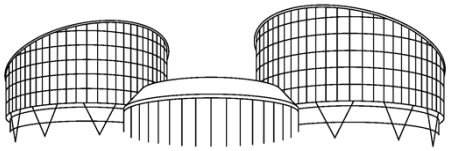

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF W.A. v. SWITZERLAND

(Application no. 38958/16)

JUDGMENT

Art 5 § 1 • Lawful detention • No causal link between conviction for violent offences and subsequent preventive detention on account of applicant's mental health condition and recidivism risk • Preventive detention in ordinary prison not justified by applicant being of "unsound mind"
Art 7 § 1 • Subsequent order for preventive detention amounting to retrospective imposition of a heavier penalty
Art 4 P7 • Right not to be tried or punished twice • Limited reopening proceedings leading to subsequent preventive detention order not a reopening of the case for the purposes of Art 4 § 2 P7

STRASBOURG

2 November 2021

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

In the case of W.A. v. Switzerland,

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

Georges Ravarani, *President,*
Georgios A. Serghides,
Dmitry Dedov,
Darian Pavli,
Anja Seibert-Fohr,
Andreas Zünd,
Frédéric Krenc, *judges,*
and Milan Blaško, *Section Registrar,*

Having regard to:

the application (no. 38958/16) against the Swiss Confederation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Swiss national, Mr W.A. ("the applicant"), on 28 June 2016;

the decision to give notice of the application to the Swiss Government ("the Government");

the decision not to have the applicant's name disclosed;

the parties' observations;

Having deliberated in private on 5 October 2021,

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

INTRODUCTION

1. The application concerns the subsequent preventive detention (*nachträgliche Verwahrung*) of the applicant after he had served his sentence of twenty years' imprisonment following his conviction notably of murder and intentional manslaughter. In the applicant's submission, this detention breached his right to liberty under Article 5 § 1 of the Convention, the prohibition on retrospective punishment under Article 7 § 1 of the Convention and the right not to be punished twice under Article 4 § 1 of Protocol No. 7 to the Convention.

THE FACTS

2. The applicant was born in 1960 and is currently detained in Regensdorf Prison. He was represented by Mr L. Erni, a lawyer practising in Zurich.

3. The Government were represented by their Agent, Mr A. Chablais, of the Federal Office of Justice.

4. The facts of the case, as submitted by the parties, may be summarised as follows.

I. THE APPLICANT'S CONVICTION AND SENTENCE AND THE REOPENING OF THE PROCEEDINGS

5. By a judgment of 6/12 May 1993, as amended on 4 July 1995 following a remittal, the Zurich Jury Court (*Geschworenengericht*) convicted the applicant, *inter alia*, of murder and of intentional manslaughter and sentenced him to twenty years' imprisonment. The court found that the applicant had murdered a man in a particularly violent manner in 1983. Owing to his personality disorder and his alcohol intoxication, as diagnosed by psychiatric expert G., his capacity to appreciate the wrongfulness of the act had been substantially diminished. Furthermore, in 1990, the applicant, acting again with substantially diminished criminal responsibility, had induced his then partner to strangle an acquaintance in their flat; no reason for the offence could be established. He had subsequently dismembered the woman's corpse.

6. The court further decided not to order the applicant's preventive detention under Article 43 § 1, sub-paragraph 2, of the Criminal Code (see paragraph 20 below). Having regard to the fact that preventive detention in practice rarely lasted more than five years, it considered that the aim of protecting society from the applicant, who was very dangerous as a result of his abnormal mental state which the expert had considered difficult to treat, could be better attained by the execution of a long term of imprisonment.

7. The applicant served his sentence until 8 October 2010. Thereafter, he was placed in detention on remand pending a decision on the Public Prosecution Office's application lodged in 2009 for the applicant's subsequent preventive detention under Article 65 § 2 of the Criminal Code, which had entered into force in 2007 (see paragraph 23 below).

8. On 2 March 2012 the Federal Court, contrary to the lower courts, found that there were new facts permitting a reopening of the proceedings to the detriment of the applicant under Article 65 § 2 of the Criminal Code. A new report issued in May 2009 by psychiatric expert P., using new analytic methods which had not yet existed in the 1990s, had concluded that the applicant had not been addicted to alcohol at the time of his offences, but had suffered from a dissocial personality disorder and from psychopathy, which could not be treated and led to a very high risk that the applicant would commit further violent offences. These new facts had not, and could not have been, known to the Jury Court when convicting the applicant. The proceedings were subsequently reopened.

II. THE PROCEEDINGS AT ISSUE

9. In the reopened proceedings, on 15 August 2013 the Zurich District Court ordered the applicant's subsequent preventive detention under Article 65 § 2 read in conjunction with Article 64 § 1 (b) of the Criminal

Code and section 2 § 1 (a) of the transitional provisions of the 13 December 2002 amendment to the Criminal Code read in conjunction with 43 § 1, sub-paragraph 2, of the previous version of the Criminal Code (see paragraphs 20-21 and 23-24 below).

10. Having regard to a new report drawn up by psychiatric expert R. in June 2013, as well as the report drawn up by expert P. in 2009 (see paragraph 8 above), it found that the requirements for the preventive detention of the applicant had been met at the time of the applicant's conviction in 1993 and were also currently met. The applicant, who had committed two capital offences, had suffered and was still suffering from a serious mental disorder, notably a serious dissocial personality disorder and psychopathy. There was a very high risk that the applicant would commit further serious violent offences owing to that disorder if released. A psychiatric treatment under Article 59 of the Criminal Code (see paragraphs 19 and 21 below) had little, if any, prospects of success.

11. After the Zurich Court of Appeal had dismissed the applicant's appeal on 16 July 2014, the Federal Court, on 16 December 2015, equally dismissed the applicant's further appeal.

12. As for the compliance of the retrospective application of measures such as the order for a person's subsequent preventive detention under Article 65 § 2 of the Criminal Code with Article 7 § 1 of the Convention the Federal Court found that the prohibition on retrospective punishment applied to orders for preventive detention under Articles 64-65 of the Criminal Code. It argued that the order of preventive detention and the imposition of a penalty were similar both in their punishing effect and in their execution. Accordingly, the principle of *"nulla poena sine lege"* laid down in Article 1 of the Criminal Code (see paragraph 19 below) expressly covered both penalties and measures.

13. Consequently, the retrospective application of preventive detention measures to perpetrators who committed an offence, or were sentenced, prior to the entry into force of the new provisions of the Criminal Code in 2007 was only permitted if the new law was not stricter than the law applicable at the time of the offence. However, Article 65 § 2 read in conjunction with Article 64 § 1 and 64a § 1 of the Criminal Code did not lay down a heavier sanction as regards the order for, and the release from, preventive detention than the law applicable at the time of the offence.

14. Furthermore, Article 65 § 2 of the Criminal Code permitted a reopening of the proceedings to the convicted person's detriment. Likewise, Article 443 § 2 of the Canton of Zurich's Code of Criminal Procedure (see paragraph 26 below) which had been applicable at the time of the applicant's conviction, interpreted correctly (and other than the Court of Appeal had done), had permitted a reopening of the proceedings to the convicted person's detriment if there were new facts or evidence. It was irrelevant that the Zurich Supreme Court (see paragraph 27 below), as well

as the doctrine, had interpreted Article 443 § 2 of that Code as not applying to convicted persons, but only to acquitted ones. It had thus been possible already under the old law to quash a final judgment to the convicted person's detriment owing to new considerable facts and evidence and to amend the judgment by the order of subsequent preventive detention. It was uncontested that both at the time of the applicant's conviction and at present, the conditions for the applicant's preventive detention (Article 43 § 1, sub-paragraph 2, of the previous version of the Criminal Code and Article 64 of its current version) were met. Therefore, the subsequent order of preventive detention did not constitute a heavier penalty than the one applicable at the time of the offence.

15. For the same reasons, Article 4 of Protocol No. 7, enshrining the *ne bis in idem* principle, had not been breached. The requirements for a reopening of the case under Article 4 § 2 of Protocol No. 7 had been met. There were new facts which the sentencing court had not known and could not have known at the time and which showed that the requirements for preventive detention under Article 43 § 1 of the old version of the Criminal Code and Article 64 of its new version had been met already at the time of the conviction. There was no double punishment for the same offences as the initial judgment of the sentencing court had been quashed following the reopening of the proceedings.

16. The order for the applicant's preventive detention further had not violated Article 5 § 1 of the Convention. It had been justified under sub-paragraph (a) of that provision as detention "after conviction". The reopening of the proceedings owing to new facts with the aim to impose a heavier sanction led to the finality of the initial judgment being set aside. By applying the rules on reopening proceedings (Article 410 of the Swiss Code of Criminal Procedure, see paragraph 25 below), the imposition of subsequent preventive detention became part of the initial judgment and thus had a sufficient causal connection with the criminal conviction contained therein.

17. It could therefore remain open whether the applicant's preventive detention could also be based on sub-paragraph (e) of Article 5 § 1 as detention of a person "of unsound mind". In any event, medical expertise had confirmed that the applicant suffered from a serious mental disorder as a result of which he posed a very high risk to the life and limb of others. In view of the seriousness of the applicant's illness and the risk he posed his detention was necessary.

18. As regards the conditions of the applicant's detention, the applicant kept being detained in Pöschwies Prison in Regensdorf after having served his term of imprisonment. He had neither completed any therapy while he served his prison sentence as he had continuously refused any therapeutic measures nor does he appear to have undergone therapy afterwards.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. PROVISIONS OF THE CRIMINAL CODE

19. Under Article 1 of the Criminal Code, a penalty (*Strafe*) or a measure (*Massnahme*) may only be imposed for an act which the law expressly defines as an offence. Penalties comprise prison sentences and fines (see Articles 34 *et seq.* of the Criminal Code) whereas measures notably comprise institutional therapeutic treatment (see Articles 59 *et seq.* of the Criminal Code) and preventive detention (see Articles 64 *et seq.* of the Criminal Code).

20. The relevant provision on preventive detention of the former Criminal Code of 21 December 1937, as in force at the time of the applicant's offences and conviction and until 31 December 2006, was worded as follows:

Article 43 (Measures concerning offenders with mental disorders)

"1. Where the mental state of an offender who, by reason of that state, has committed an act punishable by imprisonment under this Code requires medical treatment or special care intended to remove or reduce the risk that the offender might commit other such punishable acts, the court may order that he be sent to a hospital or an asylum. It may order outpatient treatment if the offender does not represent a danger to others.

If, on account of his mental state, the offender poses a severe threat to public safety and such a measure is necessary to prevent a danger to others, the court shall order his preventive detention. The detention shall take place in an appropriate institution.

The court shall deliver its judgment on the basis of an expert opinion concerning the offender's physical and mental condition, and the necessity of preventive detention, treatment or care.

2. If the court orders (...) preventive detention, it suspends the execution of a term of imprisonment imposed. ...

4. The competent authority decides to lift the measure if the ground for ordering it ceased to exist. ...

5. The court decides (...) whether and in how far penalties which were suspended at the moment of discharge from an institution (...) shall still be executed. ...

The duration of a deprivation of liberty by the execution of the measure in an institution is to be deducted from the length of a term of imprisonment which had been suspended when the measure had been ordered. ..."

21. On 1 January 2007 an amended version of the Criminal Code entered into force. The relevant provisions on preventive detention provide as follows:

Article 64 (Preventive detention: requirements and execution)

"1. The court shall order preventive detention if the offender has committed premeditated murder, intentional homicide, serious assault, rape, robbery, hostage-taking, arson, endangering life or any other offence carrying a maximum custodial sentence of at least five years by which he has caused or intended to cause serious harm to the physical, psychological or sexual integrity of another, and if:

(a) on account of the offender's personality traits, the circumstances of the offence and his personal history, there is serious cause to fear that he might commit further similar offences; or

(b) on account of a serious chronic or recurrent mental disorder linked to the offence, there is serious cause to fear that the offender might commit further similar offences and a measure under Article 59 appears to have no prospect of success. ...

2. The execution of a term of imprisonment precedes preventive detention. ..."

22. Article 64a § 1 of the amended Criminal Code provides that the offender is to be released from preventive detention and probation is to be granted once it can be expected that he or she will not commit further offences warranting preventive detention on release. Under Article 64b § 1 (a) of the Criminal Code, the competent authority examines, either on request or *ex officio*, at least once per year, and for the first time after two years, if and when the offender can be released from preventive detention under Article 64a § 1.

23. Furthermore, Article 65 was newly introduced into the Criminal Code on 1 January 2007 and provides:

Article 65 (Amendment of the sanction)

"1. If, before or during the execution of a custodial sentence or of preventive detention within the meaning of Article 64 § 1, an offender fulfils the requirements for an institutional therapeutic treatment, the court may order such a measure subsequently. The court with jurisdiction shall be the one that imposed the sentence or ordered the preventive detention. The execution of the remainder of the sentence shall be suspended.

2. If, during the execution of a custodial sentence, new facts or evidence come to light to the effect that the offender satisfies the requirements for preventive detention and that such requirements were already satisfied at the time of the conviction but could not have been known to the court, the court may order preventive detention subsequently. Jurisdiction and procedure shall be determined by the rules on reopening of proceedings."

24. Section 2 of the transitional provisions of the 13 December 2002 amendment to the Criminal Code, which entered into force on 1 January 2007, in so far as relevant, provides as follows:

"2. Imposition and execution of measures

(1) The provisions of the new law on measures (Articles 56-65) and on their execution (...) shall also apply to the perpetrators of acts committed or tried before those provisions come into force. However:

(a) The subsequent ordering of preventive detention under Article 65 § 2 shall be permitted only if such detention would also have been possible on the basis of Article 42 or Article 43 § 1, second sub-paragraph, of the former law; ..."

II. PROVISIONS OF THE CODE OF CRIMINAL PROCEDURE

25. The Swiss Code of Criminal Procedure of 5 October 2007 replaced the cantonal Codes of Criminal Procedure on 1 January 2011. The relevant provision of the Swiss Code governing the admissibility of, and grounds for, a request to reopen proceedings provides:

Article 410

"Anyone who is adversely affected by a legally binding final judgment, ... may request that the proceedings be reopened if:

(a) new facts which had existed at the time of the decision, or new evidence have come to light which may lead to an acquittal, a considerably reduced or more severe penalty for the convicted person or the conviction of an acquitted person; ..."

26. The relevant provision of the Canton of Zurich's Code of Criminal Procedure, on the reopening of proceedings to the detriment of an acquitted or convicted person, as in force until 31 December 2010, provided as follows:

Article 443

"The proceedings are reopened to the detriment of a person who was acquitted or convicted by a final decision:

(1) if, by an offence ..., for instance corruption or false testimony, the previous criminal proceedings had been influenced to the accused's advantage;

(2) if the acquitted person made a credible confession in or outside court or if other facts or evidence were discovered which alone would be sufficient for the accused's conviction."

27. According to the Zurich Supreme Court, under Article 443 § 2 of the Canton of Zurich's Code of Criminal Procedure the reopening of proceedings to the detriment of an accused owing to new facts or evidence, having regard to the wording of that provision, was only possible in respect of an acquitted person, not in respect of a convicted person (see judgment of 14 October 1986, *Blätter für Zürcherische Rechtsprechung* [ZR] 86/1987, pp. 20-23, and judgment of 14 August 2000, ZR 100/2001, pp. 22-25).

THE LAW

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

28. The applicant complained that his subsequent preventive detention violated his right to liberty as provided in Article 5 § 1 of the Convention, which, in so far as relevant, reads as follows:

> "1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:
>
> (a) the lawful detention of a person after conviction by a competent court;
>
> ...
>
> (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; ..."

A. Admissibility

29. The Court, having regard to its case-law, notes that, contrary to the Government's submission, this complaint is not manifestly ill-founded. Nor is it inadmissible on any of the other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

30. The applicant argued that his subsequent preventive detention had not complied with Article 5 § 1. In particular, it had not been covered by sub-paragraph (a) of that provision for lack of a causal link between his initial conviction and his detention. His subsequent detention had been ordered in 2013 by the Zurich District Court, more than 20 years after the Jury Court's judgment in 1993/1995 and some three years after he had served his full sentence imposed in that judgment and thus after a considerable lapse of time. There had not been any new facts regarding his dangerousness which could create a link between his initial conviction and his subsequent detention.

31. The Government argued that the order for the applicant's subsequent preventive detention had complied with Article 5 § 1. The order constituted a correction of the initial judgment of the Jury Court to the applicant's detriment under Article 65 § 2 of the Criminal Code. As an order for the applicant's preventive detention would already have been possible at the time of the applicant's conviction, there remained a sufficient causal connection between his conviction in 1993/1995 and his subsequent

detention ordered in 2013, for the purposes of sub-paragraph (a) of Article 5 § 1. Furthermore, the applicant suffered from a mental disorder, for the purposes of sub-paragraph (e) of Article 5 § 1, as confirmed by two psychiatric experts, namely P. in May 2009 and R. in June 2013 (see paragraphs 8 and 10 above).

2. The Court's assessment

(a) Relevant principles

(i) Article 5 § 1 (a)

32. The Court has held in its case-law that the word "conviction" for the purposes of Article 5 § 1 (a), having regard to the French text ("condamnation"), has to be understood as signifying both a finding of guilt after it has been established in accordance with the law that there has been an offence, and the imposition of a penalty or other measure involving the deprivation of liberty (see *Del Río Prada v. Spain* [GC], no. 42750/09, § 123, ECHR 2013, and *Ruslan Yakovenko v. Ukraine*, no. 5425/11, § 49, ECHR 2015).

33. Furthermore, the word "after" in sub-paragraph (a) does not simply mean that the detention must follow the "conviction" in point of time: in addition, the "detention" must result from, "follow and depend upon" or occur "by virtue of" the "conviction". In short, there must be a sufficient causal connection between the two (*M. v. Germany*, no. 19359/04, § 88, ECHR 2009, and *Del Río Prada*, cited above, § 124, with further references).

34. In cases of preventive detention which had been ordered subsequently under German law, the Court has clarified that it is only the judgment of a sentencing court finding a person guilty of an offence which meets the requirements of a "conviction" for the purposes of the said provision. By contrast, a judgment ordering a person's preventive detention subsequently in relation to a previous offence which that person had already been sentenced for does not satisfy the requirement of a "conviction" for the purposes of Article 5 § 1 (a) as it no longer involves a finding that the person is guilty of a (new) offence. Therefore, if in the sentencing court's judgment, no order for the preventive detention of the offender was made, that judgment did not cover any preventive detention ordered subsequently and there was thus no sufficient causal connection between the applicant's "conviction", for the purposes of Article 5 § 1 (a), and his subsequent preventive detention (compare, *inter alia*, *Haidn v. Germany*, no. 6587/04, §§ 84-88, 13 January 2011; *B v. Germany*, no. 61272/09, §§ 72-76, 19 April 2012; *S. v. Germany*, no. 3300/10, §§ 85-90, 28 June 2012; and *Ilnseher v. Germany* [GC], nos. 10211/12 and 27505/14, § 144, 4 December 2018).

35. In *Kadusic v. Switzerland* (no. 43977/13, 9 January 2018), which concerned a subsequent order of an institutional therapeutic measure under

Swiss law, the Court was in principle prepared to accept that the order for an institutional measure amounted to a correction of the original judgment following the discovery of relevant new circumstances and that the fact that the measure was ordered in the context of proceedings for the review of a penalty imposed in a previous judgment may constitute a causal link between the initial conviction and the measure in issue, as required by the relevant case-law of the Court concerning sub-paragraph (a) of Article 5 § 1 (*ibid.*, § 50). However, in the circumstances of that case, the Court found that the detention which followed the (new) judgment in the review proceedings lacked a sufficient causal connection with the initial conviction for being incompatible with its aims. The Court considered that the measure in question, which had been imposed a considerable period after the applicant's initial conviction, had not been based on a sufficiently recent expert report and that the applicant had been detained in an institution unsuited to his mental disorders (*ibid.*, §§ 53-60).

(ii) Article 5 § 1 (e)

36. As regards the deprivation of liberty of persons suffering from mental disorders, an individual cannot be deprived of his liberty as being of "unsound mind" unless the following three minimum conditions are satisfied: firstly, he must reliably be shown to be of unsound mind, that is, a true mental disorder must be established before a competent authority on the basis of objective medical expertise; secondly, the mental disorder must be of a kind or degree warranting compulsory confinement; thirdly, the validity of continued confinement depends upon the persistence of such a disorder (see, among many other authorities, *Ilnseher*, cited above, § 127; *Rooman v. Belgium* [GC], no. 18052/11, § 192, 31 January 2019; and *Denis and Irvine v. Belgium* [GC], nos. 62819/17 and 63921/17, § 135, 1 June 2021).

37. The "lawfulness" of detention further requires that that there must be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention. In principle, the "detention" of a person as a mental-health patient will be "lawful" for the purposes of Article 5 § 1 (e) only if it takes place in a hospital, clinic or other appropriate institution authorised for that purpose (see *Ilnseher*, cited above, § 134; *Rooman*, cited above, §§ 190 and 193; and *Stanev v. Bulgaria* [GC], no. 36760/06, § 147, ECHR 2012). Furthermore, the Court has had occasion to state that this rule applies even where the illness or condition is not curable or where the person concerned is not amenable to treatment (see *Rooman*, cited above, § 190).

38. The Court would further recall in that context that a lack of appropriate medical care for persons in custody is even capable of engaging a State's responsibility under Article 3, notably in the case of detainees with

mental disorders who are more vulnerable than ordinary detainees (compare *Rooman*, cited above, §§ 145-146, with further references).

(b) Application of the principles to the present case

39. The Court is called upon to determine, first, whether, in the light of the above principles, the applicant's subsequent preventive detention at issue was justified under sub-paragraph (a) of Article 5 § 1, as the Government had argued in line with the findings of the Federal Court, as detention "after conviction". It observes at the outset that only the judgment of the Zurich Jury Court of 1993/1995, as confirmed on appeal, in which it had been established that the applicant was guilty, in particular, of having committed two capital offences, and was sentenced to twenty years' imprisonment, could provide a basis of the applicant's preventive detention for the purposes of Article 5 § 1 (a). By contrast, the order made by the Zurich District Court on 15 August 2013, and confirmed on appeal, for the applicant's subsequent detention, did not itself constitute a "conviction" as required under Article 5 § 1 (a) as it did not involve the establishment of a (new) offence and a finding of guilt thereof.

40. The Court further notes that the sentencing court's judgment of 1993/1995 and the judgment ordering the applicant's subsequent preventive detention in 2013 are linked as a result of the application of the rules on the reopening of proceedings (see Article 65 § 2 of the Criminal Code, at paragraph 23 above). According to the Federal Court, the application of these rules led to the order of subsequent preventive detention becoming part of the initial judgment of the sentencing court (see paragraph 16 above).

41. In determining whether, in these circumstances, there had been a sufficient causal connection between the applicant's "conviction" by the Zurich Jury Court in 1993/1995 and his subsequent preventive detention, the Court recalls that it had been prepared to accept in the case of *Kadusic* (concerning an order for an institutional measure) that the fact that a measure was ordered in the context of proceedings for the review of a penalty imposed in a previous judgment may constitute a causal link between the initial conviction and the measure in question (see paragraph 37 above).

42. The Court reiterates that the Convention must be read as a whole, and interpreted in such a way as to promote internal consistency and harmony between its various provisions (see *Mihalache v. Romania* [GC], no. 54012/10, § 92, 8 July 2019, with further references). It notes that the Convention system accepts that the finality of a criminal court's judgment can be set aside and the judgment be amended to the convicted person's detriment in accordance with the national law of a Convention State in exceptional cases, notably if there is evidence of new or newly discovered facts which could affect the outcome of the case (compare Article 4 § 2 of

Protocol No. 7 to the Convention). However, where a State relies on such a procedure in order to create a causal link between an initial, final conviction of a person in a judgment which did not impose the deprivation of liberty in question and the subsequent imposition of a new, additional deprivation of liberty, the Court can only accept the existence of such a causal link where the initial criminal proceedings are truly "reopened" following the discovery of new facts or evidence which are so significant as to potentially affect the "outcome of the case". A "reopening" usually means that the initial judgment of the criminal court is annulled and the criminal charge is determined anew in a fresh decision (compare *Nikitin v. Russia*, no. 50178/99, §§ 45-46, ECHR 2004-VIII, and *Xheraj v. Albania*, no. 37959/02, § 73, 29 July 2008).

43. The Court observes that in the present case, the commission by the applicant of the capital offences he had been found guilty of in 1993/1995 has not been re-assessed or re-established in the reopened proceedings at issue. Nor has the term of 20 years' imprisonment imposed in 1993/1995 – and which the applicant has fully served – been re-examined. In line with the requirements of Article 65 § 2 of the Criminal Code, the domestic courts only examined whether the requirements for an additional preventive detention of the applicant were met and had already been met at the time of his conviction without this having been known to the sentencing court.

44. The Court considers that in these circumstances, no fresh determination of a criminal charge in a new decision is made in the reopened proceedings at issue. The proceedings *de facto* amount to the imposition of an additional sanction aimed at protecting society for an offence which the applicant has previously been convicted of, without there being new elements affecting the nature of the offence or the extent of the applicant's guilt (compare also the facts at issue in the Court's Grand Chamber judgment in *Ilnseher*, cited above, § 144).

45. In these circumstances, the preventive detention was incompatible with the aims of the applicant's initial conviction. The Court therefore cannot accept that the reopening procedure in question created a causal link between the initial conviction and the subsequent preventive detention. As the applicant's "conviction" in 1993/1995 did not comprise a preventive detention order, there was consequently no causal link between that conviction and the applicant's subsequent preventive detention, for the purposes of Article 5 § 1 (a) and his detention was thus not justified under that provision.

46. As to whether the applicant's subsequent preventive detention could be justified under Article 5 § 1 (e), the Court agrees with the Government that the applicant was a person "of unsound mind" for the purposes of that provision. It notes, in particular, that in the proceedings at issue, the domestic courts established that the applicant suffered from a serious personality disorder and psychopathy and that, owing to that condition,

there was a very high risk that he would commit further serious violent offences if released (see paragraph 10 above). However, preventive detention is usually executed in a similar manner as a term of imprisonment (compare paragraph 12 above) and the applicant has indeed been detained in an ordinary prison. Therefore, the applicant has not been detained in an institution suitable for the detention of mental health patients. The Court recalls that the placement of a person detained as a mental health patient in an appropriate institution for such patients is required even if the condition of the person concerned proved not to be amenable to treatment (see paragraph 37 above). The applicant's detention was thus not "lawful" for the purposes of Article 5 § 1 (e).

47. The Court further takes the view – and this is uncontested by the parties – that none of the other sub-paragraphs of Article 5 § 1 can serve to justify the applicant's detention at issue.

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

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

49. The applicant complained that the order for his subsequent preventive detention had breached the prohibition on retrospective punishment laid down in Article 7 § 1 of the Convention, which reads as follows:

> "1. No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed."

A. Admissibility

50. The Court, having regard to its case-law, notes that, contrary to the Government's submission, this complaint is not manifestly ill-founded. Nor is it inadmissible on any of the other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

51. The applicant argued that the order for his subsequent preventive detention, a penalty, breached the prohibition on retrospective punishment under Article 7 § 1. At the time of the Jury Court's judgment against him, it had not yet been possible to order preventive detention retrospectively. Under the clear wording of Article 443 of the Canton of Zurich's Code of

Criminal Procedure, as interpreted by the then alone competent Zurich Supreme Court (see paragraph 27 above), a revision of a judgment to the detriment of the accused owing to new facts or evidence was only possible against an acquitted person, not against a convicted person as himself. Therefore, the order for his subsequent detention constituted an additional, and heavier penalty as the penalty he risked incurring at the time of his conviction.

52. The Government submitted that the order for the applicant's subsequent preventive detention had not breached Article 7 § 1. As the Federal Court had confirmed, that measure was a "penalty" for the purposes of Article 7 § 1 as it was very similar to a penalty and was executed in a similar manner. However, no heavier penalty had been imposed on the applicant than the one applicable at the time of his offence. Under Article 443 § 2 of the Canton of Zurich's Code of Criminal Procedure, the Jury Court's judgment could already be revised to the applicant's detriment at the time of his conviction in 1993/1995, as the Federal Court had found in its first interpretation of this provision in the judgment in the applicant's case, in line with part of the doctrine. Article 65 § 2 of the Criminal Code equally authorised a revision to the applicant's detriment. The conditions for the applicant's preventive detention had been met both under the law in force at the time of the applicant's conviction (Article 43 § 1, sub-paragraph 2, of the Criminal Code) and under the current Article 65 § 2 of the Criminal Code.

2. The Court's assessment

(a) Relevant principles

53. As for the autonomous concept of "penalty" in Article 7 § 1, the Court refers to the principles summarised, *inter alia*, in *M. v. Germany* (cited above, § 120); *Del Río Prada* (cited above, §§ 81-82); and *Ilnseher* (cited above, § 203).

54. The Court has pointed out that when speaking of "law" («*droit*») Article 7 alludes to the very same concept as that to which the Convention refers elsewhere when using that term, a concept which comprises statutory law as well as case-law and implies qualitative requirements, notably those of accessibility and foreseeability (see *Del Río Prada*, cited above, § 91, and *Vasiliauskas v. Lithuania* [GC], no. 35343/05, § 154, ECHR 2015). Those qualitative requirements must be satisfied as regards both the definition of an offence and the penalty the offence carries (see *Del Río Prada*, cited above, § 91, and *Jidic v. Romania*, no. 45776/16, § 79, 18 February 2020).

55. As for the imposition of a "heavier" penalty "than the one that was applicable at the time the criminal offence was committed", the Court found notably in the case of *K. v. Germany* (no. 61827/09, 7 June 2012) in respect of retrospective, or subsequent, preventive detention under German law that

it amounted to such a "heavier" sanction imposed with retrospective effect. It found that at the time of that applicant's offences, it had not been possible to place the applicant in preventive detention by a retrospective order, made after his conviction by the sentencing court – which, in any event, had not ordered his preventive detention – had become final. The provision on which that applicant's subsequent preventive detention had been based had only been inserted into the Criminal Code after the applicant's offences (see *ibid.*, §§ 84-86).

56. In the case of *Kadusic* (cited above), a case concerning a subsequent order of an institutional therapeutic measure following the reopening of proceedings under Swiss law on the basis of Article 65 of the Criminal Code, which entered into force after the commission of the applicant's offences, the Court concluded that there had been no retrospective imposition of a heavier penalty. The Court observed that that applicant had not provided any convincing reasons to cast doubt on the Government's assertion that by ordering an institutional therapeutic measure following the reopening, the domestic courts had not imposed a heavier penalty than the one that would already have been applicable at the time of the criminal courts' decisions, when Article 43 § 1, sub-paragraph 2, of the Criminal Code, would have permitted the applicant's preventive detention. Nor had the applicant maintained that a review of the original decision would not have been possible under the former legislation, which at the time was formed by cantonal law (*ibid.*, §§ 71-76).

(b) Application of the principles to the present case

57. The Court agrees that the applicant's preventive detention, given notably its imposition by the criminal courts by reference to a conviction for a criminal offence, its characterisation as being similar to a penalty under domestic law (see paragraphs 12 and 19 above) and the fact that it entails deprivation of liberty of indefinite duration executed in prison, in which the applicant does not appear to undergo any therapy (see paragraph 18 above), is to be classified as a "penalty" for the purposes of Article 7 § 1.

58. In determining whether the applicant's subsequent preventive detention at issue constituted a "heavier" penalty "than the one that was applicable at the time the criminal offence was committed", the Court observes at the outset that at the time of the applicant's offences, it had not been possible to place him in preventive detention by a retrospective order, made after his conviction by the sentencing court in 1993/1995 – which, in any event, had not ordered his preventive detention – had become final. Article 65 § 2 read in conjunction with Article 64 § 1 (b) of the Criminal Code, on which the applicant's subsequent preventive detention had been based, had only been inserted into the Criminal Code on 1 January 2007, after the applicant's offences committed notably in 1983 and 1990. The Court notes in addition that, at the time of the applicant's offences,

preventive detention ordered in a sentencing court's judgment was executed prior to a term of imprisonment ordered in the same judgment (Article 43 § 2 of the former Criminal Code, see paragraph 20 above). Once preventive detention was terminated as the reasons for such detention no longer prevailed (Article 43 § 4 of the said Code), the execution of the additional term of imprisonment was either equally ended or the duration of preventive detention was at least deducted from the term of imprisonment which was still to be served (Article 43 § 5 of the said Code). In contrast, under the new, amended version of the Criminal Code (Article 64 § 2, see paragraph 21 above), a term of imprisonment was executed prior to a preventive detention order made in the same judgment and the person concerned was thus liable to be detained for a longer period of time.

59. These findings must lead the Court to conclude that a "heavier" penalty was imposed on the applicant retrospectively.

60. Consequently, the subsequent order for the applicant's preventive detention amounted to a retrospective imposition of a heavier penalty. There has accordingly been a violation of Article 7 § 1 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 4 OF PROTOCOL NO. 7 TO THE CONVENTION

61. The applicant complained that the order for his subsequent preventive detention also violated Article 4 of Protocol No. 7 to the Convention, which enshrines the *ne bis in idem principle* and which, in so far as relevant, reads as follows:

> "1. No one shall be liable to be tried or punished again in criminal proceedings under the jurisdiction of the same State for an offence for which he has already been finally acquitted or convicted in accordance with the law and penal procedure of that State.
>
> 2. The provisions of the preceding paragraph shall not prevent the reopening of the case in accordance with the law and penal procedure of the State concerned, if there is evidence of new or newly discovered facts, or if there has been a fundamental defect in the previous proceedings, which could affect the outcome of the case. ..."

A. Admissibility

62. The Court, having regard to its case-law, notes that, contrary to the Government's submission, this complaint is not manifestly ill-founded. Nor is it inadmissible on any of the other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

63. The applicant submitted that the order for his subsequent preventive detention had breached his right under Article 4 § 1 of Protocol No. 7 not to be punished twice for an offence for which he had already been finally convicted. The requirements of paragraph 2 of that provision had not been met. There had not been any new facts. At the moment of his conviction, the Jury Court had already been aware of his dangerousness, but had refrained from ordering his preventive detention only because of the practice of its execution at the time. A change in this practice was not, however, a new fact authorising a reopening of the case. Likewise, the findings of expert P. did not constitute new facts for the purposes of Article 4 § 2 of Protocol No. 7.

64. In the Government's submission, Article 4 of Protocol No. 7 had been complied with. The case against the applicant had been reopened in accordance with paragraph 2 of that provision owing to new facts. The assessment of the applicant's health and dangerousness in expert P.'s psychiatric report had been based on new scientific knowledge which had not yet existed at the time of the Jury Court's judgment. The sentencing Jury Court had neither been aware, nor could it have been aware, of the exact nature of the applicant's mental disorder, a dissocial personality disorder. Furthermore, it had not known, and could not have known, that the applicant was particularly dangerous not as a result of an excessive consumption of alcohol, as expert G. heard by the Jury Court had found, and which he might refrain from, but as a result of a permanent personality disorder.

2. The Court's assessment

(a) Relevant principles

65. Article 4 § 2 of Protocol No. 7 sets a limit on the application of the principle of legal certainty in criminal matters. As the Court has stated on many occasions, the requirements of legal certainty are not absolute, and in criminal cases, they must be assessed in the light of Article 4 § 2 of Protocol No. 7, which expressly permits Contracting States to reopen a case where new facts emerge, or where a fundamental defect is detected in the proceedings (see *Mihalache*, cited above, § 129).

66. Article 4 of Protocol No. 7 draws a clear distinction between a second prosecution or trial, which is prohibited by the first paragraph of that Article, and the resumption of a trial in exceptional circumstances, which is provided for in its second paragraph. Article 4 § 2 of Protocol No. 7 expressly envisages the possibility that an individual may have to accept prosecution on the same charges, in accordance with domestic law, subject

to the following strict conditions: the decision to reopen the case must be justified by the emergence of new or newly discovered facts or the discovery of a fundamental defect in the previous proceedings which could affect the outcome of the case. Those conditions are alternative and not cumulative (ibid., §§ 128 and 130, 8 July 2019, with further references).

67. The Court has accepted that there has been a "reopening", or resumption of the initial trial in exceptional circumstances, which is provided for in Article 4 § 2 of Prot. No. 7, as opposed to a "second trial", which is prohibited by Article 4 § 1 of that Protocol, where the procedure in question led to the initial judgment of the criminal court being annulled and the criminal charge being determined anew in a fresh decision (compare *Nikitin*, cited above, §§ 45-46, and *Xheraj*, cited above, § 73).

68. According to the Court's case-law, circumstances relating to the case which exist during the trial, but remain hidden from the judge, and become known only after the trial, are "newly discovered". Circumstances which concern the case but arise only after the trial are "new". Moreover, the term "new or newly discovered facts" includes new evidence relating to previously existing facts (ibid., § 131).

69. Lastly, in all cases, the grounds justifying the reopening of proceedings must, according to Article 4 § 2 of Protocol No. 7 *in fine*, be such as to "affect the outcome of the case" either in favour of the person or to his or her detriment (ibid., § 133 *in fine*).

(b) Application of the principles to the present case

70. The Court considers that the applicant had been finally convicted, for the purposes of Article 4 § 1 of Prot. No. 7, notably of two capital offences by the Zurich Jury Court in 1993/1995 prior to the proceedings here at issue, in which the Swiss criminal courts imposed another punishment, namely subsequent preventive detention, in relation to the same offences.

71. The Federal Court found, and the Government argued, that this sanction had been imposed following the reopening of the trial in exceptional circumstances, in accordance with the requirements of Article 4 § 2 of Protocol No. 7. The Court observes that this provision accepts a "reopening" of the case owing to new or newly discovered facts which are so significant as to potentially affect the "outcome of the case". Accordingly, a "reopening", for the purposes of Article 4 § 2 of Protocol No. 7, usually leads to the initial judgment of the criminal court being annulled and the criminal charge being determined anew in a fresh decision. However, as found above (see paragraphs 42-45), the reopening at issue in the present case did not require any new elements affecting the nature of the offences committed by the applicant or the extent of his guilt and no fresh determination of a criminal charge in a new decision was, or

was to, be made. Accordingly, the Court concludes that the applicant's case was not reopened, for the purposes of Article 4 § 2 of Protocol No. 7.

72. There has accordingly been a violation of Article 4 of Protocol No. 7 to the Convention.

IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

73. Article 41 of the Convention provides:

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

A. Damage

74. The applicant requested 100,000 Swiss francs (CHF) per year of detention since 18 October 2010, when he should have been released from prison, in respect of non-pecuniary damage suffered as a result of his detention in breach of the Convention.

75. The Government considered that, if the Court found that the applicant had been detained in breach of the Convention, a total sum of 40,000 euros (EUR) would be justified in compensation for non-pecuniary damage.

76. The Court, having regard to the fact that it found violations of Articles 5 § 1 and 7 § 1 of the Convention and Article 4 § 1 of Protocol No. 7 as a result of the proceedings in which the applicant's subsequent preventive detention had been ordered, and in so far as the applicant's detention was based on that order (and not on subsequent judicial review decisions regarding that detention), awards the applicant EUR 40,000 in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

77. The applicant also claimed a total of CHF 18,525.80 for the costs and expenses incurred in the proceedings before the Court. These comprised CHF 16,435.80 (including value-added tax (VAT)) for lawyer's costs and expenses and CHF 2,090 for the costs of the translation of his observations into English.

78. The Government considered a sum of EUR 2,700 for lawyer's costs and expenses incurred in the proceedings before the Court as sufficient, given that the questions before the Court had already been raised and addressed in the proceedings before the domestic courts.

79. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown

that these were actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 6,000 covering costs and expenses for the proceedings before the Court, plus any tax that may be chargeable to the applicant.

C. Default interest

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

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 5 § 1 of the Convention;

3. *Holds* that there has been a violation of Article 7 § 1 of the Convention;

4. *Holds* that there has been a violation of Article 4 of Protocol No. 7 to the Convention;

5. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
      (i) EUR 40,000 (forty thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 6,000 (six thousand euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 2 November 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško
Registrar

Georges Ravarani
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Zünd is annexed to this judgment.

G.R.
M.B.

CONCURRING OPINION OF JUDGE ZÜND

1. I agree with my colleagues in finding a violation of Article 5 § 1 (a), Article 7 and Article 4 of Protocol No. 7.

2. I also subscribe to the reasoning under Article 7. The law, as in force at the time when the applicant committed the crime, did not provide for a *subsequent* preventive detention, as it has done since 2007. In addition, in the past the order of execution in the case of imposition of a prison sentence combined with a preventive detention measure had regularly led to the person concerned being detained for a shorter period of time, as noted in § 58 of the judgment. Therefore, the Federal Court applied the new legislation in breach of the principle of no punishment without law.

3. Article 5 § 1 (a) and Article 4 § 2 of Protocol No. 7 have to be read together, as rightly pointed out by the Court in § 42 of the judgment.

4. Detention is lawful under Article 5 § 1 (a) when it is provided for in a judgment or linked to this judgment. In cases of preventive detention under German law, the Court has considered that if, in the sentencing court's judgment, no order was made for the preventive detention of the offender, that judgment did not cover any preventive detention ordered subsequently, and there was thus no sufficient causal connection between the applicant's "conviction", for the purposes of Article 5 § 1 and his subsequent preventive detention (§ 35 of this judgment).

5. However, Article 4 § 2 of Protocol No. 7 allows the reopening of the proceedings if there is evidence of new or newly discovered facts which could affect the outcome of the case. Unlike German law, Swiss law refers to the reopening of the proceedings when it subsequently permits a preventive detention order under Article 65 § 2 of the Criminal Code. For the majority, a reopening of the proceedings is permitted only if new facts or evidence emerge concerning the commission of a crime or the extent of guilt. In my view, however, such facts or evidence may also concern the preconditions for imposing a specific sanction such as preventive detention, inasmuch as they existed before the first judgment and the sentencing court was unaware of them.

6. I therefore consider that the Convention would not in principle rule out the possibility of imposing, in reopening proceedings, a sanction such as preventive detention where it can be shown that newly discovered facts concerning the convicted person's unsound mind had led to the commission of a crime and that the court was unaware of this fact, as provided for in Article 65 § 2 of the Swiss Criminal Code. In such a case, neither Article 5 § 1 (a) nor Article 4 § 1 of Protocol No. 7 are violated when the reopening of the proceedings is based on the detection of such facts.

7. In this case, however, it was known to the sentencing court that the applicant, when convicted in 1995, was of unsound mind. It seems unreasonable to me to find in 2015 that the psychiatric disease falls under a

psychiatric classification different from the one providing the basis for the initial judgment. The only possible decisive point is whether the person is dangerous because of an unsound mind, not the exact psychiatric diagnostic of that mental state. There were no new or newly discovered facts to permit the reopening of the proceedings within the meaning of Article 4 § 2 of Protocol No. 7. The Federal Court applied the framework of the reopening of proceedings in order to impose a sanction which the initial judgment of 1995 had intentionally failed to impose.

8. Therefore, the detention which has been going on since 2013 is based on a second punishment, in breach of Article 4 § 1 of Protocol No. 7, for an offence for which the applicant had already been convicted. Furthermore, the detention since then cannot be understood as being lawful detention after conviction within the meaning of Article 5 § 1 (a) of the Convention.