

Developments

Case Note - *Retrospective Preventive Detention in Germany: A Comment on the ECHR Decision Haidn v. Germany of 13 January 2011*

By *Grischa Merkel**

A. Introduction

In four judgements of 13 January 2011 the European Court of Human Rights (ECHR) in Strasbourg returned to the issues raised in its earlier jurisprudence regarding preventive detention ("*Sicherungsverwahrung*") under German criminal law.¹ In its decision of 17 December 2009, *M. v. Germany*,² the Court had held that the German Criminal Law's *retroactive* extension of confinement in preventive detention failed to meet the requirement of lawful detention "after conviction" under Art. 5 § 1 (a) of the Convention for the Protection of Human Rights and Fundamental Freedoms³ (hereinafter "the Convention"), and violates the prohibition of retroactivity (Art. 7 § 1 of the Convention). The articles read as follows:

Art. 5 § 1 (a):

"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;..."

Art. 7 § 1:

"No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier

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¹ For details see Grischa Merkel, *Incompatible Contrasts? – Preventive Detention in Germany and the European Convention on Human Rights*, 11 GERMAN LAW JOURNAL 1046 (2010), at 1050: <http://www.germanlawjournal.com/index.php?pageID=11&artID=1283>.

² ECHR, 5th Section, App. no. 19359/04.

³ See: http://www.echr.coe.int/NR/rdonlyres/D5CC24A7-DC13-4318-B457-5C9014916D7A/0/ENG_CONV.pdf, last accessed 30 March 2011.

penalty be imposed than the one that was applicable at the time the criminal offence was committed.”

In its most recent decisions, the Court confirmed this earlier judgement in three cases.⁴ The applicants, Kallweit, Mautes and Schummer, were convicted before 1998. Their conviction included a specific prison time and subsequent preventive detention, which was limited by law ten years at the time of their conviction. So, after they served their sentence, they retained in preventive detention, which basically means they stayed in prison under similar conditions. However, they had not been released from preventive detention after ten years, but were retained with an unlimited duration under a Federal Act⁵ conceived to fight sex offences and other severe criminality that abolished the 10-year restriction of preventive detention in 1998. As in *M. v. Germany* the ECHR found a violation of the Convention by the retroactive extension of the applicants’ placement in preventive detention, awarded a total of 125.000 EUR of compensation to the applicants, and criticised that the German administration and courts disrespected the concerned prisoner’s rights of liberty guaranteed under the Convention.

The German Government tries to avoid the affected release of approximately 100 potentially dangerous prisoners, and has therefore only partly transferred the Court’s judgement *M. v. Germany* into the German Law. This leaves the problem of how to deal with the situation to the German Courts and has led to a highly arbitrary legal situation that we will return to after a closer look on the fourth applicant’s case.

In the case *Haidn v. Germany*⁶ the ECHR extended its judgement by finding that *retrospective* preventive detention (“*nachträgliche Sicherungsverwahrung*”) does not meet the requirements of Art. 5 § 1 (a) of the Convention either, and that detention under a corresponding law therefore as well violates the prisoner’s right of liberty and freedom. Retrospective preventive detention (Article 66b of the German Criminal Code) enables courts to subject adult prisoners to preventive detention after their sentence served with no prior notification in trial and without any further conviction, if new evidence regarding the dangerousness of the prisoner becomes available during the prison term that is seen to support an extension of the detention.⁷ Since the facts of Haidn’s case quite well bring into

⁴ ECHR, judgement of 13 January 2011, 5th Section, App. nos. 17792/07 (*Kallweit v. Germany*), 20008/07 (*Mautes v. Germany*), 27360/04 and 42225/07 (*Schummer v. Germany*).

⁵ *Gesetz zur Bekämpfung von Sexualdelikten und sonstigen gefährlichen Straftaten*, *Bundesgesetzblatt* 26 January 1998, part I no. 6, at 160: <http://www.afane-jacquart.com/docs/2009/12/gesetz-zur-bekampfung-von-sexualdelikten-und-anderen-gefahrlichen-straftaten.pdf>, last accessed 30 March 2011.

⁶ *Haidn v. Germany*, judgement of 13 January 2011. 5th Section, App. no. 6587/04.

⁷ Pursuant to § 1 of Article 66b of the German Criminal Code, in force until January 2011, the court may order preventive detention retrospectively, in particular, if, prior to the end of a term of imprisonment imposed on conviction for crimes punishable with at least one year’s imprisonment against life, limb, personal liberty or sexual self-determination or for offences listed in Article 66 § 3, evidence comes to light which indicates that the convicted person presents a significant danger to the general public. An overall assessment of the convicted

light the legislators' and courts' handling of sex-offenders in Germany in the recent years, it seems worse mentioning them in more detail.

B. Haidn's legal history until his appeal to the ECHR

Albert Haidn was born in 1934, and sentenced three years and six months' imprisonment by the Passau Regional Court ("*Landgericht Passau*"), Bavaria, in 1999, after he was found guilty of a double-rape of the twelve-year-old daughter of his girlfriend in 1986. Two experts reported his suffering from a continuous cerebral decomposition, due to which his criminal responsibility was diminished. His frontal brain damage and the hereby caused progressive personality dissociation resulted from a basal skull fracture due to a motorcycle accident when he was aged 20. Five years before this conviction, in July 1994, Haidn was sentenced to eight months' imprisonment with probation by the Freyung District Court ("*Amtsgericht Freyung*"), after he sexually abused a nine-year-old girl in the spring of 1993. On three occasions Haidn touched the girl's breast under her shirt, the clothes over her genital area and kissed her mouth with his tongue. Based on his suffering from a diagnosed, progressive pathological mental disorder, the sentencing judge found that a diminished criminal responsibility could not be excluded.⁸

While Haidn was serving his full sentence until 13 April 2002 in Bayreuth prison, on 1 January 2002 the "Bavarian (Dangerous Offenders') Placement Act" entered into force.⁹ The Act empowered chambers of the Regional Courts responsible only for the execution of sentences ("*Strafvollstreckungskammern*") to order the offender's continued placement in prison if it found that the offender was dangerous and liable to re-offend. The order was to

offender's personality, his offences and additionally his development during detention must have shown that he was very liable to commit serious offences by which the victims would be seriously harmed; moreover, the other conditions listed in Article 66 of the Criminal Code had to be met (see *supra*, note 6, *para.* 48).

Pursuant to § 1 of Article 66 of the German Criminal Code, in force until January 2011, the sentencing court may, at the time of the offender's conviction, order his preventive detention in addition to his prison sentence, 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 *supra*, note 6, *para.* 38).

⁸ See *Bundesgerichtshof (BGH) 1 StR 476/05* – judgement of 23 March 2006, *para.* 3 and 4: <http://www.hrr-strafrecht.de/hrr/1/05/1-476-05-1.php?referer=db>, last accessed 30 March 2011; *supra*, note 2, *para.* 6 and 7

⁹ *Bayerisches Gesetz zur Unterbringung von besonders rückfallgefährdeten hochgefährlichen Straftätern (BayStrUBG)* of 24 Dezember 2001, see BAYERISCHES GESETZ- UND VERORDNUNGSBLATT, Seite 978.

be given at the end of the served sentence, and only for preventative purpose, so no further conviction of any criminal act was essential. On 28 January 2002 Haidn was informed by the psychologist of Bayreuth prison that he might possibly be detained beyond the date of his release, and, indeed, a chamber of the Bayreuth Regional Court, responsible for the execution of sentences, ordered Haidn's replacement under this Act on 10 April 2002. The Chamber noted that Haidn was no longer able to reflect on his possibly deviant sexual behaviour and to discern limits due to his organic personality disorder. He had failed to participate in any therapeutic measure and denied his offences. Haidn argued he didn't need therapy since he had not raped anyone. The evidence his former girlfriend's daughter gave – and his conviction based upon –, was false and an act of revenge, also, he had become impotent and invalid. The executive Chamber, in contrary, found, his advancing age rather increased his interest in children as substitutes, and that impotence may lead to redirected and impulsive displaced activity.¹⁰

After Haidn's appeal was dismissed as ill-founded by the Bamberg Court of Appeal (*"Oberlandesgericht Bamberg"*) on 3 May 2002,¹¹ he lodged a constitutional complaint with the German Federal Constitutional Court (*"Bundesverfassungsgericht"*) against the decisions of the courts. As the Bavarian legislature did not have the power to enact the legislation in question, the Bavarian (Dangerous Offenders') Placement Act was found unconstitutional by the Federal Constitutional Court on 10 February 2004 due to a breach of the Basic Law (*"Grundgesetz"*).¹² However, in a five to three decision the Federal Constitutional Court ordered the continued application of that Act until 30 September 2004. The fact that the Federal States (*"Bundesländer"*) did not have power to legislate did not result in the contested statutes being void, it found, instead, they were merely declared incompatible with the Basic Law.¹³

In exceptional cases, the Court found, the public interest in effective protection from dangerous offenders could outweigh the interest of the offender concerned by the unconstitutional Act in his personal liberty as guaranteed by Article 2 § 2 of the Basic Law.¹⁴ Accordingly, Haidn's detention was covered by the decision of the Bayreuth Regional Court until the expiry of the transitional period, during which the federal legislature had to find a decision as to whether it was necessary to enact legislation on

¹⁰ *Supra*, note 2, *para.* 10–12, see also Sabine Rückert, *Wird er es wieder tun?*, ZEIT ONLINE 08/2003: <http://www.zeit.de/2003/08/Prognose>, last accessed 30 March 2011.

¹¹ *Supra*, note 2, *para.* 16.

¹² *Bundesverfassungsgericht*, judgement of 10 February 2004 – 2 BvR 834/02, see: http://www.bundesverfassungsgericht.de/entscheidungen/rs20040210_2bvr083402.html, last accessed 30 March 2011; *supra*, note 2, *para.* 18 and 19.

¹³ *Supra*, note 11, *para.* 162; *supra*, note 2, *para.* 20–23.

¹⁴ *Supra*, note 11, *para.* 164–173; *supra*, note 2, *para.* 24.

retrospective preventive detention. In the view of the Constitutional Court this could be compatible with the Basic Law if it applied only in exceptional circumstances. Only five days before, on 5 February 2004, in the case of “M.” that later became *M. v. Germany* the Court had confirmed the retroactive extension of confinement in preventive detention beyond the 10-year restriction.¹⁵

C. The ECHR’s finding

Subsequent to the Constitutional Court’s decision, on 14 February 2004, Haidn, like “M.”, also appealed to the ECHR complaining a violation of his right to liberty as provided in Article 5 § 1 of the Convention by his continued detention in prison for preventative purposes after he had fully served his prison sentence.¹⁶ Art. 34 of the Convention posits that the ECHR may receive applications from any person claiming to be the victim of a violation by one of the Contracting Parties of the rights set forth in the Convention or in the Protocols thereto.¹⁷

In contrast to the German Constitutional Court again, the ECHR found the detention of Haidn beyond 13 April 2002 to be unlawful. In the ECHR’s view the Bayreuth executive chamber’s order to retrospective preventive detention of 10 April 2002 did not meet the requirements of Art. 5 § 1 (a). The ECHR argued that there was no sufficient causal connection between the conviction and the deprivation of liberty, since “the decision of a court responsible for the execution of sentences to retain the person concerned in detention (...) no longer involves a finding that the person is guilty of an offence.”¹⁸ As in *M. v. Germany* the ECHR also pointed out, that an Act needs to be “foreseeable in its application, in order to avoid all risk of arbitrariness” to meet the requirements of “Quality of the law”.¹⁹

¹⁵ BVerfGE 109, 133 – 2 BvR 2029/01, Decision of 5 February 2004: http://www.bundesverfassungsgericht.de/entscheidungen/rs20040205_2bvr202901.html, last accessed 30 March 2011. For further information see, Dünkel/van Zyl Smit, *Preventive Detention of Dangerous Offenders Re-examined: A Comment on two decisions of the German Federal Constitutional Court (BVerfG – 2 BvR 2029/01 of 5 February 2004 and BVerfG – 2 BvR 834/02 – 2 BvR 1588/02 of 10 February 2004) and the Federal Draft Bill on Preventive Detention of 9 March 2004*, 5 GERMAN LAW JOURNAL 619 (2004): http://www.germanlawjournal.com/pdfs/Vol05No06/PDF_Vol_05_No_06_619-637_Public_Duenkel_van_Zyl_Smit.pdf

¹⁶ *Supra*, note 2, para. 58.

¹⁷ See *supra*, note 3.

¹⁸ *Supra*, note 2, para. 84.

¹⁹ *Supra*, note 2, para. 79. For further critical arguments see Merkel (*supra*, note 1), at 1056.

Neither can Haidn's placement be considered a detention under Art. 5 § 1 (e), the ECHR found, which reads as follows:

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

The Bavarian executive court did not deal with the question of Haidn's mental illness but of his future dangerousness, the ECHR argued, besides, Haidn was detained in prison rather than in psychiatric hospital until 28 July 2004.²⁰ Since this deprivation of liberty did not satisfy the requirements of the Convention, the detention of Haidn beyond 13 April 2002 was found to be a violation of the Convention on Human Rights.

D. Haidn's legal struggle since his appeal to the ECHR

Meanwhile, on 16 December 2003, Haidn was instructed by the Bayreuth Regional Court to reside on probation in the psychiatric department of an old people's home, but was imprisoned again on 3 March 2004, because he had repeatedly sexually harassed old dement women in the facility. In two cases Haidn took their diapers off and touched one's genital area. In another case Haidn touched one's breasts, and on another occasion Haidn dressed one with a second diaper above the other.²¹ On 28 July 2004 he was transferred to psychiatric hospital, where he remains detained until the present day.²² Also on 28 July 2004, the German federal legislature enacted the Introduction of Retrospective Preventive Detention Act,²³ that entered into force the following day, but has been revised just recently (see below). Just like the Bavarian (Dangerous Offenders') Placement Act it applied if new evidence became available during the prison term suggesting with high certainty that the prisoner imposes a great danger to the public. In these cases an indefinite extension of the detention was possible without previous notice in trial. However, the order was not to be given by the executive chambers but by the criminal courts, not necessarily the trial judges, though, who were responsible for the prisoner's conviction.

²⁰ *Supra*, note 2, *para.* 93–95.

²¹ *Supra*, note 7, *para.* 8–12.

²² *Supra*, note 2, *para.* 30–33.

²³ *Gesetz zur Einführung der nachträglichen Sicherungsverwahrung* of 23 July 2004, BUNDESGESETZBLATT, Jahrgang 2004, Teil 1 Nr. 39.

On 10 June 2005 the Passau Regional Court ordered Haidn's preventive detention under this federal Act, and, within the same decision, ordered the detention to be executed in a psychiatric hospital.²⁴ This order was quashed by the German Federal Court of Justice ("*Bundesgerichtshof*", FCJ) on 23 March 2006.²⁵ The FCJ found that the "new evidence" the Passau Regional Court supplied to document that Haidn imposes a great danger to the public had not become available during Haidn's prison term: the sexual harassment of the old women happened afterwards, and the circumstances of his organic defect had already been known before his prison term. Moreover, the direction to a psychiatric hospital had to be decided by the executive chambers and not by the criminal courts.²⁶ The FCJ remitted the case to the Passau Regional Court for revision, since the FCJ's narrow interpretation of the new law – especially the law's requirement of "new evidence" – in order to avoid an extensive use of the law had not been known by the lower court. However, Haidn's placement in a psychiatric hospital was ordered by another Bavarian Regional Court of Hof on 14 June 2007 concerned solely with his acts committed in the old people's home.²⁷

E. The Consequences of *Haidn v. Germany* and the legal situation in Germany since *M. v. Germany*

Since Haidn did not submit a claim for just satisfaction, the ECHR's judgement does not exceed the Court's finding of the violation of the Convention by his unlawful detention beyond 13 April 2002. In particular, Haidn's release does not follow automatically. According to Art. 46 of the Convention, Germany is obliged to follow the ECHR's decisions once they have obtained legally binding force. The way the judgements of the ECHR need to be transformed by the contracting member states is not specified, though. Judgements of the ECHR have no constitutional character in Germany. But they need to be taken into consideration by the administration and the courts when interpreting German law.²⁸ However, as in *M. v. Germany*, the question raises of how to implement a decision of the ECHR which contradicts the will of the German legislature and the interpretation of the law by the German Constitutional Court. In any event, Haidn's release from psychiatric hospital could only be expected if the assumption fails that he imposes a great danger to the public, since his last conviction seems to be in accord with the law.

²⁴ *Landgericht Passau*, judgement of 10 June 2005 – KLS 209 Js 8551/98.

²⁵ *Supra*, note 7.

²⁶ *Supra*, note 7, *para.* 22–25, and 32–35.

²⁷ *Supra*, note 2, *para.* 30–35.

²⁸ BVerfGE 111, 307–322 – 2 BvR 1481/04, Decision of 14 October 2004: http://www.bundesverfassungsgericht.de/entscheidungen/rs20041014_2bvr148104.html, last accessed 30 March 2011.

Nevertheless, the judgement of the ECHR does affect other cases of prisoners directed to preventive detention under the Introduction of Retrospective Preventive Detention Act. After the decision *M. v. Germany* and in expectation of the ECHR's actual judgement, the German Federal Legislature has already released a new Act that has entered into force on 1 January 2011.²⁹ According to this Act, retrospective preventive detention can no longer be ordered in case of prisoners convicted before 2011. However, according to the Legislature's will it may still apply to prisoners convicted before that date, and to prisoners transferred from psychiatric hospital if they still pose a danger to the public after their mental illness is cured. Since both alternatives don't comply with the judgements of the ECHR, they may still not be applied by the courts.

In addition, the legislature has released another Act applying only to those prisoners who have already been released or may have to be released from preventive detention in the future because of the ECHR's judgement. According to this Act, the "*Therapieunterbringungsgesetz*"³⁰, the mental state of the (ex-)prisoners can be examined by psychiatrists, and, in case a mental illness is detected, the concerned may be detained in long-term-stay accommodations with psychiatric assistance if they presumably impose a danger to the public. This Act raises many questions that can only roughly be sketched here. First, it is usually up to the Federal States' Legislature and not to the Federal Legislature to deal with mentally ill people that impose a danger to the public. Apparently, though, their direction to the Federal States' psychiatric hospitals is not wanted for security and financial reasons. Second, all concerned (ex-)prisoners had been found guilty for their criminal offences and had therefore served a *restricted* sentence. According to Articles 20, 21 and 63 of the German Criminal Code, so far, a direction to indefinite psychiatric housing can only be given in cases of mental illness that excludes the responsibility of the offender for his criminal acting. The new law refers to the specific status of the concerned being (ex-)prisoners, and is therefore not in compliance with the principle of guilt that restricts detention³¹ nor was it foreseeable. Finally, all concerned were examined every second year by psychiatrists and would have had to be transferred to a Federal States' psychiatric hospital if a mental illness had been detected. The direction of the concerned to long-term-stay accommodation on the grounds of mental illness would therefore be highly arbitrary as well. Presumably, the "*Therapieunterbringungsgesetz*" will therefore not meet the requirements of "quality of the law" as the ECHR demands.

However, this act again mirrors the legally unbearable situation of assumed dangerous offenders in Germany since 1998 that has hardly changed since the ECHR's judgement *M.*

²⁹ *Gesetz zur Neuordnung des Rechts der Sicherungsverwahrung und zu begleitenden Regelungen* of 22 December 2010, BUNDESGESETZBLATT, Jahrgang 2010, Teil I, Nr. 68, at 2300.

³⁰ BUNDESGESETZBLATT (*supra*, note 23), at 2305.

³¹ For further information see Merkel (*supra*, note 1), at 1047.

v. *Germany* obtained legally binding force on 11 May 2010. Hereon, prisoners, whose confinement in preventive detention was retroactively extended, requested their release. Their claims were partially rejected by the German Regional Courts and partially accepted.³² Three of them, Schummer, Mautes and Kallweit now won their cases before the ECHR but the future legal status of two of them is still unclear. In Schummer's case the Karlsruhe Court of Appeal ("*Oberlandesgericht Karlsruhe*") in September 2010 declared his placement in preventive detention terminated and ordered his supervision of conduct. He is now observed round the clock by the police. In the cases of Kallweit and Mautes, the Cologne Court of Appeal ("*Oberlandesgericht Köln*") in summer 2010 refused to declare their preventive detention terminated, arguing that the ECHR's judgement *M. v. Germany* is not in compliance with the German Law, and thus the Federal Legislature needs to react.³³

In order to end this absence of binding legal forces, a new bill was passed by the Legislature in July 2010: In any further case of a Higher Regional Court deals with a similar case, it had to submit the case to the FCJ in order to attain a guiding precedent binding upon all regional courts.³⁴ The Courts of Appeal of Stuttgart, Celle, Koblenz and Nürnberg³⁵ submitted their cases to the FCJ as they refused to follow the ECHR's judgement. This contradicted not only the findings of other Courts of Appeals³⁶ but also of the Fourth Senate of the FCJ³⁷ which, in May 2010, found the direction to preventive detention, in a case of *retrospective* preventive detention not to be in compliance with the Convention

³² For more details see Merkel (*supra*, note 1), at 1053.

³³ See press release, issued by the Registrar of the ECHR no. 18 of 13 January 2011.

³⁴ § 121 Abs. 1 Nr. 2, Abs. 2 Nr. 3 of the Judicature Act (*Gerichtsverfassungsgesetz*) as amended on 24 July 2010 (BGBl. I S. 976).

³⁵ *Oberlandesgericht* Celle, decision of 25 May 2010 – 2 Ws 169/10, NSTZ-RR 2010, at 322: <http://openjur.de/u/52683.html>, last accessed 30 March 2011; OLG Stuttgart, decision of 1 June 2010 – 1 Ws 57/10, JUSTIZ 2010, at 346: <http://openjur.de/u/52862.html>, last accessed 30 March 2011; OLG Koblenz, decision of 30 September 2010 – 1 Ws 108/10, JR 2010, at 306: <http://openjur.de/u/56656.html>, last accessed 30 March 2011; OLG Nürnberg, decision of 24 June 2010 – 1 Ws 315/10, NSTZ 2010, at 574: <http://openjur.de/u/52275.html>, last accessed 30 March 2011; and 7 July 2010 – 1 Ws 342/10: <http://openjur.de/u/54707.html>, last accessed 30 March 2011.

³⁶ OLG Karlsruhe, decision of 15 July 2010 – 2 Ws 458/09, Justiz 2010, 350; NSTZ-RR 2010, 322: http://lrw.juris.de/cgi-bin/laender_rechtsprechung/document.py?Gericht=bw&nr=13198, last accessed 30 March 2011; OLG Frankfurt, decision of 24 June 2010 – 3 Ws 485/10, NSTZ 2010, at 573; NSTZ-RR 2010, at 321: <http://openjur.de/u/52680.html>, last accessed 30 March 2011; OLG Hamm, decision of 6 July 2010 – 4 Ws 157/10, StRR 2010, at 352: <http://openjur.de/u/52682.html>, last accessed 30 March 2011, and decision of 22 July 2010 – 4 decision of Ws 180/10, III-4 Ws 180/10: <http://www.strafrecht-online.de/inhalte/strafrechtliche-entscheidungen/aktuelle-urteile/olg-hamm-beschl-v-22072010-4-ws-18010/>, last accessed 30 March 2011; SchlHolstOLG SchlHA 2010, at 296.

³⁷ *Bundesgerichtshof*, decision of 12 May 2010 – 4 StR 577/09: <http://www.hrr-strafrecht.de/hrr/4/09/4-577-09.php>, last accessed 30 March 2011.

and the ECHR's judgement *M. v. Germany*, and therefore directed the authorities to release the prisoner immediately.

In accordance with the Constitutional Court's view, but in contrast to the Fourth Senate, the Fifth Senate of the FCJ on 9 November 2010 found that the ECHR's judgement must not necessarily lead to the release of the concerned prisoners.³⁸ However, under Art. 132 § 2 of the German *Gerichtsverfassungsgesetz* contradicting legal findings of the FCJ's Senates lead to a decision of the High Senate in criminal matters ("*Grosser Senat für Strafsachen*") to avoid any unpredictability of the law. Therefore, if no agreement of the five Senates can be found, the High Senate of the FCJ will finally have to decide. Presumably this will not be necessary since the German Federal Constitutional Court is also concerned with cases of retroactive extension of preventive detention as well as with cases of retrospective direction to preventive detention, and will therefore need to comment on the ECHR's judgements.³⁹ The reason for the long-lasting decision-finding at the FCJ might therefore well be the expectance of the Constitutional Court's forthcoming decision that will hopefully reconstitute legal certainty for criminal offenders in Germany. Since four of the eight Constitutional Court's judges of the responsible Second Senate have been exchanged since 2004 the chance for a change of the Court's mind does by all means not seem to be impossible.

³⁸ *Bundesgerichtshof*, decision of 9 November 2010 – 5 StR 394/10: <http://www.hrr-strafrecht.de/hrr/5/10/5-394-10.php>, last accessed 30 March 2011.

³⁹ For further information see: <http://www.bundesverfassungsgericht.de/pressemitteilungen/bvg10-117.html>, last accessed 30 March 2011.