



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

## **GUIDE ON ARTICLE 5**

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### **RIGHT TO LIBERTY AND SECURITY ARTICLE 5 OF THE CONVENTION**

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## I. SCOPE OF APPLICATION

### **Article 5 – Right to liberty and security**

*“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:”*

#### *1) Deprivation of liberty*

1. In proclaiming the “*right to liberty*”, Article 5 contemplates the physical liberty of the person; its aim is to ensure that no one should be deprived of that liberty in an arbitrary fashion. It is not concerned with mere restrictions on liberty of movement, which are governed by Article 2 of Protocol No. 4 (*Creangă v. Romania* [GC], § 92; *Engel and Others v. the Netherlands*, § 58).

2. The difference between restrictions on movement serious enough to fall within the ambit of a deprivation of liberty under Article 5 § 1 and mere restrictions of liberty which are subject only to Article 2 of Protocol No. 4 is one of degree or intensity, and not one of nature or substance (*Guzzardi v. Italy*, § 93; *Rantsev v. Cyprus and Russia*, § 314; *Stanev v. Bulgaria* [GC], § 115).

3. A deprivation of liberty is not confined to the classic case of detention following arrest or conviction, but may take numerous other forms (*Guzzardi v. Italy*, § 95).

#### *2) Criteria to be applied*

4. The Court does not consider itself bound by the legal conclusions of the domestic authorities as to whether or not there has been a deprivation of liberty, and undertakes an autonomous assessment of the situation (*H.L. v. the United Kingdom*, § 90; *H.M. v. Switzerland*, §§ 30 and 48; *Creangă v. Romania* [GC], § 92).

5. In order to determine whether someone has been “*deprived of his liberty*” within the meaning of Article 5, the starting point must be his concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question (*Guzzardi v. Italy*, § 92; *Medvedyev and Others v. France* [GC], § 73; *Creangă v. Romania* [GC], § 91).

6. An important factor to be taken into account is the context in which the measure is imposed (*Austin and Others v. the United Kingdom* [GC], § 59).

7. The notion of deprivation of liberty within the meaning of Article 5 § 1 contains both an *objective element* of a person's confinement in a particular restricted space for a not negligible length of time, and an additional *subjective element* in that the person has not validly consented to the confinement in question (*Storck v. Germany*, § 74; *Stanev v. Bulgaria* [GC], § 117).

8. Relevant objective factors to be considered include the possibility to leave the restricted area, the degree of supervision and control over the person's movements, the extent of isolation and the availability of social contacts (see, for example, *Guzzardi v. Italy*, § 95; *H.M. v. Switzerland*, § 45; *H.L. v. the United Kingdom*, § 91; and *Storck v. Germany*, § 73).

9. Where the facts indicate a deprivation of liberty within the meaning of Article 5 § 1, the relatively short duration of the detention does not affect this conclusion (*Rantsev v. Cyprus and Russia*, § 317; *Iskandarov v. Russia*, § 140).

10. An element of coercion in the exercise of police powers of search and stop is indicative of a deprivation of liberty, notwithstanding the short duration of the measure (*Foka*

*v. Turkey*, § 78; *Gillan and Quinton v. the United Kingdom*, § 57; *Shimovolos v. Russia*, § 50; and *Brega and Others v. Moldova*, § 43).

11. The right to liberty is too important in a democratic society for a person to lose the benefit of Convention protection for the single reason that he may have given himself up to be taken into detention, especially when that person is legally incapable of consenting to, or disagreeing with, the proposed action (*H.L. v. the United Kingdom*, § 90; *Stanev v. Bulgaria* [GC], § 119).

12. The fact that a person lacks legal capacity does not necessarily mean that he is unable to understand and consent to his or her situation (*Shtukaturvov v. Russia*, §§ 107-109; *Stanev v. Bulgaria* [GC], § 130; *D.D. v. Lithuania*, § 150).

### 3) Measures adopted within a prison

13. Disciplinary steps imposed within a prison which have effects on conditions of detention cannot be considered as constituting deprivation of liberty. Such measures must be regarded in normal circumstances as modifications of the conditions of lawful detention and fall outside the scope of Article 5 § 1 of the Convention (*Bollan v. the United Kingdom* (dec.)).

### 4) Deprivation of liberty outside formal arrest and detention

14. The question of applicability Article 5 has arisen in a variety of circumstances, including:

- the placement of individuals in psychiatric or social care institutions (see, among many other authorities, *De Wilde, Ooms and Versyp v. Belgium*; *Nielsen v. Denmark*; *H.M. v. Switzerland*; *H.L. v. the United Kingdom*; *Storck v. Germany*; *A. and Others v. Bulgaria*; *Stanev v. Bulgaria* [GC]);
- confinement in airport transit zones (*Amuur v. France*; *Shamsa v. Poland*; *Mogos and Others v. Romania* (dec.); *Mahdid and Haddar v. Austria* (dec.); and *Riad and Idiab v. Belgium*);
- questioning in a police station (*I.I. v. Bulgaria*; *Osypenko v. Ukraine*; *Salayev v. Azerbaijan*; *Farhad Aliyev v. Azerbaijan*; and *Creangă v. Romania* [GC]);
- stops and searches by the police (*Foka v. Turkey*, *Gillan and Quinton v. the United Kingdom*, and *Shimovolos v. Russia*);
- crowd control measures adopted by the police on public order grounds (*Austin and Others v. the United Kingdom* [GC]);
- house arrest (*Mancini v. Italy*; *Lavents v. Latvia*; *Nikolova v. Bulgaria* (no. 2); and *Dacosta Silva v. Spain*).

### 5) Positive obligations with respect to deprivation of liberty by private individuals

15. Article 5 § 1, first sentence, lays down a positive obligation on the State to protect the liberty of its citizens. The State is therefore obliged to take measures providing effective protection of vulnerable persons, including reasonable steps to prevent a deprivation of liberty of which the authorities have or ought to have knowledge (*Storck v. Germany*, § 102).

16. The responsibility of a State is engaged if it acquiesces in a person's loss of liberty by private individuals or fails to put an end to the situation (*Riera Blume and Others v. Spain*; *Rantsev v. Cyprus and Russia*, §§ 319-321; *Medova v. Russia*, §§ 123-125).

## II. LAWFULNESS OF THE DETENTION UNDER ARTICLE 5 § 1

### 1) Purpose of Article 5

17. The key purpose of Article 5 is to prevent arbitrary or unjustified deprivations of liberty (*McKay v. the United Kingdom* [GC], § 30). The right to liberty and security is of the highest importance in a “*democratic society*” within the meaning of the Convention (*Medvedyev and Others v. France* [GC], § 76; *Ladent v. Poland*, no. 11036/03, § 45, 18 March 2008).

18. The Court therefore considers that the unacknowledged detention of an individual is a complete negation of the fundamentally important guarantees contained in Article 5 of the Convention and discloses a most grave violation of that provision. The absence of a record of such matters as the date, time and location of detention, the name of the detainee, the reasons for the detention and the name of the person effecting it must be seen as incompatible, *inter alia*, with the very purpose of Article 5 of the Convention (see *Kurt v. Turkey*, § 125; *Anguelova v. Bulgaria*, § 154). It is also incompatible with the requirement of lawfulness under the Convention (*Anguelova v. Bulgaria, ibidem*).

### 2) Compliance with national law

19. In order to meet the requirement of lawfulness, detention must be “in accordance with a procedure prescribed by law”. This means that detention must conform to the substantive and procedural rules of national law (or international law where appropriate, see among many other authorities, *Medvedyev and Others v. France* [GC], § 79).

20. For example, the Court found that there had been a violation of Article 5 where the authorities had failed to lodge an application for extension of a detention order within the time-limit prescribed by law (*G.K. v. Poland*, § 76). By contrast, an alleged breach of a circular concerning the manner in which inquiries had to be conducted into certain types of offences did not invalidate the domestic legal basis for arrest and subsequent detention (*Talat Tepe v. Turkey*, § 62).

### 3) Review of compliance with national law

21. While it is normally in the first place for the national authorities, notably the courts, to interpret and apply domestic law, the position is different in relation to cases where failure to comply with such law entails a breach of the Convention. In cases where Article 5 § 1 of the Convention is at stake, the Court must exercise a certain power to review whether national law has been observed (see, among many other authorities, *Creangă v. Romania* [GC], § 101; *Baranowski v. Poland*, § 50; *Benham v. the United Kingdom*, § 41). In doing so, the Court must have regard to the legal situation as it stood at the material time (*Wloch v. Poland*, § 114).

### 4) The principle of legal certainty

22. Where deprivation of liberty is concerned it is particularly important that the general principle of legal certainty be satisfied. It is therefore essential that the conditions for deprivation of liberty under domestic law be clearly defined and that the law itself be foreseeable in its application, so that it meets the standard of “*lawfulness*” set by the Convention, a standard which requires that all law be sufficiently precise to allow the person – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the

circumstances, the consequences which a given action may entail (see, among recent authorities, *Creangă v. Romania*, § 120; and *Medvedyev and Others v. France* [GC], § 80).

23. For example, the practice of keeping a person in detention under a bill of indictment without any specific basis in the national legislation or case-law is in breach of Article 5 (1) (*Baranowski v. Poland*, §§ 50-58). Likewise, the practice of automatically renewing pre-trial detention without any precise legislative foundation is contrary to Article 5 § 1 (*Svipsta v. Latvia*, § 86). By contrast, the continued detention of a person on the basis of an order by the Indictment Chamber requiring further investigations, without issuing a formal detention order, did not disclose a violation of that Article (*Laumont v. France*, § 50).

24. Provisions which are interpreted in an inconsistent and mutually exclusive manner by the domestic authorities will, too, fall short of the ‘quality of law’ standard required under the Convention (*Nasrulloev v. Russia*, § 77; *Ječius v. Lithuania*, §§ 53-59). However, in the absence of any case law, the Court is not called upon to give its own interpretation of national law. Therefore, it may be reluctant to conclude that the national courts have failed to act in accordance with a procedure prescribed by law (see *Włoch v. Poland*, §§ 114-116; *Winterwerp v. the Netherlands*, §§ 48-50).

25. Although diplomatic notes are a source of international law, detention of crew on the basis of such notes is not lawful within the meaning of Article 5 (1) of the Convention insofar as they are not sufficiently precise and foreseeable. In particular, the lack of specific reference to the potential arrest and detention of crewmembers will fall foul of the requirements of legal certainty and foreseeability under Article 5 § 1 of the Convention (*Medvedyev and Others v. France* [GC], §§ 96-100).

#### 5) No arbitrariness

26. In addition, any deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness (see, among many other authorities, *Witold Litwa v. Poland*, § 78).

27. The notion of “arbitrariness” in Article 5 § 1 extends beyond lack of conformity with national law, so that a deprivation of liberty may be lawful in terms of domestic law but still arbitrary and thus contrary to the Convention (*Creangă v. Romania*, § 84; *A. and Others v. the United Kingdom* [GC], § 164; for an overview of the principles relating to the notion of “arbitrariness” see *Saadi v. the United Kingdom* [GC], §§ 68-74).

28. The speed with which the domestic courts replace a detention order which has either expired or has been found to be defective is a further relevant element in assessing whether a person’s detention must be considered arbitrary (*Mooren v. Germany* [GC], § 80). Thus, the Court considers in the context of sub-paragraph (c) that a period of less than a month between the expiry of the initial detention order and the issuing of a fresh, reasoned detention order following a remittal of the case from the appeal court to a lower court did not render the applicant's detention arbitrary (*Minjat v. Switzerland*, §§ 46 and 48). In contrast, a period of more than a year following a remittal from a court of appeal to a court of lower instance, in which the applicant remained in a state of uncertainty as to the grounds for his detention on remand, combined with the lack of a time-limit for the lower court to re-examine his detention, was found to render the applicant's detention arbitrary (see *Khudoyorov v. Russia*, §§ 136-37).

#### 6) Court order

29. A period of detention is, in principle, “lawful” if it is based on a court order. Detention on the basis of an order later found to be unlawful by a superior court may still be valid under



domestic law (*Bozano v. France*, § 55). Detention may remain in accordance with “*a procedure prescribed by law*” even though the domestic courts have admitted that there had been some flaws in the detention proceedings but held the detention to be lawful nevertheless (*Erkalo v. the Netherlands*, §§ 55-56). Thus, even flaws in the detention order do not necessarily render the underlying period of detention unlawful within the meaning of Article 5 § 1 (*Ječius v. Lithuania*, § 68; *Benham v. the United Kingdom*, §§ 42-47).

30. The Court distinguishes between acts of domestic courts which are within their jurisdiction and those which are in excess of jurisdiction (*Benham v. the United Kingdom*, §§ 43 *et seq.*). Detention orders have been found to be *ex facie* invalid in cases where the interested party did not have proper notice of the hearing (*Khudoyorov v. Russia*, § 129), the domestic courts had failed to conduct the means inquiry required by the national legislation (*Lloyd and Others v. the United Kingdom*, §§ 108 and 116), or the lower courts had failed properly to consider alternatives to imprisonment (*ibidem*, § 113). On the other hand, where there was no evidence that the national courts’ conduct amounted to a “*gross or obvious irregularity*”, the Court held that the detention was lawful (*ibidem*, § 114).

#### 7) Reasoning of decisions and the requirement of non-arbitrariness

31. The absence or lack of reasoning in detention orders is one of the elements taken into account by the Court when assessing the lawfulness of detention under Article 5 § 1. Thus, the absence of *any* grounds given by the judicial authorities in their decisions authorizing detention for a prolonged period of time may be incompatible with the principle of protection from arbitrariness enshrined in Article 5 § 1 (*Stasaitis v. Lithuania*, §§ 66-67). Likewise, a decision which is extremely laconic and makes no reference to any legal provision which would permit detention will fail to provide sufficient protection from arbitrariness (*Khudoyorov v. Russia*, § 157).

32. However, the Court may consider the applicant’s detention to be in conformity with the domestic legislation despite the lack of reasons in the detention order where the national courts were satisfied that there had been some grounds for the applicant’s detention on remand (*Minjat v. Switzerland*, § 43). Furthermore, where the domestic courts had quashed the detention order for lack of reasons but considered that there had been some grounds for the applicant’s detention, the refusal to order release of the detainee and remittal of the case to the lower courts for determination of the lawfulness of detention did not amount to a violation of Article 5 § 1 (*Minjat v. Switzerland*, § 47).

33. What is required is a detention order based on concrete grounds and setting a specific time limit (*Meloni v. Switzerland*, § 53). Moreover, authorities should consider less intrusive measures than detention (*Ambruszkiewicz v. Poland*, § 32).

#### 8) Some acceptable procedural flaws

34. The following procedural flaws have been found not to render the applicant’s detention unlawful:

- A failure to notify the detention order officially to the accused did not amount to a “*gross or obvious irregularity*” in the exceptional sense indicated by the case law given that the authorities genuinely believed that the order had been notified to the applicant (*Marturana v. Italy*, § 79; but see *Voskuil v. the Netherlands*, in which the Court found a violation where there had been a failure to notify a detention order within the time-limit prescribed by law: 3 days instead of 24h);
- A mere clerical error in the arrest warrant or detention order which was later cured by a judicial authority (*Nikolov v. Bulgaria*, § 63; *Douiyeb v. the Netherlands* [GC], § 52);

- The replacement of the formal ground for an applicant's detention in view of the facts mentioned by the courts in support of their conclusions (*Gaidjurgis v. Lithuania* (dec.)). A failure to give adequate reasons for such replacement however may lead the Court to conclude that there has been a breach of Article 5 § 1 (*Calmanovici v. Romania*, § 65).

#### 9) *Delay in executing order of release*

35. It is inconceivable that in a State subject to the rule of law a person should continue to be deprived of his liberty despite the existence of a court order for his release (*Assanidze v. Georgia* [GC], § 173). The Court however recognises that some delay in carrying out a decision to release a detainee is understandable and often inevitable. Nevertheless, the national authorities must attempt to keep it to a minimum (*Giulia Manzoni v. Italy*, § 25). A delay of eleven hours in executing a decision to release the applicant “*forthwith*” was found to be incompatible with Article 5 § 1 of the Convention (*Quinn v. France*, §§ 39-43; *Giulia Manzoni v. Italy*, § 25).

### III. AUTHORISED DEPRIVATIONS OF LIBERTY UNDER ARTICLE 5 § 1

#### A. Detention after conviction

##### **Article 5 § 1(a)**

*“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;”*

#### 1) *Existence of a conviction*

36. Article 5 § 1(a) applies to any “*conviction*” occasioning deprivation of liberty pronounced by a court and makes no distinction based on the legal character of the offence of which a person has been found guilty whether classified as criminal or disciplinary by the internal law of the State in question (*Engel and Others v. the Netherlands*, § 68; *Galstyan v. Armenia*, § 46).

37. The term signifies a finding of guilt (*Van Droogenbroeck v. Belgium*, § 35; *M. v. Germany*, § 87) and there cannot be a conviction unless it has been established in accordance with the law that there has been an offence (*Guzzardi v. Italy*, § 100; *M. v. Germany*, § 87) and the imposition of a penalty or other measure involving the deprivation of liberty (*Van Droogenbroeck v. Belgium*, § 35; *B. v. Austria*, § 38; *M. v. Germany*, § 87).

38. The provision does not prevent Contracting States from executing orders for detention imposed by competent courts outside their territory (*X v. Federal Republic of Germany*, Commission decision of 14 December 1963). Although Contracting States are not obliged to verify whether the proceedings resulting in the conviction were compatible with all the requirements of Article 6 (*Drozdz and Janousek v. France and Spain*, § 110), a conviction can not be the result of a flagrant denial of justice (*Ilaşcu and Others v. Moldova and Russia* [GC], § 461; *Stoichkov v. Bulgaria*, § 51).

## 2) Competent court

39. The term “court” denotes bodies which exhibit not only common fundamental features, of which the most important is independence of the executive and of the parties to the case, but also the guarantees of judicial procedure (*De Wilde, Ooms and Versyp v. Belgium*, § 78; *Weeks v. the United Kingdom*, § 61). The forms of the procedure need not, however, necessarily be identical in each of the cases where the intervention of a court is required. In order to determine whether a proceeding provides adequate guarantees, regard must be had to the particular nature of the circumstances in which such proceeding takes place (*De Wilde, Ooms and Versyp v. Belgium*, § 78).

40. In addition, the body in question must not have merely advisory functions but must have the competence to decide the lawfulness of the detention and to order release if the detention is unlawful (*X. v. the United Kingdom*, § 61; *Weeks v. the United Kingdom*, § 61).

## 3) Detention must follow “after” conviction

41. The term “after” 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 (*Van Droogenbroeck v. Belgium*, § 35; *Weeks v. the United Kingdom*, § 42; *M. v. Germany*, § 88). In short, there must be a sufficient causal connection between the conviction and the deprivation of liberty at issue (*Monnell and Morris v. the United Kingdom*, § 40; *M. v. Germany*, § 87).

42. However, with the passage of time, the causal link gradually becomes less strong and might eventually be broken if a position were reached in which decisions not to release and to re-detain (including the prolonging of preventive detention) were based on grounds unconnected to the objectives of the legislature or the court or on an assessment that was unreasonable in terms of those objectives. In those circumstances, a detention that was lawful at the outset would be transformed into a deprivation of liberty that was arbitrary and, hence, incompatible with Article 5 (*Van Droogenbroeck v. Belgium*, § 40; *Weeks v. the United Kingdom*, § 49; *M. v. Germany*, § 88).

43. The term “after conviction” cannot be interpreted as being restricted to the case of a final conviction, for this would exclude the arrest of convicted persons, who appeared for trial while still at liberty. It cannot be overlooked that the guilt of a person, detained during appeal or review proceedings, has been established in the course of a trial conducted in accordance with the requirements of Article 6 (*Wemhoff v. Germany*, § 9).

44. Article 5 § 1(a) applies where persons of unsound mind are detained in psychiatric facilities after conviction (*X. v. the United Kingdom*, § 39). However, it will not apply to such cases following an acquittal (*Luberti v. Italy*, § 25).

## 4) Impact of appellate proceedings

45. A period of detention will, in principle, be lawful if it is carried out pursuant to a court order. A subsequent finding that the court erred under domestic law in making the order will not necessarily retrospectively affect the validity of the intervening period of detention. The Strasbourg organs have refused to uphold applications from persons convicted of criminal offences who complain that their convictions or sentences were found by domestic appellate courts to have been based on errors of fact or law (*Benham v. the United Kingdom*, § 42). However, detention following conviction is unlawful where it has no basis in domestic law or is arbitrary (*Tsirlis and Kouloumpas v. Greece*, § 62).

## B. Detention for non-compliance with a court order or legal obligation

### **Article 5 § 1(b)**

*“the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;”*

#### *1) Non-compliance with the order of a court*

46. The choice of the language in the first limb of Article 5 § 1(b) presumes that the person arrested or detained must have had an opportunity to comply with a court order and has failed to do so (*Beiere v. Latvia*, § 49).

47. Individuals cannot be held accountable for not complying with court orders if they have never been informed of them (*ibidem*, § 50).

48. The domestic authorities must strike a fair balance between the importance in a democratic society of securing compliance with a lawful order of a court, and the importance of the right to liberty. Factors to be taken into consideration include the purpose of the order, the feasibility of compliance with the order, and the duration of the detention. The issue of proportionality assumes particular significance in the overall scheme of things (*Gatt v. Malta*, § 40).

49. The Convention organs have applied the first limb of Article 5 § 1(b) to cases concerning, for example, a failure to pay a court fine (see *Airey v. Ireland*, Commission decision), a refusal to undergo a medical examination concerning mental health (*X v. Federal Republic of Germany*, Commission decision of 10 December 1975), or a blood test ordered by a court (*X v. Austria*, Commission decision), a failure to observe residence restrictions (*Freda v. Italy*, Commission decision), a failure to comply with a decision to hand over children to a parent (*Paradis v. Germany* (dec.)), a failure to observe binding-over orders (*Steel and Others v. the United Kingdom*), a breach of bail conditions (*Gatt v. Malta*, cited above) and a confinement in a psychiatric hospital (*Beiere v. Latvia*, cited above, where the detention decision was found to be not a “lawful order of a court”).

#### *2) Fulfilment of an obligation prescribed by law*

50. The second limb of Article 5 § 1(b) allows for detention only to “secure the fulfilment” of the obligation prescribed by law. There must therefore be an unfulfilled obligation incumbent on the person concerned and the arrest and detention must be for the purpose of securing its fulfilment and not punitive in character. As soon as the relevant obligation has been fulfilled, the basis for detention under Article 5 § 1(b) ceases to exist (*Vasileva v. Denmark*, § 36).

51. The obligation must be of a specific and concrete nature (*Ciulla v. Italy*, § 36). A wide interpretation would entail consequences incompatible with the notion of the rule of law (*Engel and Others v. the Netherlands*, § 69; *Iliya Stefanov v. Bulgaria*, § 72).

52. An arrest will only be acceptable in the Convention terms if “the obligation prescribed by law” cannot be fulfilled by milder means (*Khodorkovskiy v. Russia*, § 136). The principle of proportionality further dictates that a balance must be struck between the importance in a democratic society of securing the immediate fulfilment of the obligation in question, and the importance of the right to liberty (*Saadi v. the United Kingdom* [GC], § 70).

53. In this assessment the Court considers the following points relevant: the nature of the obligation arising from the relevant legislation including its underlying object and purpose; the person being detained and the particular circumstances leading to the detention; and the length of the detention (*Vasileva v. Denmark*, § 38; *Epple v. Germany*, § 37).

54. Situations examined under the second limb of Article 5 § 1(b) include, for example, an obligation to submit to a security check when entering a country (*McVeigh and Others v. United Kingdom*, (Commission report)), to disclose personal identity (*Vasileva v. Denmark*, *Novotka v. Slovakia* (dec.); *Sarigiannis v. Italy*), to undergo a psychiatric examination (*Nowicka v. Poland*), to leave a certain area (*Epple v. Germany*), and to appear for questioning at a police station (*Iliya Stefanov v. Bulgaria*; *Osypenko v. Ukraine*; and *Khodorkovskiy v. Russia*).

### C. Detention on remand

#### Article 5 § 1(c)

“the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence of fleeing after having done so;”

#### 1) Purpose of arrest or detention

55. “Effected for the purpose of bringing him before the competent legal authority” qualifies all the three alternative bases for arrest or detention under Article 5 § 1(c) (*Lawless v. Ireland* (no. 3), §§ 13 and 14; *Ireland v. the United Kingdom*, § 196).

56. A person may be detained under Article 5 § 1(c) only in the context of criminal proceedings, for the purpose of bringing him before the competent legal authority on suspicion of his having committed an offence (*Ječius v. Lithuania*, § 50; *Schwabe and M.G. v. Germany*, § 72).

57. The existence of the purpose to bring a suspect before a court has to be considered independently of the achievement of that purpose. The standard imposed by Article 5 § 1 (c) does not presuppose that the police have sufficient evidence to bring charges at the time of arrest or while the applicant was in custody (*Erdagöz v. Turkey*, § 51). The object of questioning during detention under sub-paragraph (c) of Article 5 § 1 is to further the criminal investigation by way of confirming or dispelling the concrete suspicion grounding the arrest. (*Brogan and Others v. the United Kingdom*, §§ 52-54; *Labita v. Italy* [GC], § 155; *O’Hara v. the United Kingdom*, § 36).

58. Detention pursuant to Article 5 § 1 (c) must be a proportionate measure to achieve the stated aim (*Ladent v. Poland*, §§ 55-56).

59. The expression ‘competent legal authority’ has the same meaning as ‘judge or other officer authorised by law to exercise judicial power’ in Article 5 § 3 (*Schiesser v. Switzerland*, § 29).

#### 2) Meaning of ‘reasonable suspicion’

60. A “reasonable suspicion” that a criminal offence has been committed presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed an offence (*Erdagöz v. Turkey*, § 51; *Fox, Campbell and Hartley v. the United Kingdom*, § 32). Therefore, a failure by the authorities to make a genuine inquiry into the basic facts of a case in order to verify whether a complaint was well-founded disclosed a violation of Article 5 § 1(c) (*Stepuleac v. Moldova*, § 73; *Elci and Others v. Turkey*, § 674).

61. What may be regarded as “reasonable” will however depend upon all the circumstances of the cases (*Fox, Campbell and Hartley v. the United Kingdom*, § 32).

62. In the context of terrorism, though Contracting States cannot be required to establish the reasonableness of the suspicion grounding the arrest of a suspected terrorist by disclosing confidential sources of information, the Court has held that the exigencies of dealing with terrorist crime cannot justify stretching the notion of “reasonableness” to the point where the safeguard secured by Article 5 § 1(c) is impaired (*O’Hara v. the United Kingdom*, § 35).

63. Uncorroborated hearsay evidence of an anonymous informant was held not to be sufficient to found ‘reasonable suspicion’ of the applicant being involved in mafia-related activities (*Labita v. Italy* [GC], §§ 156 *et seq.*). By contrast, incriminating statements dating back to a number of years and later withdrawn by the suspects did not remove the existence of a reasonable suspicion against the applicant. Furthermore, it did not have an effect on the lawfulness of the arrest warrant (*Talat Tepe v. Turkey*, § 61).

### 3) The term ‘offence’

64. The term “*offence*” has an autonomous meaning, identical to that of ‘*criminal offence*’ in Article 6. The classification of the offence under national law is one factor to be taken into account. However, the nature of the proceedings and the severity of the penalty at stake are also relevant (*Benham v. the United Kingdom*, § 56);

65. The “*offence*” must be specific and concrete: preventive detention of individuals viewed by the State as presenting a danger on account of their continuing propensity to crime is not allowed (*Guzzardi v. Italy*, § 102; *Ciulla v. Italy*, § 40; *M. v. Germany*, § 89; *Shimovolos v. Russia*, § 54).

## D. Detention of a minor

### Article 5 § 1(d)

“the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;”

#### 1) General

66. The notion of a minor encompasses persons under the age of 18 (*Koniarska v. United Kingdom* (dec.)), in the light of European standards and Resolution CM (72) of the Committee of Ministers of the Council of Europe (*X v. Switzerland*, Commission decision of 14 December 1979).

67. Sub-paragraph d) is not only a provision which permits the detention of a minor. It contains a specific, but not exhaustive, example of circumstances in which minors might be detained, namely for the purpose of a) their educational supervision or b) bringing them before the competent legal authority (*Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, § 100).

#### 2) Educational supervision

68. The first limb of Article 5 § 1(d) authorises detention pursuant to a court or administrative order for the purposes of securing a child’s attendance at an educational establishment.

69. In the context of the detention of minors, the words “*educational supervision*” must not be equated rigidly with notions of classroom teaching. Such supervision must embrace

many aspects of the exercise, by the authority, of parental rights for the benefit and protection of the person concerned (*Ichin and Others v. Ukraine*, § 39; *D.G. v. Ireland*, § 80).

70. Sub-paragraph (d) does not preclude an interim custody measure being used as a preliminary to a regime of supervised education, without itself involving any supervised education. In such circumstances, however, the imprisonment must be speedily followed by actual application of such a regime in a setting (open or closed) designed and with sufficient resources for the purpose (*Bouamar v. Belgium*, § 50).

71. If the State has chosen a system of educational supervision involving a deprivation of liberty, it is obliged to put in place appropriate institutional facilities which meet the security and educational demands of that system in order to satisfy the requirements of Article 5 § 1 d) (*A. and Others v. Bulgaria*, § 69; *D.G. v. Ireland*, § 79).

72. The Court does not consider that a juvenile holding facility itself constitutes “*educational supervision*”, if no educational activities are provided (*Ichin and Others v. Ukraine*, § 39).

### 3) *Competent legal authority*

73. The second limb of Article 5 § 1(d) governs the lawful detention of a minor for the purpose of bringing her/him before the competent legal authority. According to the *travaux préparatoires*, this provision was intended to cover detention of a minor prior to civil or administrative proceedings, while the detention in connection with criminal proceedings was intended to be covered by Article 5 § 1(c).

74. However, the detention of a minor accused of a crime during the preparation of a psychiatric report necessary for the taking of a decision on his mental conditions has been considered to fall under sub-paragraph d), as being detention for the purpose of bringing a minor before the competent authority (*X. v. Switzerland*, (dec.) cited above).

## E. Detention for medical or social reasons

### **Article 5 § 1(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;”*

#### 1) *General*

75. Article 5 § 1(e) of the Convention refers to several categories of individuals, namely persons spreading infectious diseases, persons of unsound mind, alcoholics, drug addicts and vagrants. There is a link between all those persons in that they may be deprived of their liberty either in order to be given medical treatment or because of considerations dictated by social policy, or on both medical and social grounds (*Enhorn v. Sweden*, § 43).

76. The reason why the Convention allows these individuals, all of whom are socially maladjusted, to be deprived of their liberty is not only that they may be a danger to public safety but also that their own interests may necessitate their detention (*ibidem*; *Guzzardi v. Italy*, § 98 *in fine*).

#### 2) *Prevention of the spreading of infectious diseases*

77. The essential criteria when assessing the “*lawfulness*” of the detention of a person “for the prevention of the spreading of infectious diseases” are:

- a) whether the spreading of the infectious disease is dangerous to public health or safety, and
- b) whether detention of the person infected is the last resort in order to prevent the spreading of the disease, because less severe measures have been considered and found to be insufficient to safeguard the public interest.

When these criteria are no longer fulfilled, the basis for the deprivation of liberty ceases to exist (*Enhorn v. Sweden*, § 44).

### 3) *Detention of persons of unsound mind*

78. The term “*a person of unsound mind*” does not lend itself to precise definition since psychiatry is an evolving field, both medically and in social attitudes. However, it cannot be taken to permit the detention of someone simply because his or her views or behaviour deviate from established norms (*Rakevich v. Russia*, § 26).

79. An individual cannot be deprived of his liberty as being of “unsound mind” unless the following three minimum conditions are satisfied (*Stanev v. Bulgaria* [GC], § 145; *D.D. v. Lithuania*, § 156; *Kallweit v. Germany*, § 45; *Shtukurov v. Russia*, § 114; and *Varbanov v. Bulgaria*, § 45; *Winterwerp v. the Netherlands*, § 39):

- a) a person may only be detained where she’s reliably shown, by objective medical expertise, to be of unsound mind, unless emergency detention is required ;
- b) the individual’s mental disorder must be of a kind to warrant compulsory confinement. The deprivation of liberty must be shown to have been necessary in the circumstances;
- c) the mental disorder, verified by objective medical evidence, must persist throughout the period of detention.

80. As to the second of the above conditions, the detention of a mentally disordered person may be necessary not only where the person needs therapy, medication or other clinical treatment to cure or alleviate his condition, but also where the person needs control and supervision to prevent him, for example, causing harm to himself or other persons (*Hutchison Reid v. the United Kingdom*, § 52).

81. In deciding whether an individual should be detained as a person “of unsound mind”, the national authorities are to be recognised as having a certain discretion since it is in the first place for the national authorities to evaluate the evidence adduced before them in a particular case (*H.L. v. the United Kingdom*, § 98).

82. The relevant time at which a person must be reliably established to be of unsound mind, for the requirements of sub-paragraph (e) of Article 5 § 1, is the date of the adoption of the measure depriving that person of his liberty as a result of that condition (*O.H. v. Germany*, § 78).

83. When the medical evidence points to recovery, the authorities may need some time to consider whether to terminate an applicant’s confinement (*Luberti v. Italy*, § 28). However, the continuation of deprivation of liberty for purely administrative reasons is not justified (*R.L. and M.-J.D. v. France*, § 129).

84. The detention of persons of unsound mind must be effected in a hospital, clinic, or other appropriate institution authorised for the detention of such persons (*Ashingdane v. the United Kingdom*, § 44; *O.H. v. Germany*, § 79).

85. By contrast, a person can be placed temporarily in an establishment not specifically designed for the detention of mental health patients before being transferred to the appropriate institution, provided that the waiting period is not excessively long (see *Pankiewicz v. Poland*, §§ 44-45; *Morsink v. the Netherlands*, §§ 67-69; *Brand v. the Netherlands*, §§ 64-66).



#### 4) *Detention of alcoholics and drug addicts*

86. Article 5 § 1(e) of the Convention should not be interpreted as only allowing the detention of “*alcoholics*” in the limited sense of persons in a clinical state of “*alcoholism*”, because nothing in the text of this provision prevents that measure from being applied by the State to an individual abusing alcohol, in order to limit the harm caused by alcohol to himself and the public, or to prevent dangerous behaviour after drinking (*Kharin v. Russia*, § 34).

87. Therefore, persons who are not medically diagnosed as “*alcoholics*”, but whose conduct and behaviour under the influence of alcohol pose a threat to public order or themselves, can be taken into custody for the protection of the public or their own interests, such as their health or personal safety (*Hilda Hafsteinsdóttir v. Iceland*, § 42). That does not mean however that Article 5 § 1(e) permits the detention of an individual merely because of his alcohol intake (*Witold Litwa v. Poland*, §§ 61-62).

#### 5) *Vagrants*

88. The case-law on “*vagrants*” is scarce. The scope of the provision encompasses persons who have no fixed abode, no means of subsistence and no regular trade or profession. These three conditions, inspired by the Belgian Criminal Code, are cumulative: they must be fulfilled at the same time with regard to the same person (*De Wilde, Ooms and Versyp v. Belgium*, § 68).

## F. Detention of a foreigner

### **Article 5 § 1(f)**

“the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.”

#### 1) *Detention to prevent unauthorised entry into country*

89. Article 5 § 1(f) allows States to control the liberty of aliens in an immigration context. While the first limb of that provision permits the detention of an asylum seeker or other immigrant prior to the State's grant of authorisation to enter, such detention must be compatible with the overall purpose of Article 5, which is to safeguard the right to liberty and ensure that no-one should be dispossessed of his or her liberty in an arbitrary fashion (*Saadi v. the United Kingdom* [GC], §§ 64-66).

90. The principle that detention should not be arbitrary applies to the detention under the first limb of Article 5 § 1(f) in the same manner as it applies to detention under the second limb (*ibidem*, § 73).

91. “*Freedom from arbitrariness*” in the context of the first limb of Article 5 § 1(f) therefore means that such detention must be carried out in good faith; it must be closely connected to the purpose of preventing unauthorised entry of the person to the country; the place and conditions of detention should be appropriate, bearing in mind that the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country; and the length of the detention should not exceed that reasonably required for the purpose pursued (*ibidem*, § 74).

92. When reviewing the manner in which the detention order was implemented the Court must have regard to the particular situation of would-be immigrants (*Kanagaratnam v. Belgium*, § 80, where the applicant and her three children were kept in a closed facility

designed for adults; *Rahimi v. Greece*, § 108, concerning the automatic application of detention to an unaccompanied minor).

## 2) Detention with a view to deportation or extradition

93. Article 5 § 1(f) does not demand that detention be reasonably considered necessary, for example to prevent the individual from committing an offence or fleeing. In this respect, Article 5 § 1(f) provides a different level of protection from Article 5 § 1(c): all that is required under sub-paragraph (f) is that “*action is being taken with a view to deportation or extradition*”. It is therefore immaterial, for the purposes of its application, whether the underlying decision to expel can be justified under national or Convention law (*Chahal v. the United Kingdom*, § 112; *Čonka v. Belgium*, § 38; *Nasrullojev v. Russia*, § 69; *Soldatenko v. Ukraine*, § 109).

94. Detention may be justified for the purposes of the second limb of Article 5 § 1(f) by enquiries from the competent authorities, even if a formal request or an order of extradition has not been issued, given that such enquiries may be considered “actions” taken in the sense of the provision (*X v. Switzerland*, Commission decision of 9 December 1980).

95. Any deprivation of liberty under the second limb of Article 5 § 1(f) will be justified only for as long as deportation or extradition proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible under Article 5 § 1(f) (*A. and Others v. the United Kingdom* [GC], § 164).

96. To avoid being branded as arbitrary, detention under Article 5 § 1(f) must be carried out in good faith; it must be closely connected to the ground of detention relied on by the Government; the place and conditions of detention should be appropriate; and the length of the detention should not exceed that reasonably required for the purpose pursued (*ibidem*; see also *Yoh-Ekale Mwanje v. Belgium*, §§ 117-119 with further references).

97. Article 5 § 1(f) or other sub-paragraphs do not permit a balance to be struck between the individual's right to liberty and the State's interest in protecting its population from terrorist threat (*A. and Others v. the United Kingdom*, § 171).

98. The Convention contains no provisions concerning the circumstances in which extradition may be granted, or the procedure to be followed before extradition may be granted. Subject to it being the result of cooperation between the States concerned and provided that the legal basis for the order for the fugitive's arrest is an arrest warrant issued by the authorities of the fugitive's State of origin, even an atypical extradition cannot as such be regarded as being contrary to the Convention (*Öcalan v. Turkey* [GC], § 86; *Adamov v. Switzerland*, § 57).

99. As regards extradition arrangements between States when one is a party to the Convention and the other is not, the rules established by an extradition treaty or, in the absence of any such treaty, the cooperation between the States concerned are also relevant factors to be taken into account for determining whether the arrest that has led to the subsequent complaint to the Court was lawful. The fact that a fugitive has been handed over as a result of cooperation between States does not in itself make the arrest unlawful and does not therefore give rise to any problem under Article 5 (*Öcalan v. Turkey* [GC], § 87).

100. The implementation of an interim measure following an indication by the Court to a State Party that it would be desirable not to return an individual to a particular country does not in itself have any bearing on whether the deprivation of liberty to which that individual may be subject complies with Article 5 § 1 of the Convention (*Gebremedhin [Gaberamadhien] v. France*, § 74). The fact that the application of such a measure prevents the individual's deportation does not render his detention unlawful, provided that the

expulsion proceedings are still pending and the duration of his continued detention is not unreasonable (*S.P. v. Belgium* (dec.), and *Yoh-Ekale Mwanje v. Belgium*, § 120).

## IV. GUARANTEES FOR PERSONS DEPRIVED OF LIBERTY

### A. Information on the reasons for arrest (Article 5 § 2)

#### **Article 5 § 2**

*“Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.”*

#### *1) Applicability*

101. The words used in Article 5 § 2 should be interpreted autonomously and, in particular, in accordance with the aim and purpose of Article 5 which is to protect everyone from arbitrary deprivations of liberty. The term “*arrest*” extends beyond the realm of criminal law measures and the words “*any charge*” do not indicate a condition of applicability but an eventuality which is taken into account. Article 5 § 4 does not make any distinction between persons deprived of their liberty on the basis of whether they have been arrested or detained. Therefore, there are no grounds for excluding the latter from the scope of Article 5 § 2 (*Van der Leer v. the Netherlands*, §§ 27 and 28) which extends to detention for the purposes of extradition (*Shamayev and Others v. Georgia and Russia*, §§ 414 and 415) and medical treatment (*Van der Leer v. the Netherlands, ibidem; X. v. the United Kingdom*, § 66) and also applies where persons have been recalled to places of detention following a period of conditional release (*X. v. the United Kingdom*, § 66; *X v. Belgium*).

#### *2) Purpose*

102. Article 5 § 2 contains the elementary safeguard that any person arrested should know why he is being deprived of his liberty and is an integral part of the scheme of protection afforded by Article 5. Where a person has been informed of the reasons for his arrest or detention, he may, if he sees fit, apply to a court to challenge the lawfulness of his detention in accordance with Article 5 § 4 (*Fox, Campbell and Hartley v. the United Kingdom*, § 40; *Čonka v. Belgium*, § 50).

103. Any person who is entitled to take proceedings to have the lawfulness of his detention decided speedily cannot make effective use of that right unless he is promptly and adequately informed of the reasons why he has been deprived of his liberty (*Van der Leer v. the Netherlands* § 28; *Shamayev and Others v. Georgia and Russia*, § 413).

#### *3) Person to whom the reasons must be provided*

104. It is plain from the wording of Article 5 § 2 that the duty on States is to furnish specific information to the individual or his representative (see Chamber judgment in *Saadi v. the United Kingdom*, § 53, confirmed by the Grand Chamber, 29 January 2008). If the applicant is incapable of receiving the information, the relevant details must be given to those persons who represent his interests such as a lawyer or guardian (*X v. the United Kingdom*, Commission Report, § 106).

#### 4) *Reasons must be provided 'promptly'*

105. Whether the promptness of the information conveyed is sufficient must be assessed in each case according to its special features. However, the reasons need not be related in their entirety by the arresting officer at the very moment of the arrest (*Fox, Campbell and Hartley v. the United Kingdom*, § 40; *Murray v. the United Kingdom* [GC], § 72).

106. The constraints of time imposed by the notion of promptness will be satisfied where the arrested person is informed of the reasons for their arrest within a few hours (*Kerr v. the United Kingdom* (dec.); *Fox, Campbell and Hartley v. the United Kingdom*, § 42).

#### 5) *Manner in which the reasons are provided*

107. The reasons do not have to be set out in the text of any decision authorising detention and do not have to be in writing or in any special form (*X v. Germany*, Commission decision; *Kane v. Cyprus* (dec.)).

108. The reasons for the arrest may be provided or become apparent in the course of post-arrest interrogations or questioning (*Fox, Campbell and Hartley v. the United Kingdom*, § 41; *Murray v. the United Kingdom* [GC], § 77; *Kerr v. the United Kingdom* (dec.)).

109. Arrested persons may not claim a failure to understand the reasons for their arrest in circumstances where they were arrested immediately after the commission of a criminal and intentional act (*Dikme v. Turkey*, § 54) or where they were aware of the details of alleged offences contained within previous arrest warrants and extradition requests (*Öcalan v. Turkey* (dec.)).

#### 6) *Extent of the reasons required*

110. Whether the content of the information conveyed is sufficient must be assessed in each case according to its special features (*Fox, Campbell and Hartley v. the United Kingdom*, § 40). However, a bare indication of the legal basis for the arrest, taken on its own, is insufficient for the purposes of Article 5 § 2 (*ibidem*, § 41; *Murray v. the United Kingdom* [GC], § 76; *Kortesis v. Greece*, §§ 61-62).

111. Arrested persons must be told, in simple, non-technical language that they can understand, the essential legal and factual grounds for the arrest, so as to be able, if they see fit, to apply to a court to challenge its lawfulness in accordance with Article 5 § 4 (*Fox, Campbell and Hartley v. the United Kingdom*, § 40; *Murray v. the United Kingdom* [GC], § 72). However, Article 5 § 2 does not require that the information consist of a complete list of the charges held against the arrested person (*Bordovskiy v. Russia*, § 56; *Nowak v. Ukraine*, § 63; *Gasiņš v. Latvia*, § 53).

112. Where persons are arrested for the purposes of extradition, the information given may be even less complete (*Kaboulov v. Ukraine*, § 144; *Bordovskiy v. Russia*, § 56) as arrest for such purposes does not require a decision on the merits of any charge (*Bejaoui v. Greece*, Commission decision). However, such persons must nonetheless receive sufficient information so as to be able to apply to a court for the review of lawfulness provided for in Article 5 § 4 (*Shamayev and Others v. Georgia and Russia*, § 427).

#### 7) *In a language which he understands*

113. Where the warrant of arrest, if any, is written in a language which the arrested person does not understand, Article 5 § 2 will be complied with where the applicant is subsequently interrogated, and thus made aware of the reasons for his arrest, in a language which he

understands (*Delcourt v. Belgium* (Commission decision of 7 February 1967 referred to in the Commission’s report of 1 October 1968)).

114. However, where translators are used for this purpose, it is incumbent on the authorities to ensure that requests for translation are formulated with meticulousness and precision (*Shamayev and Others v. Georgia and Russia*, § 425).

## B. Right to be brought promptly before a judge (Article 5 § 3)

### Article 5 § 3

*“Everyone arrested or detained in accordance with the provision of paragraph 1(c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power ...”*

#### 1) Aim of the provision

115. Article 5 § 3 of the Convention provides persons arrested or detained on suspicion of having committed a criminal offence with a guarantee against any arbitrary or unjustified deprivation of liberty (*Aquilina v. Malta* [GC], § 47; *Stephens v. Malta (no. 2)*, § 52).

116. Judicial control of interferences by the executive with the individual’s right to liberty is an essential feature of the guarantee embodied in Article 5 § 3 (*Brogan and Others v. the United Kingdom*, § 58; *Pantea v. Romania*, § 236); *Assenov and Others v. Bulgaria*, § 146). Judicial control is implied by the rule of law, “one of the fundamental principles of a democratic society ..., which is expressly referred to in the Preamble to the Convention” and “from which the whole Convention draws its inspiration” (*Brogan and Others v. the United Kingdom*, § 58).

117. Judicial control serves to provide effective safeguards against the risk of ill-treatment, which is at its greatest in this early stage of detention, and against the abuse of powers bestowed on law enforcement officers or other authorities for what should be narrowly restricted purposes and exercisable strictly in accordance with prescribed procedures (*Ladent v. Poland*, § 72).

#### 2) Prompt and automatic judicial control

118. The opening part of Article 5 § 3 is aimed at ensuring prompt and automatic judicial control of police or administrative detention ordered in accordance with the provisions of paragraph 1 (c) (*De Jong, Baljet and Van den Brink v. the Netherlands*, § 51; *Aquilina v. Malta* [GC], §§ 48-49).

119. Judicial control on the first appearance of an arrested individual must above all be prompt, to allow detection of any ill-treatment and to keep to a minimum any unjustified interference with individual liberty. The strict time constraint imposed by this requirement leaves little flexibility in interpretation, otherwise there would be a serious weakening of a procedural guarantee to the detriment of the individual and the risk of impairing the very essence of the right protected by this provision (*McKay v. the United Kingdom* [GC], § 33).

120. Article 5 § 3 does not provide for any possible exceptions from the requirement that a person be brought promptly before a judge or other judicial officer after his or her arrest or detention, not even on grounds of prior judicial involvement (*Bergmann v. Estonia*, § 45).

121. Any period in excess of 4 days is *prima facie* too long (*Oral and Atabay v. Turkey*, § 43; *McKay v. the United Kingdom* [GC], § 47; *Nastase-Silivestru v. Romania*, § 32). Shorter periods can also breach the promptness requirement if there are no special difficulties or

exceptional circumstances preventing the authorities from bringing the arrested person before a judge sooner (*Ipek and Others v. Turkey*, §§ 36-37; and *Kandzhov v. Bulgaria*, § 66).

122. The fact that an arrested person had access to a judicial authority is not sufficient to constitute compliance with the opening part of Article 5 § 3 (*De Jong, Baljet and Van den Brink v. the Netherlands*, § 51; *Pantea v. Romania*, § 231).

123. Judicial control of detention must be automatic and cannot be made to depend on a previous application by the detained person (*McKay v. the United Kingdom* [GC], § 34; *Varga v. Romania*, § 52; *Viorel Burzo v. Romania*, § 107). Such a requirement would not only change the nature of the safeguard provided for under Article 5 § 3, a safeguard distinct from that in Article 5 § 4, which guarantees the right to institute proceedings to have the lawfulness of detention reviewed by a court. It might even defeat the purpose of the safeguard under Article 5 § 3 which is to protect the individual from arbitrary detention by ensuring that the act of deprivation of liberty is subject to independent judicial scrutiny (*Aquilina v. Malta*, § 49; *Niedbala v. Poland*, § 50).

124. The automatic nature of the review is necessary to fulfil the purpose of the paragraph, as a person subjected to ill-treatment might be incapable of lodging an application asking for a judge to review their detention; the same might also be true of other vulnerable categories of arrested person, such as the mentally frail or those ignorant of the language of the judicial officer (*McKay v. the United Kingdom* [GC], § 34; *Ladent v. Poland*, § 74).

### 3) *The nature of the appropriate judicial officer*

125. The expression “*judge or other officer authorised by law to exercise judicial power*” is a synonym for “*competent legal authority*” in Article 5 § 1(c) (*Schiesser v. Switzerland*, § 29).

126. The exercise of “*judicial power*” is not necessarily confined to adjudicating on legal disputes. Article 5 § 3 includes officials in public prosecutors’ departments as well as judges sitting in court (*ibidem*, § 28).

127. The “*officer*” referred to in paragraph 3 must offer guarantees befitting the “*judicial*” power conferred on him by law (*ibidem*, § 30).

128. Formal, visible requirements stated in the ‘law’ as opposed to standard practices are especially important for the identification of the judicial authority empowered to decide on the liberty of an individual (*Hood v. the United Kingdom* [GC], § 60; *De Jong, Baljet and Van den Brink v. the Netherlands*, § 48).

129. The “*officer*” is not identical with the “*judge*” but must nevertheless have some of the latter’s attributes, that is to say he must satisfy certain conditions each of which constitutes a guarantee for the person arrested (*Schiesser v. Switzerland*, § 31).

### 4) *Independence*

130. The first of such conditions is independence of the executive and of the parties. This does not mean that the “*officer*” may not be to some extent subordinate to other judges or officers provided that they themselves enjoy similar independence (*Schiesser v. Switzerland*, § 31).

131. A judicial officer who is competent to decide on detention may also carry out other duties, but there is a risk that his impartiality may arouse legitimate doubt on the part of those subject to his decisions if he is entitled to intervene in the subsequent proceedings as a representative of the prosecuting authority (*Huber v. Switzerland*, § 43; *Brincat v. Italy*, § 20).

132. In this respect, objective appearances at the time of the decision on detention are material: if it then appears that the “*officer authorised by law to exercise judicial power*” may

later intervene in subsequent criminal proceedings on behalf of the prosecuting authority, his independence and impartiality may be open to doubt (*Brincat v. Italy*, § 21; *Hood v. the United Kingdom*, § 57; *Nikolova v. Bulgaria* [GC], § 49; *Pantea v. Romania*, § 236).

#### 5) Procedural requirement

133. The procedural requirement places the “*officer*” under the obligation of hearing the individual brought before him or her in person before taking the appropriate decision (*Schiesser v. Switzerland*, § 31; *De Jong, Baljet and Van den Brink v. the Netherlands*, § 51; *Nikolova v. Bulgaria* [GC], § 49; *Aquilina v. Malta*, § 50).

134. A lawyer’s presence at the hearing is not obligatory (*Schiesser v. Switzerland*, § 36). However, the exclusion of a lawyer from a hearing may adversely affect the applicant’s ability to present his case (*Lebedev v. Russia*, §§ 83-91).

#### 6) Substantive requirement

##### (a) REVIEW OF THE MERITS OF DETENTION

135. The substantive requirement imposes on the “*officer*” the obligations of reviewing the circumstances militating for or against detention and of deciding, by reference to legal criteria, whether there are reasons to justify detention (*Schiesser v. Switzerland*, § 31; *Pantea v. Romania*, § 231). In other words, Article 5 § 3 requires the judicial officer to consider the merits of the detention (*Aquilina v. Malta*, § 47; *Krejčíř v. the Czech Republic*, § 89).

136. The initial automatic review of arrest and detention must be capable of examining lawfulness issues and whether or not there is a reasonable suspicion that the arrested person had committed an offence, in other words, that detention falls within the permitted exception set out in Article 5 § 1(c) (*McKay v. the United Kingdom* [GC], § 40; *Oral and Atabay v. Turkey*, § 41).

137. The matters which the judicial officer must examine go beyond the question of lawfulness. The review required under Article 5 § 3, being intended to establish whether the deprivation of the individual’s liberty is justified, must be sufficiently wide to encompass the various circumstances militating for or against detention (*Aquilina v. Malta*, § 52).

138. The examination of lawfulness may be more limited in scope in the particular circumstances of a given case than under Article 5 § 4 (*Stephens v. Malta (no. 2)*, § 58).

##### (b) POWER OF RELEASE

139. If there are no reasons to justify detention, the “*officer*” must have the power to make a binding order for the detainee’s release (*Assenov and Others v. Bulgaria*, § 146; *Nikolova v. Bulgaria* [GC], § 49; *Niedbala v. Poland*, § 49; *McKay v. the United Kingdom* [GC], § 40).

140. It is highly desirable in order to minimise delay, that the judicial officer who conducts the first automatic review of lawfulness and the existence of a ground for detention, also has the competence to consider release on bail. It is not however a requirement of the Convention and there is no reason in principle why the issues cannot be dealt with by two judicial officers, within the requisite time frame. In any event, as a matter of interpretation, it cannot be required that the examination of bail take place with any more speed than is demanded of the first automatic review, which the Court has identified as being a maximum four days (*McKay v. the United Kingdom* [GC], § 47).

### C. Right to trial within a reasonable time or to be released pending trial (Article 5 § 3)

#### Article 5 § 3

“Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article ... shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.”

#### 1) Period to be taken into consideration

141. In determining the length of detention pending trial under Article 5 § 3 of the Convention, the period to be taken into consideration begins on the day the accused is taken into custody and ends on the day when the charge is determined, even if only by a court of first instance (see, for example, *Solmaz v. Turkey*, §§ 23-24; *Kalashnikov v. Russia*, § 110; *Wemhoff v. Germany*, § 9).

142. In view of the essential link between Article 5 § 3 of the Convention and paragraph 1 (c) of that Article, a person convicted at first instance cannot be regarded as being detained “for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence”, as specified in the latter provision, but is in the position provided for by Article 5 § 1(a), which authorises deprivation of liberty “after conviction by a competent court” (see, among numerous authorities, *Belevitskiy v. Russia*, § 99; *Piotr Baranowski v. Poland*, § 45; *Górski v. Poland*, § 41).

#### 2) General principles

143. The second limb of Article 5 § 3 does not give judicial authorities a choice between either bringing an accused to trial within a reasonable time or granting him provisional release pending trial. Until conviction, he must be presumed innocent, and the purpose of the provision under consideration is essentially to require his provisional release once his continuing detention ceases to be reasonable.

144. Continued detention therefore can be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty laid down in Article 5 of the Convention.

145. The responsibility falls in the first place to the national judicial authorities to ensure that, in a given case, the pre-trial detention of an accused person does not exceed a reasonable time. To this end they must, paying due regard to the principle of the presumption of innocence, examine all the facts arguing for or against the existence of the above-mentioned demand of public interest justifying a departure from the rule in Article 5 and must set them out in their decisions on the applications for release. It is essentially on the basis of the reasons given in these decisions and of the established facts stated by the applicant in his appeals that the Court is called upon to decide whether or not there has been a violation of Article 5 § 3.

146. The persistence of reasonable suspicion that the person arrested has committed an offence is a condition *sine qua non* for the lawfulness of the continued detention, but with the lapse of time this no longer suffices and the Court must then establish whether the other grounds given by the judicial authorities continued to justify the deprivation of liberty. Where such grounds were “relevant” and “sufficient”, the Court must also be satisfied that the national authorities displayed “special diligence” in the conduct of the proceedings.



147. In sum, domestic courts are under an obligation to review the continued detention of persons pending trial with a view to ensuring release when circumstances no longer justify continued deprivation of liberty. For at least an initial period, the existence of reasonable suspicion may justify detention but there comes a moment when this is no longer enough. As the question whether or not a period of detention is reasonable cannot be assessed in the abstract but must be assessed in each case according to its special features, there is no fixed time-frame applicable to each case (*McKay v. the United Kingdom* [GC], §§ 41-45; *Bykov v. Russia* [GC], §§ 61-64; *Idalov v. Russia* [GC], §§ 139-141; see also *Labita v. Italy* [GC], §§ 152-153; and *Kudla v. Poland* [GC], §§ 110-111).

148. The arguments for and against release must not be “*general and abstract*” (*Boicenco v. Moldova*, § 142; *Khudoyorov v. Russia*, § 173), but contain references to the specific facts and the applicant’s personal circumstances justifying his detention (*Aleksanyan v. Russia*, § 179).

149. Quasi-automatic prolongation of detention contravenes the guarantees set forth in Article 5 § 3 (*Tase v. Romania*, § 40).

150. The burden of proof in these matters should not be reversed by making it incumbent on the detained person to demonstrate the existence of reasons warranting his release (*Bykov v. Russia* [GC], § 64).

151. Where circumstances that could have warranted a person's detention may have existed but were not mentioned in the domestic decisions it is not the Court's task to establish them and to take the place of the national authorities which ruled on the applicant's detention (*Bykov v. Russia* [GC], § 66; *Giorgi Nikolaishvili v. Georgia*, § 77). It is only by giving a reasoned decision that there can be public scrutiny of the administration of justice (*Tase v. Romania*, § 41).

### 3) *Grounds for continued detention*

152. The Convention case-law has developed four basic acceptable reasons for refusing bail: a) the risk that the accused will fail to appear for trial; b) the risk that the accused, if released, would take action to prejudice the administration of justice, or; c) commit further offences, or; d) cause public disorder (*Tiron v. Romania*, § 37; *Smirnova v. Russia*, § 59; *Piruzyan v. Armenia*, § 94).

153. **Danger of absconding:** The danger of absconding cannot be gauged solely on the basis of the severity of the sentence risked. It must be assessed with reference to a number of other relevant factors which may either confirm the existence of a danger of absconding or make it appear so slight that it cannot justify pre-trial detention (*Panchenko v. Russia*, § 106).

154. The risk of absconding has to be assessed in light of the factors relating to the person’s character, his morals, home, occupation, assets, family ties and all kinds of links with the country in which he is being prosecuted (*Becciev v. Moldova*, § 58).

155. The mere absence of a fixed residence does not give rise to a danger of flight (*Sulaoja v. Estonia*, § 64).

156. The danger of flight necessarily decreases with the passages of time spent in detention (*Neumeister v. Austria*, § 10).

157. While the severity of the sentence faced is a relevant element in the assessment of the risk that an accused might abscond, the gravity of the charges cannot by itself serve to justify long periods of detention on remand (*Idalov v. Russia* [GC], § 145; *Garycki v. Poland*, § 47, 6 February 2007; *Chraidi v. Germany*, § 40; *Ilijkov v. Bulgaria*, §§ 80-81).

158. Although, in general, the expression “*the state of evidence*” may be a relevant factor for the existence and persistence of serious indications of guilt, it alone cannot justify lengthy detention (*Dereci v. Turkey*, § 38).

159. **Obstruction of the proceedings:** The danger of the accused's hindering the proper conduct of the proceedings cannot be relied upon *in abstracto*, it has to be supported by factual evidence (*Becciev v. Moldova*, § 59).

160. The risk of pressure being brought to bear on witnesses can be accepted at the initial stages of the proceedings (*Jarzynski v. Poland*, § 43).

161. In the long term, however, the requirements of the investigation do not suffice to justify the detention of a suspect: in the normal course of events the risks alleged diminish with the passing of time as the inquiries are effected, statements taken and verifications carried out (*Clooth v. Belgium*, § 44).

162. **Repetition of offences:** The seriousness of a charge may lead the judicial authorities to place and leave a suspect in detention on remand in order to prevent any attempts to commit further offences. It is however necessary that the danger be a plausible one and the measure appropriate, in the light of the circumstances of the case and in particular the past history and the personality of the person concerned (*Clooth v. Belgium*, § 40).

163. Previous convictions could give a ground for a reasonable fear that the accused might commit a new offence (*Selçuk v. Turkey*, § 34; *Matznetter v. Austria*, § 9).

164. It cannot be concluded from the lack of a job or a family that a person is inclined to commit new offences (*Sulaoja v. Estonia*, § 64).

165. **Preservation of public order:** It is accepted that, by reason of their particular gravity and public reaction to them, certain offences may give rise to a social disturbance capable of justifying pre-trial detention, at least for a time. In exceptional circumstances this factor may therefore be taken into account for the purposes of the Convention, in any event in so far as domestic law recognises the notion of disturbance to public order caused by an offence.

166. However, this ground can be regarded as relevant and sufficient only provided that it is based on facts capable of showing that the accused's release would actually disturb public order. In addition, detention will continue to be legitimate only if public order remains actually threatened; its continuation cannot be used to anticipate a custodial sentence (*Letellier v. France*, § 51; *I.A. v. France*, § 104; *Prencipe v. Monaco*, § 79; *Tiron v. Romania*, §§ 41-42).

#### 4) *Special diligence*

167. The complexity and special characteristics of the investigation are factors to be considered in ascertaining whether the authorities displayed "*special diligence*" in the proceedings (*Scott v. Spain*, § 74).

168. The right of an accused in detention to have his case examined with particular expedition must not unduly hinder the efforts of the judicial authorities to carry out their tasks with proper care (*Shabani v. Switzerland*, § 65; *Sadegül Özdemir v. Turkey*, § 44);

#### 5) *Alternative measures*

169. When deciding whether a person should be released or detained, the authorities are obliged to consider alternative measures of ensuring his appearance at trial (*Idalov v. Russia* [GC], § 140). That provision proclaims not only the right to "*trial within a reasonable time or to release pending trial*" but also lays down that "*release may be conditioned by guarantees to appear for trial*" (*Khudoyorov v. Russia*, § 183; *Lelièvre v. Belgium*, § 97; *Shabani v. Switzerland*, § 62).

### 6) Bail

170. The guarantee provided for by Article 5 § 3 of the Convention is designed to ensure not the reparation of loss but, in particular, the appearance of the accused at the hearing. Its amount must therefore be assessed principally “by reference to [the accused], his assets and his relationship with the persons who are to provide the security, in other words to the degree of confidence that is possible that the prospect of loss of the security or of action against the guarantors in case of his non-appearance at the trial will act as a sufficient deterrent to dispel any wish on his part to abscond” (*Mangouras v. Spain* [GC], § 78; *Neumeister v. Austria*, § 14).

171. Bail may only be required as long as reasons justifying detention prevail (*Musuc v. Moldova*, § 42; *Aleksandr Makarov v. Russia*, § 139). If the risk of absconding can be avoided by bail or other guarantees, the accused must be released, bearing in mind that where a lighter sentence could be anticipated, the reduced incentive for the accused to abscond should be taken into account (*Vrenčev v. Serbia*, § 76). The authorities must take as much care in fixing appropriate bail as in deciding whether or not the accused’s continued detention is indispensable (see, among other authorities, *Piotr Osuch v. Poland*, § 39; *Bojilov v. Bulgaria*, § 60; *Skrobol v. Poland*, § 57).

172. Furthermore, the amount set for bail must be duly justified in the decision fixing bail (*Georgieva v. Bulgaria*, §§ 15, 30 and 31) and must take into account the accused’s means (*Hristova v. Bulgaria*, § 111) and his capacity to pay (*Toshev v. Bulgaria*, §§ 69-73). In certain circumstances it may not be unreasonable to take into account also the amount of the loss imputed to him (*Mangouras v. Spain* [GC], §§ 81 and 92).

173. Automatic refusal of bail by virtue of the law, devoid of any judicial control, is incompatible with the guarantees of Article 5 § 3 (*Piruzyan v. Armenia*, §105; *S.B.C. v. the United Kingdom*, §§ 23-24).

### 7) Justification for any period of detention

174. Article 5 § 3 of the Convention cannot be seen as authorising pre-trial detention unconditionally provided that it lasts no longer than a certain minimum period. Justification for any period of detention, no matter how short, must be convincingly demonstrated by the authorities (*Idalov v. Russia* [GC], § 140; *Tase v. Romania*, § 40; *Castravet v. Moldova*, § 33; *Belchev v. Bulgaria*, § 82).

### 8) Pre-trial detention of minors

175. The pre-trial detention of minors should be used only as a measure of last resort; it should be as short as possible and, where detention is strictly necessary, minors should be kept apart from adults (*Nart v. Turkey*, § 31; *Güveç v. Turkey*, § 109).

## D. Right to have lawfulness of detention speedily examined by a Court (Article 5 § 4)

### Article 5 § 4

“Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.”

#### 1) Aim of the provision

176. Article 5 § 4 is the *habeas corpus* provision of the Convention. It provides detained persons with the right to actively seek a judicial review of their detention (*Mooren v. Germany* [GC], § 106; *Rakevich v. Russia*, § 43).

177. The fact that the Court has found no breach of the requirements of Article 5 § 1 of the Convention does not mean that it is dispensed from carrying out a review of compliance with Article 5 § 4. The two paragraphs are separate provisions and observance of the former does not necessarily entail observance of the latter (*Douiyeb v. the Netherlands* [GC], § 57; *Kolompar v. Belgium*, § 45).

#### 2) The nature of the review required

178. Article 5 § 4 entitles an arrested or detained person is entitled to bring proceedings for review by a court of the procedural and substantive conditions which are essential for the “lawfulness”, in the sense of Article 5 § 1, of his or her deprivation of liberty (see, among many authorities, *Idalov v. Russia* [GC], § 161; *Reinprecht v. Austria*, § 31).

179. If a person is detained under Article 5 § 1(c) of the Convention, the “court” must be empowered to examine whether or not there is sufficient evidence to give rise to a reasonable suspicion that he or she has committed an offence, because the existence of such a suspicion is essential if detention on remand is to be “lawful” under the Convention (*Nikolova v. Bulgaria* [GC], § 58).

180. Where a person is deprived of his liberty pursuant to a conviction by a competent court, the supervision required by Article 5 § 4 is incorporated in the decision by the court at the close of judicial proceedings (*De Wilde, Ooms and Versyp v. Belgium*, § 76) and no further review is therefore required. However, in cases where the grounds justifying the person’s deprivation of liberty are susceptible to change with the passage of time, the possibility of recourse to a body satisfying the requirements of Article 5 § 4 of the Convention is required (*Kafkaris v. Cyprus* (no. 2) (dec.)).

181. The “court” to which the detained person has access for the purposes of Article 5 § 4 does not have to be a court of law of the classical kind integrated within the standard judicial machinery of the country (*Weeks v. the United Kingdom*, § 61). It must however be a body of “judicial character” offering certain procedural guarantees. Thus the “court” must be independent both of the executive and of the parties to the case (*Stephens v. Malta* (no. 1), § 95).

182. To satisfy the requirements of the Convention the review of the national court should comply with both the substantial and procedural rules of the national legislation and be conducted in conformity with the aim of Article 5, the protection of the individual against arbitrariness (*Koendjiharie v. the Netherlands*, § 27).

183. Although Article 5 § 4 does not compel the Contracting States to set up a second level of jurisdiction for the examination of the lawfulness of detention, a State which institutes such a system must in principle accord to the detainees the same guarantees on

appeal as at first instance (*Kučera v. Slovakia*, § 107; *Navarra v. France*, § 28; *Toth v. Austria*, § 84).

184. Article 5 § 4 does not impose an obligation on a court examining an appeal against detention to address every argument contained in the appellant's submissions. However, the court cannot treat as irrelevant, or disregard, concrete facts invoked by the detainee and capable of putting into doubt the existence of the conditions essential for the "lawfulness," in the sense of the Convention, of the deprivation of liberty (*Ilijkov v. Bulgaria*, § 94).

185. The "court" must have the power to order release if it finds that the detention is unlawful; a mere power of recommendation is insufficient (*Benjamin and Wilson v. the United Kingdom*, §§ 33 and 34).

### 3) Procedural guarantees

186. The requirement of procedural fairness under Article 5 § 4 does not impose a uniform, unvarying standard to be applied irrespective of the context, facts and circumstances. Although it is not always necessary that an Article 5 § 4 procedure be attended by the same guarantees as those required under Article 6 for criminal or civil litigation, it must have a judicial character and provide guarantees appropriate to the type of deprivation of liberty in question (*A. and Others v. the United Kingdom* [GC], § 203; *Idalov v. Russia* [GC], § 161).

187. In the case of a person whose detention falls within the ambit of Article 5 § 1 (c), a hearing is required (*Nikolova v. Bulgaria* [GC], § 58). The opportunity for a detainee to be heard either in person or through some form of representation features among the fundamental guarantees of procedure applied in matters of deprivation of liberty (*Kampanis v. Greece*, § 47).

However, Article 5 § 4 does not require that a detained person be heard every time he lodges an appeal against a decision extending his detention, but that it should be possible to exercise the right to be heard at reasonable intervals (*Çatal v. Turkey*, § 33; *Altınok v. Turkey*, § 45).

188. The proceedings must be adversarial and must always ensure "equality of arms" between the parties (*Reinprecht v. Austria*, § 31; *A. and Others v. the United Kingdom* [GC], § 204). In remand cases, since the persistence of a reasonable suspicion that the accused person has committed an offence is a condition *sine qua non* for the lawfulness of the continued detention, the detainee must be given an opportunity effectively to challenge the basis of the allegations against him. This may require the court to hear witnesses whose testimony appears to have a bearing on the continuing lawfulness of the detention (*Turcan v. Moldova*, §§ 67-70.). It may also require that the detainee or his representative be given access to documents in the case-file which form the basis of the prosecution case against him (*Fodale v. Italy*; *Korneykova v. Ukraine*, § 68).

189. The principle of adversarial proceedings and equality of arms must equally be respected in the proceedings before the appeal court (see *Çatal v. Turkey*, §§ 33-34 and the cases referred to therein).

### 4) The "speediness" requirement

190. Article 5 § 4, in guaranteeing to detained persons a right to institute proceedings to challenge the lawfulness of their detention, also proclaims their right, following the institution of such proceedings, to a speedy judicial decision concerning the lawfulness of detention and the ordering of its termination if it proves unlawful (*Idalov v. Russia* [GC], § 154; *Baranowski v. Poland*, § 68). The question whether the right to a speedy decision has been respected must be determined in the light of the circumstances of each case (*Rehbock v. Slovenia*, § 84).

191. The opportunity for legal review must be provided soon after the person is taken into detention and thereafter at reasonable intervals if necessary (*Molotchko v. Ukraine*, § 148; *Varbanov v. Bulgaria*, § 45; *Kurt v. Turkey*, § 123).

192. The notion of “*speedily*” (*à bref délai*) indicates a lesser urgency than that of “*promptly*” (*aussitôt*) in Article 5 § 3 (*E. v. Norway*, § 64; *Brogan and Others v. the United Kingdom* § 59).

**(a) THE PERIOD TO BE TAKEN INTO CONSIDERATION**

193. The Court has taken as a starting point the moment that the application for release was made/proceedings were instituted. The relevant period comes to an end with the final determination of the legality of the applicant’s detention, including any appeal (*Sanchez-Reisse v. Switzerland*, § 54; *E. v. Norway*, § 64).

194. If an administrative remedy has to be exhausted before recourse can be had to a court, time begins to run when the administrative authority is seized of the matter (*Sanchez-Reisse v. Switzerland*, § 54).

195. If the proceedings have been conducted over two levels of jurisdiction, an overall assessment must be made in order to determine whether the requirement of “*speedily*” has been complied with (*Hutchison Reid v. the United Kingdom*, § 78; *Navarra v. France*, § 28).

**(b) RELEVANT FACTORS TO BE TAKEN INTO CONSIDERATION WHEN ASSESSING SPEEDINESS**

196. The term “*speedily*” cannot be defined in the abstract. As with the “*reasonable time*” stipulations in Article 5 § 3 and Article 6 § 1 it must be determined in the light of the circumstances of the individual case (*R.M.D. v. Switzerland*, § 42).

197. In assessing the speedy character required by Article 5 § 4, comparable factors may be taken into consideration as those which play a role with respect to the requirement of trial within a reasonable time under Article 5 § 3 and Article 6 § 1 of the Convention such as, the diligence shown by the authorities, any delay caused by the detained person and any other factors causing delay that do not engage the state’s responsibility (*Mooren v. Germany* [GC], § 106; *Kolompar v. Belgium*, § 42).

198. Where one year per instance may be a rough rule of thumb in Article 6 § 1 cases, Article 5 § 4, concerning issues of liberty, requires particular expedition (*Panchenko v. Russia*, § 117). Where an individual’s personal liberty is at stake, the Court has very strict standards concerning the State’s compliance with the requirement of speedy review of the lawfulness of detention (see, for example, *Kadem v. Malta*, §§ 44-45, where the Court considered a time-period of seventeen days in deciding on the lawfulness of the applicant’s detention to be excessive, and *Mamedova v. Russia*, § 96, where the length of appeal proceedings lasting, *inter alia*, twenty-six days, was found to be in breach of the “*speediness*” requirement).

199. Where the determination involves complex issues – such as the detained person’s medical condition – this may be taken into account when considering how long is “*reasonable*” under Article 5 § 4. However, even in complex cases, there are factors which require the authorities to carry out a particularly speedy review, including the presumption of innocence in the case of pre-trial detention (*Frasik v. Poland*, § 63; *Jablonski v. Poland*, §§ 91-93).

200. Detention on remand in criminal cases calls for short intervals between reviews (*Bezicheri v. Italy*, § 21).

201. If the length of time before a decision is taken is *prima facie* incompatible with the notion of speediness, the Court will look to the State to explain the reason for the delay or to

put forward exceptional grounds to justify the lapse of time in question (*Musiał v. Poland* [GC], § 44; *Koendjibiharie v. the Netherlands*, § 29).

202. Neither an excessive workload nor a vacation period can justify a period of inactivity on the part of the judicial authorities (*E. v. Norway*, § 66; *Bezicheri v. Italy*, § 25).

## E. Right to compensation for unlawful detention (Article 5 § 5)

### Article 5 § 5

“Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.”

#### 1) Applicability

203. The right to compensation set forth in paragraph 5 presupposes that a violation of one of the other paragraphs has been established, either by a domestic authority or by the Court (see, among many other authorities, *N.C. v. Italy* [GC], § 49; *Pantea v. Romania*, § 262; *Vachev v. Bulgaria*, § 78).

204. In the absence of a finding by a domestic authority of a breach of any of the other provisions of Article 5, either directly or in substance, the Court itself must first establish the existence of such a breach for Article 5 § 5 to apply (see, for example, *Nechiporuk and Yonkalo v. Ukraine*, §§ 227 and 229; *Yankov v. Bulgaria*, §§ 190-193).

205. The applicability of Article 5 § 5 is not dependant on a domestic finding of unlawfulness or proof that but for the breach the person would have been released (*Blackstock v. the United Kingdom*, § 51; *Waite v. the United Kingdom*, § 73). The arrest or detention may be lawful under domestic law, but still in breach of Article 5, which makes Article 5 § 5 applicable (*Harkmann v. Estonia*, § 50).

#### 2) Judicial remedy

206. Article 5 § 5 creates a direct and enforceable right to compensation before the national courts (see *A. and Others v. the United Kingdom* [GC], § 229; *Storck v. Germany*, § 122).

#### 3) Availability of compensation

207. Article 5 § 5 is complied with where it is possible to apply for compensation in respect of a deprivation of liberty effected in conditions contrary to paragraphs 1, 2, 3 or 4 (see as more recent authorities, *Michalák v. Slovakia*, § 204; *Lobanov v. Russia*, § 54).

208. An enforceable right to compensation must be available either before or after the Court’s judgment (*Stanev v. Bulgaria* [GC], §§ 183-184; *Brogan and Others v. the United Kingdom*, § 67).

209. The effective enjoyment of the right to compensation must be ensured with a sufficient degree of certainty (see, for example, *Ciulla v. Italy*, § 44; *Sakik and Others v. Turkey*, § 60). Compensation must be available both in theory (*Dubovik v. Ukraine*, § 74) and practice (*Chitayev and Chitayev v. Russia*, § 195).

210. In considering compensation claims, the domestic authorities are required to interpret and apply domestic law in the spirit of Article 5, without excessive formalism (*Shulgin v. Ukraine*, § 65; *Houtman and Meeus v. Belgium*, § 46).

#### 4) *Nature of compensation*

211. The right to compensation relates primarily to financial compensation. It does not confer a right to secure the detained person's release, which is covered by Article 5 § 4 of the Convention (*Bozano v. France*, Commission decision).

212. Crediting a period of pre-trial detention towards a penalty does not amount to compensation required by Article 5 § 5, because of its non-financial character (*Włoch v. Poland (no. 2)*, § 32).

#### 5) *Existence of damage*

213. Article 5 § 5 does not prohibit the Contracting States from making the award of compensation dependent upon the ability of the person concerned to show damage resulting from the breach. There can be no question of "compensation" where there is no pecuniary or non-pecuniary damage to compensate (*Wassink v. the Netherlands*, § 38).

214. However, excessive formalism in requiring proof of non-pecuniary damage resulting from unlawful detention is not compliant with the right to compensation (*Danev v. Bulgaria*, §§ 34-35).

#### 6) *Amount of compensation*

215. Article 5 § 5 of the Convention does not entitle the applicant to a particular amount of compensation (*Damian-Burueana and Damian v. Romania*, § 89; *Çağdaş Şahin v. Turkey*, § 34).

216. However, compensation which is negligible or disproportionate to the seriousness of the violation would not comply with the requirements of Article 5 § 5 as this would render the right guaranteed by that provision theoretical and illusory (*Cumber v. the United Kingdom*, Commission decision; *Attard v. Malta* (dec.)).

217. An award cannot be considerably lower than that awarded by the Court in similar cases (*Ganea v. Moldova*, § 30; *Cristina Boicenco v. Moldova*, § 43).



## LIST OF JUDGMENTS AND DECISIONS

The Court delivers its judgments and decisions in English and/or French, its two official languages. The hyperlinks to the cases cited in the Guide are linked to the original text of the judgment or decision. The Court's judgments and decisions can be found in the HUDOC database on the Court website ([www.echr.coe.int](http://www.echr.coe.int)). HUDOC also contains translations of many important cases into some twenty non-official languages, and links to around one hundred online case-law collections produced by third parties.

- A. and Others v. Bulgaria*, no. 51776/08, 29 November 2011  
*A. and Others v. the United Kingdom* [GC], no. 3455/05, ECHR 2009  
*Adamov v. Switzerland*, no. 3052/06, 21 June 2011  
*Airey v. Ireland*, no. 6289/73, Commission decision of 7 July 1977, D.R. 8, p. 42  
*Aleksandr Makarov v. Russia*, no. 15217/07, 12 March 2009  
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*Altınok v. Turkey*, no. 31610/08, 29 November 2011  
*Ambruszkiewicz v. Poland*, no. 38797/03, 4 May 2006  
*Amuur v. France*, 25 June 1996, *Reports of Judgments and Decisions* 1996-III  
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