Jaeger,
Rait Maruste,
Isabelle Berro-Lefèvre,
Mirjana Lazarova Trajkovska,
Zdravka Kalaydjieva,
Ganna Yudkivska, *judges,*

and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 7 December 2010,

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

PROCEDURE

1. The case originated in an application (no. 6587/04) 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 Albert Haidn ("the applicant"), on 14 February 2004.

2. The applicant, who had been granted legal aid, was represented by Mr J. Driendl, a lawyer practising in Bayreuth. The German Government ("the Government") were represented by their Agent, Mrs A. Wittling-Vogel, *Ministerialdirigentin*, of the Federal Ministry of Justice, assisted by Mr H. Schöch, Professor of criminal law, counsel.

3. The applicant alleged that his continued detention in prison for preventive purposes after he had fully served his prison sentence under the unconstitutional Bavarian (Dangerous Offenders') Placement Act violated Article 5 § 1 of the Convention. He further claimed that his retrospective detention for preventive purposes, in view of the circumstances in which it had been ordered and of its indefinite duration, amounted to inhuman and degrading treatment prohibited by Article 3 of the Convention.

4. On 9 January 2007 the President of the Fifth Section decided to give notice of the application to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1934 and is currently detained in a psychiatric hospital in Bayreuth.

A. The applicant's previous convictions

6. On 27 July 1994 the Freyung District Court convicted the applicant of three counts of sexual abuse of children and gave him a cumulative suspended sentence of eight months' imprisonment with probation. The applicant was found to have sexually abused a nine-year-old girl on three occasions in the spring of 1993. As confirmed by an expert, the applicant suffered from a pathological mental disorder such that diminished criminal responsibility (Article 21 of the Criminal Code) could not be excluded. On 10 December 1997 this sentence was remitted.

7. On 16 March 1999 the Passau Regional Court convicted the applicant of two counts of rape and gave him a cumulative sentence of three years and six months' imprisonment (two years and nine months for each count of rape). The Regional Court found that the applicant had raped twelve-year-old S. twice within two weeks by use of force in the summer of 1986. It was reported by a psychiatric and a psychological expert that the applicant suffered from a continuous cerebral decomposition, due to which his criminal responsibility was diminished.

8. According to the Regional Court's finding of facts, the applicant had had an extra-marital relationship with S.'s mother A. since 1980. Since then he had sexually abused S., then aged seven, at least once a week. Since 1982 he had had himself sexually satisfied also by P., A.'s elder daughter, then aged fourteen. These offences were time-barred when the victims reported them to the prosecution authorities. In the summer of 1982 the applicant persuaded fifteen-year-old P. to have sexual intercourse with him in exchange for his paying the family's electricity bill. P., who had initially consented, then asked the applicant to stop due to severe pain caused by the intercourse and resisted heavily, whereupon the applicant raped her by use of force. The prosecution of this offence was discontinued in view of the two counts of rape of which the applicant was convicted.

9. The Regional Court did not examine whether preventive detention was to be ordered against the applicant because the relevant Article 66 § 3 of the Criminal Code was not applicable to offences which, as was the case for those of which the applicant was found guilty, had been committed prior to 31 January 1998 (section 1a § 2 of the Introductory Law to the Criminal Code, see paragraph 41 below).

10. The applicant served his full sentence of three years and six months' imprisonment until 13 April 2002. Some two and a half months prior to that date, on 28 January 2002, the applicant was informed by the psychologist of Bayreuth prison that he could possibly be detained beyond that date under the Bavarian Act for the placement of particularly dangerous offenders very liable to reoffend ("Bavarian (Dangerous Offenders') Placement Act") of 1 January 2002 (see paragraphs 43-46 below).

B. The proceedings at issue

1. The proceedings before the Bayreuth Regional Court

11. On 10 April 2002 the Bayreuth Regional Court, sitting as a chamber responsible for the execution of sentences composed of three professional judges, having heard the applicant and his counsel as well as the representatives of Bayreuth prison and two medical experts, ordered the applicant's placement in prison for an indefinite duration under sections 1 and 2 of the Bavarian (Dangerous Offenders') Placement Act (see paragraphs 44-45 below).

12. The Regional Court found that the applicant was liable to be placed in prison under section 1 § 1 of that Act. He had served a sentence imposed following his conviction for two counts of rape, the offences being serious enough to meet the requirements of Article 66 § 3 of the Criminal Code (see paragraph 41 below). The Regional Court further subscribed to the views expressed by both a psychological and a psychiatric and psychotherapeutic expert, who, in their reports dated 22 March 2002 and 1 April 2002 respectively, had found that following the applicant's conviction, new facts had evolved during his detention which warranted the conclusion that the applicant currently posed a serious threat to the sexual self-determination of others. It noted that the applicant had failed to participate in any therapeutic measure to address his sexual problems which had led to his offences and, by denying his offences in prison, had made any therapy pointless. Moreover, due to his organic personality disorder, which led to a continuous decomposition of his personality, the applicant was no longer able to reflect on his possibly deviant sexual behaviour and to discern limits. Statistically, his advancing age also increased his interest in children as substitutes.

13. The Regional Court further noted that neither the applicant's placement in a psychiatric hospital (Article 63 of the Criminal Code – see paragraph 50 below) nor his preventive detention (Article 66 of the Criminal Code – see paragraphs 36-38 below) had been ordered (section 1 § 2 of the Bavarian (Dangerous Offenders') Placement Act). Moreover, the applicant had not been placed in a psychiatric hospital under the Bavarian Act on the Placement in an Institution of Mentally Ill Persons and Their Care of 5 April 1992 (see section 1 § 3 of the Bavarian (Dangerous

Offenders') Placement Act and paragraph 51 below). In fact, the Bayreuth Health Office had refused to request the applicant's placement in a psychiatric hospital under the latter Act after the applicant had served his prison sentence.

14. Taking into consideration the experts' findings, the Regional Court found that there was a high risk that the applicant might re-offend. Not least because of his limited faculties, there was a concrete danger that reactions of his victims would result in his committing very serious offences.

15. The Regional Court stated that it considered the Bavarian (Dangerous Offenders') Placement Act to be constitutional.

2. The proceedings before the Bamberg Court of Appeal

16. On 3 May 2002 the Bamberg Court of Appeal dismissed the applicant's appeal as ill-founded. Endorsing the reasons given by the Bayreuth Regional Court, it found that the applicant was liable to be placed in prison pursuant to section 1 of the Bavarian (Dangerous Offenders') Placement Act. In particular, as had been convincingly shown by two experts, there was a considerable risk of recidivism.

17. According to the Court of Appeal, the Bavarian (Dangerous Offenders') Placement Act was constitutional. It struck a fair balance between the applicant's interest in his liberty and the public interest in security. There was no breach of the principle of legitimate trust (*Vertrauensgrundsatz*), as the applicant had been informed in writing by the prison authorities that it was necessary for him to undergo therapy. Nor did the Act violate the prohibition on being punished twice for the same offence, as it was not his past offences, but the risk of his re-offending in the future which was decisive for his placement. Furthermore, the Bavarian legislature had the legislative power to pass the Act in question.

3. The proceedings before the Federal Constitutional Court

18. The applicant subsequently lodged a constitutional complaint with the Federal Constitutional Court against the decisions of the Bayreuth Regional Court of 10 April 2002 and the Bamberg Court of Appeal of 3 May 2002. He argued that his detention was illegal because the Bavarian (Dangerous Offenders') Placement Act was unconstitutional, notably as the Bavarian legislature had not had the power to legislate on the subject-matter in question. Moreover, the provisions of the Act violated the prohibition of punishment without law and human dignity as they treated him as a mere "disturbing object".

(a) The Federal Constitutional Court's judgment

19. On 10 February 2004 the Federal Constitutional Court, having held a hearing, partly allowed the applicant's constitutional complaint

(no. 2 BvR 834/02), together with that of another complainant (no. 2 BvR 1588/02), Mr F. Oberländer, who was the applicant in application no. 9643/04 before this Court. It found unanimously that the Bavarian (Dangerous Offenders') Placement Act, as well as another comparable Act, the Saxony-Anhalt (Dangerous Offenders') Placement Act, were incompatible with Article 74 § 1 no. 1 read in conjunction with Articles 70 § 1 and 72 § 1 of the Basic Law (see paragraph 52 below) as the *Länder* did not have the power to enact the legislation in question.

20. According to the Federal Constitutional Court, the area covered by the *Länder* statutes regulating the placement of offenders in detention after they had served their prison sentence – so-called retrospective preventive detention (*nachträgliche Sicherungsverwahrung*) – fell within the concurrent legislative powers of the Federation as it involved criminal law within the meaning of Article 74 § 1 of the Basic Law. The term "criminal law" in connection with the question of power to legislate covered the regulation of all, even subsequent, repressive or preventive penal responses by the State which used the offence as a connecting factor, which were aimed exclusively at offenders and which were factually justified by the original offence. This interpretation was compatible with the fact that measures of correction and prevention, such as preventive detention, were not to be classified as "penalties" to which the prohibition of retrospective punishment under Article 103 § 2 of the Basic Law applied. The objective of this latter provision, laying down a fundamental right, was different from that of a provision on legislative competence such as Article 74 of the Basic Law. Retrospective placement in prison under the (Dangerous Offenders') Placement Acts enacted by the *Länder* was very similar to preventive detention under the Criminal Code, both in relation to the applicable procedure and in relation to its nature, and had been authorised in order to complement the measures of correction and prevention under the Criminal Code by the possibility of a preventive detention which had not been ordered in the judgment of the sentencing court. The *Länder* therefore did not have the power to make laws on the placement of criminals in detention because the Federation exhausted its concurrent legislative power in this area. The court thus disagreed with the submissions of the Federal Government, which had taken the view that the *Länder* had legislative competence to regulate the subject-matter at issue.

21. The Federal Constitutional Court found that placement in prison for an indefinite duration or for indefinitely renewable periods after an offender had served his full prison sentence constituted a particularly serious interference with the offender's right to liberty as protected by Article 2 § 2 of the Basic Law. It stressed that in order for the long-term deprivation of liberty ordered independently of a person's guilt to remain proportionate, it was necessary for it to be dependent on the prior commission of a serious offence. Moreover, the courts ordering placement in detention had to make

their prognosis of the offender's dangerousness based on a comprehensive assessment of his offences and personality.

22. The Federal Constitutional Court, by a majority of five votes to three in this respect, further found that the fact that the *Länder* did not have power to legislate did not result in the contested statutes being void. Instead, they were merely declared incompatible with the Basic Law and the Constitutional Court ordered their continued application until 30 September 2004. Until the expiry of that transitional period, the applicant's detention was covered by the decision of the Bayreuth Regional Court, based on the (Dangerous Offenders') Placement Act, which remained applicable.

23. The court argued that the Federal Constitutional Court Act did not prescribe that a statute found to be unconstitutional was void under all circumstances, pursuant to section 95 § 3, first sentence, of the Federal Constitutional Court Act (see paragraph 55 below). The Act also allowed a mere declaration of incompatibility with the Basic Law pursuant to section 31 § 2 of the Federal Constitutional Court Act (see paragraph 54 below). Under the Federal Constitutional Court's case-law, a mere declaration of incompatibility and a limited continued application of the unconstitutional statute was possible if the immediate invalidity of the contested law removed the basis for protection of paramount interests related to the public good, and if the result of weighing those interests against the fundamental rights affected was that the interference had to be accepted for a transitional period.

24. In the instant case, there was a paramount interest in protecting the public against offenders who had been found by at least two experts and by courts to currently pose a considerable danger to the life, physical integrity, freedom or sexual self-determination of others. In the event of the statutes being declared void, persons who were extremely dangerous would have to be released without the federal legislature having taken the decision imposed upon it – because it mistakenly assumed it had no power to do so – as to whether it was necessary to enact federal legislation. Such federal legislation on retrospective preventive detention could be compatible with the Basic Law if it applied only in limited circumstances.

25. The public interest in effective protection from dangerous offenders could, in exceptional circumstances, outweigh the interest of the offender concerned by the unconstitutional Act in his personal liberty as guaranteed by Article 2 § 2 of the Basic Law. For the interference with the right to liberty to be proportionate, it was, however, necessary for the transitional period, during which the Federal Constitutional Court's order of continued application of the unconstitutional Acts served as the basis for the detention of the offenders concerned, to be short. Moreover, the criminal courts which had ordered placements on the basis of the impugned Acts had to re-examine without delay whether the placements complied with the

reasoning set out in the Federal Constitutional Court's judgment. In particular, they had to base their placement decisions on a properly reasoned expert's opinion as to the dangerousness of the offender in question, in the light of his personality and the offences committed. Furthermore, they were authorised to order that the offender's placement be executed in a psychiatric hospital (Article 63 of the Criminal Code) if the offender's reintegration into society could better be furthered thereby, as prescribed by Article 67a § 2 of the Criminal Code (see paragraph 39 below).

(b) The dissenting judges' view on the statutes' continued applicability

26. According to the partly dissenting opinion of three judges, the unanimous finding of the Senate that the impugned Acts were unconstitutional should have led to their being declared void. As a consequence, the complainants would have had to be released. During the transitional period, the complainants were therefore detained without a legal basis.

27. The minority argued that by ordering the continued application of an Act which it had found to be unconstitutional, the Federal Constitutional Court took responsibilities which, in accordance with the principle of separation of powers, were for the legislature to assume. Moreover, by ordering a continued application of the *Länder* statutes, it suggested that the Federal legislature authorise subsequent preventive detention, a measure which the Federation, when reforming the provisions on preventive detention in 1998 and 2002, had deliberately chosen not to introduce. The minority of judges stressed that there were numerous other, less intrusive instruments available to the courts, police and social authorities to avert the dangers posed by dangerous convicts on their release.

28. In the minority's submission, the court's order that the *Länder* statutes continued to apply was also incompatible with Article 104 § 1 of the Basic Law (see paragraph 53 below). According to that Article, a person's liberty could only be restricted by virtue of a statute enacted by Parliament and only in compliance with the forms prescribed therein. The Federal Constitutional Court's order that the statutes continued to apply was, on the contrary, based on customary law and, being a court order, did not justify the deprivation of liberty. The minority further stressed that section 31 § 2, second sentence, of the Federal Constitutional Court Act, according to which a decision of the Federal Constitutional Court had force of law, was applicable only to a declaration that a statute was void and no longer applied, and not to a declaration, based on that court's case-law, that an unconstitutional statute continued to apply.

29. Lastly, the minority took the view that the court's order of continued application of the *Länder* statutes disregarded the prohibition on the enactment of laws with retrospective effect. After serving the sentence

imposed on them by the criminal courts, offenders had a legitimate expectation of release.

C. Subsequent developments

30. On 16 December 2003 the Bayreuth Regional Court decided to suspend for one year the applicant's placement in prison pursuant to its order dated 10 April 2002. It instructed him to reside in an old people's home in Zell and not to leave the home without the permission of his custodian (*Betreuer*). Having regard to the findings of a psychiatric expert, the Regional Court found that the applicant's placement in the psychiatric department of an old people's home sufficiently averted the dangers he posed for the sexual self-determination of others.

31. On 3 March 2004 the applicant was again detained in Bayreuth prison under a detention order issued under the Bavarian (Dangerous Offenders') Placement Act that day.

32. On 26 March 2004 the Bayreuth Regional Court revoked the suspension of the applicant's placement in prison. It found that the applicant had repeatedly sexually harassed several old women suffering from dementia in the old people's home where he had been living. By this behaviour, the applicant had shown that he still posed a serious threat to the sexual self-determination of others.

33. On 5 July 2004 the Bayreuth Regional Court ordered that the applicant's placement under the Bavarian (Dangerous Offenders') Placement Act, read in conjunction with the judgment of the Federal Constitutional Court of 10 February 2004, was to be executed in a psychiatric hospital in order to further his reintegration into society. On 28 July 2004 the applicant was transferred to Bayreuth psychiatric hospital.

34. On 10 June 2005 the Passau Regional Court ordered the applicant's subsequent preventive detention under Article 66b § 1 of the Criminal Code (see paragraph 48 below) which was to be executed in a psychiatric hospital. On 23 March 2006 the Federal Court of Justice quashed that order and remitted the case to the Passau Regional Court.

35. On 14 June 2007 the Hof Regional Court, having regard to the acts committed by the applicant in the old people's home (sexual harassment of persons incapable of resisting), ordered the applicant's placement in a psychiatric hospital under Article 63 of the Criminal Code. In view of that decision, the prosecution then applied to discontinue the proceedings concerning the applicant's subsequent preventive detention that were pending before the Passau Regional Court.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Legislation on detention of convicted offenders for preventive purposes

1. Federal legislation on preventive detention until 1 January 2002

36. Initially, the continued detention of convicted offenders who had served their sentence in order to protect the public was solely regulated in federal legislation, notably in the provisions on preventive detention (Articles 66 *et seq.* of the Criminal Code), a so-called measure of correction and prevention (*Maßregel der Besserung und Sicherung*). A comprehensive summary of the provisions of the Criminal Code and of the Code of Criminal Procedure governing the distinction between penalties and measures of correction and prevention, in particular preventive detention, and the making, review and execution in practice of preventive detention orders, is contained in the Court's judgment in the case of *M. v. Germany* (no. 19359/04, §§ 45-78, 17 December 2009). The provisions relevant to the present case will be summarised below.

37. Pursuant to Article 66 of the Criminal Code, the criminal sentencing court may, at the time of the offender's conviction, order his preventive detention under certain circumstances in addition to his prison sentence if the offender has been shown to be a danger to the public.

38. Paragraph 1 of Article 66 provides that the sentencing court orders preventive detention in addition to the penalty if someone is sentenced for an intentional offence to at least two years' imprisonment and if the following further conditions are satisfied. Firstly, the perpetrator must have been sentenced twice already, to at least one year's imprisonment in each case, for intentional offences committed prior to the new offence. Secondly, the perpetrator must previously have served a prison sentence or must have been detained pursuant to a measure of correction and prevention for at least two years. Thirdly, a comprehensive assessment of the perpetrator and his acts must reveal that, owing to his propensity to commit serious offences, notably those which seriously harm their victims physically or mentally or which cause serious economic damage, the perpetrator presents a danger to the general public.

39. Under Article 67a § 2 of the Criminal Code, the court may transfer a perpetrator against whom preventive detention has been ordered to a psychiatric hospital subsequently if the perpetrator's reintegration into society can be better promoted thereby.

40. The provisions on preventive detention underwent a reform in 1998.

41. By the Combating of Sexual Offences and Other Dangerous Offences Act (*Gesetz zur Bekämpfung von Sexualdelikten und anderen*

gefährlichen Straftaten) of 26 January 1998, which entered into force on 31 January 1998, a new paragraph 3 was inserted into Article 66 of the Criminal Code. Pursuant to that provision, preventive detention could also be ordered for certain serious offences (including rape and sexual abuse of children) if the perpetrator had committed two such offences which were to be punished separately with at least two years' imprisonment, if he was sentenced to an aggregate sentence of at least three years' imprisonment for these offences and if he presented a danger to the public as prescribed in Article 66 § 1, even if the perpetrator had not previously been convicted and detained as required in paragraph 1 of Article 66. Article 66 § 3 was only applicable if the perpetrator had committed one of the offences listed in that provision after 31 January 1998 (section 1a § 2 of the Introductory Law to the Criminal Code, in its version then in force).

42. However, although the issue had been raised on several occasions in the course of the legislative process (see the judgment of the Federal Constitutional Court of 10 February 2004 in the present case, A.I.1. and 2., pp. 4-13), the Federal legislature did not choose to introduce a legal basis for ordering an offender's preventive detention retrospectively after a sentencing court's judgment which had not ordered this measure (retrospective preventive detention – *nachträgliche Sicherungsverwahrung*) if it became apparent only after the final judgment, notably during the convict's detention, that he was a danger to the public. Unlike several *Länder*, the Federal Government considered at the relevant time that it was the *Länder* parliaments, and not the Federal Legislature, which had the power to enact legislation on that issue (see, for instance, *Bundesrat* Printed Papers no. 822/2000 of 21 December 2000, pp. 647 *et seq.*).

2. Länder *legislation on detention for preventive purposes*

43. In view of the foregoing, several *Länder* parliaments passed Acts, based on their legislative competence for the preventive aversion of dangers (*Gefahrenabwehr*), introducing retrospective detention of convicted offenders for preventive purposes. In doing so, the *Länder* were reacting to the fact that the Federation had not enacted corresponding legislation.

44. The *Land* of Bavaria, in particular, enacted the Bavarian Act for the placement of particularly dangerous offenders very liable to reoffend (*Bayerisches Gesetz zur Unterbringung von besonders rückfallgefährdeten hochgefährlichen Straftätern* – Bavarian (Dangerous Offenders') Placement Act) of 24 December 2001, which entered into force on 1 January 2002. Pursuant to section 1 § 1 of that Act, the Regional Court could order a convicted offender's placement in prison if the latter was serving a sentence under the conditions laid down in Article 66 of the Criminal Code and if facts having come to light after the offender's conviction showed that he currently posed a serious risk to life and limb or sexual self-determination of others, in particular because during the execution of his prison sentence he

had persistently refused to cooperate in attaining the objective of the execution of his sentence, notably by declining or discontinuing psychotherapy or social therapy aimed at preventing recidivism. Such order was not to be made or was to be quashed if the person concerned was placed in a psychiatric hospital under Article 63 of the Criminal Code or in preventive detention under Article 66 of the Criminal Code (section 1 § 2 of the Bavarian (Dangerous Offenders') Placement Act) or if he was placed in a psychiatric hospital under the Bavarian Act on the Placement in an Institution of Mentally Ill Persons and Their Care (section 1 § 3 of the Bavarian (Dangerous Offenders') Placement Act).

45. Section 2 of the Bavarian (Dangerous Offenders') Placement Act prescribed that retrospective detention for preventive purposes was to be ordered for an indefinite period unless it was to be expected that the person concerned would no longer be dangerous after a certain time.

46. A chamber of the Regional Court responsible for the execution of sentences had jurisdiction to order a convicted offender's placement in prison for preventive purposes at the request of the prison in which the person concerned was serving his sentence. The Regional Court had to consult two experts on the dangerousness of the person concerned before taking its decision (see sections 3 and 4 of the Bavarian (Dangerous Offenders') Placement Act). It had to review at least every two years whether the placement in prison of the person concerned was still necessary and had to suspend the placement and put him on probation if it was no longer necessary (section 5 of the Bavarian (Dangerous Offenders') Placement Act). The placement order was to be executed in a prison; for the execution of the placement, Articles 129 to 135 of the Execution of Sentences Act (which contain special rules for the execution of preventive detention orders made under the Criminal Code) applied by analogy (section 6 of the Bavarian (Dangerous Offenders') Placement Act).

3. Federal legislation on retrospective preventive detention following the Federal Constitutional Court's judgment of 10 February 2004

47. On 28 July 2004 the Federal legislature enacted the Introduction of Retrospective Preventive Detention Act (*Gesetz zur Einführung der nachträglichen Sicherungsverwahrung*), which entered into force on 29 July 2004.

48. Pursuant to the newly introduced Article 66b of the Criminal Code, the court may order preventive detention retrospectively, in particular, if, prior to the end of a term of imprisonment imposed on conviction for crimes punishable with at least one year's imprisonment against life, limb, personal liberty or sexual self-determination or for offences listed in Article 66 § 3, evidence comes to light which indicates that the convicted person presents a significant danger to the general public. An overall assessment of the convicted offender's personality, his offences and additionally his

development during detention must have shown that he was very liable to commit serious offences by which the victims would be seriously harmed; moreover, the other conditions listed in Article 66 of the Criminal Code had to be met (§ 1 of Article 66b).

49. The newly introduced Article 66b of the Criminal Code was applicable to persons who had been placed in detention under the Bavarian (Dangerous Offenders') Placement Act (section 1a of the Introductory Law to the Criminal Code, as amended).

B. Provisions on the detention of mentally ill persons

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

51. Secondly, pursuant to sections 1 § 1, 5 and 7 of the Bavarian Act on the Placement in an Institution of Mentally Ill Persons and Their Care of 5 April 1992 (Bavarian (Mentally Ill Persons') Placement Act – *Bayerisches Gesetz über die Unterbringung psychisch Kranker und deren Betreuung*) a court may order a person's placement in a psychiatric hospital at the request of the authorities of a town or county if the person concerned is mentally ill and thereby poses a severe threat to public security and order. Such an order may only be executed as long as no measure under Article 63 of the Criminal Code has been taken (section 1 § 2 of the said Act).

C. Provisions of the Basic Law

52. The distribution of legislative powers between the Federation and the *Länder* is laid down in Articles 30 and 70 *et seq.* of the Basic Law. Pursuant to Articles 30 and 70 § 1 the *Länder* have the right to legislate in so far as the Basic Law does not confer legislative power on the Federation. Pursuant to Article 74 § 1 no. 1 of the Basic Law, the Federation has concurrent power to legislate (*konkurrierende Gesetzgebungskompetenz*) in the domain of criminal law. In relation to subject-matter in which the Federation and the *Länder* have concurrent power to legislate, the *Länder* are authorised to legislate as long as and in so far as the Federation has not exercised its power to legislate by enacting a law (Article 72 § 1 of the Basic Law).

53. Article 104 of the Basic Law governs legal guarantees in the event of deprivation of liberty. Under paragraph 1 of Article 104, personal liberty may only be restricted pursuant to a law enacted by Parliament and then only in compliance with the procedures prescribed therein.

D. The Federal Constitutional Court Act

54. Pursuant to section 31 § 2, second sentence, of the Federal Constitutional Court Act, the decision of the Federal Constitutional Court on a constitutional complaint has force of law (*Gesetzeskraft*) if that court declares a law to be compatible or incompatible with the Basic Law or to be void.

55. Section 95 § 3 of the Federal Constitutional Court Act provides that if a constitutional complaint against a law is upheld, the law has to be declared void. The same applies if a constitutional complaint against a decision is upheld as the decision quashed was based on an unconstitutional law.

56. Pursuant to the Federal Constitutional Court's well-established case-law, section 95 § 3 of the Federal Constitutional Court Act is, however, interpreted in a flexible manner. Instead of declaring a statute to be void *ab initio*, the Constitutional Court may also solely declare it to be incompatible with the provisions of the Basic Law. It proceeds in this manner notably in cases in which, by declaring a statute void, it would create a situation which would be even less compatible with the Basic Law (see, for example, the decisions of the Federal Constitutional Court, Collection of the decisions of the Federal Constitutional Court (*BVerfGE*) vol. 92, pp. 158 *et seq.*, 159, 186 *et seq.*, vol. 99, pp. 216 *et seq.*, 218-19, 243-44) or in which the basis for the protection of paramount interests related to the public good would otherwise be removed (see, for example, the decisions of the Federal Constitutional Court, Collection of the decisions of the Federal Constitutional Court, vol. 33, pp. 1 *et seq.*, 13-14, vol. 40, pp. 276 *et seq.*, 283). In such circumstances, the court has on several occasions decided to order the continued application of a statute found to be unconstitutional (see, *inter alia*, the decisions of the Federal Constitutional Court, collection of the decisions of the Federal Constitutional Court, vol. 99, pp. 216 *et seq.*, 219, 243-44, vol. 72, pp. 330 *et seq.*, 333, 422; see also, among others, Schmidt-Bleibtreu in: Maunz / Schmidt-Bleibtreu / Klein / Bethge, *Bundesverfassungsgerichtsgesetz*, *Kommentar*, Munich 2006, section 95, § 32, with many references to the Federal Constitutional Court's case-law).

E. *Länder* (Dangerous Offenders') Placement Acts: statistical material

57. According to statistical material submitted by the Government, five of the sixteen German *Länder* had chosen to enact legislation for the placement of convicted offenders who were particularly liable to reoffend that was comparable to the Bavarian (Dangerous Offenders') Placement Act. At the beginning of 2004, four persons were placed in prison under the Bavarian Act. In June 2004 a total of eight persons were placed in prison under all of the said *Länder* (Dangerous Offenders') Placement Acts.

THE LAW

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

58. The applicant complained that his continued detention in prison for preventive purposes, after he had fully served his prison sentence, under the unconstitutional Bavarian (Dangerous Offenders') Placement Act violated his right to liberty as provided in Article 5 § 1 of the Convention, which, in so far as relevant, reads as follows:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (a) the lawful detention of a person after conviction by a competent court;
>
> ...
>
> (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
>
> ...
>
> (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;
>
> ..."

59. The Government contested that argument.

A. Admissibility

60. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 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

61. The applicant argued that he had been deprived of his liberty in breach of Article 5 § 1. His detention had not been covered by any of the sub-paragraphs (a) to (f) of Article 5 § 1. He took the view that, whereas preventive detention which was ordered by the sentencing court was compatible with sub-paragraph (a) of Article 5 § 1, this was not the case for preventive detention which was ordered retrospectively. There was a sufficient causal connection between an offender's conviction and his detention for the purposes of that provision only in cases where preventive detention had been ordered in the judgment of the sentencing court. Other subsequent causal connections with that judgment did not suffice. In particular, the causal connection between the judgment of the sentencing court and the subsequent, retrospective order of preventive detention was broken if that detention was based on new facts which had emerged only after the said judgment, during the offender's detention.

62. The applicant further submitted that his preventive detention had also not been justified under sub-paragraph (c) of Article 5 § 1. That provision only covered preventive detention for a short duration in cases where the commission of a specific offence was imminent and where the detention was effected for the purpose of bringing the person concerned before a court.

63. Likewise, in the applicant's submission, sub-paragraph (e) of Article 5 § 1 was not applicable to him. The sentencing courts, having consulted medical experts, had confirmed that he had not been mentally ill, but had been criminally responsible for his acts. As a consequence, they had not placed him in a psychiatric hospital.

64. The applicant further submitted that his detention had not been "lawful" under domestic law and that the judgment of the Federal Constitutional Court had not been rendered in accordance with the procedure prescribed by law, as had been convincingly shown in the dissenting opinion attached to that court's judgment. His continued detention could not be based on the Federal Constitutional Court's judgment

alone. It did not make a difference for the purposes of Article 5 § 1 whether the Bavarian (Dangerous Offenders') Placement Act had been declared void or had been considered incompatible with the Basic Law by the Federal Constitutional Court, as in both cases his detention was not "lawful" for the purposes of Article 5 § 1.

65. Moreover, the applicant argued that there would not have been an intolerable legislative gap had the (Dangerous Offenders') Placement Act been declared void. Only a minority of the German *Länder* had enacted legislation authorising a so-called retrospective preventive detention at the relevant time; before 2001, retrospective preventive detention had not existed at all. He had been seventy years old and in a poor state of health in 2004 and could not therefore have been regarded as a particularly dangerous offender. There had also not been any new facts which had come to light during the execution of his sentence and which would have called for his placement in prison. As the Bavarian (Dangerous Offenders') Placement Act entered into force only shortly before he had fully served his sentence, he had also been unable to adapt his conduct in prison to the new legislation.

(b) The Government

66. The Government took the view that the applicant's deprivation of liberty complied with Article 5 § 1. They pointed out that during the period in which the applicant had been released on probation and had been instructed by the Bayreuth Regional Court to reside in an old people's home (from 16 December 2003 until 3 March 2004), he had not been deprived of his liberty. During that period, he had only been subjected to a restriction of his freedom of movement to which he had agreed in the hearing before the Regional Court.

67. In the Government's submission, the applicant's retrospective placement in prison under the Bavarian (Dangerous Offenders') Placement Act had been covered by sub-paragraph (a) of Article 5 § 1. They argued that there had been a sufficient causal connection between the applicant's criminal conviction and his detention under the Bavarian (Dangerous Offenders') Placement Act. The Federal Constitutional Court, in its judgment of 10 February 2004, had emphasised that the previous criminal conviction of the person concerned was not only a *sine qua non* for his placement in prison under the (Dangerous Offenders') Placement Act. That conviction was the decisive element in determining whether that person was to be considered a danger to the public, while the fact that the person had refused or given up therapy was only an additional factor. Moreover, the (Dangerous Offenders') Placement Act had referred to the requirements of Article 66 of the Criminal Code, in particular to the serious offences listed therein, which suggested the dangerousness of the perpetrator. There had also been a sufficient connection in time between the criminal conviction of an offender and his placement in prison under the

(Dangerous Offenders') Placement Act because that placement could only be ordered as long as the person concerned still served his sentence. The placement had further been ordered by an independent tribunal, a chamber of the Regional Court dealing with the execution of sentences.

68. Furthermore, the Government submitted that sub-paragraph (c) of Article 5 § 1, if interpreted extensively, could have covered the applicant's placement in prison under the (Dangerous Offenders') Placement Act. The detention of a person who had been considered dangerous under that Act could have been "reasonably considered necessary to prevent his committing an offence" for the purposes of the said provision.

69. The Government further argued that the applicant's detention had also been justified under sub-paragraph (e) of Article 5 § 1. In its decision of 10 April 2002, the Bayreuth Regional Court had based the order of the applicant's retrospective detention for preventive purposes on the fact that the applicant, as had been confirmed by two psychiatric experts, suffered from a mental disorder due to which he was unable to reflect on his deviant sexual behaviour. The applicant's detention complied with the criteria developed in relation to sub-paragraph (e) of Article 5 § 1 in the Court's judgment of 24 October 1979 in the case of *Winterwerp v. the Netherlands*. The fact that the applicant's retrospective detention for preventive purposes had been ordered in view of his unsound mind was proven, in particular, by the fact that he had subsequently been placed under guardianship as he suffered from dementia and had been ordered to live in an old people's home. Moreover, he had been placed in a psychiatric hospital since 28 July 2004.

70. In the Government's view, the applicant's detention had also been lawful and in accordance with a procedure prescribed by law for the purposes of Article 5 § 1. The deprivation of liberty had been based on a law enacted by Parliament, as prescribed by Article 104 § 1 of the Basic Law (see paragraph 53 above). The applicant had been detained under the Bavarian (Dangerous Offenders') Placement Act, read in conjunction, since 10 February 2004, with the Federal Constitutional Court's order made in its judgment of that day that the Bavarian (Dangerous Offenders') Placement Act, despite its incompatibility with the Basic Law, continued to apply until 30 September 2004 at the latest. Thereby, the Federal Constitutional Court had ordered that the said Act, despite its incompatibility with the Basic Law, remained valid and applicable until that date. The applicant's deprivation of liberty had therefore retained a legal basis also during the short transitional period between the judgment of the Federal Constitutional Court and the entry into force of the Federal legislation on retrospective preventive detention on 29 July 2004.

71. The Government argued that the Federal Constitutional Court had had jurisdiction to make the said order under section 31 § 2 of the Federal Constitutional Court Act, as that court had confirmed in its well-established

case-law. If the (Dangerous Offenders') Placement Act had been declared void, there would have been an intolerable legislative gap which would have been even less compatible with the Basic Law than the said Act which had been found to be incompatible with the Basic Law. The vital interest of the public in being protected effectively by the State against very dangerous offenders who were particularly liable to reoffend made it necessary to put the Federal legislature in a position to decide whether or not to enact a statute regulating the situation at issue. Otherwise, the persons imprisoned on the basis of the (Dangerous Offenders') Placement Act would have had to be released with immediate effect, which would have made effective protection of the public impossible.

72. The Government further took the view that the applicant's deprivation of liberty had not been arbitrary. The Parliament of Bavaria had assumed in good faith that it had the power to enact the (Dangerous Offenders') Placement Act. It had been foreseeable for the applicant that he was liable to be detained under that Act. In view of the short duration of the transitional period during which the (Dangerous Offenders') Placement Act continued to apply, the Federal Constitutional Court had restricted the applicant's right to liberty in a proportionate manner. The Government pointed out that placement in prison under the Bavarian (Dangerous Offenders') Placement Act had been ordered only in a few exceptional cases. At the beginning of 2004 only four persons had been placed in prison under that Act (see also paragraph 57 above).

2. The Court's assessment

(a) Recapitulation of the relevant principles

(i) Grounds for deprivation of liberty

73. 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, *inter alia*, *Guzzardi v. Italy*, 6 November 1980, § 96, Series A no. 39; *Witold Litwa v. Poland*, no. 26629/95, § 49, ECHR 2000-III; and *Saadi v. the United Kingdom* [GC], no. 13229/03, § 43, ECHR 2008-...). However, the applicability of one ground does not necessarily preclude that of another; a deprivation of liberty may, depending on the circumstances, be justified under one or more sub-paragraphs (see, among other authorities, *Eriksen v. Norway*, 27 May 1997, § 76, *Reports of Judgments and Decisions* 1997-III; *Erkalo v. the Netherlands*, 2 September 1998, § 50, *Reports* 1998-VI; and *Witold Litwa*, cited above, § 49).

74. For the purposes of sub-paragraph (a) of Article 5 § 1, the word "conviction", having regard to the French text ("*condamnation*"), has to be understood as signifying both a finding of guilt after it has been established in accordance with the law that there has been an offence (see *Guzzardi*, cited above, § 100), and the imposition of a penalty or other measure involving deprivation of liberty (see *Van Droogenbroeck v. Belgium*, 24 June 1982, § 35, Series A no. 50, and *M. v. Germany*, no. 19359/04, § 87, 17 December 2009).

75. Furthermore, the word "after" in sub-paragraph (a) does not simply mean that the "detention" must follow the "conviction" in point of time: in addition, the "detention" must result from, follow and depend upon or occur by virtue of the "conviction" (see *Van Droogenbroeck*, cited above, § 35). In short, there must be a sufficient causal connection between the conviction and the deprivation of liberty at issue (see *Weeks v. the United Kingdom*, 2 March 1987, § 42, Series A no. 114; *Stafford v. the United Kingdom* [GC], no. 46295/99, § 64, ECHR 2002-IV; *Waite v. the United Kingdom*, no. 53236/99, § 65, 10 December 2002; *Kafkaris v. Cyprus* [GC], no. 21906/04, § 117, ECHR 2008-...; and *M. v. Germany*, cited above, § 88).

76. Under sub-paragraph (c) of Article 5 § 1, the detention of a person may be justified "when it is reasonably considered necessary to prevent his committing an offence". However, that ground of detention is not adapted to a policy of general prevention directed against an individual or a category of individuals who present a danger on account of their continuing propensity to crime. It does no more than afford the Contracting States a means of preventing a concrete and specific offence (see *Guzzardi*, cited above, § 102; compare also *Eriksen*, cited above, § 86). This can be seen both from the use of the singular ("an offence") and from the object of Article 5, namely to ensure that no one should be dispossessed of his liberty in an arbitrary fashion (see *Guzzardi*, ibid.).

77. For the purposes of sub-paragraph (e) of Article 5 § 1, 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 v. the Netherlands*, 24 October 1979, § 39, Series A no. 33; *Varbanov v. Bulgaria*, no. 31365/96, §§ 45 and 47, ECHR 2000-X; *Hutchison Reid v. the United Kingdom*, no. 50272/99, § 48, ECHR 2003-IV; and *Shtukaturov v. Russia*, no. 44009/05, § 114, 27 March 2008).

78. Furthermore, there must be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of

detention. In principle, the "detention" of a person as a mental health patient will only be "lawful" for the purposes of sub-paragraph (e) of paragraph 1 if effected in a hospital, clinic or other appropriate institution (see *Ashingdane v. the United Kingdom*, 28 May 1985, § 44, Series A no. 93; *Aerts v. Belgium*, 30 July 1998, § 46, *Reports* 1998-V; *Hutchison Reid*, cited above, § 49; and *Brand v. the Netherlands*, no. 49902/99, § 62, 11 May 2004).

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

79. It is well established in the Court's case-law under the sub-paragraphs of Article 5 § 1 that any deprivation of liberty must, in addition to falling within one of the exceptions set out in sub-paragraphs (a) to (f), 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*, cited above, § 52; *Saadi v. the United Kingdom*, cited above, § 67; and *Kafkaris*, cited above, § 116). This primarily requires any arrest or detention to have a legal basis in domestic law but also relates to the quality of the law, requiring it to be compatible with the rule of law, a concept inherent in all the Articles of the Convention (see *Stafford*, cited above, § 63, and *Kafkaris*, cited above, § 116). "Quality of the law" in this sense implies that where a national law authorises deprivation of liberty it must be sufficiently accessible, precise and foreseeable in its application, in order to avoid all risk of arbitrariness (see *Amuur v. France*, 25 June 1996, § 50, *Reports* 1996-III; *Nasrulloyev v. Russia*, no. 656/06, § 71, 11 October 2007; and *Mooren v. Germany* [GC], no. 11364/03, § 76, 9 July 2009). The standard of "lawfulness" set by the Convention thus requires that all law be sufficiently precise to allow the person – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail (see *Steel and Others v. the United Kingdom*, 23 September 1998, § 54, *Reports* 1998-VII, and *Baranowski v. Poland*, no. 28358/95, § 52, ECHR 2000-III).

80. 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; *Saadi v. the United Kingdom*, cited above, § 67; and *Mooren*, cited above, § 72).

(b) Application of these principles to the present case

81. The Court is therefore called upon to determine whether the applicant in the present case, during his placement in prison for preventive purposes ordered by the Bayreuth Regional Court on the basis of the

Bavarian (Dangerous Offenders') Placement Act, since 10 February 2004, read in conjunction with the Federal Constitutional Court's order that this Act continue to apply until 30 September 2004, was deprived of his liberty in accordance with one of the sub-paragraphs (a) to (f) of Article 5 § 1.

82. The Court notes at the outset that from 16 December 2003 until 3 March 2004 the applicant was released from detention on probation and was instructed by the Bayreuth Regional Court to reside in an old people's home, which he was not to leave without his custodian's permission. Having regard to the material before the Court and to its case-law (see, in particular, *Guzzardi*, cited above, §§ 92 *et seq.*; *Ciancimino v. Italy*, no. 12541/86, Commission decision of 27 May 1991, Decisions and Reports (DR) 70, pp. 122-123; and *Raimondo v. Italy*, 22 February 1994, § 39, Series A no. 281-A), the Court has serious doubts whether the restrictions on the applicant's liberty of movement during that period amounted to a deprivation of liberty within the meaning of Article 5 § 1, as opposed to a mere restriction on his freedom of movement. That question can, however, be left open because, as is uncontested between the parties, the applicant was in any event deprived of his liberty within the meaning of Article 5 § 1 on the basis of the Bavarian (Dangerous Offenders') Placement Act between 14 April 2002 and 16 December 2003 and between 3 March 2004 and 30 September 2004, when he was placed in prison and subsequently in a psychiatric hospital.

83. The Court observes that in the Government's submission, the applicant's retrospective placement in prison under the Bavarian (Dangerous Offenders') Placement Act was covered by sub-paragraph (a) of Article 5 § 1 as there was a sufficient causal connection between the applicant's criminal conviction and his detention under that Act.

84. The Court reiterates in this connection that "conviction" under sub-paragraph (a) of Article 5 § 1 signifies a finding of guilt in respect of an offence and the imposition of a penalty or other measure involving deprivation of liberty (see paragraph 74 above). As has been clarified in the Court's judgment in the case of *M. v. Germany* (cited above), it is the judgment of a sentencing court finding a person guilty of an offence which meets the requirements of a "conviction" for the purposes of the said provision. By contrast, the decision of a court responsible for the execution of sentences to retain the person concerned in detention does not satisfy the requirement of a "conviction" for the purposes of Article 5 § 1 (a) as it no longer involves a finding that the person is guilty of an offence (ibid., §§ 95-96). Thus, in the present case, it is only the judgment of the Passau Regional Court of 16 March 1999 convicting the applicant of two counts of rape which can be characterised as a "conviction" for the purposes of the Convention. The decision of the Bayreuth Regional Court of 10 April 2002 ordering the applicant's placement in prison under the Bavarian (Dangerous Offenders') Placement Act, which did not involve a

finding of guilt in respect of a (new) offence, is, on the contrary, not a "conviction" within the meaning of sub-paragraph (a) of Article 5 § 1.

85. Therefore, the applicant's detention for preventive purposes after 13 April 2002 can be considered as justified under Article 5 § 1 (a) only if it still occurred "after" his "conviction" for rape by the Passau Regional Court. In other words, the applicant's detention must result from, follow and depend upon or occur by virtue of that "conviction"; there must be a sufficient causal connection between that conviction and the deprivation of liberty (see paragraph 75 above).

86. The Court notes, however, that in the sentencing judgment of the Passau Regional Court no order had been made for the applicant's detention for preventive purposes in addition to his prison sentence. That court had not in fact been called upon to determine whether, owing to a propensity to commit serious offences, the applicant was a danger to the public, because the legal preconditions for an order of preventive detention under Article 66 of the Criminal Code had not been met in the applicant's case (see paragraph 9 above). As a consequence, the applicant's conviction did not involve an order – or even a possibility – that he be placed in detention for preventive purposes after serving his term of imprisonment.

87. The Court observes that in the Government's submission, there was nevertheless a sufficient causal connection between the applicant's criminal conviction for rape and the retrospective order, by the Bayreuth Regional Court responsible for the execution of sentences, for the applicant's detention for preventive purposes. They emphasised that the applicant's criminal conviction was the decisive element in determining whether he was to be considered a danger to the public under the Bavarian (Dangerous Offenders') Placement Act and that such detention for preventive purposes could only be ordered as long as the person concerned was still serving his sentence.

88. The Court notes that the Federal Constitutional Court indeed stressed that it was the prior commission of a serious offence which was decisive for an order of detention for preventive purposes to remain proportionate, as opposed to new facts having arisen during the detention of the person concerned (see paragraphs 21 and 25 above). It reiterates, however, that only a narrow interpretation of the exceptions to the right to liberty secured in Article 5 § 1 is consistent with the aim of that provision, namely to ensure that no one is arbitrarily deprived of his or her liberty (see, *inter alia*, *Labita v. Italy* [GC], no. 26772/95, § 170, ECHR 2000-IV, and *Lexa v. Slovakia*, no. 54334/00, § 119, 23 September 2008). The Court therefore considers that, as the applicant's detention for preventive purposes on the basis of the Bavarian (Dangerous Offenders') Placement Act had not been provided for and was not even possible under the judgment convicting him of rape, it cannot be regarded as having ensued "by virtue of" that criminal conviction simply because the order placing him in detention for preventive

purposes referred to it and occurred while he was serving the corresponding sentence. In short, there was no sufficient causal connection between the applicant's conviction and his detention for preventive purposes, ordered retrospectively. Therefore, his detention was not justified under sub-paragraph (a) of Article 5 § 1.

89. The Court will further examine whether the applicant's detention for preventive purposes was justified under any of the other sub-paragraphs of Article 5 § 1. It notes that, in the Government's submission, the applicant's detention could have been covered by sub-paragraph (c) as having been "reasonably considered necessary to prevent his committing an offence" if that provision were to be interpreted extensively.

90. The Court observes that the applicant's placement in prison for preventive purposes for an unlimited duration was justified by the courts responsible for the execution of sentences with reference to the risk that the applicant might commit further offences against the sexual self-determination of others if released. However, an interpretation of sub-paragraph (c) of Article 5 § 1, in the light of Article 5 as a whole, confirms that the applicant's detention for an indefinite period for preventive purposes was not covered by that sub-paragraph. Pursuant to paragraph 3 of Article 5, everyone detained in accordance with the provisions of paragraph 1 (c) of that Article must be brought promptly before a judge and tried within a reasonable time or released pending trial. The applicant's detention for preventive purposes was not, however, decided in order for him to be brought promptly before a judge and tried for offences – potential ones – and was thus not pre-trial detention as permitted by that provision. Moreover, the potential further offences in question were not sufficiently concrete and specific, as required by the Court's case-law (see, in particular, *Guzzardi*, cited above, § 102, and *M. v. Germany*, cited above, § 102), as regards, in particular, the place and time of their commission and their victims. Therefore, the applicant's detention was not justified under Article 5 § 1 (c), a narrow interpretation of which alone, as reiterated above (see paragraph 88), is consistent with the aim of Article 5 § 1. In this connection, the Court also refers, *mutatis mutandis*, to its findings in relation to preventive detention under Article 66 of the Criminal Code in the case of *M. v. Germany* (cited above, § 102).

91. The Court will further examine whether, as submitted by the Government, the applicant's detention was justified under sub-paragraph (e) of Article 5 § 1 as detention of a person "of unsound mind". Under the Court's well-established case-law (see paragraph 77 above), this requires, firstly, that the applicant be reliably shown to be of unsound mind; that is, a true mental disorder must have been established before a competent authority on the basis of objective medical expertise. The Court notes that the Bayreuth Regional Court based its decision, upheld on appeal, to order the applicant's placement in prison for an unlimited period of time after

consulting two experts (a psychological expert and a psychiatric and psychotherapeutic expert, see paragraphs 12 and 14 above) on the applicant's dangerousness, as prescribed by section 4 of the Bavarian (Dangerous Offenders') Placement Act (see paragraph 46 above). These experts had confirmed that the applicant currently posed a serious threat to the sexual self-determination of others. In that connection, the medical experts had found that the applicant suffered from an organic personality disorder which led to a continuous decomposition of his personality, owing to which he was no longer able to reflect on his possibly deviant sexual behaviour.

92. In view of the foregoing, the Court considers that there was objective medical expertise to show that the applicant suffered from a personality disorder. As for the authority before which that disorder was established, the Court notes, however, that in the German legal system, a difference is made between the placement of dangerous offenders in a prison for preventive purposes and the placement of mentally ill persons in a psychiatric hospital. This is illustrated by Articles 66 and 63 of the Criminal Code, a Federal law, and apparently also by the distinction made between the Bavarian (Dangerous Offenders') Placement Act on the one hand, and the Bavarian (Mentally Ill Persons') Placement Act, on the other. Under section 1 § 3 of the Bavarian (Dangerous Offenders') Placement Act, an order for a person's placement in prison was not to be made if that person was placed in a psychiatric hospital under the Bavarian (Mentally Ill Persons') Placement Act (see paragraph 44 above). Thus, it is clear that dangerous persons diagnosed with a mental illness were to be placed in a psychiatric hospital by the competent courts. In the applicant's case, the competent authorities had, however, refused to request the applicant's placement in a psychiatric hospital under the Bavarian (Mentally Ill Persons') Placement Act (see paragraph 13 above).

93. Having regard to the foregoing, the Court is not convinced that a "true mental disorder", for the purposes of Article 5 § 1 (e) of the Convention, had been established in respect of the applicant. It further doubts that such a mental disorder could have been "established before a competent authority" under German law, as the courts dealing with the execution of sentences in the present case were not called upon to examine under the Bavarian (Dangerous Offenders') Placement Act whether the applicant was to be detained as a mentally ill person, but had to determine whether the applicant represented a particular danger to the public, irrespective of his mental health. As a consequence, the medical experts who examined the applicant were equally not called upon to establish whether the applicant suffered from a true mental disorder, but whether he currently posed a serious risk for the sexual self-determination of others, again irrespective of his mental condition.

94. Moreover, under the Court's case-law, the "detention" of the applicant as a mental health patient could only be "lawful" for the purposes of sub-paragraph (e) of paragraph 1 if effected in a hospital, clinic or other appropriate institution (see paragraph 78 above). In the present case, the applicant was placed in an ordinary prison until 28 July 2004. For the execution of his placement, the rules for the execution of preventive detention orders made under the Criminal Code applied by analogy (section 6 of the Bavarian (Dangerous Offenders') Placement Act, see paragraph 46 above). As the Court concluded in its recent judgment in the case of *M. v. Germany* (cited above, §§ 127-129), there is no substantial difference in practice between the execution of a (long) prison sentence and that of a preventive detention order. As shown above, it is the psychiatric hospitals which are considered under German law to be the appropriate institutions to provide conditions of detention adapted to mentally ill persons. Therefore, there was no sufficient relationship between the alleged detention of the applicant as a mental health patient and his placement and conditions of detention in prison.

95. Having regard to the foregoing, the Court finds that the applicant's detention was not covered by sub-paragraph (e) of Article 5 § 1 either. It further takes the view – and this is uncontested by the parties – that none of the other sub-paragraphs of Article 5 § 1 can serve to justify the applicant's detention at issue.

96. The Court further observes that the present application raises an issue in terms of the lawfulness of the applicant's detention. It reiterates that, in order to be "lawful", the detention must conform to the substantive and procedural rules of national law, which must, moreover, be of a certain quality and, in particular, must be foreseeable in its application, in order to avoid all risk of arbitrariness (see paragraph 79 above). The Court notes that the domestic courts based the applicant's detention on the Bavarian (Dangerous Offenders') Placement Act, which the Federal Constitutional Court found to be incompatible with the Basic Law. However, that court ordered the continued application of that Act until 30 September 2004. During the period at issue before the Court, the applicant's detention could therefore be considered to have complied with national law, as the said Act, read in conjunction with the Federal Constitutional Court's order, remained valid and applicable during a transitional period. However, a further issue arises in relation to the foreseeability of the (continued) application of the Bavarian (Dangerous Offenders') Placement Act, despite its unconstitutionality. The Court notes in this connection that three of the eight judges of the Federal Constitutional Court itself considered that that court did not have the power, in the applicant's case, to order the continued application of the unconstitutional (Dangerous Offenders') Placement Act (see paragraphs 26-29 above). However, in view of the above finding that the applicant's detention for preventive purposes was not justified under any

of the sub-paragraphs of Article 5 § 1, it is not necessary to decide this question in the present case.

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

II. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

98. The applicant complained that his continued detention for preventive purposes after he had fully served his prison sentence, having regard to the circumstances in which it had been ordered and to its indefinite duration, amounted to inhuman and degrading treatment prohibited by Article 3 of the Convention, which reads as follows:

> "No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

99. The Government contested that argument.

A. Admissibility

100. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 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

101. The applicant took the view that the retrospective order and execution of his placement in prison under the (Dangerous Offenders') Placement Act amounted to inhuman and degrading treatment or punishment. Born in 1934, he had been old and in a poor state of health at the relevant time and only able to walk with a cane. He had been taken by surprise and had been shocked by the order of preventive detention for an indefinite duration made retrospectively against him, and of which he had been notified three days before his scheduled release from prison. In particular, he had not been sufficiently advised about retrospective preventive detention in his meeting with the psychologist of Bayreuth prison on 28 January 2002.

102. The applicant further stressed that he had then legitimately expected to be released as a result of the fact that the (Dangerous Offenders') Placement Act was unconstitutional, but had then learnt that he

would be kept in detention arbitrarily on the basis of unconstitutional legislation and on the unjustified assumption that he represented a particular danger to the public. Following the Federal Constitutional Court's judgment, he was expected to wait to find out whether the Federal legislature would enact provisions on retrospective preventive detention which would serve as a basis for his detention after 30 September 2004. Consequently, he had been treated as a mere object of the proceedings.

(b) The Government

103. The Government took the view that the order for the applicant's placement in detention for preventive purposes, for an indefinite period of time shortly before he had fully served his prison term, and the execution of that detention, had not violated Article 3. The applicant had been informed as soon as possible after the entry into force of the Bavarian (Dangerous Offenders') Placement Act on 1 January 2002, namely on 28 January 2002, that he might be placed in detention for preventive purposes on the basis of that Act. Furthermore, the applicant had been made aware during the time he had served his prison sentence that it was necessary for him to undergo therapy and that a refusal to do so might have negative consequences for him. By enacting the Bavarian (Dangerous Offenders') Placement Act and by ordering the applicant's detention for preventive purposes, the German legislature and the German courts had not intended to debase the applicant, but to comply with the overriding public interest to be protected from dangerous offenders.

104. As to the indefinite duration of the applicant's detention for preventive purposes, the Government pointed out that under the Bavarian (Dangerous Offenders') Placement Act there had been a periodic judicial review of the question whether his detention could be suspended and he could be put on probation. Therefore, the applicant had had a possibility of being released and reintegrated into society. Finally, the way in which the detention had been executed in the particular circumstances of the applicant's case had not amounted to inhuman or degrading treatment or punishment for the purposes of Article 3. In accordance with section 6 of the Bavarian (Dangerous Offenders') Placement Act, the applicant had been detained in prison and had had the same advantages, compared to ordinary long-term prisoners, as persons detained in preventive detention under the Criminal Code. As the applicant had demonstrated when released on probation that he was still capable of committing offences, his detention also did not raise an issue under Article 3 in view of his age or his poor health. He had further received comprehensive medical care in prison.

2. The Court's assessment

(a) Recapitulation of the relevant principles

105. As has been established in the Court's case-law, ill-treatment, including punishment, must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is, in the nature of things, relative; it depends on all the circumstances of the case, such as the nature and context of the treatment or punishment, the manner and method of its execution, its duration, its physical or mental effects and, in some instances, the sex, age and state of health of the victim (see, *inter alia*, *Soering v. the United Kingdom*, 7 July 1989, § 100, Series A no. 161, and *Kudła v. Poland* [GC], no. 30210/96, § 91, ECHR 2000-XI).

106. Under certain circumstances, the detention of an elderly person over a lengthy period might raise an issue under Article 3. Nonetheless, regard is to be had to the particular circumstances of each specific case (see *Priebke v. Italy* (dec.), no. 48799/99, 5 April 2001; *Sawoniuk v. the United Kingdom* (dec.), no. 63716/00, 29 May 2001; and *Papon v. France (no. 1)* (dec.), no. 64666/01, ECHR 2001-VI).

107. The Court has further found, in relation to the imposition of a penalty, that matters of appropriate sentencing largely fall outside the scope of the Convention, but has not excluded that an arbitrary or disproportionately lengthy sentence might in some circumstances raise issues under the Convention (see, *inter alia*, *Sawoniuk*, cited above, concerning a life sentence imposed on a person of advanced age; and also *Weeks*, cited above, § 47; *V. v. the United Kingdom* [GC], no. 24888/94, §§ 97 *et seq.*, ECHR 1999-IX; and *T. v. the United Kingdom* [GC], no. 24724/94, §§ 96 *et seq.*, 16 December 1999, all three judgments concerning life sentences imposed on minors). Likewise, it cannot be excluded that leaving a detainee in a state of uncertainty over a long time as to his future, notably as to the duration of his imprisonment, or removing from a detainee any prospect of release might also give rise to an issue under Article 3 (compare, in particular, *T. v. the United Kingdom*, cited above, § 99; *V. v. the United Kingdom*, cited above, § 100; and *Sawoniuk*, cited above). Furthermore, the fact that a sentence had no legal basis or legitimacy for Convention purposes is another factor capable of bringing a punishment received by the convicted person within the proscription under Article 3 (compare *Ilaşcu and Others v. Moldova and Russia* [GC], no. 48787/99, § 436, ECHR 2004-VII). These principles must apply, *mutatis mutandis*, to a person's continued detention in prison for preventive purposes after he has fully served his prison sentence, as is here at issue.

(b) Application of these principles to the present case

108. The Court observes that the applicant in the present case was sixty-seven years old when he was placed in prison for preventive purposes by the domestic courts. He had been diagnosed as suffering at that time from an organic personality disorder which led to a continuous decomposition of his personality and he submitted that he had a walking disability; no further elements calling into question his otherwise satisfactory state of health have been reported. The applicant did not allege, and there is nothing to indicate, that he did not receive the necessary medical care in prison. The Court has had occasion to note that advanced age as such is not a bar to detention in any of the Council of Europe's member States (see, for instance, *Papon*, cited above). Having regard to the material before it, the Court considers that the applicant's relatively advanced, but not particularly old age, combined with his state of health, which cannot be considered as critical for detention purposes, did not as such attain a minimum level of severity so as to fall within the scope of Article 3.

109. As to the circumstances in which the applicant was detained, the Court notes that on 10 April 2002, three days before his scheduled release from prison on 13 April 2002, the domestic courts placed him in prison for an indefinite duration for preventive purposes. The Bavarian (Dangerous Offenders') Placement Act, which served as the legal basis for his further detention, entered into force only on 1 January 2002, less than three and a half months before his scheduled release. Even though the said Act was found by the Federal Constitutional Court to be unconstitutional, that court ordered its continued application until 30 September 2004 and the applicant was detained further on the basis of that Act. Despite the fact that his detention must therefore be considered to have remained legal under domestic law, it failed to comply with Article 5 § 1 of the Convention, for the reasons set out above.

110. The Court observes that the said circumstances in which the applicant was detained after he had fully served his prison sentence must have generated in him feelings of humiliation and uncertainty as to the future, going beyond the inevitable element of suffering connected with any imprisonment. However, in view of the fact that the Bavarian (Dangerous Offenders') Placement Act had entered into force only shortly before the court's order to detain the applicant further, it cannot be said that the authorities deliberately wished to surprise, let alone debase, the applicant by ordering his continued detention three days before his scheduled release from prison. Likewise, there is nothing to indicate that the German courts, in ordering the applicant's continued detention, did not act in good faith and on the assumption that his detention was compatible with the Convention.

111. Furthermore, as regards the indefinite duration of the order to place the applicant in prison, the Court observes that the domestic courts, under

section 5 of the Bavarian (Dangerous Offenders') Placement Act, had to review at least every two years whether the placement in prison of the person concerned was still necessary. If it was no longer necessary, the court had to suspend the placement and put him on probation (see paragraph 46 above). The Court further notes that the Bayreuth Regional Court indeed decided to suspend the applicant's placement in prison on 16 December 2003, less than two years after ordering it. However, that court revoked the decision less than three months later as the applicant had again committed offences against the sexual self-determination of women. This demonstrates that, despite the indefinite duration of the placement order, the applicant did have a possibility of being released.

112. The Court, having regard to all the material before it, therefore considers that the circumstances of the order and the duration of the applicant's continued detention for preventive purposes did not attain the minimum level of severity such as to amount to inhuman or degrading treatment or punishment.

113. There has accordingly been no violation of Article 3 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

114. Article 41 of the Convention provides:

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

115. The applicant did not submit a claim for just satisfaction within the time-limit fixed for the submission of his observations on the merits (Rule 60 § 2 of the Rules of Court).

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 5 § 1 of the Convention;
3. *Holds* that there has been no violation of Article 3 of the Convention.

Done in English, and notified in writing on 13 January 2011, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek Registrar	Peer Lorenzen President