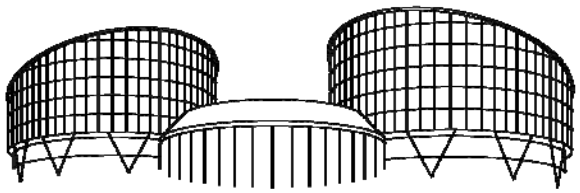

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF RANGELOV v. GERMANY

(Application no. 5123/07)

JUDGMENT

STRASBOURG

22 March 2012

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 Rangelov v. Germany,

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

Dean Spielmann, *President,*
Elisabet Fura,
Boštjan M. Zupančič,
Mark Villiger,
Ganna Yudkivska,
Angelika Nußberger,
André Potocki, *judges,*

and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 21 February 2012,

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

PROCEDURE

1. The case originated in an application (no. 5123/07) 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 Bulgarian national, Mr Georgiev Cvetan Rangelov ("the applicant"), on 12 October 2004.

2. The applicant, who had been granted legal aid, was initially represented by Ms U. Groos and subsequently by Mr J. Oelbermann, both lawyers practising in Berlin. The German Government ("the Government") were represented by their Agents, Mrs A. Wittling-Vogel, *Ministerialdirigentin*, and Mr H.-J. Behrens, *Ministerialrat*, of the Federal Ministry of Justice.

3. The applicant alleged that the execution of the preventive detention order against him had violated Articles 5 § 1 and 14 of the Convention because in view of his foreign nationality, he had been refused important measures putting him in a position to prove that he was no longer dangerous to the public.

4. On 7 March 2007 the application was communicated to the Government. It was also decided to rule on the admissibility and merits of the application at the same time (Article 29 § 1).

5. The Government of Bulgaria, having been informed of their right to intervene in the proceedings (Article 36 § 1 of the Convention and Rule 44 of the Rules of Court), did not indicate that they wished to exercise that right.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1961. When lodging his application, he was detained in Straubing Prison (Germany). He is currently detained in Grad Vraca (Bulgaria).

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

7. The applicant entered Germany in 1979. He has been convicted some fifteen times since 1980, notably of theft and burglary. In particular, on 1 March 1984 the Kempten District Court convicted him of three counts of joint theft as a member of a gang and sentenced him to three years' imprisonment. On 7 October 1988 the Munich I Regional Court convicted the applicant of six counts of burglary and one count of attempted burglary and sentenced him to five years' imprisonment. On 1 October 1993 the Munich District Court convicted the applicant of joint attempted burglary, committed approximately one month after his release from prison, and sentenced him to one year and six months' imprisonment.

8. On 21 December 1994 the applicant was arrested and remanded in detention.

9. On 26 January 1996 the Munich I Regional Court convicted the applicant of eight counts of burglary and attempted burglary, committed only a few months after his release from prison, and sentenced him to eight years and six months' imprisonment. It found that by breaking into different shops, the applicant had stolen goods worth some 140,000 Deutschmarks (approximately 71,581 euros). It further ordered the applicant's preventive detention pursuant to Article 66 § 1 of the Criminal Code (see paragraphs 40-41 below). Having regard to an expert report, the court found that the applicant had a propensity to commit offences by which serious economic damage was caused and was therefore dangerous to the public.

10. By a decision of 16 April 1997, supplemented on 29 October 1997, the city of Munich ordered the applicant's expulsion to Bulgaria and prohibited him to re-enter Germany for an indefinite duration in view of his criminal convictions. It authorised the applicant's expulsion directly from prison as soon as he had served his sentence. The expulsion order became final on 30 December 1997, the regional government of Upper Bavaria having dismissed the applicant's appeal on 25 November 1997.

11. In the plan governing the execution of the applicant's sentence, drawn up by the Straubing Prison authorities and presented to the applicant on 9 October 1997, it is noted that the applicant's transfer to a social

therapeutic institution, relaxations in the conditions of his detention and preparations for his release were not envisaged as the city of Munich had issued a deportation order against him.

12. On 7 January 2002 the Erlangen Prison authorities informed the applicant, who was at that time detained in Straubing Prison, that it was not possible to transfer him to Erlangen in order to enable him to participate in a social therapy because he was liable to be expelled after having served his prison sentence.

13. The applicant served his full prison sentence until 19 June 2003. Since then, he was remanded in preventive detention.

B. The proceedings at issue

1. The decision of the Regional Court

14. On 21 August 2003 the Regensburg Regional Court, in review proceedings pursuant to Article 67c § 1 of the Criminal Code (see paragraph 42 below), decided that the execution of the applicant's preventive detention was still necessary in view of its objective.

15. On 1 December 2003 the Nuremberg Court of Appeal, allowing the applicant's appeal, quashed the decision of 21 August 2003 and remitted the case to the Regional Court. It found that the Regional Court had not been entitled to authorise one of its judges to hear the applicant alone instead of hearing him in its full composition without giving reasons for doing so. Moreover, the refusal of the Straubing Prison authorities to allow the applicant's defence counsel to inspect his personal files had violated the right to a fair trial.

16. The applicant's counsel was subsequently granted access to the applicant's personal files at Straubing Prison.

17. On 26 February 2004 the Regensburg Regional Court, having heard the applicant on 15 January 2004 and the applicant and the two experts W. and T. on 19 February 2004, again decided that the execution of the applicant's preventive detention was necessary in view of its objective (Article 67c § 1 of the Criminal Code). It therefore refused to suspend the execution of the applicant's preventive detention and to grant probation.

18. Having regard to the report submitted by the expert for forensic psychiatry W., the Regional Court found that it was very likely that the applicant would reoffend if released. He had been convicted of burglary on numerous occasions and had reoffended shortly after having served long prison sentences. As confirmed by a report submitted by the Straubing Prison authorities dated 17 January 2003 and by the applicant's statements at the hearing, the applicant continuously refused critically to reflect on his offences and felt persecuted and wrongfully convicted by the German courts.

19. The Regional Court considered that there were also no other elements indicating that the applicant was no longer inclined to reoffend. It noted that according to expert W., it was advisable for the applicant to participate in a social therapy. It conceded that the applicant had not been admitted to a social therapy in Erlangen Prison he had applied for in 2002. The conditions of his detention had also not been relaxed (*Vollzugslockerungen*). Both of these measures were important conditions for arriving at a prognosis that he was no longer dangerous to the public. However, this did not alter the fact that the applicant kept posing a risk to the public.

20. According to the Regional Court, the applicant's preventive detention was also not disproportionate. As the applicant was not a German national it was unlikely that the prison authorities, having regard to the usual practice, would relax his conditions of detention. He had further been refused a social therapy in view of his imminent expulsion. The court considered that it was illegal to retain a convicted person in preventive detention for an indefinite period of time only as a consequence of his foreign nationality and the resulting refusal of relaxed conditions of imprisonment. The Public Prosecutor's Office would have to consider this issue when deciding on a fresh motion lodged by the applicant to suspend his preventive detention pursuant to Article 456a of the Code of Criminal Procedure (see paragraph 45 below). Otherwise, a suspension of the preventive detention order against the applicant on probation could have to be ordered in the future for reasons of proportionality even without the conditions of his detention having previously been relaxed.

2. The decision of the Nuremberg Court of Appeal

21. On 23 April 2004 the Nuremberg Court of Appeal dismissed the applicant's appeal against the Regional Court's decision of 26 February 2004.

22. Endorsing the reasons given by the Regional Court, the Court of Appeal found that the applicant was still dangerous to the public. He had also proved obstinate in prison and had to be punished three times in 2003 for having insulted the prison staff. Due to the fact that the applicant, as confirmed by expert W., refused to take responsibility for his past offences, there were no suitable measures to prepare the applicant adequately for his release. As the applicant was in preventive detention only since 20 June 2003, the execution of this measure was still proportionate.

3. The decision of the Federal Constitutional Court

23. On 27 May 2004 the applicant, represented by counsel, lodged a constitutional complaint with the Federal Constitutional Court. He notably argued that his right to freedom as guaranteed by Article 2 § 2 of the Basic

Law was violated because his preventive detention was disproportionate. Moreover, he claimed that the refusal to admit him to a social therapy due to his imminent expulsion discriminated him because of his Bulgarian nationality and therefore disregarded his right to equality under Article 3 of the Basic Law.

24. On 28 September 2004 the Federal Constitutional Court refused to admit the applicant's constitutional complaint and to grant him legal aid (no. 2 BvR 1079/04). It found that his complaint had no prospects of success. There was nothing to indicate that the criminal courts, in reaching their decision under Article 67c § 1 of the Criminal Code, notably in finding that the applicant was still dangerous, had failed duly to consider human dignity and the right to freedom as guaranteed by the Basic Law.

25. The Federal Constitutional Court confirmed that measures relaxing the conditions of detention were a decisive factor for the prognosis of a convicted person's dangerousness. However, the applicant neither claimed to have applied for such measures in the course of his preventive detention nor to have been unlawfully refused such measures. The decisions of the criminal courts were also not based on the fact that until then, no such measures had been granted. As regards therapeutic measures, the criminal courts had rightly pointed out that due to the applicant's persistent refusal to accept responsibility for his offences there were no suitable measures to prepare him adequately for his release.

C. Subsequent developments

1. Proceedings concerning relaxations in the conditions of the applicant's detention

26. On 25 November 2004 the Straubing District Court dismissed the applicant's request for measures relaxing the conditions of his preventive detention, notably leave under escort for one day under the supervision of two prison officers. It argued that he might abscond on that occasion. The applicant's appeal on points of law against this decision to the Nuremberg Court of Appeal was to no avail. On 14 March 2006 the Straubing Prison authorities dismissed another request made by the applicant to relax his conditions of preventive detention on the same grounds.

2. Proceedings concerning the applicant's admission to a therapy

27. On 17 December 2004 the Erlangen Prison again declared not to consent to a transfer of the applicant from Straubing Prison to it in order to admit the applicant to a social therapy. It argued that it was not in a position to prepare the applicant, who was liable to be expelled, for a life without offences in Bulgaria. The living conditions in that country were not known

to the therapists. On 31 January 2005 the Nuremberg-Fürth Regional Court dismissed as inadmissible the applicant's request to declare that refusal unlawful. It found that it were the Straubing Prison authorities which were competent to decide on the applicant's transfer to a different prison.

3. Judicial review of the applicant's preventive detention

28. On 21 December 2006 the Regensburg Regional Court, reviewing the necessity of the applicant's preventive detention under Articles 67d § 2 and 67e of the Criminal Code (see paragraphs 43-44 below), refused to suspend the execution of the applicant's preventive detention order on probation. Having regard to the report of psychiatric expert A. it had consulted, it found that there was still a risk that the applicant would commit further serious offences against the property of others (but no violent offences) if released.

29. The Regional Court considered that the applicant's continued preventive detention was still proportionate. It conceded that it was problematic that no measures at all were planned by the prison authorities to further the applicant's reintegration into society. Moreover, owing to, in particular, his foreign nationality, the applicant could not expect any relaxations in the conditions of his detention. In practice, the latter were a precondition for coming to an assessment that a detainee was no longer dangerous to the public. Therefore, the court would have to decide at the next periodic review of the applicant's preventive detention whether the applicant was to be released for reasons of proportionality, despite the fact that he had not previously been granted relaxations in the conditions of his detention and had not been considered as no longer posing a threat to the public.

30. On 12 March 2007 the Nuremberg Court of Appeal, endorsing the reasons given by the Regional Court, dismissed the applicant's appeal. It noted, in particular, that expert A. had considered that there was no starting point for beginning with measures preparing the applicant's conditional release. As he contested having committed the property offences he had been found guilt of, he could not critically reflect on his criminal behaviour. Therefore, relaxations in the conditions of the applicant's detention, which were very important to arrive at a prognosis that a person was no longer dangerous to the public, had not been refused without good cause.

4. Proceedings under Article 456a of the Code of Criminal Procedure

(a) First set of proceedings

31. On 16 February 2005 the Munich I Public Prosecutor's Office dismissed the applicant's request to suspend the execution of his preventive detention in view of his imminent expulsion under Article 456a of the Code

of Criminal Procedure. On 25 April 2005 the General Public Prosecutor dismissed the applicant's appeal.

32. On 12 July 2005 the Munich Court of Appeal dismissed the applicant's request for judicial review. Endorsing the reasons given by the prosecution authorities, it found that there was still a risk that the applicant reoffended and that he was still was not conscious of his guilt. In these circumstances, a therapeutic treatment was without prospects of success.

33. On 19 June 2007 the Federal Constitutional Court declined to consider the applicant's constitutional complaint (file no. 2 BvR 1676/05). It found that the decision of the Court of Appeal to consider as lawful the prosecution's balancing between the public interest in the continuation of the applicant's preventive detention and the applicant's interest in his personal liberty had – at least at that time – not been unconstitutional.

(b) Second set of proceedings

34. On 7 November 2005 the Munich I Public Prosecutor's Office dismissed another request made by the applicant to suspend the execution of his preventive detention under Article 456a of the Code of Criminal Procedure on the same grounds.

35. The applicant's appeals were to no avail. In its decision of 16 May 2006 the Munich Court of Appeal noted, in particular, that it might appear contradictory to the applicant that measures aiming at his reintegration into society, such as a social therapy, were refused to him because of the deportation order against him, but that the authorities nevertheless refused to suspend the execution of his preventive detention under Article 456a of the Code of Criminal Procedure. However, the refusal of the said measures alone did not mean that the prosecution authorities could only exercise their discretion in a lawful manner by granting his request under the said provision.

(c) Third set of proceedings

36. On 7 September 2007 the Munich I Public Prosecutor's Office decided to suspend the execution of the applicant's preventive detention at the date of his expulsion to Bulgaria, and on 1 November 2007 at the earliest, under Article 456a of the Code of Criminal Procedure.

37. On 13 December 2007 the applicant was expelled to Bulgaria in accordance with the deportation order issued by the city of Munich on 16 April 1997.

5. Further developments

38. On 30 November 2009 the Korneuburg Regional Court (Austria) convicted the applicant of two counts of murder, one count of attempted murder and robbery with firearms, committed on 1 June 2009 in Austria and

sentenced him to life imprisonment. The judgment was upheld on appeal. The applicant was subsequently transferred to Bulgaria in order to serve his sentence.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Provisions governing preventive detention

39. 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 referred to in the present case provide as follows:

1. The order of preventive detention by the sentencing court

40. The sentencing court may, at the time of the offender's conviction, order his preventive detention (a so-called measure of correction and prevention) under certain circumstances in addition to his prison sentence (a penalty), if the offender has been shown to be a danger to the public (Article 66 of the Criminal Code).

41. In particular, 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 (see Article 66 § 1 of the Criminal Code, in its version in force at the relevant time).

2. The order for the execution of preventive detention by the court responsible for the execution of sentences

42. Article 67c of the Criminal Code governs orders for the preventive detention of convicted persons which are not executed immediately after the judgment ordering them becomes final. Paragraph 1 of the Article provides

that if a term of imprisonment is executed prior to a simultaneously ordered placement in preventive detention, the court responsible for the execution of sentences (that is, a special Chamber of the Regional Court composed of three professional judges, see sections 78a and 78b (1)(1) of the Court Organisation Act) must review, before completion of the prison term, whether the person's preventive detention is still necessary in view of its objective. If that is not the case, it suspends the execution of the preventive detention order and places the person on probation with supervision of their conduct which commences with the suspension.

3. Judicial review and duration of preventive detention

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

44. Pursuant to Article 67e of the Criminal Code, the court (that is, the chamber responsible for the execution of sentences) may review at any time whether the further execution of the preventive detention order should be suspended and a measure of probation applied. It is obliged to do so within fixed time-limits (paragraph 1 of Article 67e). For persons in preventive detention, this time-limit is two years (paragraph 2 of Article 67e).

B. Provision on the execution of sentences in cases of expulsion

45. Pursuant to Article 456a § 1 of the Code of Criminal Procedure, the Public Prosecutor's Office may dispense with the execution of a prison sentence or a measure of correction and prevention if the convicted person is expelled from German territory. The execution of the sentence or measure may be continued if the expelled person returns to Germany territory (Article 456a § 2 of the Code of Criminal Procedure).

C. Provisions of the Execution of Sentences Act

46. Section 9 § 2 of the Execution of Sentences Act provides that prisoners may be transferred to a socio-therapeutic institution with their consent if the special therapeutic measures and social aids of the institution are advisable for their rehabilitation. The transfer is conditional upon the consent of the head of the socio-therapeutic institution concerned.

47. Under section 11 § 1 of the Execution of Sentences Act, the conditions of detention may be relaxed by making an order permitting the

prisoner to perform regular work outside prison either under the supervision of a member of the prison staff (outside work) or without such supervision (work release). The prisoner may further be permitted to leave the prison for a certain time during the day either under the supervision of the prison staff (short leave under escort) or without such supervision (short leave). Under section 11 § 2 of the said Act, these measures may only be ordered with the prisoner's consent and if there is no risk that the prisoner might seek to abscond or commit offences during the relaxation of the conditions of his detention.

48. Under section 6 § 1 (c) of the Federal Administrative Rules relating to Article 11 of the Execution of Sentences Act, which seek to ensure the uniform application of the law by the authorities, external work, work release and short leave may, as a rule, not be permitted to prisoners against whom a final expulsion order is in force and who are to be deported directly from prison. Exceptions may be granted in agreement with the competent aliens' authority. Short leave under escort may be authorised.

D. Recent case-law of the Federal Constitutional Court on preventive detention

49. 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 the complainants' preventive detention (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 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.

50. The Federal Constitutional Court further held that all the relevant provisions of the Criminal Code on the imposition and duration of preventive detention were incompatible with the fundamental right to liberty of persons in preventive detention. It found that those provisions did not satisfy the constitutional requirement of establishing a difference between preventive detention and detention for serving a term of imprisonment (*Abstandsgebot*). These provisions included, in particular, Article 66 of the Criminal Code in its version in force since 27 December 2003.

51. The Federal Constitutional Court ordered that all provisions declared incompatible with the Basic Law remained applicable until the entry into force of new legislation and until 31 May 2013 at the latest. The provisions on the imposition and duration of preventive detention which did not

concern the retrospective ordering or prolongation of preventive detention could only continue to be applied in the transitional period subject to a strict review of proportionality. As a general rule, proportionality was only observed where there was a danger of the person concerned committing serious violent crimes or sexual offences if released.

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

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION, TAKEN TOGETHER WITH ARTICLE 5

53. The applicant complained under Article 5 § 1 of the Convention that his preventive detention was unlawful as he had been refused a social therapy or relaxations in the conditions of his detention in view of his future expulsion. However, at the same time his sentence was not suspended because the prosecution authorities argued that he was not impressed by the execution of his sentence and had not changed his attitude towards his offences. Relying on Article 14 of the Convention, he further argued that he had suffered discrimination because of his Bulgarian origin as a result of the refusal of the said measures when the order for the execution of his preventive detention was made.

54. The Court considers that these complaints fall to be examined solely under Article 14, taken together with Article 5 § 1 of the Convention, which read as follows:

Article 5

"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; ..."

Article 14

"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

55. The Government contested that argument.

A. Scope of the case before the Court

56. Having regard to the parties' submissions, the Court considers it necessary to clarify at the outset that the proceedings at issue in the present application are only the proceedings for judicial review, under Article 67c of the Criminal Code, of whether the execution of the applicant's preventive detention was still necessary (see paragraphs 14-25 above). Further proceedings brought by the applicant concerning relaxations in the conditions of his detention, his admission to a therapy or the suspension, under Article 456a of the Code of Criminal Procedure, of the execution of his preventive detention in view of his expulsion are relevant for understanding the execution in practice of the preventive detention order against the applicant, but are not as such the subject-matter of the present application.

B. Admissibility

1. The parties' submissions

(a) The Government

57. The Government argued that the application was already inadmissible. The applicant's complaints relating to the prosecution's failure to apply Article 456a of the Code of Criminal Procedure in 2002/2003, raised in his initial application to the Court, were declared inadmissible by the Court on 20 February 2007 (application no. 30182/03) and were not the subject-matter of the present application. Furthermore, the applicant failed sufficiently to set out his present complaints in relation to the proceedings under Article 67c of the Criminal Code here at issue, as

required by Article 34 of the Convention and Rule 47 of the Rules of Court. Moreover, when lodging his application with the Court, the applicant had not yet exhausted domestic remedies in accordance with Article 35 § 1 of the Convention. Furthermore, the applicant had failed to exhaust domestic remedies in relation to the proceedings concerning relaxations in the conditions of his detention, his admission to a social therapy and the suspension of the execution of his preventive detention in view of his deportation.

58. In their further observations dated 14 June 2011 the Government objected that the applicant had failed to exhaust domestic remedies as required by Article 35 § 1 of the Convention also on another ground. They argued that in its leading judgment of 4 May 2011 on preventive detention (see paragraphs 49-52 above), the Federal Constitutional Court had introduced a new domestic remedy for the review of the ongoing preventive detention of persons concerned by that judgment. For persons in preventive detention which had not been ordered or prolonged retrospectively, as in the applicant's case, the Federal Constitutional Court had set stricter standards for their preventive detention to continue. The prolongation of preventive detention could be ordered only if there was a danger of the person concerned committing serious crimes of violence or sexual offences if released. The applicant had been obliged to avail himself of that new domestic remedy.

59. The Government further took the view that the applicant could no longer claim to be the victim of a violation of his Convention rights. In its above-mentioned judgment, the Federal Constitutional Court had implemented the findings the Court had made in its judgments on preventive detention in Germany. The Convention violations found had thus been remedied in part by the Federal Constitutional Court in its transitional rules, and would be remedied as soon as possible as to the remaining part.

(b) The applicant

60. The applicant contested that view. He submitted that he had submitted to the Court all relevant information which was requested in the application form. Furthermore, he had exhausted all effective domestic remedies prior to the communication of the application by the Court to the respondent Government.

2. The Court's assessment

(a) Exhaustion of domestic remedies

61. The Court refers to its above finding (see paragraph 56) that the proceedings at issue in the present application are the proceedings for judicial review, under Article 67c of the Criminal Code, of whether the

execution of the applicant's preventive detention was still necessary. The applicant's preventive detention was ordered in these proceedings by the Regensburg Regional Court on 26 February 2004 and confirmed by the Nuremberg Court of Appeal on 23 April 2004 and by the Federal Constitutional Court on 28 September 2004. The present application was lodged with the Court on 12 October 2004. It was subsequently separated from the proceedings at issue in application no. 30182/03 and registered under the current application number. Application no. 30182/03, which concerned complaints relating to the execution of the applicant's prison sentence, was declared inadmissible afterwards. The present application was communicated by the President of the Fifth Section on 7 March 2007.

62. Having regard to the foregoing, the Court considers that in the proceedings which alone are at issue here, the applicant exhausted domestic remedies in that he obtained decisions of the Regional Court, the Court of Appeal and the Federal Constitutional Court in accordance with the formal requirements of domestic law, as required by Article 35 § 1 of the Convention, prior to lodging his (new) application with the Court. The Government's objection of non-exhaustion of domestic remedies must therefore be dismissed in this respect.

63. As regards the Government's additional objection of non-exhaustion of domestic remedies, made in their further observations dated 14 June 2011, the Court notes, irrespective of the question whether the Government should be considered estopped from raising that objection (see Rule 55 of the Rules of Court), the following. According to its well-established case-law, under Article 35 § 1 of the Convention, recourse should be had to remedies which are available and sufficient to afford redress in respect of the breach of the Convention alleged (see, among many other authorities, *Akdivar and Others v. Turkey*, 16 September 1996, § 66, *Reports of Judgments and Decisions* 1996-IV).

64. As noted above, the proceedings here at issue concern the applicant's preventive detention ordered and confirmed in 2004. The applicant was released from preventive detention and expelled to Bulgaria on 13 December 2007. The new domestic remedy introduced subsequently, on 4 May 2011, by the Federal Constitutional Court for the review of ongoing preventive detention is not, therefore, capable of affording redress to the applicant in relation to his preventive detention at issue in the present case and which had previously already come to an end. The applicant thus did not have to avail himself of that remedy for the purposes of Article 35 § 1 of the Convention. Consequently, the Government's objection of non-exhaustion of domestic remedies must also be rejected in this respect.

(b) Loss of victim status

65. The Court observes that the Government also objected that the applicant could no longer claim to be the victim of a violation of his

Convention rights within the meaning of Article 34 of the Convention as the Federal Constitutional Court had remedied the alleged Convention violations by its judgment of 4 May 2011 and, in particular, by the transitional rules it contained.

66. The Court refers to its well-established case-law on that issue (see, *inter alia*, *Eckle v. Germany*, 15 July 1982, § 66, Series A no. 51; *Amuur v. France*, 25 June 1996, § 36, *Reports* 1996-III; and *Dalban v. Romania* [GC], no. 28114/95, § 44, ECHR 1999-VI). It agrees with the Government that by its said judgment, the Federal Constitutional Court implemented in the domestic legal order the Court's findings in its judgments on preventive detention in Germany (*M. v. Germany* (cited above) and the follow-up cases thereto).

67. Having regard to the scope of the Federal Constitutional Court's judgment, however, it appears doubtful whether that court intended to acknowledge a violation of Article 14 of the Convention, read in conjunction with Article 5 § 1 of the Convention, in the circumstances at issue in the present application. In any event, the Court, referring to its findings above (see paragraph 64), considers that the Federal Constitutional Court's judgment of 4 May 2011 cannot be deemed to have afforded redress for the alleged breach of Article 14 taken in conjunction with Article 5 § 1 resulting from the applicant's preventive detention as ordered by the Regensburg Regional Court on 26 February 2004 and as confirmed on appeal and by the Federal Constitutional Court itself on 28 September 2004.

68. The Government's objection that the applicant has lost his victim status must therefore likewise be rejected.

(c) Conclusion

69. The Court further notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. In particular, having regard to the material before it, it considers that the applicant sufficiently substantiated his application – which, having regard to that material, was communicated by the President of the Fifth Section – in accordance with Article 34 of the Convention and Rule 47 of the Rules of Court. The Court further notes that the application is not inadmissible on any other grounds. It must therefore be declared admissible.

C. Merits

1. The parties' submissions

(a) The applicant

70. The applicant complained of a violation of Articles 5 § 1 and 14 of the Convention by the domestic courts' decision to execute the preventive detention order against him. He took the view that he had been denied any measures and treatment in detention only because of the fact that he was a foreign national. This had already been fixed in the plan concerning the execution of his detention on his arrival in prison and had not, therefore, been a result of his conduct in prison.

71. The applicant stressed that he had not been given any chance to obtain the suspension of his preventive detention and to be granted probation. Without having previously proved reliable during relaxations in the conditions of his detention, no expert would find that there was no longer a risk that he would reoffend if released and thus recommend the suspension of the execution of the preventive detention order. He further stressed that under Article 11 of the Execution of Sentences Act (see paragraph 47 above), it was necessary for him to agree to measures relaxing the conditions of his detention, but he had not been obliged to request such measures himself. It was for the prison authority to examine on its own motion whether these measures should be granted. As the prison authorities had decided against granting him such measures already on his arrival in prison and having regard to the applicable administrative rules (see paragraph 48 above), any request made by him to be granted such relaxations had, in any event, not had any prospects of success. Being a foreigner against whom a final expulsion order was in force, he had not been eligible for such measures.

72. The same applied to the refusal to offer him a social therapy or any other preparations for his release. In view of this, his allegedly negative conduct in prison or his allegedly lacking receptiveness for a therapy had been irrelevant for that refusal. He further stressed that a social therapy was aimed at developing social competences and learning adequate conflict solution mechanisms. Unlike relaxations in the conditions of a person's detention, it was not aimed at preparing a detainee's future social contacts. His alleged lack to accept his guilt and his negative conduct in prison should have been an indication that he lacked social competence, which should therefore have been addressed in a social therapy. He had been refused that therapy in view of his foreign nationality, in accordance with the current practice relating to the Execution of Sentences Act. Any request by him to be offered such therapy also with the Straubing Prison authorities would therefore have been to no avail.

73. The applicant further claimed that, having regard to the way in which his preventive detention had been executed, his deprivation of liberty had been disproportionate. This had in fact been confirmed by the recent leading judgment of the Federal Constitutional Court dated 4 May 2011. No measures had been taken during his detention aimed at averting the risk that he would reoffend if released. By refusing to offer him a social therapy by reference to his foreign nationality, he had not been given any chance to avert the execution of the preventive detention order against him. The suspension of the execution of his preventive detention at the date of his expulsion to Bulgaria under Article 456a of the Code of Criminal Procedure had been ordered only after he had spent more than five years in preventive detention. That procedure could not, therefore, compensate for the lack of any measures aimed at the reintegration into society of foreign nationals.

(b) The Government

74. The Government submitted that the applicant had not been discriminated on grounds of his national origin, as prohibited by Article 14 of the Convention, read in conjunction with Article 5 § 1 of the Convention. He had not been treated differently compared to persons in preventive detention of German nationality.

75. The Government argued that the order for the execution of the applicant's preventive detention had been made because of his dangerousness and his unwillingness to critically reflect upon his offences. His national origin did not play any role in that assessment.

76. The Government further stressed that the applicant had not been treated less favourably than detainees of German nationality in relation to therapeutic measures and relaxations in the conditions of his detention. They noted that in the applicant's submission, the assessment of his dangerousness could have been in his favour if such measures had been granted to him. However, as regards a social therapy, the Government took the view that the applicant had not been eligible for such – or any other – therapy (see section 9 § 2 of the Execution of Sentences Act). It had not been possible to treat him because he failed to reflect critically upon his offences and to acknowledge his guilt. In such circumstances, a detainee of German nationality would not have been offered a therapy either. Moreover, a social therapy sought to influence a person's future social environment after his release and to assist him both before and after his release. Therefore, a social therapy would not be possible for any person in preventive detention who wished or had to move abroad after his release, irrespective of whether that person was of German or foreign nationality.

77. Moreover, the Government argued that relaxations in the conditions of the applicant's preventive detention, which the applicant had applied for in July 2004 for the first time, had been refused for risk of abuse. This refusal had not been linked to his national origin or to the fact that an

expulsion order had been made against him as a detainee of German nationality would equally have been refused such relaxations in the circumstances of the applicant's case. Therefore, it had not been due to the applicant's national origin that he had not been offered an opportunity to display good conduct in the course of such a measure, which would have led to a more advantageous prognosis as to his dangerousness.

78. The Government further submitted that there had been other therapeutic measures in Straubing Prison, such as work, psychological and educational care and different sports and leisure groups, which had been available to all persons in preventive detention. As the applicant made use of these offers only in part, he could not claim that his treatment had been insufficient.

79. Moreover, the Government stressed that the plan concerning the execution of his detention referred to by the applicant had to be made on his arrival in prison and could not, therefore, take into account his conduct in detention. However, that plan was regularly adapted to new developments. It did not play a role for the ordering of measures such as relaxations in the conditions of the applicant's detention or the transfer to a socio-therapeutic institution whether such a measure had been foreseen in the said plan or not. The courts had to determine whether, at the time of their decision, the legal conditions for such a measure were met, irrespective of what had been laid down in the plan concerning the execution of the detention of the person concerned.

80. The Government further argued that the order for the execution of the applicant's preventive detention, having also regard to the short period of its execution, had been proportionate despite the limited offer of therapies and relaxations in the conditions of his detention available to the applicant. The domestic courts had taken these elements into account in examining the proportionality of the applicant's preventive detention.

81. Finally, the Government stressed that according to the findings of the Regensburg Regional Court of 26 February 2004, a person could not be remanded in preventive detention indefinitely only as a consequence of his foreign nationality which in turn resulted in refusing him relaxations in the conditions of his detention. The Munich I Public Prosecutor's Office had accordingly decided to dispense with the further execution of the applicant's preventive detention at the date of his deportation and on 1 November 2007 at the earliest.

2. The Court's assessment

(a) Applicability of Article 14, taken in conjunction with Article 5 of the Convention

82. The Court reiterates that Article 14 complements the other substantive provisions of the Convention and the Protocols. It has no

independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions. However, the application of Article 14 does not necessarily presuppose the violation of one of the substantive rights guaranteed by the Convention and to this extent it is autonomous. For Article 14 to become applicable it suffices that the facts of a case fall within the ambit of another substantive provision of the Convention or its Protocols (see *Thlimmenos v. Greece* [GC], no. 34369/97, § 40, ECHR 2000-IV; *Sommerfeld v. Germany* [GC], no. 31871/96, § 84, ECHR 2003-VIII (extracts); and *Kafkaris v. Cyprus* [GC], no. 21906/04, § 159, ECHR 2008-...).

83. Article 5 of the Convention does not guarantee a right to automatic parole (see, for example, *Gerger v. Turkey* [GC], no. 24919/94, § 69, 8 July 1999; and *Çelikkaya v. Turkey*, no. 34026/03, § 60, 1 June 2010). However, where procedures relating to the release of prisoners appear to operate in a discriminatory manner, this may raise issues under Article 5 of the Convention taken together with Article 14 (see *Gerger*, cited above, § 69; *Çelikkaya*, cited above, § 63; and *Clift v. the United Kingdom*, no. 7205/07, § 42, 13 July 2010).

84. In the present case, the applicant's preventive detention here at issue was ordered by the Munich I Regional Court on 26 January 1996 together with his conviction of burglary. Such detention is, in principle, covered by sub-paragraph (a) of Article 5 § 1 as detention "after conviction" by a competent court (see *M. v. Germany*, no. 19359/04, §§ 96 and 97-105, 17 December 2009; and *Grosskopf v. Germany*, no. 24478/03, §§ 46-47, 21 October 2010). The applicant further alleges that the domestic courts' decision not to suspend on probation the execution of the preventive detention order against him had been made in a discriminatory manner. Accordingly, the facts of the case fall within the ambit of Article 5 and Article 14 is applicable.

(b) Compliance with Article 14, taken in conjunction with Article 5 of the Convention

(i) Relevant principles

85. The Court has established in its case-law that in order for an issue to arise under Article 14 there must be a difference in the treatment of persons in analogous, or relevantly similar, situations (see, *inter alia*, *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, § 175, ECHR 2007-...; and *Clift*, cited above, § 66). Article 14 prohibits differences in treatment based on an identifiable, objective or personal characteristic, or "status", by which persons or groups of persons are distinguishable from one another (see *Kafkaris*, cited above, § 160; and *Clift*, cited above, § 55).

86. Such a difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a

legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised (see *Burden v. the United Kingdom* [GC], no. 13378/05, § 60, ECHR 2008–...; *Andrejeva v. Latvia* [GC], no. 55707/00, § 81, ECHR 2009–...; and *Sejdić and Finci v. Bosnia and Herzegovina* [GC], nos. 27996/06 and 34836/06, § 42, ECHR 2009–...).

87. The Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment (see *Gaygusuz v. Austria*, 16 September 1996, § 42, *Reports* 1996-IV; and *Burden*, cited above, § 60). The scope of this margin will vary according to the circumstances, the subject matter and its background (see *Andrejeva*, cited above, § 82; and *Sejdić and Finci*, cited above, § 42). While in principle a wide margin of appreciation applies in questions of prisoner and penal policy, the Court must nonetheless exercise close scrutiny where there is a complaint that domestic measures have resulted in detention which was arbitrary or unlawful (see *Clift*, cited above, § 73). Very weighty reasons would have to be put forward before the Court could regard a difference of treatment based exclusively on the ground of nationality as compatible with the Convention (see *Gaygusuz*, cited above, § 42; and *Andrejeva*, cited above, § 87).

88. As to the burden of proof in relation to Article 14 of the Convention, the Court has held that once the applicant has shown a difference in treatment, it is for the Government to show that it was justified (see *D.H. and Others v. the Czech Republic*, cited above, § 177; and *Andrejeva*, cited above, § 84).

(ii) Application of those principles to the present case

(α) Difference in the treatment of persons in relevantly similar situations

89. The Court shall therefore examine, first, whether the applicant in the present case has been treated differently, compared to prisoners in a relevantly similar situation, on grounds of his national origin, namely his Bulgarian nationality, in relation to the order for the execution of his preventive detention.

90. The Court notes in that context that the applicant's complaint concerns the domestic courts' decisions relating to the execution of a preventive detention order. The decision of whether the execution of such an order is necessary or whether it can be suspended and probation be granted is a risk-assessment exercise. The order shall only be executed if there is still a risk that the person concerned, after having served his prison sentence, will commit further offences similar to those he was previously found guilty of on his release and is thus still dangerous to the public (Article 67c § 1 of the Criminal Code, see paragraph 42 above). In so far as the assessment of this risk is concerned, the applicant can claim to be in an

analogous situation to that of other prisoners of German nationality against whom a preventive detention order has been made by a sentencing court and where the courts dealing with the execution of sentences have to determine whether or not that order shall be executed. This appears indeed to be uncontested between the parties.

91. In determining whether the applicant has been treated differently in relation to the order for the execution of his preventive detention on grounds of his nationality, the Court must have regard to the reasons given by the domestic courts for making that order. It notes that both the Regional Court and the Court of Appeal, having consulted a psychiatric expert, considered that the applicant refused critically to reflect on and take responsibility for his offences and that it was therefore very likely that he would reoffend on his release (see paragraphs 18 and 22 above). As has also been argued by the Government, this assessment as such does not disclose any difference in treatment of the applicant based on his foreign nationality.

92. However, it has been stressed by the domestic courts in the proceedings at issue that there were important conditions for them to arrive at a prognosis that a prisoner was no longer dangerous to the public which would in turn lead to a finding that the execution of the preventive detention order was not necessary and could thus be suspended and probation be granted.

93. Firstly, the Regional Court, in particular, the decision of which was confirmed on appeal, found that the successful completion of a suitable therapy would be an important precondition for it to come to the conclusion that the applicant was no longer dangerous to the public. That court further noted that the psychiatric expert it had consulted had considered it advisable for the applicant to undergo a social therapy. It found, however, that the applicant had not been admitted to a social therapy in Erlangen Prison he had previously applied for, in 2002. In the Regional Court's view, it was clear that the applicant had been refused a social therapy – the only therapy which had been considered adequate for the applicant – in view of his imminent expulsion.

94. Secondly, the Regional Court observed that the prison authority had not relaxed the conditions of the applicant's detention whereas good conduct in the course of such relaxations were another important precondition for a finding of the court that the execution of the preventive detention order against the applicant was not necessary. It made it quite plain that, having regard to the usual practice, it was also unlikely that the prison authority would do so in the future as the applicant was not a German national (see paragraphs 19-20 above). It had taken that view despite the fact that, under section 11 of the Execution of Sentences Act and the administrative rules relating to it (see paragraphs 47-48 above), at least short leave under escort may be authorised for detainees against whom a final expulsion order is in force and other, more far-reaching relaxations in the

conditions of detention may be granted in agreement with the competent aliens' authority.

95. In the Court's opinion, it is clear from that reasoning that the applicant had not been offered the only therapy considered suitable by the psychiatric expert consulted by the domestic courts as well as relaxations in the conditions of his detention in view of the final expulsion order made against him, which he was and could only be subject to as a foreign national. Unlike German nationals in his situation, the applicant was thereby denied a chance to successfully complete such a therapy, aimed at changing his attitude, and to prove reliable during relaxations in the conditions of his detention and thus to fulfil important preconditions for the domestic courts to conclude that the execution of the preventive detention order against him could be suspended on probation.

96. The Court further does not overlook that the Court of Appeal and the Federal Constitutional Court, for their part, stressed in their reasoning that in view of the applicant's persistent refusal to take responsibility for his past offences, there were no suitable therapeutic measures to prepare him adequately for his release.

97. The Court would note in this respect at the outset that both the Court, in its judgment in the case of *M. v. Germany* (cited above, § 129), and the Federal Constitutional Court, in its leading judgment of 4 May 2011 (see paragraph 52 above), have stressed that persons in preventive detention require an individualised and intensified offer of therapy and care and have to be offered an individualised therapy if the standard therapies available in the institution do not have prospects of success. The same must apply to persons in the applicant's situation, against whom a preventive detention order has been made and will be executed unless a necessary therapy has been completed.

98. The Court is aware of the fact that the successful completion of therapeutic measures necessitates the cooperation of the person concerned. However, it is not convinced that, as has also been argued by the Government, it was the applicant's attitude and conduct, and not his nationality, which was decisive for the refusal of the only therapeutic measures considered advisable by the psychiatric expert and the Regional Court. It notes, in particular, that under the administrative practice relating to section 9 of the Execution of Sentences Act (see paragraph 46 above), prisoners against whom an enforceable expulsion order had been made were excluded from transfer to a social therapeutic institution and that this practice was apparently applied in the applicant's case. Having regard to all the material in its possession, the Court considers that, irrespective of his conduct and of further requests for such measures, the applicant would not have been granted the measures in question in view of the final expulsion order against him. The Court would add that, this situation having been made clear to the applicant, there must have been little incentive for him to

bring about a change in his attitude as even after such a change, he would not have been considered eligible for the measures at issue.

99. The Court concludes that the applicant was treated differently compared to prisoners in a relevantly similar situation on grounds of his national origin in relation to the order for the execution of his preventive detention. He was denied a chance to fulfil essential preconditions for the domestic courts to conclude that the execution of the preventive detention order against him could be suspended and probation be granted.

(β) Justification of the difference of treatment

100. The Court shall therefore examine, second, if that difference of treatment was justified, that is, if it pursued a legitimate aim and was proportionate to the aim sought to be realised.

101. The Court notes that the aim pursued by the refusal to grant a social therapy to foreign nationals who shall be expelled appears to be based on the fact that the therapists were considered not being in a position to prepare those prisoners for a life without offences in a country the living conditions of which were not sufficiently known to them. The refusal to grant relaxations in the conditions of detention to foreign nationals against whom a final expulsion order has been made appears to be to prevent them from absconding prior to having served their term of imprisonment and to secure the execution of the expulsion order afterwards. The aims pursued thus included securing the execution of final decisions of the criminal courts and of expulsion orders made against offenders and reserving available therapies to those to whose needs they are most tailored. The Court will examine the case on the assumption that those aims were legitimate for the purposes of Article 14, taken in conjunction with Article 5, in view of the following.

102. In determining whether the difference in treatment of the applicant at issue was proportionate to the above aims pursued, the Court refers to its above finding that very weighty reasons have to be put forward by the Government in order to prove a difference of treatment based on nationality to be justified (see paragraphs 87-88 above). It observes that the refusal to grant the applicant measures usually considered as important in order to obtain a suspension of the preventive detention order on probation were not compensated by offers of a different therapy or any other measures adapted to his situation. It refers to its above findings on the importance of offering such therapeutic measures for persons in or liable to be held in preventive detention.

103. Finally, the Court observes that it was possible and considered by the prosecution authorities to dispense with the further execution of the preventive detention order against the applicant at the date of his deportation (Article 456a of the Code of Criminal Procedure, see paragraph 45 above). That measure, which is only applicable to foreign nationals liable to be expelled and leads to them regaining their liberty in

their country of origin, can in principle be considered as a measure favourable to foreign nationals and might thus compensate for disadvantages suffered in the execution of the preventive detention order against them. However, that measure was not applied during the applicant's preventive detention covered by the proceedings here at issue. The Court further notes that it was not applied until the applicant had spent some four and a half years in preventive detention.

104. Having regard to the foregoing, the difference of treatment of the applicant therefore lacked objective justification.

105. There has accordingly been a violation of Article 14, taken together with Article 5 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

106. Article 41 of the Convention provides:

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

A. Damage

107. The applicant claimed a total of 4,124 euros (EUR) in respect of pecuniary damage. These comprised costs for the applicant's detention he had been charged with (EUR 120) and loss of potential income in Bulgaria (EUR 4,004). The applicant submitted a certificate dated 16 September 2005 showing that he had been ordered to pay the said amount for costs of his detention.

108. The applicant further claimed EUR 36,000 in respect of non-pecuniary damage suffered as a result of his unlawful preventive detention, which had entailed intense mental distress.

109. The Government submitted that the amounts claimed by the applicant in respect of pecuniary damage had not been substantiated. They further considered that the amount claimed by the applicant in respect of non-pecuniary damage was excessive.

110. The Court observes that it has found a violation of Article 14, read in conjunction with Article 5 of the Convention, as the applicant was denied a chance to fulfil important preconditions for the domestic courts to conclude that the execution of the preventive detention order against him could be suspended on probation. It cannot speculate as to whether, and if so, when the preventive detention order would have been suspended and probation granted to the applicant had there been no difference in treatment on grounds of his nationality. Therefore, it has not been shown that there

was a causal link between the violation found and the pecuniary damage alleged. The Court therefore rejects the applicant's claim under that head.

111. On the other hand, having regard to its above findings, it considers that the applicant must have suffered distress as a result of the failure to give him a chance to obtain the suspension on probation of the preventive detention order against him. Making its assessment on an equitable basis, it awards the applicant EUR 6,000 in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

112. The applicant also claimed EUR 5,000 for the costs and expenses incurred before the domestic courts and for those incurred before the Court. He claimed that he had only been assigned a counsel by the courts in the proceedings concerning the order for the execution of his preventive detention.

113. The Government submitted that the applicant could have averted the costs in the proceedings before the domestic courts by applying for legal aid. The costs claimed had further not been substantiated.

114. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court rejects the claim for costs and expenses incurred in the proceedings before the domestic courts. It considers that the applicant failed to substantiate in detail if he sustained costs in the only proceedings here at issue, concerning the order for the execution of his preventive detention, which were not covered by legal aid, and if so, the exact amount of those costs.

115. The Court further considers it reasonable to award the sum of EUR 2,500 for costs and expenses incurred in the proceedings before the Court, less EUR 850 received as legal aid payment from the Court, that is, EUR 1,650, plus any tax that may be chargeable to the applicant.

C. Default interest

116. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 14 of the Convention, taken in conjunction with Article 5 of the Convention;

3. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:
      (i) EUR 6,000 (six thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 1,650 (one thousand six hundred and fifty euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 22 March 2012, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Dean Spielmann
President