



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

## Guide on Article 5 of the European Convention on Human Rights

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Right to liberty and security

Updated on 30 April 2020

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## Note to readers

This Guide is part of the series of Guides on the Convention published by the European Court of Human Rights (hereafter “the Court”, “the European Court” or “the Strasbourg Court”) to inform legal practitioners about the fundamental judgments and decisions delivered by the Strasbourg Court. This particular Guide analyses and sums up the case-law on Article 5 of the European Convention on Human Rights (hereafter “the Convention” or “the European Convention”). Readers will find herein the key principles in this area and the relevant precedents.

The case-law cited has been selected among the leading, major, and/or recent judgments and decisions.\*

The Court’s judgments and decisions serve not only to decide those cases brought before it but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties (*Ireland v. the United Kingdom*, § 154, 18 January 1978, Series A no. 25, and, more recently, *Jeronovičs v. Latvia* [GC], no. 44898/10, § 109, 5 July 2016).

The mission of the system set up by the Convention is thus to determine issues of public policy in the general interest, thereby raising the standards of protection of human rights and extending human rights jurisprudence throughout the community of the Convention States (*Konstantin Markin v. Russia* [GC], § 89, no. 30078/06, ECHR 2012). Indeed, the Court has emphasised the Convention’s role as a “constitutional instrument of European public order” in the field of human rights (*Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, § 156, ECHR 2005-VI).

This Guide contains references to keywords for each cited Article of the Convention and its Additional Protocols. The legal issues dealt with in each case are summarised in a [List of keywords](#), chosen from a thesaurus of terms taken (in most cases) directly from the text of the Convention and its Protocols.

The [HUDOC database](#) of the Court’s case-law enables searches to be made by keyword. Searching with these keywords enables a group of documents with similar legal content to be found (the Court’s reasoning and conclusions in each case are summarised through the keywords). Keywords for individual cases can be found by clicking on the Case Details tag in HUDOC. For further information about the HUDOC database and the keywords, please see the [HUDOC user manual](#).

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\* The case-law cited may be in either or both of the official languages (English and French) of the Court and the European Commission of Human Rights. Unless otherwise indicated, all references are to a judgment on the merits delivered by a Chamber of the Court. The abbreviation “(dec.)” indicates that the citation is of a decision of the Court and “[GC]” that the case was heard by the Grand Chamber. Chamber judgments that were not final when this update was published are marked with an asterisk (\*).

### Article 5 of the Convention – 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:

- (a) the lawful detention of a person after conviction by a competent court;
- (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;
- (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 or fleeing after having done so;
- (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;
- (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;
- (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.

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.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

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.

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.”

### HUDOC keywords

1. Liberty of person (5-1) – Security of person (5-1) – Deprivation of liberty (5-1) – Procedure prescribed by law (5-1) – Lawful arrest or detention (5-1)

(a) Conviction (5-1-a) – After conviction (5-1-a) – Competent court (5-1-a)

(b) Lawful order of a court (5-1-b) – Non-compliance with court order (5-1-b) – Secure fulfilment of obligation prescribed by law (5-1-b)

(c) Bringing before competent legal authority (5-1-c) – Criminal offence (5-1-c) – Reasonable suspicion (5-1-c) – Reasonably necessary to prevent offence (5-1-c) – Reasonably necessary to prevent fleeing (5-1-c)

(d) Minors (5-1-d) – Educational supervision (5-1-d) – Bringing before competent authority (5-1-d)

(e) Prevention of spreading of infectious diseases (5-1-e) – Persons of unsound mind (5-1-e) – Alcoholics (5-1-e) – Drug addicts (5-1-e) – Vagrants (5-1-e)

(f) Prevent unauthorised entry into country (5-1-f) – Expulsion (5-1-f) – Extradition (5-1-f)

2. Prompt information (5-2) – Information in language understood (5-2) – Information on reasons for arrest (5-2) – Information on charge (5-2)

3. Judge or other officer exercising judicial power (5-3) – Brought promptly before judge or other officer (5-3) – Trial within a reasonable time (5-3) – Release pending trial (5-3) – Length of pre-trial detention (5-3) – Reasonableness of pre-trial detention (5-3) – Conditional release (5-3) – Guarantees to appear for trial (5-3)

4. Review of lawfulness of detention (5-4) – Take proceedings (5-4) – Review by a court (5-4) – Speediness of review (5-4) – Procedural guarantees of review (5-4) – Order release (5-4)

5. Compensation (5-5)

## I. Scope of application

### Article 5 § 1 of the Convention

“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: ...”

### HUDOC keywords

Liberty of person (5-1) – Security of person (5-1) – Deprivation of liberty (5-1) – Procedure prescribed by law (5-1) – Lawful arrest or detention (5-1)

### A. 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 (*De Tommaso v. Italy* [GC], § 80; *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 (*De Tommaso v. Italy* [GC], § 80; *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).

### B. 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 (*Khlaifia and Others v. Italy* [GC], § 71; *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 (*De Tommaso v. Italy* [GC], § 80; *Guzzardi v. Italy*, § 92; *Medvedyev and Others v. France* [GC], § 73; *Creangă v. Romania* [GC], § 91).

6. The requirement to take account of the “type” and “manner of implementation” of the measure in question enables the Court to have regard to the specific context and circumstances surrounding types of restriction other than the paradigm of confinement in a cell. Indeed, the context in which the measure is taken is an important factor, since situations commonly occur in modern society where the public may be called on to endure restrictions on freedom of movement or liberty in the interests of the common good (*De Tommaso v. Italy* [GC], § 81; *Nada v. Switzerland* [GC], § 226; *Austin and Others v. the United Kingdom* [GC], § 59).

7. In determining the distinction between a restriction on liberty of movement and deprivation of liberty in the context of confinement of foreigners in airport transit zones and reception centres for the identification and registration of migrants, the factors taken into consideration by the Court may



be summarised as follows: i) the applicants' individual situation and their choices, ii) the applicable legal regime of the respective country and its purpose, iii) the relevant duration, especially in the light of the purpose and the procedural protection enjoyed by applicants pending the events, and iv) the nature and degree of the actual restrictions imposed on or experienced by the applicants (*Z.A. and Others v. Russia* [GC], § 138; *Ilias and Ahmed v. Hungary* [GC], § 217).

8. Even measures intended for protection or taken in the interest of the person concerned may be regarded as a deprivation of liberty (*Khlaifia and Others v. Italy* [GC], § 71).

9. The purpose of measures taken by the authorities depriving individuals of their liberty is not decisive for the assessment of whether there has in fact been a deprivation of liberty. The Court takes this into account only at a later stage of its analysis, when examining the compatibility of the measures with Article 5 § 1 (*Rozhkov v. Russia (no. 2)*, § 74).

10. 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).

11. 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 (*Guzzardi v. Italy*, § 95; *H.M. v. Switzerland*, § 45; *H.L. v. the United Kingdom*, § 91; *Storck v. Germany*, § 73). However, where an eight-year-old child was left alone in a police station for over twenty-four hours, it was not necessary to assess whether he had been kept in closed and guarded premises, since he could not be expected to leave the police station alone (*Tarak and Depe v. Turkey*, § 61).

12. 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, *Zelčs v. Latvia\**, § 40).

13. An element of coercion in the exercise of police powers of stop and search is indicative of a deprivation of liberty, notwithstanding the short duration of the measure (*Krupko and Others v. Russia*, § 36; *Foka v. Turkey*, § 78; *Gillan and Quinton v. the United Kingdom*, § 57; *Shimovolos v. Russia*, § 50; *Brega and Others v. Moldova*, § 43).

14. The fact that a person is not handcuffed, put in a cell or otherwise physically restrained does not constitute a decisive factor in establishing the existence of a deprivation of liberty (*M.A. v. Cyprus*, § 193).

15. 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; see also *N. v. Romania*, §§ 165-167, where the applicant's continued detention after the decision ordering his release was found to be arbitrary, even though the applicant had agreed to remain in detention until such time as the social services found an appropriate solution to his situation).

16. The fact that a person lacks legal capacity does not necessarily mean that he is unable to understand and consent to situation (*ibid.*, § 130; *Shtukaturov v. Russia*, §§ 107-09; *D.D. v. Lithuania*, § 150).

### C. Measures adopted within a prison

17. 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.); see also *Munjaz v. the United Kingdom*, where the applicant's seclusion in a high-security hospital did not amount to a further deprivation of liberty).

## D. Security checks of air travellers

18. Where a passenger has been stopped by border officials during border control in an airport in order to clarify his situation and where this detention has not exceeded the time strictly necessary to comply with relevant formalities, no issue arises under Article 5 of the Convention (*Gahramanov v. Azerbaijan* (dec.), § 41; see, by contrast, *Kasparov v. Russia* where the applicant's five-hour detention went far beyond the time strictly necessary for verifying the formalities normally associated with airport travel).

## E. Deprivation of liberty outside formal arrest and detention

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

- the placement of individuals in psychiatric or social care institutions (*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 (*Z.A. and Others v. Russia* [GC]; *Amuur v. France*; *Shamsa v. Poland*; *Mogoş and Others v. Romania* (dec.); *Mahdid and Haddar v. Austria* (dec.); *Riad and Idiab v. Belgium*);
- confinement in land border transit zones (*Ilias and Ahmed v. Hungary* [GC]);
- questioning in a police station (*Cazan v. Romania*; *I.I. v. Bulgaria*; *Osypenko v. Ukraine*; *Salayev v. Azerbaijan*; *Farhad Aliyev v. Azerbaijan*; *Creangă v. Romania* [GC]);
- placement in a police car to draw up an administrative-offence report (*Zelčs v. Latvia*\*);
- stops and searches by the police (*Foka v. Turkey*; *Gillan and Quinton v. the United Kingdom*; *Shimovolos v. Russia*);
- house search (*Stănculeanu v. Romania*);
- police escorting (*Rozhkov v. Russia (no. 2)*; *Tsvetkova and Others v. Russia*);
- crowd control measures adopted by the police on public order grounds (*Austin and Others v. the United Kingdom* [GC]);
- house arrest (*Buzadji v. the Republic of Moldova* [GC]; *Mancini v. Italy*; *Lavents v. Latvia*; *Nikolova v. Bulgaria (no. 2)*; *Dacosta Silva v. Spain*).
- holding sea-migrants in reception facilities and on ships (*Khlaifia and Others v. Italy* [GC]);
- keeping irregular migrants in asylum hotspot facilities (*J.R. and Others v. Greece*).

## F. Positive obligations with respect to deprivation of liberty

20. Article 5 § 1, first sentence, lays down a positive obligation on the State not only to refrain from active infringement of the rights in question, but also to take appropriate steps to provide protection against an unlawful interference with those rights to everyone within its jurisdiction (*El-Masri v. the former Yugoslav Republic of Macedonia* [GC], § 239).

21. 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).

22. 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*, §§ 319-21; *Medova v. Russia*, §§ 123-25).

## II. Lawfulness of the detention under Article 5 § 1

### A. Purpose of Article 5

23. The key purpose of Article 5 is to prevent arbitrary or unjustified deprivations of liberty (*S., V. and A. v. Denmark* [GC], § 73; *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*, § 45, 18 March 2008).

24. 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 (*El-Masri v. the former Yugoslav Republic of Macedonia* [GC], § 233; *Al Nashiri v. Poland*, § 529; *Belozorov v. Russia and Ukraine*, § 113). 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 (*Kurt v. Turkey*, § 125). It is also incompatible with the requirement of lawfulness under the Convention (*Angelova v. Bulgaria*, § 154).

25. No deprivation of liberty will be lawful unless it falls within one of the permissible grounds specified in sub-paragraphs (a) to (f) of Article 5 § 1 (*Khlaifia and Others v. Italy* [GC], § 88).

26. Three strands of reasoning may be identified as running through the Court’s case-law: the exhaustive nature of the exceptions, which must be interpreted strictly and which do not allow for the broad range of justifications under other provisions (Articles 8 to 11 of the Convention in particular); the repeated emphasis on the lawfulness of the detention, both procedural and substantive, requiring scrupulous adherence to the rule of law; and the importance of the promptness or speediness of the requisite judicial controls (under Article 5 §§ 3 and 4) (*S., V. and A. v. Denmark* [GC], § 73; *Buzadji v. the Republic of Moldova* [GC], § 84).

27. As regards detention taking place during an international armed conflict, the safeguards under Article 5 must be interpreted and applied taking into account the context and the provisions of international humanitarian law (*Hassan v. the United Kingdom* [GC], §§ 103-106).

28. If a given instance of deprivation of liberty does not fit within the confines of one of the sub-paragraphs of Article 5, as interpreted by the Court, it cannot be made to fit by an appeal to the need to balance the interests of the State against those of the detainee (*Merabishvili v. Georgia* [GC], § 298).

### B. Compliance with national law

29. In order to meet the requirement of lawfulness, detention must be “in accordance with a procedure prescribed by law”.

The Convention refers essentially to national law but also, where appropriate, to other applicable legal standards, including those which have their source in international law (*Medvedyev and Others v. France* [GC], § 79; *Toniolo v. San Marino and Italy*, § 46) or European law (*Paci v. Belgium*, § 64 and *Pirozzi v. Belgium*, §§ 45-46, concerning detention on the basis of a European Arrest Warrant). In all

cases it establishes the obligation to conform to the substantive and procedural rules of the laws concerned (*ibid.*)

30. 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). Where the trial court had refused to release the applicant despite the Constitutional Court's decision finding his detention to be unlawful, the applicant's continued pre-trial detention could not be regarded as "in accordance with a procedure prescribed by law" (*Şahin Alpay v. Turkey*, § 118; *Mehmet Hasan Altan v. Turkey*, § 139).

### C. Review of compliance with national law

31. 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 (*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 (*Włoch v. Poland*, § 114).

### D. General principles

32. The requirement of lawfulness is not satisfied merely by compliance with the relevant domestic law; domestic law must itself be in conformity with the Convention, including the general principles expressed or implied in it (*Plesó v. Hungary*, § 59).

The general principles implied by the Convention to which the Article 5 § 1 case-law refers are the principle of the rule of law and, connected to the latter, that of legal certainty, the principle of proportionality and the principle of protection against arbitrariness which is, moreover, the very aim of Article 5 (*Simons v. Belgium* (dec.), § 32).

### E. The principle of legal certainty

33. 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 (*Khlaifia and Others v. Italy* [GC], § 92; *Del Río Prada v. Spain* [GC], § 125; *Creangă v. Romania*, § 120; *Medvedyev and Others v. France* [GC], § 80).

34. Article 5 § 1 thus does not merely refer back to domestic law, it also relates to the "quality of the law" which implies that where a national law authorises deprivation of liberty it must be sufficiently accessible, precise and foreseeable in its application. Factors relevant to this assessment of the "quality of law" – which are referred to in some cases as "safeguards against arbitrariness" – will include the existence of clear legal provisions for ordering detention, for extending detention, and for setting time-limits for detention; and the existence of an effective remedy by which the applicant can contest the "lawfulness" and "length" of his continuing detention (*J.N. v. the United Kingdom*, § 77).

35. 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 (*Svijsta 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).

36. 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 (*Nasrullojev 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 (*Włoch v. Poland*, §§ 114-16; *Winterwerp v. the Netherlands*, §§ 48-50).

37. 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 crew members 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).

38. The requirements of legal certainty become even more paramount where a judge has been deprived of his liberty (*Baş v. Turkey\**, § 158). Where domestic law has granted judicial protection to members of the judiciary in order to safeguard the independent exercise of their functions, it is essential that such arrangements should be properly complied with. Given the prominent place that the judiciary occupies among State organs in a democratic society and the growing importance attached to the separation of powers and to the necessity of safeguarding the independence of the judiciary, the Court must be particularly attentive to the protection of members of the judiciary when reviewing the manner in which a detention order was implemented from the standpoint of the provisions of the Convention (*Alparslan Altan v. Turkey*, § 102).

## F. No arbitrariness

39. In addition, any deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness (*S., V. and A. v. Denmark* [GC], § 74; *Witold Litwa v. Poland*, § 78).

40. 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).

41. The notion of arbitrariness varies to a certain extent depending on the type of detention involved. The Court has indicated that arbitrariness may arise where there has been an element of bad faith or deception on the part of the authorities; where the order to detain and the execution of the detention did not genuinely conform to the purpose of the restrictions permitted by the relevant sub-paragraph of Article 5 § 1; where there was no connection between the ground of permitted deprivation of liberty relied on and the place and conditions of detention; and where there was no relationship of proportionality between the ground of detention relied on and the detention in question (for a detailed overview of the key principles see *James, Wells and Lee v. the United Kingdom*, §§ 191-95; *Saadi v. the United Kingdom* [GC], §§ 68-74).

42. 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 (*Khudoyorov v. Russia*, §§ 136-37).

## G. Court order

43. 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 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 (*Yefimenko v. Russia*, §§ 102-08; *Ječius v. Lithuania*, § 68; *Benham v. the United Kingdom*, §§ 42-47).

44. The Court distinguishes between acts of domestic courts which are within their jurisdiction and those which are in excess of jurisdiction (*ibid.*, §§ 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 (*ibid.*, § 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 (*ibid.*, § 114).

## H. Reasoning of decisions and the requirement of non-arbitrariness

45. 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 (*S., V. and A. v. Denmark* [GC], § 92). Thus, the absence of *any* grounds given by the judicial authorities in their decisions authorising detention for a prolonged period of time may be incompatible with the principle of protection from arbitrariness enshrined in Article 5 § 1 (*Stašaitis 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).

46. 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 (*ibid.*, § 47).

47. A breach of Article 5 § 1 has occurred where a lack of any reasons for ordering pre-trial detention was combined with a failure to fix its duration. However, there is no requirement for the national courts to fix the duration of pre-trial detention in their decisions regardless of how the matter is regulated in domestic law (*Merabishvili v. Georgia* [GC], § 199; *Oravec v. Croatia*, § 55). The existence or absence of time-limits is one of a number of factors which the Court might take into

consideration in its overall assessment of whether domestic law was foreseeable in its application and provided safeguards against arbitrary detention (*J.N. v. the United Kingdom*, § 90; *Meloni v. Switzerland*, § 53.)

48. Moreover, authorities should consider less intrusive measures than detention (*Ambruszkiewicz v. Poland*, § 32).

## I. Some acceptable procedural flaws

49. 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 (*Maturana 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: three days instead of twenty-four hours);
- 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).

## J. Delay in executing order of release

50. 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).

Administrative formalities connected with release cannot justify a delay of more than a few hours (*Ruslan Yakovenko v. Ukraine*, § 68, where there was a delay of two days, and *Quinn v. France*, §§ 39-43, concerning a delay of eleven hours in executing a decision to release the applicant “forthwith”.)

## III. Authorised deprivations of liberty under Article 5 § 1

### A. Detention after conviction

#### Article 5 § 1 (a) of the Convention

“1. ... 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;”

#### HUDOC keywords

Deprivation of liberty (5-1) – Procedure prescribed by law (5-1) – Lawful arrest or detention (5-1)

Conviction (5-1-a) – After conviction (5-1-a) – Competent court (5-1-a)

#### 1. Existence of a conviction

51. 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).

52. The term signifies both a finding of guilt, and the imposition of a penalty or other measure involving the deprivation of liberty (*Del Río Prada v. Spain* [GC], § 125; *James, Wells and Lee v. the United Kingdom*, § 189; *M. v. Germany*, § 87; *Van Droogenbroeck v. Belgium*, § 35; *B. v. Austria*, § 38).

53. Matters of appropriate sentencing fall in principle outside the scope of the Convention. It is not the role of the Court to decide what is the appropriate term of detention applicable to a particular offence. However, measures relating to the execution of a sentence or to its adjustment can affect the right to liberty protected by Article 5 § 1, as the actual duration of deprivation of liberty depends on their application (*Aleksandr Aleksandrov v. Russia*, § 22; *Khamtokhu and Aksenchik v. Russia* [GC], §§ 55-56).

54. The provision does not prevent Contracting States from executing orders for detention imposed by competent courts outside their territory (*X. v. Germany*, Commission decision of 14 December 1963). Although Contracting States are not obliged to verify whether the proceedings in a foreign State resulting in the conviction were compatible with all the requirements of Article 6 (*Drozd 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). If a conviction is the result of proceedings which were “manifestly contrary to the provisions of Article 6 or the principles embodied therein”, the resulting deprivation of liberty would not be justified under Article 5 § 1 (a) (*Willcox and Hurford v. the United Kingdom* (dec.), § 95, with examples of forms of fairness amounting to a flagrant denial of justice; *Stoichkov v. Bulgaria*, §§ 56-58, concerning application of the principle to domestic proceedings).

#### 2. Competent court

55. 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 (*Weeks v. the United Kingdom*, § 61; *De Wilde, Ooms and Versyp v. Belgium*, § 78). 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 (*ibid.*).

56. 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).

57. A court is not “competent” if its composition is not “established by law” (*Yefimenko v. Russia*, §§ 109-11).

### 3. Detention must follow “after” conviction

58. 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. In short, there must be a sufficient causal connection between the conviction and the deprivation of liberty at issue (*James, Wells and Lee v. the United Kingdom*, § 189; *Monnell and Morris v. the United Kingdom*, § 40; *Del Río Prada v. Spain* [GC], § 124).

59. 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 a decision 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 (*ibid.*, § 124; and *H.W. v. Germany*, § 102; *M. v. Germany*, § 88, for continued preventive detention).

60. The Court has found that various forms of preventive detention beyond the prison sentence constituted an applicant’s detention “after conviction by a competent court.” In such circumstances the detention at issue was not part of a penalty, but rather ensued from another “measure involving deprivation of liberty” (see *Ruslan Yakovenko v. Ukraine*, § 51 with further references).

61. A decision not to release a detainee may become inconsistent with the objectives of the sentencing court’s detention order if the person concerned continued to be detained on the grounds of a risk that he or she would reoffend, but the person is, at the same time, deprived of the necessary means, such as suitable therapy, to demonstrate that he or she was no longer dangerous (*Klinkenbuß v. Germany*, § 47).

62. The reasonableness of the decision to extend a person’s detention in order to protect the public is called into question where the domestic courts plainly had at their disposal insufficient elements warranting the conclusion that the person concerned was still dangerous to the public, notably because the courts failed to obtain indispensable and sufficiently recent expert advice. The question whether medical expertise was sufficiently recent is not answered by the Court in a static way but depends on the specific circumstances of the case, in particular, whether there were potentially significant changes in the applicant’s situation since the last examination by an expert (*D.J. v. Germany*, §§ 59-61). Moreover, when the offender has been detained in the same institution for a considerable time and his therapeutic treatment has reached a deadlock, it is particularly important to consult an external expert in order to obtain fresh propositions for initiating the necessary treatment (*Tim Henrik Bruun Hansen v. Denmark*, §§ 77-78).

63. A defendant is considered to be detained “after conviction by a competent court” within the meaning of Article 5 § 1 (a) once the judgment has been delivered at first instance, even where it is not yet enforceable and remains amenable to appeal (*Ruslan Yakovenko v. Ukraine*, § 46). 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).

64. Article 5 § 1 (a) applies where persons of unsound mind are detained in psychiatric facilities after conviction (*Klinkenbuß v. Germany*, § 49; *Radu v. Germany*, § 97; *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

65. 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) of the Convention

“1. ... No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

...

(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;”

### HUDOC keywords

Deprivation of liberty (5-1) – Procedure prescribed by law (5-1) – Lawful arrest or detention (5-1)

Lawful order of a court (5-1-b) – Non-compliance with court order (5-1-b) – Secure fulfilment of obligation prescribed by law (5-1-b)

### 1. Non-compliance with the order of a court

66. 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).

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

68. A refusal of a person to undergo certain measures or to follow a certain procedure prior to being ordered to do so by a competent court has no presumptive value in decisions concerning compliance with such a court order (*Petukhova v. Russia*, § 59).

69. 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).

70. 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 (*Velinov v. the former Yugoslav Republic of Macedonia; Airey v. Ireland*, Commission decision), a refusal to undergo a medical examination concerning mental health (*X. v. 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*) and a confinement in a psychiatric hospital (*Trutko v. Russia* and *Beiere v. Latvia*, where the domestic proceedings did not provide sufficient guarantees against arbitrariness).

## 2. Fulfilment of an obligation prescribed by law

71. The second limb of Article 5 § 1 (b) allows for detention only to “secure the fulfilment” of any 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; *S., V. and A. v. Denmark* [GC], §§ 80-81).

72. Article 5 § 1 (b) refers back to domestic law as the contents of the obligation, as well as to the procedure to be observed for imposing and complying with such an obligation (*Rozhkov v. Russia (no. 2)*, § 89)

73. 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 (*S., V. and A. v. Denmark* [GC], § 83; *Engel and Others v. the Netherlands*, § 69; *Iliya Stefanov v. Bulgaria*, § 72).

74. The obligation not to commit a criminal offence can only be considered as “specific and concrete” if the place and time of the imminent commission of the offence and its potential victims have been sufficiently specified. In the context of a duty to refrain from doing something, as distinct from a duty to perform a specific act, it is necessary, prior to concluding that a person has failed to satisfy his obligation at issue, that the person concerned was made aware of the specific act which he or she was to refrain from committing and that the person showed himself or herself not to be willing to refrain from so doing (*Ostendorf v. Germany*, §§ 93-94).

The duty not to commit a criminal offence in the imminent future cannot be considered sufficiently concrete and specific, as long as no specific measures have been ordered which have not been complied with (*S., V. and A. v. Denmark* [GC], § 83).

75. An arrest will only be acceptable in 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).

76. 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 (*S., V. and A. v. Denmark* [GC], § 75; *Vasileva v. Denmark*, § 38; *Epple v. Germany*, § 37).

77. 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. the United*

*Kingdom*, Commission report), to disclose details of one’s 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*), to appear for questioning at a police station (*Iliya Stefanov v. Bulgaria*; *Osypenko v. Ukraine*; and *Khodorkovskiy v. Russia*), to keep the peace by not committing a criminal offence (*Ostendorf v. Germany*) and to reveal the whereabouts of attached property to secure payment of tax debts (*Göthlin v. Sweden*).

## C. Detention on remand

### Article 5 § 1 (c) of the Convention

“1. ... No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

...

(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 or fleeing after having done so;”

### HUDOC keywords

Deprivation of liberty (5-1) – Procedure prescribed by law (5-1) – Lawful arrest or detention (5-1)

Bringing before competent legal authority (5-1-c) – Criminal offence (5-1-c) – Reasonable suspicion (5-1-c) – Reasonably necessary to prevent offence (5-1-c) – Reasonably necessary to prevent fleeing (5-1-c)

## 1. Purpose of arrest or detention

78. “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)*, §§ 13-14; *Ireland v. the United Kingdom*, § 196).

79. 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 (*Şahin Alpay v. Turkey*, § 103; *Ječius v. Lithuania*, § 50; *Schwabe and M.G. v. Germany*, § 72).

80. The second alternative of that provision (“when it is reasonably considered necessary to prevent his committing an offence”) does not permit a policy of general prevention directed against an individual or a category of individuals who are perceived by the authorities as being dangerous or having the propensity to commit unlawful acts. This ground of detention does no more than afford the Contracting States a means of preventing a concrete and specific offence as regards, in particular, the place and time of its commission and its victim(s). In order for a detention to be justified under the second limb of Article 5 § 1 (c), the authorities must show convincingly that the person concerned would in all likelihood have been involved in the concrete and specific offence, had its commission not been prevented by the detention (*S., V. and A. v. Denmark* [GC], § 89 and 91).

81. The second limb of Article 5 § 1 (c) provides a distinct ground for detention, independent of the existence of “a reasonable suspicion of his having committed an offence.” It thus applies to preventive detention outside criminal proceedings (*S., V. and A. v. Denmark* [GC], §§ 114-116, concerning detention to prevent spectator violence).

82. 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 (*Petkov and Profirov v. Bulgaria*, § 52; *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 (*Mehmet Hasan Altan v. Turkey*, § 125; *Brogan and Others v. the United Kingdom*, §§ 52-54; *Labita v. Italy* [GC], § 155; *O’Hara v. the United Kingdom*, § 36).

83. The “purpose” requirement of bringing a detainee before a court is to be applied with a degree of flexibility to detention falling under the second limb of Article 5 § 1 (c), in order not to prolong unnecessarily short preventive detention. When a person is released from preventive detention after a short period of time, either because the risk has passed or, for example, because a prescribed short time-limit has expired, the purpose requirement should not constitute an obstacle to preventive detention (*S., V. and A. v. Denmark* [GC], §§ 118-126).

84. Detention pursuant to Article 5 § 1 (c) must be a proportionate measure to achieve the stated aim (*Ladent v. Poland*, §§ 55-56). It is incumbent on the domestic authorities to convincingly demonstrate that detention is necessary. Where the authorities order the detention of an individual pending trial on the grounds of his or her failure to appear before them when summoned, they should make sure that the individual in question had been given adequate notice and sufficient time to comply and take reasonable steps to verify that he or she has in fact absconded (*Vasiliciuc v. the Republic of Moldova*, § 40).

85. The necessity test under the second limb of Article 5 § 1 (c) requires that measures less severe than detention have to be considered and found to be insufficient to safeguard the individual or public interest. The offence in question has to be of a serious nature, entailing danger to life and limb or significant material damage. In addition, the detention should cease as soon as the risk has passed, which called for monitoring, the duration of the detention being also a relevant factor (*S., V. and A. v. Denmark* [GC], § 161).

86. 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”

87. The “reasonableness” of the suspicion on which an arrest must be based forms an essential part of the safeguard laid down in Article 5 § 1 (c) (*Mehmet Hasan Altan v. Turkey*, § 124; *Fernandes Pedroso v. Portugal*, § 87).

88. 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 (*Ilgar Mammadov v. Azerbaijan*, § 88; *Erdagöz v. Turkey*, § 51; and *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; *Elçi and Others v. Turkey*, § 674).

89. What is reasonable depends on all the circumstances, but the facts which raise a suspicion need not be of the same level as those necessary to justify a conviction, or even the bringing of a charge (*Merabishvili v. Georgia* [GC], § 184).

90. The term “reasonableness” also means the threshold that the suspicion must meet to satisfy an objective observer of the likelihood of the accusations. A deprivation of liberty must be based on sufficient objective elements to justify a “reasonable suspicion” that the facts at issue had actually occurred. In addition, the facts relied on have to be reasonably considered as falling under one of

the sections describing criminal behaviour in the Criminal Code. Thus, there could clearly not be a “reasonable suspicion” if the acts or facts held against a detained person did not constitute a crime at the time when they occurred (*Kavala v. Turkey\**, § 128).

91. In assessing whether the minimum standard for the reasonableness of a suspicion required for an individual’s arrest has been met, the Court has regard to the general context of the facts of a particular case including the applicant’s status, the sequence of the events, the manner in which the investigations were carried out and the authorities’ conduct (*Ibrahimov and Mammadov v. Azerbaijan\**, §§ 113-131).

92. While reasonable suspicion must exist at the time of the arrest and initial detention, it must also be shown, in cases of prolonged detention, that the suspicion persisted and remained “reasonable” throughout the detention (*Ilgar Mammadov v. Azerbaijan*, § 90).

93. 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; *Baş v. Turkey\**, § 184).

94. 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”

95. 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; *S., V. and A. v. Denmark* [GC], § 90).

## D. Detention of a minor

### Article 5 § 1 (d) of the Convention

“1. ... No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

...

(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;”

### HUDOC keywords

Deprivation of liberty (5-1) – Procedure prescribed by law (5-1) – Lawful arrest or detention (5-1)

Minors (5-1-d) – Educational supervision (5-1-d) – Bringing before competent authority (5-1-d)

## 1. General

96. The notion of a minor encompasses persons under the age of 18 (*Koniarska v. the 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).

97. 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

98. The first limb of Article 5 § 1 d) authorises the deprivation of a minor’s liberty in his or her own interests, irrespective of the question whether he or she is suspected of having committed a criminal offence or is simply a child “at risk” (*D.L. v. Bulgaria*, § 71).

99. 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 (*P. and S. v. Poland*, § 147; *Ichin and Others v. Ukraine*, § 39; *D.G. v. Ireland*, § 80).

“Educational supervision” must nevertheless contain an important core schooling aspect so that schooling in line with the normal school curriculum should be standard practice for all detained minors, even when they are placed in a temporary detention centre for a limited period of time, in order to avoid gaps in their education (*Blokhin v. Russia* [GC], § 170).

100. Detention based on “behaviour correction” or the need to prevent a minor from committing further delinquent acts is not permissible under Article 5 § 1 (d) of the Convention (*Blokhin v. Russia* [GC], § 171).

101. 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).

102. The placement of a minor in a closed institution must also be proportionate to the aim of “educational supervision.” It must be a measure of last resort, taken in the best interests of the child and intended to prevent serious risks for the child’s development (*D.L. v. Bulgaria*, § 74).

103. 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).

Regarding implementation of a pedagogical and educational system, the State is to be afforded a certain margin of appreciation (*D.L. v. Bulgaria*, § 77).

104. 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

105. The second limb of Article 5 § 1 (d) governs the lawful detention of a minor for the purpose of bringing him or her 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).

106. 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*, Commission decision of 14 December 1979).

## E. Detention for medical or social reasons

### Article 5 § 1 (e) of the Convention

“1. ... No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

...

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;”

### HUDOC keywords

Liberty of person (5-1) – Security of person (5-1) – Deprivation of liberty (5-1) – Procedure prescribed by law (5-1) – Lawful arrest or detention (5-1)

Prevention of spreading of infectious diseases (5-1-e) – Persons of unsound mind (5-1-e) – Alcoholics (5-1-e) – Drug addicts (5-1-e) – Vagrants (5-1-e)

### 1. General

107. 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).

108. 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 (*ibid.*; *Guzzardi v. Italy*, § 98 *in fine*).

### 2. Prevention of the spreading of infectious diseases

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

- whether the spreading of the infectious disease is dangerous to public health or safety; and
- 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

110. 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).

The term must be given an autonomous meaning, without the Court being bound by the interpretation of the same or similar terms in domestic legal orders (*Petschulies v. Germany*, 74-77). It is not a requirement that the person concerned suffered from a condition which would be such as to exclude or diminish his criminal responsibility under domestic criminal law when committing an offence (*Ilseher v. Germany* [GC], § 149).

111. An individual cannot be deprived of his liberty as being of “unsound mind” unless the following three minimum conditions are satisfied (*Ilseher v. Germany* [GC], § 127; *Stanev v. Bulgaria* [GC], § 145; *D.D. v. Lithuania*, § 156; *Kallweit v. Germany*, § 45; *Shtukaturov v. Russia*, § 114; *Varbanov v. Bulgaria*, § 45; and *Winterwerp v. the Netherlands*, § 39):

- the individual must be reliably shown, by objective medical expertise, to be of unsound mind, unless emergency detention is required;
- 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;
- the mental disorder, verified by objective medical evidence, must persist throughout the period of detention.

112. No deprivation of liberty of a person considered to be of unsound mind may be deemed in conformity with Article 5 § 1 (e) of the Convention if it has been ordered without seeking the opinion of a medical expert (*Ruiz Rivera v. Switzerland*, § 59; *S.R. v. the Netherlands* (dec.), § 31).

Where no other possibility exists, for instance because of a refusal of the person concerned to appear for an examination, at least a medical expert’s assessment on the basis of the case file of the actual state of that person’s mental health must be sought, failing which it cannot be maintained that the person has reliably been shown to be of unsound mind (*Constancia v. the Netherlands* (dec.), § 26, where the Court allowed other existing information to be thus substituted for a medical examination of the applicant’s mental state).

113. 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 (*Ilseher v. Germany* [GC], § 133; *Hutchison Reid v. the United Kingdom*, § 52).

Article 5 § 1 (e) authorises the confinement of a mentally disordered person even where no medical treatment is envisaged, but such a measure must be duly justified by the seriousness of the person’s state of health and the need to protect the person concerned or others (*N. v. Romania*, § 151).

114. A mental condition must be of a certain gravity in order to be considered as a “true” mental disorder (*Glien v. Germany*, § 85). To be qualified as a true mental disorder for the purposes of subparagraph (e) of Article 5 § 1, the mental disorder in question must be so serious as to necessitate treatment in an institution appropriate for mental health patients (*Ilseher v. Germany* [GC], § 129 *Petschulies v. Germany*, § 76).

115. 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 (*Ilseher v. Germany* [GC], § 128; *Plesó v. Hungary*, § 61; *H.L. v. the United Kingdom*, § 98).

The competent domestic authority must subject the expert advice before it to a strict scrutiny and reach its own decision on whether the person concerned suffered from a mental disorder (*Illseher v. Germany* [GC], § 132).

116. 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 (*Illseher v. Germany* [GC], § 134; *O.H. v. Germany*, § 78). However, changes, if any, to the mental condition of the detainee following the adoption of the detention order must be taken into account (*Illseher v. Germany* [GC], § 134). Medical expert reports relied on by the authorities must therefore be sufficiently recent (*Kadusic v. Switzerland*, §§ 44 and 55).

117. 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).

118. 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 (*L.B. v. Belgium*, § 93; *Ashingdane v. the United Kingdom*, § 44; *O.H. v. Germany*, § 79).

119. 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 (*Pankiewicz v. Poland*, §§ 44-45; *Morsink v. the Netherlands*, §§ 67-69; *Brand v. the Netherlands*, §§ 64-66).

120. In view of an intrinsic link between the lawfulness of a deprivation of liberty and its conditions of execution, the detention of a person of unsound mind on the basis of the original detention order can become lawful once that person is transferred from an institution unsuitable for mental health patients to a suitable institution (*Illseher v. Germany* [GC], §§ 140-141).

121. The administration of suitable therapy has become a requirement of the wider concept of the “lawfulness” of the deprivation of liberty. Any detention of mentally ill persons must have a therapeutic purpose, aimed at curing or alleviating their mental-health condition, including, where appropriate, bringing about a reduction in or control over their dangerousness (*Rooman v. Belgium* [GC], § 208).

122. The deprivation of liberty under Article 5 § 1(e) thus has a dual function: on the one hand, the social function of protection, and on the other a therapeutic function that is related to the individual interest of the person of unsound mind in receiving an appropriate and individualised form of therapy or course of treatment. Appropriate and individualised treatment is an essential part of the notion of “appropriate institution” (*Rooman v. Belgium* [GC], § 210).

123. Article 5 § 1 (e) of the Convention also affords procedural safeguards related to the judicial decisions authorising a person’s involuntary hospitalisation (*M.S. v. Croatia (no. 2)*, § 114). The notion of “lawfulness” requires a fair and proper procedure offering the person concerned sufficient protection against arbitrary deprivation of liberty (*V.K. v. Russia*, § 33; *X. v. Finland*, § 148, concerning the lack of adequate safeguards in respect of the continuation of the applicant’s involuntary confinement).

124. The proceedings leading to the involuntary placement of an individual in a psychiatric facility must thus provide effective guarantees against arbitrariness given the vulnerability of individuals suffering from mental disorders and the need to adduce very weighty reasons to justify any restriction of their rights (*M.S. v. Croatia (no. 2)*, § 147).

125. It is essential that the person concerned should have access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation. This implies

that an individual confined in a psychiatric institution should, unless there are special circumstances, receive legal assistance in the proceedings relating to the continuation, suspension or termination of his confinement (*ibid.*, §§ 152 and 153; *N. v. Romania*, § 196).

126. The mere appointment of a lawyer, without that lawyer actually providing legal assistance in the proceedings, could not satisfy the requirements of necessary “legal assistance” for persons confined as being of “unsound mind”. An effective legal representation of persons with disabilities requires an enhanced duty of supervision of their legal representatives by the competent domestic courts (*M.S. v. Croatia (no. 2)*, § 154; see also *V.K. v. Russia* concerning a failure of a court-appointed lawyer to provide effective legal assistance and a manifest failure of the domestic courts to take that defect into consideration).

#### 4. Detention of alcoholics and drug addicts

127. 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).

128. 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 (*Petschulies v. Germany*, § 65; *Witold Litwa v. Poland*, §§ 61-62).

#### 5. Vagrants

129. 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) of the Convention

“1. ... No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

...

(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.”

##### HUDOC keywords

Deprivation of liberty (5-1) – Procedure prescribed by law (5-1) – Lawful arrest or detention (5-1)

Prevent unauthorised entry into country (5-1-f) – Expulsion (5-1-f) – Extradition (5-1-f)

#### 1. Detention to prevent unauthorised entry into country

130. Article 5 § 1 (f) allows States to control the liberty of aliens in an immigration context (*Khlaifia and Others v. Italy* [GC], § 89). 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).

131. The question as to when the first limb of Article 5 § 1 (f) ceases to apply, because the individual has been granted formal authorisation to enter or stay, is largely dependent on national law (*Suso Musa v. Malta*, § 97).

132. 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 (*Saadi v. the United Kingdom* [GC], § 73).

133. “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 (*ibid.*, § 74).

134. The Court has expressed reservations as to the practice of the authorities to automatically place asylum seekers in detention without an individual assessment of their particular needs (*Thimothawes v. Belgium*, § 73; *Mahamed Jama v. Malta*, § 146).

135. 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).

136. In the case of massive arrivals of asylum-seekers at State borders, subject to the prohibition of arbitrariness, the lawfulness requirement of Article 5 may be considered generally satisfied by a domestic legal regime that provides, for example, for no more than the name of the authority competent to order deprivation of liberty in a transit zone, the form of the order, its possible grounds and limits, the maximum duration of the confinement and, as required by Article 5 § 4, the applicable avenue of judicial appeal (*Z.A. and Others v. Russia* [GC], § 162).

137. Article 5 § 1 (f) does not prevent States from enacting domestic law provisions that formulate the grounds on which such confinement can be ordered with due regard to the practical realities of massive influx of asylum-seekers. In particular, subparagraph 1(f) does not prohibit deprivation of liberty in a transit zone for a limited period on grounds that such confinement is generally necessary to ensure the asylum seekers’ presence pending the examination of their asylum claims or, moreover, on grounds that there is a need to examine the admissibility of asylum applications speedily and that, to that end, structure and adapted procedures have been put in place at the transit zone (*ibid.*, § 163).

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

138. 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 subparagraph (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; *Nasrulloev v. Russia*, § 69; *Soldatenko v. Ukraine*, § 109).

A test of necessity of detention may still be required under domestic legislation (*Muzamba Oyaw v. Belgium* (dec.), § 36; *J.R. and Others v. Greece*, § 111).

139. The Court has nevertheless regard to the specific situation of the detained individuals and any particular vulnerability (such as health or age) which may render their detention inappropriate (*Thimothawes v. Belgium*, § 73, 79-80)

When a child is involved the Court has considered that, by way of exception, the deprivation of liberty must be necessary to fulfil the aim pursued, namely to secure the family's removal (*A.B. and Others v. France*, § 120). The presence in a detention centre of a child accompanying his or her parents will comply with Article 5 § 1 (f) only where the national authorities can establish that this measure of last resort has been taken after actual verification that no other measure involving a lesser restriction of their freedom could be put in place (*ibid.*, § 123).

140. 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 enquires may be considered "actions" taken in the sense of the provision (*X. v. Switzerland*, Commission decision of 9 December 1980).

141. 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) (*Khlaifia and Others v. Italy* [GC], § 90; *A. and Others v. the United Kingdom* [GC], § 164; *Amie and Others v. Bulgaria*, § 72).

142. 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 (*A. and Others v. the United Kingdom*, § 164; *Yoh-Ekale Mwanje v. Belgium*, §§ 117-19 with further references).

143. Detention with a view to expulsion should not be punitive in nature and should be accompanied by appropriate safeguards (*Azimov v. Russia*, § 172).

144. The domestic authorities have an obligation to consider whether removal is a realistic prospect and whether detention with a view to removal is from the outset, or continues to be, justified (*Al Husin v. Bosnia and Herzegovina (no. 2)*, § 98). There must procedural safeguards in place capable of preventing the risk of arbitrary detention pending expulsion (*Kim v. Russia*, § 53).

145. In its assessment of whether domestic law provides sufficient procedural safeguards against arbitrariness, the Court may take into account the existence or absence of time-limits for detention as well as the availability of a judicial remedy. However, Article 5 § 1(f) does not require States to establish a maximum period of detention pending deportation or automatic judicial review of immigration detention. The case-law demonstrates that compliance with time-limits under domestic law or the existence of automatic judicial review will not in themselves guarantee that a system of immigration detention complies with the requirements of Article 5 § 1(f) of the Convention (*J.N. v. the United Kingdom*, §§ 83-96).

146. 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* [GC], § 171).

147. 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).

148. When an extradition request concerns a person facing criminal charges in the requesting State, the requested State is required to act with greater diligence than when an extradition is sought for the purposes of enforcing a sentence, in order to secure the protection of the rights of the person concerned (*Gallardo Sanchez v. Italy*, § 42).

149. 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).

150. 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). Detention should still be lawful and not arbitrary (*Azimov v. Russia*, § 169).

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.); *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 of the Convention

“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.”

#### HUDOC keywords

Prompt information (5-2) – Information in language understood (5-2) – Information on reasons for arrest (5-2) – Information on charge (5-2)

#### 1. Applicability

151. 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*, §§ 27-28) which extends to detention for the purposes of extradition (*Shamayev and Others v. Georgia and Russia*, §§ 414-15) and medical treatment (*Van der Leer v. the Netherlands*, §§ 27-28; *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. Belgium*, Commission decision).

#### 2. Purpose

152. 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 (*Khlaifia and Others v. Italy* [GC], § 115). 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).

153. 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

154. 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 (*Saadi v. the United Kingdom*, § 53, confirmed by the Grand Chamber in 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; *Z.H. v. Hungary*, §§ 42-43).

#### 4. Reasons must be provided “promptly”

155. 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 (*Khlaifia and Others v. Italy* [GC], § 115; *Fox, Campbell and Hartley v. the United Kingdom*, § 40; *Murray v. the United Kingdom* [GC], § 72).

156. The constraints of time imposed by the notion of promptness will be satisfied where the arrested person is informed of the reasons for his 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

157. 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 of 13 December 1978; *Kane v. Cyprus* (dec.)).

However, if the condition of a person with intellectual disability is not given due consideration in this process, it cannot be said that he was provided with the requisite information enabling him to make effective and intelligent use of the right ensured by Article 5 § 4 to challenge the lawfulness of detention unless a lawyer or another authorised person was informed in his stead (*Z.H. v. Hungary*, § 41).

158. 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.)).

159. 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

160. 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 (*ibid.*, § 41; *Murray v. the United Kingdom* [GC], § 76; *Kortesis v. Greece*, §§ 61-62).

161. 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 (*Khlaifia and Others v. Italy* [GC], § 115; *J.R. and Others v. Greece*, §§ 123-124; *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).

162. Where persons are arrested for the purposes of extradition, the information given may be even less complete (*Suso Musa v. Malta*, §§ 113 and 116; *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

163. 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).

164. 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 of the Convention

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

### HUDOC keywords

Judge or other officer exercising judicial power (5-3) – Brought promptly before judge or other officer (5-3)

### 1. Aim of the provision

165. 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).

166. 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).

167. 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

168. 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).

169. 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).

170. 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).

171. Any period in excess of four days is *prima facie* too long (*Oral and Atabay v. Turkey*, § 43; *McKay v. the United Kingdom* [GC], § 47; *Năstase-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 (*Gutsanovi v. Bulgaria*, §§ 154-59; *İpek and Others v. Turkey*, §§ 36-37; *Kandzhov v. Bulgaria*, § 66).

The requirement of promptness is even stricter in a situation where the placement in police custody follows on from a period of actual deprivation of liberty (*Vassis and Others v. France*, § 60, concerning the detention of a crew on the high seas).

172. Where a person is detained under the second limb of Article 5 § 1 (c) outside the context of criminal proceedings, the period needed between a person’s arrest for preventive purposes and the person’s prompt appearance before a judge should be shorter than in the case of pre-trial detention in criminal proceedings. As a rule, release at a time before prompt judicial control in the context of preventive detention should be a matter of hours rather than days (*S., V. and A. v. Denmark* [GC], §§ 133-134).

173. 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).

174. 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* [GC], § 49; *Niedbata v. Poland*, § 50).

175. 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

176. 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).

177. 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 (*ibid.*, § 28).

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

179. 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).

180. 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

181. 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 (*ibid.*).

182. 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).

183. 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 (*ibid.*, § 21; *Hood v. the United Kingdom*, § 57; *Nikolova v. Bulgaria* [GC], § 49; *Pantea v. Romania*, § 236).

#### 5. Procedural requirement

184. 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* [GC], § 50).

185. 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

186. 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* [GC], § 47; *Krejčíř v. the Czech Republic*, § 89).

187. 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).

188. 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* [GC], § 52).

189. 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

190. 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; *Niedbata v. Poland*, § 49; *McKay v. the United Kingdom* [GC], § 40).

191. 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 (*ibid.*, § 47; see also *Magee and Others v. the United Kingdom*, where the absence of a possibility of conditional release during the early stages of the applicants’ detention did not give rise to any issues under Article 5 § 3 of the Convention).

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

### Article 5 § 3 of the Convention

“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.”

### HUDOC keywords

Trial within a reasonable time (5-3) – Release pending trial (5-3) – Length of pre-trial detention (5-3) – Reasonableness of pre-trial detention (5-3) – Conditional release (5-3) – Guarantees to appear for trial (5-3)

### 1. Period to be taken into consideration

192. 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, *Štvrtecký v. Slovakia*, § 55; *Solmaz v. Turkey*, §§ 23-24; *Kalashnikov v. Russia*, § 110; *Wemhoff v. Germany*, § 9).

193. 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” (*Belevitskiy v. Russia*, § 99; *Piotr Baranowski v. Poland*, § 45; *Górski v. Poland*, § 41).

### 2. General principles

194. 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.

195. The question whether a period of time spent in pre-trial detention is reasonable cannot be assessed in the abstract. Whether it is reasonable for an accused to remain in detention must be assessed on the facts of each case and according to its specific features. 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.

196. 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 (*Buzadji v. the Republic of Moldova* [GC], §§ 89-91; *McKay v. the United Kingdom* [GC], §§ 41-43).

197. The persistence of a reasonable suspicion is a condition sine qua non for the validity of the continued detention. But when the national judicial authorities first examine, “promptly” after the arrest, whether to place the arrestee in pre-trial detention, that suspicion no longer suffices, and the authorities must also give other relevant and sufficient grounds to justify the detention (*Merabishvili v. Georgia* [GC], § 222, and *Buzadji v. the Republic of Moldova* [GC], § 102). Where such the grounds continued to justify the deprivation of liberty, the Court must also be satisfied that the national authorities displayed “special diligence” in the conduct of the proceedings (*Buzadji v. the Republic of Moldova* [GC], § 87; *Idalov v. Russia* [GC], § 140).

198. 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; *Rubtsov and Balayan v. Russia*, §§ 30-32).

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

200. It falls on the authorities to establish the persistence of reasons justifying continued pre-trial detention (*Merabishvili v. Georgia* [GC], § 234). 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).

201. 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 (*ibid.*, § 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. Justification for any period of detention

202. 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).

#### 4. Grounds for continued detention

203. 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 (*Buzadji v. the Republic of Moldova* [GC], § 88; *Tiron v. Romania*, § 37; *Smirnova v. Russia*, § 59; *Piruzyan v. Armenia*, § 94). Those risks must be duly substantiated, and the authorities' reasoning on those points cannot be abstract, general or stereotyped (*Merabishvili v. Georgia* [GC], § 222). However, nothing precludes the national judicial authorities from endorsing or incorporating by reference the specific points cited by the authorities seeking the imposition of pre-trial detention (*ibid.*, § 227).

##### a. Danger of absconding

204. 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).

205. 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).

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

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

208. When the only remaining reason for detention is the fear that the accused will flee and thus avoid appearing for trial, he or she must be released pending trial if it is possible to obtain guarantees that will ensure that appearance (*Merabishvili v. Georgia* [GC], § 223).

209. 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; *Chraid v. Germany*, § 40; *Ilijkov v. Bulgaria*, §§ 80-81).

210. 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).

##### b. Obstruction of the proceedings

211. 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).

212. The risk of pressure being brought to bear on witnesses can be accepted at the initial stages of the proceedings (*Jarzyński v. Poland*, § 43). However, it cannot be based only on the likelihood of a severe penalty, but must be linked to specific facts (*Merabishvili v. Georgia* [GC], § 224).

213. 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).

214. In cases concerning organised criminal activities or gangs, the risk that a detainee, if released, might bring pressure to bear on witnesses or other co-suspects, or otherwise obstruct the proceedings, is often particularly high (*Štvrtecký v. Slovakia*, § 61; *Podeschi v. San Marino*, § 149).

### c. Repetition of offences

215. 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).

216. 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).

217. 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).

### d. Preservation of public order

218. 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.

219. 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).

220. The protection of public order is particularly pertinent in cases involving charges of grave breaches of fundamental human rights, such as war crimes against civilian population (*Milanković and Bošnjak v. Croatia*, § 154).

## 5. Special diligence

221. 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).

222. 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).

## 6. Alternative measures

223. 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).

## 7. Bail

224. 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” (*Gafà v. Malta*, § 70; *Mangouras v. Spain* [GC], § 78; *Neumeister v. Austria*, § 14).

225. Bail may only be required as long as reasons justifying detention prevail (*Muşuc 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 (*Piotr Osuch v. Poland*, § 39; *Bojilov v. Bulgaria*, § 60; *Skrobol v. Poland*, § 57).

226. Furthermore, the amount set for bail must be duly justified in the decision fixing bail (*Georgieva v. Bulgaria*, §§ 15 and 30-31) and must take into account the accused’s means (*Gafà v. Malta*, § 70; *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).

227. The fact that a detainee remains in custody after being granted bail suggests that the domestic courts have not taken the necessary care in fixing appropriate bail (*Gafà v. Malta*, § 73; *Kolakovic v. Malta*, § 72).

228. The authorities are required to conduct the proceedings with “special diligence” also after bail is formally granted but the individual remains in detention as a result of his inability to pay (*Gafà v. Malta*, § 71; *Kolakovic v. Malta*, § 74).

229. 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).

## 8. Pre-trial detention of minors

230. 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 of the Convention

“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.”

### HUDOC keywords

Review of lawfulness of detention (5-4) – Take proceedings (5-4) – Review by a court (5-4) – Speediness of review (5-4) – Procedural guarantees of review (5-4) – Order release (5-4)

### 1. Aim of the provision

231. 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).

Article 5 § 4 also secures to persons arrested or detained the right to have the lawfulness of their detention decided “speedily” by a court and to have their release ordered if the detention is not lawful (*Ilseher v. Germany* [GC], § 251; *Khlaifia and Others v. Italy* [GC], § 131).

232. 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 (*Douiye v. the Netherlands* [GC], § 57; *Kolompar v. Belgium*, § 45).

233. In cases where detainees had not been informed of the reasons for their deprivation of liberty, the Court has found that their right to appeal against their detention was deprived of all effective substance (*Khlaifia and Others v. Italy* [GC], § 132).

### 2. Applicability of the provision

234. While Article 5 § 4 normally contemplates situations in which an individual takes proceedings while in detention, the provision could also apply where the individual is no longer in detention during appeal proceedings the outcome of which is crucial in determining the lawfulness of the individual’s detention (*Oravec v. Croatia*, § 65).

While the guarantee of speediness is no longer relevant for the purpose of Article 5 § 4 after the person’s release, the guarantee of effectiveness of the review continues to apply even thereafter since a former detainee may well have a legitimate interest in the determination of the lawfulness of his or her detention even after having been released (*Kováčik v. Slovakia*, § 77; *Osmanović v. Croatia*, § 49). In particular, a decision on the issue of lawfulness may affect the “enforceable right to compensation” under Article 5 § 5 of the Convention (*S.T.S. v. the Netherlands*, § 61).

235. No issue arises under Article 5 § 4 where the impugned detention is of a short duration (*Rozhkov v. Russia (no. 2)*, § 65, where the applicant’s detention lasted only several hours; see, by contrast, *A.M. v. France*, § 36, where the provision was found to apply to a period of three and a half days of administrative detention pending expulsion).

236. 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* (dec.), § 58).

237. Article 5 § 4 also comes back into play when, following a conviction, new issues affecting the lawfulness of a detention arise (see *Etute v. Luxembourg*, § 25 and 33 concerning a decision revoking a prisoner's release on licence; *Ivan Todorov v. Bulgaria*, §§ 59-61, concerning the question whether the sentence for a criminal offence imposed some twenty years earlier had become time-barred).

238. Where the Contracting States provide for procedures which go beyond the requirements of Article 5 § 4 of the Convention, the provision's guarantees have to be respected also in these procedures. Article 5 § 4 has thus been found to be applicable in the post-conviction period because domestic law provided that a person is detained on remand until his or her conviction becomes final, including during appeal proceedings, and accorded the same procedural rights to all remand prisoners (*Stollenwerk v. Germany*, § 36).

239. 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 (*Illseher v. Germany* [GC], § 254; *Kučera v. Slovakia*, § 107; *Navarra v. France*, § 28; *Toth v. Austria*, § 84).

240. Article 5 § 4 can also be applicable to proceedings before constitutional courts (*Illseher v. Germany* [GC], § 254; *Mehmet Hasan Altan v. Turkey*, § 159).

### 3. The nature of the review required

241. Article 5 § 4 entitles an arrested or detained person 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 (*Khlaifia and Others v. Italy* [GC], § 128; *Idalov v. Russia* [GC], § 161; *Reinprecht v. Austria*, § 31).

The notion of "lawfulness" under Article 5 § 4 has the same meaning as in Article 5 § 1, so that the arrested or detained person is entitled to a review of the "lawfulness" of his detention in the light not only of the requirements of domestic law but also of the Convention, the general principles embodied therein and the aim of the restrictions permitted by Article 5 § 1 (*Khlaifia and Others v. Italy* [GC], § 128; *Suso Musa v. Malta*, § 50; see also *A.M. v France*, § 40-41, concerning the required scope of judicial review under Article 5 § 1 (f)).

242. 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; *Ali Osman Özmen v. Turkey*, § 87, *Baş v. Turkey\**, §§ 266-267, where the Court confirmed that the term "court" referred to in Article 5 § 4 must be construed as a body which enjoys the same qualities of independence and impartiality as are required of the "tribunal" mentioned in Article 6).

243. The forms of judicial review satisfying the requirements of Article 5 § 4 may vary from one domain to another, and will depend on the type of deprivation of liberty in issue (*Khlaifia and Others v. Italy* [GC], § 129; *M.H. v. the United Kingdom*, § 75).

244. It is not excluded that a system of automatic periodic review of the lawfulness of detention by a court may ensure compliance with the requirements of Article 5 § 4. However, where automatic review has been instituted, the decisions on the lawfulness of detention must follow at “reasonable intervals” (*Abdulkhanov v. Russia*, §§ 209 and 212-14, for a summary of the case-law in the context of detention under sub-paragraphs (a), (c), (e) and (f) of Article 5 § 1).

A breach of time-limits for automatic reviews established in law does not necessarily amount to a violation of Article 5 § 4, if the lawfulness of an applicant’s detention was nonetheless examined speedily by a court (*Aboya Boa Jean v. Malta*, § 80).

245. By virtue of Article 5 § 4, a detainee is entitled to apply to a “court” having jurisdiction to decide “speedily” whether or not his deprivation of liberty has become “unlawful” in the light of new factors which have emerged subsequently to the initial decision depriving a person of his liberty (*Abdulkhanov v. Russia*, § 208; *Azimov v. Russia*, §§ 151-52).

246. 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).

247. A person of unsound mind who is compulsorily confined in a psychiatric institution for a lengthy period is entitled to take proceedings “at reasonable intervals” to put in issue the lawfulness of his detention (*M.H. v. the United Kingdom*, § 77, for a summary of the applicable principles). A system of periodic review in which the initiative lies solely with the authorities is not sufficient on its own (*X. v. Finland*, § 170; *Raudevs v. Latvia*, § 82).

248. The criteria for “lawful detention” under Article 5 § 1 (e) entail that the review of lawfulness guaranteed by Article 5 § 4 in relation to the continuing detention of a mental health patient should be made by reference to the patient’s contemporaneous state of health, including his or her dangerousness, as evidenced by up-to-date medical assessments, and not by reference to past events at the origin of the initial decision to detain (*Juncal v. the United Kingdom* (dec.), § 30; *Ruiz Rivera v. Switzerland*, § 60; *H.W. v. Germany*, § 107).

249. The bringing of proceedings to challenge the lawfulness under Article 5 § 1 (f) of administrative detention pending deportations does not need to have a suspensive effect on the implementation of the deportation order. Such a requirement would, paradoxically, lead to prolonging the very situation which the detainee was seeking to end by challenging the administrative detention (*A.M. v. France*, § 38).

250. 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 (*Iljiov v. Bulgaria*, § 94).

If the court fails to give adequate reasons, or gives repeated stereotyped decisions which provide no answer to the arguments of the applicant, this may disclose a violation by depriving the guarantee under Article 5 § 4 of its substance (*G.B. and Others v. Turkey*, § 176).

251. 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*, §§ 33-34; *Khlaifia and Others v. Italy* [GC], § 128).

252. Article 5 § 4 proceedings need not necessarily result in freedom, but may also lead to another form of detention. Where an individual’s detention is covered by both sub-paragraphs (a) and (e) of Article 5 § 1, it would be contrary to the object and purpose of Article 5 to interpret paragraph 4 of

that provision as making confinement in a mental institution immune from review of its lawfulness merely because the initial decision ordering detention was taken by a court under Article 5 § 1(a). The reason for guaranteeing a review under Article 5 § 4 is equally important to persons detained in a mental institution regardless of whether or not they were serving, in parallel, a prison sentence (*Kuttner v. Austria*, § 31, where the applicant's request to lift the measure of detention in a mental institution could lead only to his transfer to an ordinary prison).

#### 4. Procedural guarantees

253. 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).

254. 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).

255. An oral hearing is also required in the context of an adversarial procedure involving legal representation and the possibility of calling and questioning witnesses, where the judicial authorities are called upon to examine the personality and the level of maturity of the detainee in order to decide on his dangerousness. However, a hearing is not essential in all circumstances, particularly where it was unlikely to result in any additional clarification (*Derungs v. Switzerland*, §§ 72 and 75, where a person held in preventive detention on psychiatric grounds had not provided any relevant information or evidence concerning his personality since a previous hearing that was such as to make a new hearing necessary).

256. 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).

Equality of arms is not ensured if the applicant, or his counsel, is denied access to those documents in the investigation file which are essential in order effectively to challenge the lawfulness of his detention (*Ovsjannikov v. Estonia*, § 72; *Fodale v. Italy*, § 41; and *Korneykova v. Ukraine*, § 68). It may also be essential that the individual concerned should not only have the opportunity to be heard in person but that he should also have the effective assistance of his lawyer (*Cernák v. Slovakia*, § 78).

257. Since detention proceedings require special expedition, a judge may decide not to wait until a detainee avails himself of legal assistance, and the authorities are not obliged to provide him with free legal aid in the context of detention proceedings (*Karachentsev v. Russia*, § 52).

258. The principle of adversarial proceedings and equality of arms must equally be respected in the proceedings before the appeal court (*Çatal v. Turkey*, §§ 33-34 and the cases referred to therein) as well as in the proceedings which the Contracting States, as a matter of choice, make available to post-conviction detainees (*Stollenwerk v. Germany*, § 44).

259. The right to adversarial proceedings means that the parties, in principle, have the right to be informed of and to discuss any document or observation presented to the court for the purpose of influencing its decision, even if it comes from an independent legal officer (*Venet v. Belgium*, §§ 42-43, where the applicant was unable to reply to the oral submissions of the advocate-general at the Belgian Court of Cassation).

260. The right to adversarial proceedings necessarily entitles the detainee and his lawyer to be informed within a reasonable time about the scheduling of a hearing, without which the right would be devoid of substance (*ibid.*, § 45).

261. Terrorism falls into a special category. Article 5 § 4 does not preclude the use of a closed hearing wherein confidential sources of information supporting the authorities' line of investigation are submitted to a court in the absence of the detainee or his lawyer. What is important is that the authorities disclose adequate information to enable a detainee to know the nature of the allegations against him and to have the opportunity to refute them, and to participate effectively in proceedings concerning his continued detention (*Sher and Others v. the United Kingdom*, § 149, where the Court accepted that the threat of an imminent terrorist attack justified restrictions on the adversarial nature of the proceedings concerning the warrants for further detention, for reasons of national security. See also *Al Husin v. Bosnia and Herzegovina (no. 2)*, §§ 120-122, where the applicant had been given a reasonable opportunity to present his case, despite restrictions on his access to evidence related to national security).

## 5. The “speediness” requirement

262. 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 (*Ilseher v. Germany* [GC], § 252; *Rehbock v. Slovenia*, § 84).

263. 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).

264. 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).

However, where a decision to detain a person has been taken by a non-judicial authority rather than a court, the standard of “speediness” of judicial review under Article 5 § 4 comes closer to the standard of “promptness” under Article 5 § 3 (*Shcherbina v. Russia*, §§ 65-70, where a delay of sixteen days in the judicial review of the applicant’s detention order issued by the prosecutor was found to be excessive).

265. The standard of “speediness” is less stringent when it comes to proceedings before a court of appeal (*Abdulkanov v. Russia*, § 198). Where the original detention order was imposed by a court in a procedure offering appropriate guarantees of due process, the Court is prepared to tolerate longer periods of review in the proceedings before the second instance court (*Ilseher v. Germany* [GC], § 255; *Shcherbina v. Russia*, § 65). These considerations apply even more so to complaints concerning proceedings before the constitutional courts which are separate from proceedings before ordinary courts (*Mehmet Hasan Altan v. Turkey*, § 163; *Ilseher v. Germany* [GC], § 274). Proceedings before the higher courts are less concerned with arbitrariness, but provide additional guarantees based primarily on an evaluation of the appropriateness of continued detention (*Mehmet Hasan Altan v. Turkey*, § 165). Nevertheless, the constitutional courts are similarly bound by the requirement of speediness under Article 5 § 4 (*G.B. and Others v. Turkey*, § 184; *Kavala v. Turkey\**, § 184).

266. In principle, however, since the liberty of the individual is at stake, the State must ensure that the proceedings are conducted as quickly as possible (*Khlaifia and Others v. Italy* [GC], § 131).

#### a. The period to be taken into consideration

267. 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).

268. 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).

269. 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

270. 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).

271. In making such an assessment, the circumstances to be taken into account include the complexity of the proceedings, their conduct by the domestic authorities and by the applicant, what was at stake for the latter (*Ilmseher v. Germany* [GC], § 252; *Mooren v. Germany* [GC], § 106; *Mehmet Hasan Altan v. Turkey*, § 162) and any specificities of the domestic procedure (*Khlaifia and Others v. Italy* [GC], § 131; *Mehmet Hasan Altan v. Turkey*, § 163, and *Ilmseher v. Germany* [GC], §§ 270-271 concerning proceedings before constitutional courts).

272. 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).

273. Where the national authorities decide in exceptional circumstances to detain a child and his or her parents in the context of immigration controls, the lawfulness of such detention should be examined by the national courts with particular expedition and diligence at all levels (*G.B. and Others v. Turkey*, §§ 167 and 186).

274. 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; *Ilmseher v. Germany* [GC], § 253).

275. In exceptional situations, the complexity of the case may justify the length of periods which in an ordinary context cannot be considered as “speedy” (*Mehmet Hasan Altan v. Turkey*, § 165-167, and *Şahin Alpay v. Turkey*, §§ 137-139, where the Court found no violation of Article 5 § 4 in respect of the proceedings before the Constitutional Court lasting for periods between fourteen and sixteen months, concerning new and complicated issues under the state of emergency; see also *Ilmseher v.*

*Germany* [GC], §§ 265-275, where a period of eight months and twenty-three days of proceedings before the Federal Constitutional Court was found to comply with the speediness requirement, having regard in particular to the complexity of the issues raised by a new system of preventive detention).

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

277. 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; *Koendjiharie v. the Netherlands*, § 29).

278. 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 of the Convention

“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.”

### HUDOC keywords

Compensation (5-5)

### 1. Applicability

279. 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 (*N.C. v. Italy* [GC], § 49; *Pantea v. Romania*, § 262; *Vachev v. Bulgaria*, § 78).

280. 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*, §§ 190-93).

281. The applicability of Article 5 § 5 is not dependent 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

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

### 3. Availability of compensation

283. 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 (*Michalák v. Slovakia*, § 204; *Lobanov v. Russia*, § 54).

284. An enforceable right to compensation must be available either before or after the Court's judgment (*Stanev v. Bulgaria* [GC], §§ 183-84; *Brogan and Others v. the United Kingdom*, § 67).

285. The effective enjoyment of the right to compensation must be ensured with a sufficient degree of certainty (*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).

286. In considering compensation claims, the domestic authorities are required to interpret and apply domestic law in the spirit of Article 5, without excessive formalism (*Fernandes Pedrosa v. Portugal*, § 137; *Shulgin v. Ukraine*, § 65; *Houtman and Meeus v. Belgium*, § 46).

#### 4. Nature of compensation

287. 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).

288. 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).

However, a reduction of sentence could constitute compensation within the meaning of Article 5 § 5 if it was explicitly granted to afford redress for the violation in question and it had a measurable and proportionate impact on the sentence served by the person concerned (*Porchet v. Switzerland* (dec.), §§ 18-25).

289. Article 5 § 5 comprises a right to compensation not only in respect of pecuniary damage but also for any distress, anxiety and frustration that a person may suffer as a result of a violation of others provisions of Article 5 (*Sahakyan v. Armenia*, § 29; *Teymurazyan v. Armenia*, § 76, concerning the unavailability of compensation for damage of a non-pecuniary nature under Armenian law).

#### 5. Existence of damage

290. 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).

291. 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

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

293. In determining the existence of a violation of Article 5 § 5, the Court has regard to its own practice under Article 41 of the Convention in similar cases as well as to the factual elements of the case, such as the duration of the applicant's detention (*Vasilevskiy and Bogdanov v. Russia*, § 23).

294. The mere fact that the amount awarded by the national authorities is lower than the award the Court would have made in similar cases does not per se entail a violation of Article 5 § 5 (*Mehmet Hasan Altan v. Turkey*, § 176).

295. However, compensation which is negligible or wholly 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 (*Vasilevskiy and Bogdanov v. Russia*, § 22 and 26; *Cumber v. the United Kingdom*, Commission decision; *Attard v. Malta* (dec.)).



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

297. There may be differences in approach between assessing the loss of victim status under Article 5 § 1 on account of the quantum of compensation awarded at national level, on the one hand, and the matter of a right to compensation in terms of Article 5 § 5, on the other (see *Tsvetkova and Others v. Russia*, §§ 157-158, where the domestic award, which was not comparable to what could be awarded by the Court, did not deprive the applicant of his victim status, but it was not so low as to undermine the right to compensation under Article 5 § 5; see also *Vedat Doğru v. Turkey*, §§ 40-42 and 63-64, where the sum awarded by the domestic courts was regarded as manifestly insufficient for the applicant to lose his victim status, but no issue was found to arise under Article 5 § 5).

## List of cited cases

The case-law cited in this Guide refers to judgments or decisions delivered by the Court and to decisions or reports of the European Commission of Human Rights (“the Commission”).

Unless otherwise indicated, all references are to a judgment on the merits delivered by a Chamber of the Court. The abbreviation “(dec.)” indicates that the citation is of a decision of the Court and “[GC]” that the case was heard by the Grand Chamber.

Chamber judgments that were not final within the meaning of Article 44 of the Convention when this update was published are marked with an asterisk (\*) in the list below. Article 44 § 2 of the Convention provides: “The judgment of a Chamber shall become final (a) when the parties declare that they will not request that the case be referred to the Grand Chamber; or (b) three months after the date of the judgment, if reference of the case to the Grand Chamber has not been requested; or (c) when the panel of the Grand Chamber rejects the request to refer under Article 43”. In cases where a request for referral is accepted by the Grand Chamber panel, the Chamber judgment does not become final and thus has no legal effect; it is the subsequent Grand Chamber judgment that becomes final.

The hyperlinks to the cases cited in the electronic version of the Guide are directed to the HUDOC database (<http://hudoc.echr.coe.int>) which provides access to the case-law of the Court (Grand Chamber, Chamber and Committee judgments and decisions, communicated cases, advisory opinions and legal summaries from the Case-Law Information Note) and of the Commission (decisions and reports), and to the resolutions of the Committee of Ministers.

The Court delivers its judgments and decisions in English and/or French, its two official languages. HUDOC also contains translations of many important cases into more than thirty non-official languages, and links to around one hundred online case-law collections produced by third parties. All the language versions available for cited cases are accessible via the “Language versions” tab in the HUDOC database, a tab which can be found after you click on the case hyperlink.

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