



Strasbourg, 13 December 2012

PC-GR-DD (2012) 2 EN

**AD HOC DRAFTING GROUP ON DANGEROUS OFFENDERS  
(PC-GR-DD)**

**Compilation of the Case Law of the ECHR**

Document prepared by the Secretariat of  
the Directorate General Human Rights and Rule of Law (DG1)

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## **1. Detention Conditions**

### **1. Ramirez Sanchez v France (no. 59450/00) (4 Jul 2006)**

Judgment 4.7.2006 [GC]

Article 3

- Degrading treatment
- Inhuman treatment
- Prolonged detention in solitary confinement: no violation

Article 13

- Effective remedy
- Absence of a remedy in domestic law permitting a detainee to contest his placement in solitary confinement: violation

**Facts:** The applicant, who had been implicated in a number of terrorist attacks, was sentenced to life imprisonment in 1997 for the murder of three people, two of them police officers. In mid-August 1994 he was placed in solitary confinement in prison, under an order which was extended at three-monthly intervals until mid-October 2002. He was therefore kept in solitary confinement for eight years and two months. Whilst in solitary confinement, he was placed in a one-person cell and was prohibited from any contact with the other prisoners and the prison warders, and from any activity outside his cell other than a two-hour daily walk each day and an hour in the cardiac-training room. The applicant could read newspapers and watch television in his cell, which was lit with natural light. He received very frequent visits from lawyers. The reasons generally given for his detention in solitary confinement were the need to prohibit all contact with the other prisoners and to maintain order and security in the prison, given that he was under investigation in several terrorism cases. The applicant remained in satisfactory mental and physical health. No appeal lay against the decisions placing him in solitary confinement and prolonging his confinement.

**Law:** Article 3 – The physical conditions in which the applicant had been detained were proper and complied with the European Prison Rules that had been adopted by the Committee of Ministers of the Council of Europe on 16 January 2006. These conditions had also been considered as “globally acceptable” by the CPT (European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment) in its visit in May 2000. The applicant had received twice-weekly visits from a doctor, a once-monthly visit from a priest and very frequent visits from one or more of his 58 lawyers, including his representative in the proceedings before the Court who was now his wife under Islamic law. He had received more than 640 visits from her over a period of four years and ten months and more than 860 visits in seven years and eight months from his other lawyers. There had been no restrictions on family visits. The applicant had therefore not been in complete sensory isolation or total social isolation, but in partial and relative isolation. The fact remained that it had lasted for over eight years. There were no signs that the applicant’s physical or mental health had been adversely affected: he himself had made no such allegation, and had refused the psychological help offered to him. In the present case, the authorities appeared to have sought to find a solution adapted to the applicant’s character and the danger he represented. Their concerns that the applicant might use communications either inside the prison or on the outside to re-establish contact with members of his terrorist cell, to seek to proselytise other prisoners or to prepare an escape had also been reasonable.

**Conclusion:** no violation (twelve votes to five).

Article 13 – There was no remedy available in domestic law that would have allowed the applicant to contest the decisions prolonging his detention in solitary confinement over the eight-year period.

**Conclusion:** violation (unanimously).

## **2. Rohde v Denmark (no. 69332/01) (21 Jul 2005)**

Judgment 21.7.2005 [Section I]

Article 3

- Degrading treatment
- Inhuman treatment

Pre-trial detention in solitary confinement of a drug-trafficking suspect – later acquitted – who subsequently developed a mental illness: no violation

**Facts:** The applicant was arrested and charged with drug trafficking in relation to an importation of papaya fruits in which 5.684 kg of cocaine were found. The City Court decided that the applicant be placed in solitary confinement on 14 December 1994. The measure was prolonged on several occasions given the lack of reasonable explanations on the applicant's involvement in the importation of the drugs. It was lifted on 28 November 1995, when the applicant confirmed that he had had been involved in the importation of the fruits, but under the belief that the smuggling concerned diamonds. Thereafter, the applicant was kept under Normal pre-trial detention conditions until 14 May 1996, when the High Court sitting with a jury acquitted the applicant of the drug offences. Subsequently, the applicant instituted court proceedings claiming compensation. During the proceedings medical reports were procured which revealed that the applicant had shown no signs of mental suffering before his detention, but that at the time of the examination, that is, at the end of 1997 the applicant's sense of reality was lacking to such an extent that he could be characterised as psychotic, most likely suffering from a paranoid psychosis. Moreover, taking the applicant's distinct personality and mental vulnerability into account, it was found probable that the outbreak and the progress of his illness were linked to the fact that he was solitary confined during a longer period. By a final judgment of 5 September 2000 the Supreme Court granted the applicant compensation in the amount of 1,109,600 Danish kroner (DKK), covering pecuniary damage for disablement and loss of working capacity. The applicant's claim for compensation for non-pecuniary damage was refused since the court found that the applicant himself to a significant extent gave rise to the measures taken against him, notably by having changed explanation several times and actively having opposed the investigation of the drug case by construing a “cover story”. Moreover, the Supreme Court found that there was no reason to assume that the applicant had not been treated in a proper manner during his detention on remand and that accordingly the case disclosed no appearance of a violation of Article 3 of the Convention.

**Law:** Article 3 – Whether the duration of the isolation had been excessive: The Court reiterated that solitary confinement was not in itself in breach of Article 3. Whilst prolonged removal from association with others was undesirable, whether such a measure fell within the ambit of Article 3 depended, inter alia, on the particular conditions, stringency, duration and effects of the measure on the person concerned. Moreover, the Court noted that in the more recent reports of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) concerning Denmark, solitary confinement featured prominently as an issue in the ongoing dialogue between the CPT and the Danish authorities. The CPT had stressed that all forms of solitary confinement without appropriate mental or physical stimulation were likely in the long term to have damaging effects, resulting in deterioration of mental faculties and social abilities. In the present case, the length of the solitary confinement had lasted eleven months and fourteen days. Whilst such a length could give rise to concern, in making its assessment the Court took into account the applicant's conditions of detention and the extent of his social isolation. He had been in a cell of around eight square metres in

which there was a television and had access to newspapers. Although he was excluded from association with other inmates, the applicant had regular contact with prison staff, and received weekly language lessons and visited the prison chaplain. He was regularly attended by doctors, nurses and physiotherapists, and received visits from his family and friends under supervision. In these circumstances, the Court found that the period of solitary confinement had not amounted to treatment contrary to Article 3.

Whether the applicant's mental health had been effectively monitored: The Court noted that the very day of his arrest the applicant had expressed contemplation of suicide. Moreover, in mid-January 1995 he went on a hunger strike, during which he was monitored every day by doctors, and once by a psychiatrist. On the basis of the medical notes submitted, the Court considered it established that the applicant had been regularly attended to by medical staff, and that the latter had reacted promptly and increased their observation of the applicant when he had shown changes in mood or behaviour. Moreover, the Court recalled the statements of the Chief Consultant of the Copenhagen Prisons before the domestic courts underlining that none of the highly qualified and well-trained doctors and nurses attending the applicant had noted any signs of mental disorder in the applicant. Hence, it could not share the applicant's view that the monitoring carried out had not been as such adequate and sufficient. Admittedly, the applicant was not automatically or regularly examined by a psychologist or a psychiatrist, however such a general obligation could not be imposed on the authorities. Finally, as to the testimonies of the applicant's mother, cousin, the prison chaplain and teacher that his behaviour during his detention in isolation should have given rise to the authorities providing more specialised medical monitoring, none of these witnesses had expressed their concerns to the courts or to the prison personnel, which would have been highly appropriate. In these circumstances, the Court concluded there had been no lack of effective medical monitoring.

**Conclusion:** no violation (4 votes to 3).

**3. *Kröcher & Möller v Switzerland (8463/78) (19 Jul 1981)*  
(no Legal Summary)**

**2. The rights of the victims of the society**

**4. *Rantsev v Cyprus and Russia (25965/04) (7 Jan 2010)***

Judgment 7.1.2010 [Section I]

Article 4

- Trafficking in human beings: article 4 applicable
- Failure by Cyprus to establish suitable framework to combat trafficking in human beings or to take operational measures to protect victims: violation
- Failure by Russia to conduct effective investigation into recruitment of a young woman on its territory by traffickers: violation

Article 1

- Jurisdiction of states
- Extent of Court's competence in cases involving international trafficking in human beings

Article 2

Article 2-1

- Effective investigation

- Failure by Cypriot authorities to conduct effective homicide investigation, in particular, as regards securing relevant evidence abroad under international convention for mutual assistance: violation

**Facts** – The applicant’s daughter Ms Rantseva, a Russian national, died in unexplained circumstances after falling from a window of a private property in Cyprus in March 2001. She had arrived in Cyprus a few days earlier on a “cabaret-artiste” visa, but had abandoned her work and lodging shortly after starting and had left a note to say she wanted to return to Russia. After locating her in a discotheque some days later, the manager of the cabaret had taken her to the central police station at around 4 a.m. and asked them to detain her as an illegal immigrant. The police had contacted the immigration authorities, who gave instructions that Ms Rantseva was not to be detained and that her employer, who was responsible for her, was to pick her up and bring her to the immigration office at 7 a.m. The manager had collected Ms Rantseva at around 5.20 a.m. and taken her to private premises, where he had also remained. Her body had been found in the street below the apartment at about 6.30 a.m. A bedspread had been looped through the railing of the balcony.

An inquest held in Cyprus concluded that Ms Rantseva had died in circumstances resembling an accident while attempting to escape from an apartment in which she was a guest, but that there was no evidence of foul play. Although the Russian authorities considered, in the light of a further autopsy that was carried out following the repatriation of the body to Russia, that the verdict of the inquest was unsatisfactory, the Cypriot authorities stated that it was final and refused to carry out any additional investigations unless the Russian authorities had evidence of criminal activity. No steps were taken by either the Russian or Cypriot authorities to interview two young women living in Russia whom the applicant said had worked with his daughter at the cabaret and could testify to sexual exploitation taking place there.

In April 2009 the Cypriot authorities made a unilateral declaration acknowledging violations of Articles 2, 3, 4, 5 and 6 of the Convention, offering to pay compensation to the applicant and advising that independent experts had been appointed to investigate the circumstances of Ms Rantseva’s death, employment and stay in Cyprus.

The Cypriot Ombudsman, the Council of Europe Commissioner for Human Rights and the United States State Department have published reports which refer to the prevalence of trafficking in human beings for commercial sexual exploitation in Cyprus and the role of the cabaret industry and “artiste” visas in facilitating trafficking in Cyprus.

**Law** – Article 37 § 1: The Court refused the Cypriot Government’s request for the application to be struck out. It found that, despite the unilateral declaration acknowledging violations of the Convention, respect for human rights in general required it to continue its examination of the case in view of the serious nature of the allegations, the acute nature of the problem of trafficking and sexual exploitation in Cyprus and the paucity of case-law on the question of the interpretation and application of Article 4 of the Convention to trafficking in human beings.

**Conclusion:** case not struck out (unanimously).

Article 1: Jurisdiction *ratione loci* – The Court did not accept the Russian Government’s submission that they had no jurisdiction over, and hence no responsibility for, the events to which the application pertained. Since the alleged trafficking had commenced in Russia, the Court was competent to examine the extent to which Russia could have taken steps within the limits of its own territorial sovereignty to protect the applicant’s daughter from trafficking and to investigate both the allegations of trafficking and the circumstances that had led to her death, in particular, by interviewing witnesses resident in Russia.

**Conclusion:** preliminary objection dismissed (unanimously).

Article 2: (a) Cyprus – (i) Substantive aspect: Although it was undisputed that victims of trafficking and exploitation were often forced to live and work in cruel conditions and may suffer violence and ill-treatment at the hands of their employers, a general risk of ill-treatment and violence could not constitute a real and immediate risk to life. In the instant case, even if the police ought to have been aware that Ms Rantseva might have been a victim of trafficking, there had been no indications while she was at the police station that her life was at real and immediate risk and the particular chain of events that had led to her death could not have been foreseeable to the police when they released her into the cabaret manager’s custody. Accordingly, no obligation to take operational measures to prevent a risk to life had arisen.

**Conclusion:** no violation (unanimously).

(ii) Procedural aspect: The Cypriot authorities’ investigation into the death had been unsatisfactory in a number of ways: inconsistencies in the evidence had been left unresolved; relevant witnesses had not been questioned; little had been done to investigate events at the police station and, in particular, possible corruption on the part of the police; the applicant had not been able to participate effectively in the proceedings; and the Cypriot authorities had refused a Russian offer of assistance that would have enabled them to obtain the testimony of two important witnesses. On this last point, the Court made it clear that member States were required to take necessary and available steps to secure relevant evidence, whether or not it was located on their territory, particularly in a case such as the instant one, in which both States were parties to a convention providing for mutual assistance in criminal matters.

**Conclusion:** violation (unanimously).

(b) Russia – Procedural aspect: Article 2 did not require the criminal law of member States to provide for universal jurisdiction in cases involving the death of one of their nationals outside their territory. The Russian authorities had, therefore, not been under a free-standing obligation to investigate Ms Rantseva’s death in Cyprus. As to Russia’s duty as a State where evidence was located to render legal assistance to the investigating State (Cyprus), there had been no obligation on the Russian authorities to take action of their own motion to secure the evidence of the two Russian witnesses in the absence of any request from the Cypriot authorities. Lastly, as regards the applicant’s complaint that the Russian authorities had failed to request the initiation of criminal proceedings, the Court observed that they had made extensive and repeated use of the opportunities presented by the relevant legal-assistance agreements to press for action by the Cypriot authorities.

**Conclusion:** no violation (unanimously).

Article 4: (a) Applicability – In response to the Russian Government’s submission that the complaint under Article 4 was inadmissible *ratione materiae* in the absence of any slavery, servitude or forced or compulsory labour, the Court noted that trafficking in human beings as a global phenomenon had increased significantly in recent years. The conclusion of the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (“the Palermo Protocol”) in 2000 and the Council of Europe Convention on Action against Trafficking in Human Beings in 2005 demonstrated the increasing recognition at international level of the prevalence of trafficking and the need for measures to combat it. It was thus appropriate to examine the extent to which trafficking itself could be considered to run counter to the spirit and purpose of Article 4. By its very nature and aim, trafficking in human beings was based on the exercise of powers attaching to the right of ownership. It treated human beings as commodities to be bought and sold and put to forced labour, often for little or no payment, usually in the sex industry but also elsewhere. It implied close surveillance of the activities of victims, whose movements were often circumscribed and involved the use of violence and threats against people who lived and worked under poor conditions. There could be no doubt that trafficking threatened the human dignity and fundamental freedoms of its victims and could not be

considered compatible with a democratic society and the values expounded in the Convention. In view of its obligation to interpret the Convention in light of present-day conditions, the Court considered it unnecessary to identify whether the treatment about which the applicant complained constituted “slavery”, “servitude” or “forced and compulsory labour”. Instead, trafficking itself, within the meaning of Article 3(a) of the Palermo Protocol and Article 4(a) of the Anti-Trafficking Convention, fell within the scope of Article 4 of the European Convention.

**Conclusion:** preliminary objection dismissed (unanimously).

(b) Merits – Positive obligations: It was clear from the provisions of the Palermo Protocol and the Anti-Trafficking Convention that the Contracting States had formed the view that only a combination of measures could be effective in the fight against trafficking. This gave rise to positive obligations to take measures to prevent trafficking, to protect victims and potential victims and to prosecute and punish those responsible for trafficking. As regards the latter point, it was a feature of trafficking that in many cases it was not confined to the domestic arena. Victims were often trafficked from one State to another. Relevant evidence and witnesses could be located in more than one State. For this reason, in addition to the obligation to conduct a domestic investigation into events occurring on their own territories, member States were also subject to a duty in cross-border trafficking cases to cooperate effectively with the other States concerned in the investigation, in order to ensure a comprehensive international approach to trafficking in the countries of origin, transit and destination.

(i) Compliance by Cyprus: Cyprus had failed to comply with its positive obligations under Article 4 on two counts: firstly, it had failed to put in place an appropriate legal and administrative framework to combat trafficking and, secondly, the police had failed to take suitable operational measures to protect Ms Rantseva from trafficking. (The issue whether the Cypriot authorities had discharged their procedural obligation to investigate the trafficking had been subsumed by the general obligations under Article 2 and did not need to be examined separately.)

As to the first point, although the domestic legislation on trafficking did not in itself appear to give rise to any concern, both the Council of Europe Commissioner for Human Rights and the Cypriot Ombudsman had criticised the “cabaret-artiste” visa regime, which they considered to have been responsible for encouraging large numbers of young foreign women to come to Cyprus, where they were at risk of trafficking. Further, while it was legitimate for immigration-control purposes to require employers to notify the authorities when an artiste left her employment, the responsibility for ensuring compliance with immigration obligations had to remain with the authorities themselves. Measures which encouraged cabaret owners and managers to track down or take personal responsibility for the conduct of artistes were unacceptable and the practice of requiring owners and managers to lodge a bank guarantee to cover potential future costs associated with artistes they had employed was particularly troubling. These factors had been at play in Ms Rantseva’s case. The regime of artiste visas had thus failed to afford Ms Rantseva practical and effective protection against trafficking and exploitation.

As to the second point, the State had been under a positive obligation to take measures to protect Ms Rantseva as there had been sufficient indicators available to the police to give rise to a credible suspicion that she was at real and immediate risk of trafficking or exploitation. There had been multiple failings on the part of the police, who had failed to make immediate further inquiries to establish whether she had been trafficked, had confined her into the custody of the cabaret manager instead of releasing her and had not complied with their statutory duty to protect her.

**Conclusion:** violations (unanimously).

(ii) Compliance by Russia: The Court found no violations of Article 4 as regards the positive obligations to put in place an appropriate legislative and administrative framework and to take protective measures. As to the need for an effective investigation in Russia, the Russian authorities had been best placed to conduct an effective investigation into Ms Rantseva’s recruitment, which had

occurred on Russian territory. No investigation had taken place, however, a failing that was all the more serious in the light of Ms Rantseva's subsequent death and the mystery surrounding the circumstances of her departure from Russia.

**Conclusion:** violation (unanimously).

Article 5: Ms Rantseva's detention at the police station and her subsequent confinement in the apartment amounted to a deprivation of liberty. Although it could be inferred that she was initially detained to enable her immigration status to be checked, there had been no basis in domestic law for the police's decision, once they had established that her papers were in order, to continue to hold her or to consign her to the cabaret manager's custody. Cyprus's responsibility was also engaged for Ms Rantseva's detention in the apartment because, even though she had been held by a private individual, it was clear that this would not have been possible without the active cooperation of the police. Her detention in the apartment had been both arbitrary and unlawful.

**Conclusion:** violation by Cyprus (unanimously).

Article 41: Awards in respect of non-pecuniary damage of EUR 40,000 against Cyprus and EUR 2,000 against Russia.

### **5. *Maiorano v Italy (28634/06) (15 Dec 2009)***

Judgment 15.12.2009 [Section II]

Article 2

Article 2-1

- Life
- Effective investigation
- Responsibility of judiciary and prosecutors for a double murder committed by a dangerous offender on day release: violations

**Facts** – In 1976 one Mr Izzo was sentenced to life imprisonment for the abduction, rape and brutal abuse of two young women and the murder of one of them. In spite of his involvement in numerous incidents in prison, which led to further convictions, in November 2004 the sentence-execution court granted him day release. While on day release he planned and carried out the murder of two women (“the victims”) with the help of two accomplices. He was given a further life sentence. In May 2005 the Minister of Justice opened an administrative inquiry to determine whether, on account of the procedure which had led to Mr Izzo being granted day release, the judges of the sentence-execution court were liable to disciplinary penalties. In March 2008 the National Council of the Judiciary issued the judges concerned with a reprimand. In September 2007 the applicants, who are relatives of the victims, filed a criminal complaint against the judges, but the proceedings were discontinued.

**Law** – Article 2: (a) Substantive aspect – At the time Mr Izzo was granted day release it had not been possible to identify the two victims as potential targets of a lethal act on his part. The Court could not per se find fault with the arrangements in Italy for the rehabilitation of prisoners, as they afforded sufficient safeguards to ensure the protection of society. However, the question remained whether, in the particular circumstances of the case, the granting of day release to Mr Izzo disclosed a breach of the duty of care imposed by Article 2 in this sphere. The Court could not overlook the various positive indicators which had led to the granting of measures to assist his rehabilitation, in particular the favourable reports by probation officers and psychiatrists. But those had been counterbalanced by many others that should have counselled greater prudence. After being sentenced to life imprisonment for an exceptionally brutal offence, Mr Izzo's behaviour had been far from exemplary. He had shown familiarity with weapons and a propensity to disobey both the law and orders from the authorities. The

decision to proceed with the social rehabilitation of an offender such as Mr Izzo had therefore been highly questionable. The Court attached considerable weight to his misconduct after he was granted day release and before he murdered the two victims. In particular, an informant in prison had told a local public prosecutor that Mr Izzo was actively planning a murder and other serious offences. Subsequent investigations had shown that that information had not been considered unfounded. Mr Izzo and his associates had been placed under close surveillance, which had revealed that Mr Izzo was breaching the conditions of his day release. That information represented a cause for great concern and should have been brought to the attention of the sentence-execution court. It had been for that court, not the public prosecutor, to assess whether Mr Izzo's conduct was serious enough to justify a disciplinary penalty or revocation of the order for day-release, having regard to the purpose of that measure as an alternative to imprisonment and balancing Mr Izzo's interest in his gradual social rehabilitation with the need to protect the community. Therefore, the granting of day release to Mr Izzo, together with the failure to forward information to the sentence-execution court about his non-compliance with the conditions, had constituted a breach of the duty of care, arising from the obligation to protect life under Article 2. Accordingly, there had been a violation of Article 2 on account of the sentence-execution court's decision and the failure to seek revocation of the order for day-release in the light of the information from the prison informant and the results of the police investigations.

**Conclusion:** violation (unanimously).

(b) Procedural aspect – In January 2007, one year and eight months after the murders, Mr Izzo was sentenced to life imprisonment and ordered to pay the applicants, as civil parties, an advance on the amount due in respect of non-pecuniary damage. In those circumstances, the Italian authorities had fulfilled their obligation under Article 2 to guarantee a criminal investigation. It remained to be determined whether the authorities were also under a positive obligation to secure the accountability of the State officials involved. Disciplinary proceedings had been opened against the judges of the sentence-execution court. These had led to a disciplinary penalty by the National Council of the Judiciary in the form of a reprimand. However, that decision had concerned only certain specific aspects of the case. In particular, the National Council of the Judiciary had not addressed the fact that neither the information provided by the prison informant nor the results of the police investigations had been used to consider the possible revocation of the order for day-release – a factor that the Court had found essential in its reasons for finding a substantive violation of Article 2. The applicants had filed a criminal complaint about that omission but it had not been followed up and no disciplinary proceedings had been brought against the authorities concerned. Therefore, the disciplinary proceedings brought by the Minister of Justice had not entirely fulfilled the State's positive obligation to secure the accountability of its officials for their possible role in the matter.

**Conclusion:** violation (unanimously).

Article 41: EUR 10,000 awarded to the seventh applicant and EUR 5,000 to each of the other six applicants and jointly to the heirs of the eighth applicant, in respect of non-pecuniary damage.

**6. *Osman v United Kingdom (87/1997/871/1083) (28 Oct 1998)*  
(no Legal Summary)**

**3. Legality of detention**

**7. *Vinter and Others v. the United Kingdom (66069/09, 130/10, 3896/10) (17 Jan 2012)***

Judgment 17.1.2012 [Section IV]

### Article 3

- Degrading punishment
- Inhuman punishment
- Imprisonment for life with release possible only in the event of terminal illness or serious incapacitation: no violation

**Facts** – In England and Wales murder carries a mandatory life sentence. Prior to the entry into force of the Criminal Justice Act 2003 the Secretary of State was empowered to set tariff periods for mandatory life sentence prisoners indicating the minimum term they must serve before they became eligible for early release on licence. Since the entry into force of the Act, that power is now exercised by the trial judge. Prisoners whose tariff was set by the Secretary of State under the previous practice may apply to the High Court for a review.

All three applicants were given “whole life orders” following convictions for murder. Such an order means that their offences are considered so serious that they must remain in prison for life unless the Secretary of State exercises his discretion to order their release on compassionate grounds if satisfied that exceptional circumstances – in practice, terminal illness or serious incapacitation – exist. The whole life order in the case of the first applicant, Mr Vinter, was made by the trial judge under the 2003 Act and upheld by the Court of Appeal on the grounds that Mr Vinter already had a previous conviction for murder. The whole life order in the cases of the second and third applicants had been made by the Secretary of State under the previous practice, but were confirmed on a review by the High Court under the 2003 Act in decisions that were subsequently upheld on appeal. In the case of the second applicant, Mr Bamber, it was noted that the murders had been premeditated and involved multiple victims; these factors, coupled with sexual gratification, had also been present in the case of the third applicant, Mr Moore.

In their applications to the European Court, the applicants complained that the imposition of whole life orders meant their sentences were, in effect, irreducible, in violation of Article 3 of the Convention, and that the imposition of whole life orders without the possibility of regular review by the domestic courts violated Article 5 § 4. The second and third applicants also alleged a violation of Article 7 in that the whole life orders in their cases had been made not by the trial judge, but subsequently by the High Court, according to principles which they maintained reflected a harsher sentencing regime than had been in place when their offences were committed.

**Law** – Article 3: While, in principle, matters of appropriate sentencing largely fell outside the scope of the Convention, a grossly disproportionate sentence could amount to ill-treatment contrary to Article 3 at the moment of its imposition. However, “gross disproportionality” was a strict test that would be met only on “rare and unique occasions”. Given the gravity of the murders of which the applicants had been convicted, the whole life orders imposed on them were not grossly disproportionate.

The next point to examine was at what point in the course of a life or other very long sentence an Article 3 issue might arise. For life sentences it was necessary to distinguish between three types of sentence: (i) a life sentence with eligibility for release after a minimum period has been served; (ii) a discretionary sentence of life imprisonment without the possibility of parole; and (iii) a mandatory sentence of life imprisonment without the possibility of parole. The first type of sentence was clearly reducible and no issue could therefore arise under Article 3. As for the second and third types (discretionary and mandatory sentences of life imprisonment without the possibility of parole) in the absence of gross disproportionality, an Article 3 issue could not arise when the sentence was imposed, but only at such time as it could be shown (i) that the applicant’s continued imprisonment could no longer be justified on any legitimate penological grounds; and (ii) that the sentence was irreducible *de facto* and *de iure*.

The whole life orders imposed in the applicants' cases were, in effect, of the second category: discretionary sentences of life imprisonment without parole. As regards the first limb of the above tests, the Court found that none of the applicants had demonstrated that their continued incarceration could no longer be justified on any legitimate penological grounds. The first applicant, Mr Vinter, had been convicted of a particularly brutal and callous murder while on parole following a previous murder and had only been serving his sentence for three years. His continued incarceration served the legitimate penological purposes of punishment and deterrence. While the second and third applicants, Mr Bamber and Mr Moore, had served respectively twenty-six and sixteen years in prison, they had effectively been re-sentenced in 2009 following their application to the High Court for review of their whole life tariffs. In the light of the relevant, sufficient and convincing reasons given in the High Court's decisions, the Court was satisfied that their continued incarceration also served the legitimate penological purposes of punishment and deterrence.

Since the applicants had failed to show that their continued incarceration could no longer be justified on any legitimate penological grounds, the Court did not need to go on to examine the second limb of the test, namely whether the whole life orders imposed on them were irreducible de facto and de iure[1].

**Conclusion:** no violation in respect of all three applicants (four votes to three).

Article 5 § 4: The applicants' complaints were indistinguishable from the complaint that was declared inadmissible in the Kafkaris decision[2]. While continued detention could violate Article 3 if it was no longer justified on legitimate penological grounds and the sentence was irreducible, that did not mean that the detention had to be reviewed regularly in order for it to comply with Article 5. It was clear from the domestic courts' remarks that whole life orders were imposed to meet the requirements of punishment and deterrence. The applicants' sentences were therefore different from the life sentence considered in Stafford, [3] which the Court found was divided into a tariff period (imposed for the purposes of punishment) and the remainder of the sentence, when continued detention was determined by considerations of risk and dangerousness. Consequently, as in Kafkaris, the Court was satisfied that the lawfulness of the applicants' detention required under Article 5 § 4 was incorporated in the whole life orders and no further review was required.

**Conclusion:** inadmissible (manifestly ill-founded).

Article 7: The second and third applicants had complained that in its review of the Secretary of State's decisions the High Court had imposed whole life orders on the basis of a harsher sentencing regime than had been in force when they were convicted. The Court rejected that argument. While it accepted that the setting of a minimum term in the context of a sentence of life imprisonment attracted the protection of Article 7, it noted, firstly, that the legislation under which the High Court had reached its decisions expressly protected against the imposition of a longer minimum term than was initially imposed and, secondly, that in conducting its review the High Court was required to have regard to both the new sentencing regime, which provided a comprehensive and carefully constructed framework for determining the minimum term justified for the purposes of punishment and deterrence, and the recommendations made by the trial judge and the Lord Chief Justice.

**Conclusion:** inadmissible (manifestly ill-founded).

(See also [Kafkaris v. Cyprus](#) [GC], no. 21906/04, 12 February 2008, [Information Note no. 105](#); [Iorgov v. Bulgaria \(no. 2\)](#), no. 36295/02, 2 September 2010, [Information Note no. 133](#); and [Schuchter v. Italy \(dec.\)](#), no. 68476/10, 11 October 2011, [Information Note no. 145](#); and [Harkins and Edwards v. the United Kingdom](#), nos. 9146/07 and 32650/07, 17 January 2012, [Information Note no. 148](#))

[1]The Court did, however, express certain reservations about the Secretary of State's policy on compassionate release: (i) as drafted, it could conceivably mean that a prisoner would remain in

prison even if his continued imprisonment could not be justified on any legitimate penological grounds; (ii) it no longer followed the former practice of holding a twenty-five year review of the need for continued imprisonment; and (iii) could compassionate release for the terminally ill or physically incapacitated really be considered release at all, if all it meant was that a prisoner died at home or in a hospice rather than behind prison walls.

[2] [Kafkaris v. Cyprus](#) (dec.), no. 9644/09, 21 June 2011.

[3] [Stafford v. the United Kingdom](#) [GC], no. 46295/99, 28 May 2002, [Information Note no. 42](#)

## **8. *Vinter and Others v. the United Kingdom (referral) - 66069/09, 130/10 and 3896/10***

Judgment 17.1.2012 [Section IV]

### Article 3

- Degrading punishment
- Inhuman punishment
- Imprisonment for life with release possible only in the event of terminal illness or serious incapacitation: case referred to the Grand Chamber

In England and Wales murder carries a mandatory life sentence. All three applicants were given “whole life orders” following convictions for murder. Such an order meant that their offences were considered so serious that they must remain in prison for life unless the Secretary of State exercised his discretion to order their release on compassionate grounds if satisfied that exceptional circumstances – in practice, terminal illness or serious incapacitation – existed. In their applications to the European Court, the applicants complained that the imposition of whole life orders in their cases meant their sentences were, in effect, irreducible, in violation of Article 3 of the Convention.

In a judgment of 17 January 2012 a Chamber of the Court held, by four votes to three, that there had been no violation of Article 3 (see Information Note no. 148) .

On 9 July 2012 the case was referred to the Grand Chamber at the applicants’ request.

## **9. *James, Wells and Lee v. UK (25119/09, 57715/09, 57877/09) (18 Sep 2012)* (no Legal Summary)**

### *Press release*

[Detaining prisoners indefinitely on grounds of risk without giving them access to rehabilitative courses was arbitrary](#)

In today’s Chamber judgment in the case of [James, Wells and Lee v. the United Kingdom](#) (application nos. 25119/09, 57715/09 and 57877/09), which is not final<sup>1</sup>, the European Court of Human Rights held:

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<sup>1</sup> Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.

unanimously, that there had been a **violation of Article 5 § 1 (right to liberty and security)** of the European Convention on Human Rights concerning the applicants' detention following the expiry of their tariff periods and until steps had been taken to progress them through the prison system with a view to their access to appropriate rehabilitative courses; and,

by six votes to one, that there had been **no violation of Article 5 § 4 (right to have lawfulness of detention decided speedily by a court)** concerning Mr Wells' and Mr Lee's complaint about the possibility of their release.

The Court found in particular that the considerable delays in the applicants making any progress in their sentences had been the result of lack of resources, planning and realistic consideration of the impact of the sentencing scheme introduced in 2005, despite the fact that it had been premised on the understanding that rehabilitative treatment would be made available to those prisoners concerned. Indeed, these deficiencies had been the subject of universal criticism in the domestic courts and had resulted in a finding that the Secretary of State had breached his public law duty.

#### Principal facts

The case concerned prisoners who were subject to indeterminate sentences of imprisonment for the public protection ("IPP sentences") in the United Kingdom. IPP sentencing was introduced in April 2005 by virtue of section 225 of the Criminal Justice Act 2003 (the "2003 Act"). It was initially mandatory where a future risk existed of further offending. Risk was assumed where there was a previous conviction for violent or sexual offences, unless the sentencing judge considered it unreasonable to make such an assumption. A minimum term, known as the "tariff", was fixed by the sentencing judge. After the expiry of the tariff, IPP sentences required the Parole Board's decision that the prisoner was no longer dangerous before he could be released. Following the entry into force of this new legislation, large numbers of IPP prisoners swamped the system. The IPP scheme was amended in 2008 and, no longer mandatory, only applies in cases where – if imposed – the tariff would be fixed at more than two years, subject to certain limited exceptions. Further, risk is no longer assumed, even where a defendant has relevant previous convictions.

The applicants, Brett James, Nicholas Wells and Jeffrey Lee, are British nationals who were born in 1985, 1983 and 1965 respectively. Mr James lives in Wakefield (England), Mr Wells is currently in detention and Mr Lee lives in Fleetwood (England). Following their convictions for violent offences and in the light of their offending histories, all three men were given automatic IPP sentences in 2005 with tariffs of, respectively, two years, 12 months and nine months.

They were recommended to take part in a number of rehabilitative courses, such as ETS (Enhanced Thinking Skills), ASRO (Addressing Substance Related Offending), CALM (Controlling Anger and Learning to Manage it), Victim Awareness and Healthy Relationships Programme. However, by the time their respective tariffs expired, all three applicants remained in their local prisons, without access to the relevant courses, awaiting transfer to first stage lifer prisons to begin progressing through the prison system. They were only transferred five months (Mr James), 21 months (Mr Wells) and 25 months (Mr Lee) after the expiry of their tariffs.

Meanwhile, all three men brought judicial review proceedings before the national courts, which were eventually joined on appeal before the House of Lords. They complained in particular that their post-

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Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: [www.coe.int/t/dghl/monitoring/execution](http://www.coe.int/t/dghl/monitoring/execution)

tariff detention and lack of access to courses was unlawful and in breach of Article 5 §§ 1 and 4 of the European Convention.

Throughout the domestic proceedings the Secretary of State was criticised for the systemic failure to put in place the resources necessary to enable the provisions of the 2003 Act to function as intended and he was found to have breached his public law duty. In particular, before the House of Lords, Lord Judge referred to “seriously defective structures” and the fact that the new sentencing provisions were “comprehensively unresourced” with the result that numerous prisoners continued to be detained after the expiry of the punitive element of their sentences “without the question either of their rehabilitation or the availability of up to date, detailed information about their progress”. He indicated that as tariff periods expired, nothing had been done to enable an informed assessment by the Parole Board of the question whether the protection of the public required the prisoner’s continued detention.

Nonetheless, on 6 May 2009 the House of Lords unanimously dismissed the applicants’ appeals, finding no breach of either Article 5 § 1 or 4 of the Convention. It held that, despite the above concerns, the applicants’ detention could not be said to be arbitrary or unlawful as notwithstanding the failure to provide access to courses the causal connection between the ground for the detention and the detention itself had not been broken. It also found that the procedure before the Parole Board satisfied the requirement for a speedy review of the legality of their detention.

#### Complaints, procedure and composition of the Court

Relying on Article 5 §§ 1 and 4 (right to liberty and security), the three applicants complained about the failure to ensure their access to courses to address their offending behaviour while in prison and the impact of this failure on their ability to show that they were rehabilitated and able safely to be released. Mr Wells and Mr Lee further argued under Article 5 § 4 that neither the Parole Board nor the domestic courts had been able to order their release due to the provisions of the primary legislation and the absence of any such power in the 2003 Act.

The applications were lodged with the European Court of Human Rights on 7 May 2009, 27 October 2009 and 27 October 2009, respectively.

Judgment was given by a Chamber of seven judges, composed as follows:

Lech **Garlicki** (Poland), *President*,  
David Thór **Björgvinsson** (Iceland),  
Nicolas **Bratza** (the United Kingdom),  
George **Nicolaou** (Cyprus),  
Zdravka **Kalaydjieva** (Bulgaria),  
Nebojša **Vučinić** (Montenegro),  
Vincent A. **de Gaetano** (Malta),  
and also Fatoş **Araci**, *Deputy Section Registrar*.

#### Decision of the Court

##### [Article 5 § 1 \(whether detention was lawful\)](#)

The Court noted that in these cases, once risk of re-offending had been established by way of the statutory presumption, the sentencing judge had no power to impose any sentence but an indeterminate sentence of imprisonment. It was therefore important to ensure a genuine correlation between the aim of the detention and the detention itself. The Court reviewed statements made by Baroness Scotland of Asthal, then Minister of State at the Home Office, during the Parliamentary

debate on the draft legislation, and the Government's policy as regards the management and treatment of prisoners serving indeterminate sentences. It also considered the findings of the judges in the domestic proceedings in the High Court, the Court of Appeal and the House of Lords. It concluded that in cases concerning indeterminate sentences of imprisonment for the protection of the public, a real opportunity for rehabilitation was a necessary element of any part of the detention which was to be justified solely by reference to public protection.

Turning to assess the operation of the IPP scheme in practice, the Court referred to the harsh criticism in the domestic courts. In the Court of Appeal it was found that there had been a systemic failure on the part of the Secretary of State to put in place the resources necessary to implement the scheme of rehabilitation necessary to enable the provisions of the 2003 Act to function as intended. In the House of Lords the Secretary of State was found to have failed "deplorably" in the public law duty that he had to be taken to have accepted when he had persuaded Parliament to introduce IPP sentences. References were also made to the "seriously defective structures" and to the "comprehensively unresourced" sentencing provisions. The Court noted that the specific impact of these general deficiencies on the progress of the applicants through the prison system in the present cases could be clearly seen.

The Court found that indeterminate detention for the public protection could be justified under Article 5 § 1, but that it could not be allowed to open the door to arbitrary detention. Where a prisoner was in detention solely on the grounds of the risk that he was perceived to pose, regard had to be had to the need to encourage his rehabilitation. In the applicants' cases, this meant that they had to be given reasonable opportunities to undertake courses aimed at addressing their offending behaviour and the risks they posed. Experience had shown that courses were necessary for dangerous prisoners to cease to be dangerous. While Article 5 § 1 did not impose any absolute requirement for prisoners to have immediate access to all courses they might require, any restrictions or delays due to resource considerations had to remain reasonable.

It was therefore significant that the Secretary of State had failed to anticipate the demands which would be placed on the prison system by the introduction of IPP sentencing, despite the relevant legislation having been premised on the understanding that rehabilitative treatment would be made available to IPP prisoners. Indeed, this failure had been the subject of universal criticism in the domestic courts and resulted in a finding that the Secretary of State had breached his public law duty.

Substantial periods of time had passed as concerned each of the applicants before they had even begun to make any progress in their sentences, and this despite the clear guidance in relevant policy documents. It was clear that the delays had been the result of a lack of resources. The inadequate resources had apparently been the consequence of the introduction of the measures for indeterminate detention without the necessary planning and without realistic consideration of their impact. Further, the length of the delays in the applicants' cases had been considerable: for around two and a half years, they had simply been left in local prisons where there had been few, if any, offending behaviour programmes. The stark consequence of the failure to make available the necessary resources was that the applicants had no realistic chance of making objective progress towards a real reduction or elimination of the risk they posed by the time their tariff periods expired. Moreover, once the applicants' tariffs had expired, their detention had been justified solely on the grounds of the risk they had posed to the public and the need for access to rehabilitative treatment at that stage became all the more pressing.

In those circumstances, the Court considered that following the expiry of the applicants' tariff periods and until steps had been taken to progress them through the prison system with a view to their access to appropriate rehabilitative courses, their detention had been arbitrary and therefore unlawful within the meaning of Article 5 § 1. Although in the cases of Mr James and Mr Wells the Court was satisfied that following their transfer there was no evidence of any unreasonable delay in providing them with

access to courses, it noted that Mr Lee had experienced a further five-month delay following the recommendation for prior motivational work. By the time the recommendation was made, Mr Lee was already two years and ten months post-tariff, in the context of a ninemonth tariff. It had accordingly been imperative that his treatment be progressed as a matter of urgency and, in the absence of any explanation from the Government for the delay, the Court concluded that that period of detention had also been arbitrary and therefore unlawful within the meaning of Article 5 § 1. There had therefore been a violation of Article 5 § 1 of the Convention as concerned all three applicants.

#### Article 5 § 4 (whether lawfulness of detention was decided speedily by a court)

The Court found that no separate issue arose under Article 5 § 4 regarding the applicants' complaint about lack of access to courses as it had already been examined in the context of their complaint under Article 5 § 1. Furthermore, there had been no violation of Article 5 § 4 as concerned Mr Wells' and Mr Lee's complaint about the possibility of their release, as the Court found that they had failed to establish that the combination of the Parole Board and judicial review proceedings could not have resulted in an order for their release.

#### Just satisfaction (Article 41)

The court held that the United Kingdom was to pay Mr James 3,000 euros (EUR), Mr Wells EUR 6,200 and Mr Lee EUR 8,000 in respect of non-pecuniary damage. For costs and expenses, the applicants were awarded EUR 12,000, each.

#### Separate opinion

Judge Kalaydjieva expressed a dissenting opinion regarding Article 5 § 4 which is annexed to the judgment.

*The judgment is available only in English.*

*This press release is a document produced by the Registry. It does not bind the Court. Decisions, judgments and further information about the Court can be found on [www.echr.coe.int](http://www.echr.coe.int).*

### **10. Haidn v Germany (6587/04) (13/01/2011)**

Judgment 13.1.2011 [Section V]

#### Article 5

##### Article 5-1

- Deprivation of liberty
- Lawful arrest or detention
- Indefinite preventive detention following completion of prison term: violation

**Facts** – In 1999 the applicant was given a three-and-a-half-year prison sentence following a conviction for rape. In April 2002, three days before he completed his sentence, the court responsible for the execution of sentences ordered his preventive detention in prison for an indefinite duration under the recently introduced Bavarian (Dangerous Offenders') Placement Act after finding, on the basis of psychiatric reports, that he posed a serious risk to others. That decision was upheld on appeal. The applicant was held in preventive detention until December 2003 and from March to September 2004. He was subsequently admitted to a psychiatric unit.

**Law** – Article 5 § 1: The applicant's preventive detention from April 2002 to December 2003 and from March to September 2004 did not constitute detention "after conviction" for the purposes of Article 5 § 1 (a) of the Convention in the absence of a sufficient causal link between the conviction and the

detention. The trial court had not made, and had not had the power to make, any such order. The order made by the court responsible for the execution of sentences had not involved any finding of guilt and could not be regarded as having ensued “by virtue of” the criminal conviction simply because it referred to the conviction and was made while the sentence was still being served. Nor was the preventive detention covered by Article 5 § 1 (c) as being “reasonably considered necessary to prevent [the applicant’s] committing an offence”: Article 5 § 1 was to be interpreted narrowly and the potential further offences were not sufficiently concrete and specific as regards the place and time of commission or the victims. Lastly, the detention did not come within Article 5 § 1 (e). Although there was objective medical evidence to show that the applicant suffered from a personality disorder, a distinction was made in the German legal system between the placement of dangerous offenders in prison for preventive purposes and the placement of mentally ill persons in a psychiatric hospital. The applicant had been detained under the legislation on dangerous offenders, which required only an assessment of the risk he posed to the public, not of his mental health, and initially at least he had been held in an ordinary prison, rather than in a hospital, clinic or other appropriate institution. In sum, the applicant’s preventive detention was not covered by any of the sub-paragraphs of Article 5 § 1.

**Conclusion:** violation (unanimously).

Article 3: The Court was not persuaded that the combination of the applicant’s advancing years and declining (but not critical) health was such as to bring him within the scope of Article 3. Further, while the circumstances in which the applicant had been detained after completing his prison sentence must have generated feelings of humiliation and uncertainty going beyond the inevitable element of suffering connected with imprisonment, there was no indication of any intent to debase him by ordering his continued detention three days before his scheduled release. Lastly, although the order for his detention was of indefinite duration, the applicant had been entitled to a two-yearly review by the domestic courts. Accordingly, the minimum level of severity required for inhuman or degrading treatment or punishment had not been attained.

**Conclusion:** no violation (unanimously).

Article 41: Claim made out of time.

(See also, with reference to preventive detention ordered by the trial court itself but extending beyond the maximum ten-year period allowed under domestic law, *M. v. Germany*, no. 19359/04, 17 December 2009, Information Note no. 125; and three judgments of 13 January 2011: *Kallweit v. Germany*, no. 17792/07; *Mautes v. Germany*, no. 20008/07; and *Schummer v. Germany*, nos. 27360/04 and 42225/07)

### **11. *M v Germany (also M., K., S. v Germany) (19359/04) (17 Dec 2009)***

Judgment 17.12.2009 [Section V]

Article 5

Article 5-1

- Deprivation of liberty
- Lawful arrest or detention

Applicant’s continued placement in preventive detention beyond the maximum period authorised at the time of his placement: violation

Article 7

Article 7-1

- Heavier penalty
- Retroactivity

Retrospective extension of preventive detention from a maximum of ten years to an unlimited period of time: violation

**Facts** – In 1986 the applicant was convicted of attempted murder and robbery and sentenced to five years' imprisonment. In addition, the trial court ordered his placement in preventive detention, a measure considered necessary in view of the applicant's strong propensity to commit offences which seriously damaged his victims' physical integrity. He had already been convicted and imprisoned on numerous occasions, notably for attempted murder, theft, assault and blackmail. In the court's opinion, he was liable to commit spontaneous acts of violence and was a danger to the public. The applicant finished serving his prison sentence in August 1991 and has been in preventive detention ever since. In April 2001 a court refused to release him on licence and ordered that he be kept in preventive detention beyond 8 September 2001, the date the maximum ten-year period previously authorised for such detention was due to expire. In making that order the court applied the Criminal Code as amended by a law which had entered into force in January 1998. It stated that the amended provision was applicable also to prisoners who had been placed in preventive detention prior to the law's entry into force and added that, on account of the gravity of the applicant's criminal record and the likelihood of his committing further offences, his continued placement in preventive detention was not disproportionate. The court of appeal confirmed that the applicant's dangerousness necessitated his continued preventive detention and added that such detention was not contrary to the prohibition of retrospective provisions in the criminal law. The applicant lodged an unsuccessful constitutional complaint. The Federal Constitutional Court held, in particular, that the abolition of the maximum period of detention, and the application of this measure to criminals who had been placed in preventive detention prior to the entry into force of the new legislation and had not yet finished serving their sentences, were compatible with the Constitution. It also considered that the retrospective application of the amended provision of the Criminal Code was not disproportionate.

**Law** – Article 5 § 1: The Court confirmed that the applicant's preventive detention before the expiry of the ten-year period had resulted from his "conviction" by the sentencing court in 1986 and was therefore covered by Article 5 § 1 (a). The Court, however, found that there was no sufficient causal connection between his conviction and his continued deprivation of liberty beyond the period of ten years in preventive detention, which had been made possible only by the subsequent change in the law in 1998. The applicant's continued detention had been justified by the courts responsible for the execution of sentences with reference to the risk that the applicant might commit further serious offences – similar to those of which he had previously been convicted – if released. These potential further offences were not, however, sufficiently concrete and specific, as required by the Court's case-law as regards the place and time of their commission and the victims, and did not, therefore, fall within the ambit of Article 5 § 1 (c). The domestic courts had not based their decisions to further detain the applicant on the ground that he was of unsound mind. Therefore, his detention could not be justified under Article 5 § 1 (e) either. In sum, the applicant's preventive detention beyond the ten-year period had not been justified under any of the sub-paragraphs of Article 5 § 1.

**Conclusion:** violation (unanimously).

Article 7 § 1: The Court had to determine whether the applicant's preventive detention constituted a "penalty" within the meaning of this provision. Under German law, such a measure was not considered a penalty to which the absolute ban on retrospective punishment applied, but rather a measure of correction and prevention aimed at protecting the public from a dangerous offender. However, just like a prison sentence, preventive detention entailed a deprivation of liberty. Persons subject to preventive detention were detained in ordinary prisons, albeit in separate wings. Minor alterations to the detention regime compared to that of an ordinary prisoner serving his sentence, including privileges such as detainees' right to wear their own clothes and to further equip their more comfortable prison cells, could not mask the fact that there was no substantial difference between the execution of a prison sentence and that of a preventive-detention order. There was currently no sufficient psychological support specifically aimed at prisoners in preventive detention to secure the prevention of offences by

the persons concerned. The Court could not therefore subscribe to the Government's argument that preventive detention served a purely preventive, and no punitive, purpose. Pursuant to the Criminal Code, preventive-detention orders could be made only against persons who had repeatedly been found guilty of criminal offences of a certain gravity. Given its unlimited duration, preventive detention might well be understood as constituting an additional punishment and entailed a clear deterrent element. Courts belonging to the criminal-justice system were involved in making and implementing orders for preventive detention. The suspension of preventive detention on probation was subject to a court's finding that there was no danger that the detainee would commit further serious offences, a condition which could be difficult to fulfil. This measure appeared, therefore, to be among the most severe – if not the most severe – which could be imposed under the German Criminal Code. In view of the foregoing, the Court concluded that preventive detention under the German Criminal Code was to be qualified as a "penalty" for the purposes of Article 7 § 1 of the Convention. The Court was further unconvinced by the Government's argument that the extension of the applicant's detention merely concerned the execution of the penalty imposed on the applicant by the sentencing court. Given that at the time the applicant committed the offence he could have been kept in preventive detention only for a maximum of ten years, the extension had constituted an additional penalty which had been imposed on him retrospectively, under a law enacted after he had committed his offence.

Conclusion: violation (unanimously).

Article 41: EUR 50,000 in respect of non-pecuniary damage.

#### **4. Relevant rights of the offender**

**12. *Aerts v. Belgium* (25357/94) (30 Jul 1998)  
(no Legal Summary)**

**13. *Dax v Germany* (19969/92) (7 Jul 1992)  
(no Legal Summary)**

**14. *E v Norway* (11701/85) (29 Aug 1990)  
(no Legal Summary)**

**15. *Van Droogenbroeck v Belgium* (7906/77) (25 Apr 1983)  
(no Legal Summary)**

**16. *Guzzardi v Italy* (7367/76) (06 Nov 1980)  
(no Legal Summary)**

**17. *X v Netherlands* (6591/74) (26 May 1975)  
(no Legal Summary)**

**18. *X v Norway* (24 Jul 1970) (4210/69)  
(no Legal Summary)**

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James, Wells and Lee v UK (18 Sep 2012)	<a href="http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61795">http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-61795</a>	5 § 1 (a) ; 5 § 4
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**RELEVANT RIGHTS OF THE OFFENDER**

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Van Droogenbroeck v Belgium (25 Apr 1983)	<a href="http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57471">http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57471</a>	4 ; 5 § 1 ; 5 § 4
E v Norway (29 Aug 1990)	<a href="http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57634">http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-57634</a>	5 § 4
Dax v Germany (7 Jul 1992)	<a href="http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-1350">http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-1350</a>	5 § 1 ; 6 § 2 ; 7 § 1
Aerts v Belgium (30 Jul 1998)	<a href="http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58209">http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-58209</a>	3 ; 5 § 1 ; 5 § 4 ; 6 § 1