



# The right to liberty and security of the person

*A guide  
to the implementation  
of Article 5  
of the European Convention  
on Human Rights*

Monica Macovei

Human rights handbooks, No. 5





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## What the Convention says

### 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 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.*

### Article 1 of Protocol No. 4

*No one shall be deprived of his liberty merely on the ground of inability to fulfil a contractual obligation.*

Article 5 of the European Convention embodies a key element in the protection of an individual's human rights. Personal liberty is a fundamental condition, which everyone should generally enjoy. Its

deprivation is something that is also likely to have a direct and adverse effect on the enjoyment of many of the other rights, ranging from the right to family and private life, through the right to freedom of assembly, association and expression to the right to freedom of movement. Furthermore, any deprivation of liberty will invariably put the person affected into an extremely vulnerable position, exposing him or her to the risk of being subjected to torture and inhuman and degrading treatment. Judges should constantly keep in mind that in order for the guarantee of liberty to be meaningful, any deprivation of it should always be exceptional, objectively justified and of no longer duration than absolutely necessary.

The “right to liberty and security” is a unique right, as the expression has to be read as a whole. “Security of a person” must be understood in the context of physical liberty and it cannot be interpreted as to referring to different matters (such as a duty on the state to give someone personal protection from an attack by others, or right to social security). The guarantee of “security of person” serves to underline a requirement that the authorities in Strasbourg have developed when interpreting and explaining the right to liberty in Article 5.

The European Court has stressed the importance of the right to liberty and security in many cases. Thus, in *Kurt v. Turkey*,<sup>1</sup> the Court held:

*...that the authors of the Convention reinforced the individual's protection against arbitrary deprivation of*

*his or her liberty by guaranteeing a corpus of substantive rights which are intended to minimise the risks of arbitrariness by allowing the act of deprivation of liberty to be amenable to independent judicial scrutiny and by securing the accountability of the authorities for that act. [...] What is at stake is both the protection of the physical liberty of individuals as well as their personal security in a context which, in the absence of safeguards, could result in a subversion of the rule of law and place detainees beyond the reach of the most rudimentary forms of legal protection.*

In seeking to give effect to the requirements of Article 5, the interpretation of text by the European Court of Human Rights is vital. As with all the articles of the European Convention, the European Court has interpreted every provision of Article 5 in a purposeful and dynamic manner, inevitably taking one beyond the literal terms of the text of the Convention in determining what particular provisions entail. Many such terms have been given an autonomous meaning by the European Court. The purposive interpretation proceeds on the basis that the object and purpose of the European Convention must be reached when determining what Article 5 and its other provisions require. This approach is consistent with the rules of treaty interpretation and it is also a reflection of the constitutional character of the European Convention. It is thus inappropriate to see the restrictions imposed by Article 5 as ones which should be narrowly construed. The aim of the Con-

1 *Kurt v. Turkey*, judgment of 25 May 1998, para. 123.

vention is to secure real rights for individuals, which means that the rights should be ones with a substantive content and not simply affording a mere formal guarantee. Consequently, the limitations on the right to liberty should be seen as exceptional and only permitted where a cogent justification for them is provided; their implementation cannot begin with any assumption that anything which public authorities propose is necessarily appropriate. The dynamic interpretation embodies a willingness to re-examine the interpretation already given to a particular provi-

sion in the light of changing circumstances. The significance of the European Court's interpretation of the legal texts cannot be underestimated. In order to achieve a full compliance with obligations under Article 5 (as well as under the entire Convention) judges must observe the European Court's dynamic case-law.

The subsequent sections will address the fundamental principles and rules found in Article 5 of the European Convention on the basis of their interpretation and application to concrete situations by the Court in Strasbourg.

# Section I: presumption of liberty; requirement of lawfulness; concept of detention

## 1. The presumption in favour of liberty

Paragraph 1 of Article 5 of the European Convention points to there being a presumption that everyone should enjoy liberty and that, therefore, a person can only be deprived of it in exceptional circumstances. Thus it begins with an unqualified assertion of the right, "Everyone has the right to liberty and security of the person" and this is followed by the structure that "No one shall be deprived of liberty save in the following cases and in accordance with a procedure prescribed by law".

Furthermore, the presumption in favour of liberty is underlined by the imperative requirement under Article 5 to ensure that liberty should both be lost for no longer than is absolutely necessary and be capable of being readily recovered where such loss is not justified. The former is evident in the stipulation that suspected offenders "shall be entitled to trial within a reasonable time" and the latter is found in the prescription that everyone deprived of liberty "be entitled to take pro-

ceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful". There is thus a clear burden of proof on those who have taken away someone's liberty to establish not only that the power under which it occurred falls within one of the grounds specified in Article 5 but also that its exercise was applicable to the particular situation in which it was used.

This burden necessarily requires a self-critical analysis by those who can exercise powers which may lead to a deprivation of liberty to ensure that, when they do use them, the limits imposed by Article 5 are continually observed. However, the assurance that such an analysis is both undertaken and is effective is heavily dependent upon a sceptical perspective being adopted on the part of judges when performing the key supervisory function assigned to them by Article 5 (3) and (4). In any case, where a deprivation of liberty is contested it will be essential for a judge to start from the proposition that the person affected should be free. Pursuant to such a proposition the judge should not only expect and require reasons to be advanced for this deprivation of liberty but also subject them to close scrutiny to see whether they actually support the action that has been taken. Anything less than that would entail an abandonment of the rule of law and a surrender to arbitrary treatment.

The unacceptability of any tendency in this direction can be seen in the European Court's conclusion that a person's continued detention could not

be justified in *Mansur v. Turkey*,<sup>2</sup> when the national court repeatedly authorised the continuation of detention using invariably identical and indeed stereotypical form of words, often without further elaboration. In taking such an approach the national judge was merely rubber-stamping the decision of the law-enforcement officials and failing to exercise an independent critical judgement. This can never be consistent with the requirement that a deprivation of liberty be justified.

## **2. The lawfulness of the detention**

Paragraph 1 of Article 5 requires that any deprivation of liberty be “in accordance with a procedure prescribed by law”. Further, each sub-paragraph providing for the cases where deprivation of liberty is permitted supposes that the measure be “lawful”. The requirement of lawfulness has been interpreted as referring to both procedure and substance. Moreover, lawfulness is understood to mean that any detention must be in accordance with the national law and the European Convention and must not be arbitrary.

### **Formal compliance with national law**

It is, of course, essential to check first whether the requirements of the relevant national law have

been satisfied when someone has been deprived of his or her liberty. This may be a matter of determining whether an essential procedure has been followed, or assessing whether there is a legal provision covering the action taken. The latter may be a matter of construing the scope of a particular provision but it may also be a question of establishing that the sort of factual situation to which such a provision applied actually existed. There are a significant number of instances where the European Court has found that these have still not been performed and they should not, therefore, be taken for granted.<sup>3</sup> Thus in *Van der Leer v. the Netherlands*<sup>3</sup> a woman had been confined in a psychiatric hospital, but the judge who had made the order had failed to observe the legislative requirement that she be heard beforehand. Indeed, as the Court noted, the judge had not even bothered to explain why he had departed from the opinion of the psychiatrist dealing with the woman’s case that it would not be devoid of purpose or medically inadvisable for her to be heard by a judge. It is irrelevant for the purposes of applying the European Convention that the woman’s confinement might on its merits have been appropriate and consistent in this respect with the grounds authorised by Article 5; wherever there has been a failure to fulfil a procedural requirement before liberty can be deprived the arrest or detention must necessarily be regarded as improper.

Similarly, in *Lukanov v. Bulgaria*<sup>5</sup> one of the coun-

2 8 June 1995.

3 Although accepting that it is principally for the authorities of a State party – and especially the courts – to interpret and apply its law, the Court reserves the power to review whether that law has in fact been complied with; and in some of the cases considered below it has reached a different conclusion from that arrived at by those authorities.

4 21 February 1990.

5 20 March 1997.

try's former prime ministers had been deprived of his liberty in relation to the grant of certain public funds to developing countries. Although deprivation of liberty in connection with criminal offences is potentially compatible with the Convention, there was a failure to establish in this case that the activity giving rise to the loss of liberty was actually unlawful, let alone a criminal offence. This impugned activity of the applicant could not, therefore, provide a basis in Bulgarian law for depriving him of his liberty. Furthermore, even if the criminal prohibition on seeking an advantage for oneself might have been potentially applicable to the making of these grants (which seemed unlikely), there was no fact or information which pointed to the existence of a reasonable suspicion that the prime minister had actually sought such an advantage. His loss of liberty was thus entirely without any legal foundation and was an incontestable violation of Article 5.

This was also the case in *Steel v. the United Kingdom*<sup>6</sup> with respect to some of the applicants who had been arrested when handing out leaflets and holding up banners in the course of a protest about the sale of weapons. Although there was a power of arrest where a breach of the peace was apprehended, their behaviour did not provide the police with any justification for fearing that this would occur; there was no evidence that they had significantly obstructed or attempted to obstruct persons attending the conference or had taken any other action that was likely to

provoke them to violence. The European Court held that the arrest and subsequent detention of these applicants under the breach of the peace power was unlawful.<sup>7</sup>

### **The importance of a continuing legal basis**

The requirement of the legal basis for any deprivation of liberty extends to the whole period for which it lasts. There have been a number of instances where violations have been found because the legal basis for the deprivation of liberty, despite being originally lawful, had at some point had ceased to exist. Thus in *Quinn v. France*<sup>8</sup> the release had been ordered by a court of a person who had previously been remanded in custody entirely in accordance with French law. However, for some eleven hours after that order had been made, the applicant had remained in custody without being notified of the order or any move being made to commence its execution. Apparently, the prosecutor's office had needed this time to set in motion extradition proceedings against him which would then have avoided having to comply with the order for release. The European Court acknowledged that there could be some delay in complying with such an order, but held that the respective interval was clearly too long to satisfy the Article 5 requirement.

In *Labita v. Italy*, a violation of Article 5 was found where the delay of over 10 hours in release

6 23 September 1998.  
7 See also *Raninen v. Finland*, 16 December 1997, where an arrest of someone who had refused to perform his national service had been contrary to Finnish law, because he had not first been asked whether he would persist in this refusal.  
8 22 March 1995.

- 9 6 April 2000 .
- 10 27 November 1997.
- 11 See also *Engel and Others v. the Netherlands*, 8 June 1976, where the maximum permitted provisional arrest period of twenty-four hours was exceeded by between twenty-two and thirty hours.
- 12 28 March 2000.
- 13 Other factors shaping the notion of *lawfulness* are considered further below. A violation of Article 5 (1) for these reasons in respect of the same practice has also been found in *Kawka v. Poland*, 9 January 2001. Prior to the rulings in these cases the practice had been ended and replaced by one of referring each case where a detention order had been made at the investigation stage to a court in order to obtain a fresh ruling as to whether the detention of the person concerned should continue. This fulfils the Convention's requirements as to *lawfulness* and judicial supervision.
- 14 31 July 2000.

from prison was attributable to the absence of the registration officer, which prevented verification of whether there were any other reasons for keeping the applicant in detention.<sup>9</sup> In *K.-F. v. Germany*,<sup>10</sup> where national law granted the authorities the power to detain a person up to twelve hours in order to establish his or her identity, the applicant was kept in custody forty minutes longer than the twelve-hour limit. The German Government claimed that this had been required in order to record the applicant's personal details. The European Court observed that this recording of details was part of the measures for checking identity and it should, therefore, have been carried out during the period of detention which was allotted by the law for this purpose. In the circumstances the detention of the applicant had to be regarded as having become unlawful and the Court found a violation of Article 5.<sup>11</sup>

### **Misguided reliance on domestic practice**

Violations of Article 5 have been found by the European Court in cases where the domestic authorities relied on longstanding practices whose legality has not even been questioned. Thus in *Baranowski v. Poland*<sup>12</sup> the applicant had initially been properly arrested and then detained on remand in connection with fraud charges. His detention, however, ceased to be reviewed once the prosecutor filed the bill of indictment with the

court. In accordance with the Polish practice of placing a detainee "at the disposal of the court", the detention which had previously been ordered at the investigation stage of a case was prolonged indefinitely; the court was not obliged, of its own motion, to make any further decision as to whether the detention fixed at that stage should be extended. This practice had undoubtedly – and understandably – arisen to fill a gap, but there was a complete absence of any support for it in either legislation or case-law. It is doubtful whether the legality of the practice was ever questioned, since the need for continued detention was undeniable – and potentially quite compatible with the European Convention – and its development is a good illustration of how the general legitimacy of a course of conduct can lead one into overlooking or failing to question the absence of legality for it. In this case the Court condemned the practice as a violation of Article 5 (1) because it was seen as lacking foreseeability and certainty, as well as giving scope for arbitrariness.<sup>13</sup> In *Ječius v. Lithuania*<sup>14</sup> the applicant – a murder suspect – had continued to be detained after a period of detention on remand authorised by the deputy prosecutor general had expired. This appeared to be the way in which cases had come to be handled and it is the sort of habit which cannot co-exist with the requirements of the Convention. The Court held that the applicant's deprivation of liberty had been incompatible with

the principles of legal certainty and the protection from arbitrariness.<sup>15</sup>

### **Compliance with the Convention. The Convention understanding of lawfulness**

In addition to being fully in compliance with national law, any deprivation of liberty must also satisfy the potentially wider European Convention understanding of the term “lawful”. This understanding relates in the first place to a concern to ensure that the specific requirements of Article 5 – even though not found in national law – are observed. A deprivation of liberty will be found objectionable where this is effected either as a means of interfering with other rights and freedoms guaranteed by the Convention or through a law which is applied in an arbitrary fashion or whose very character is to be regarded as deficient. In *Kurt v. Turkey*, the European Court held that

*... any deprivation of liberty must not only have been effected in conformity with the substantive and procedural rules of national law but must equally be in keeping with the very purpose of Article 5, namely to protect the individual from arbitrariness.*<sup>16</sup>

Where the domestic authorities fail to provide for any ground of the detention, the Court is ready to find a violation of Article 5 (1). In *Denizci and Others v. Cyprus*, the applicants claimed, *inter alia*, that no reason was given for their arrest, and the Court

found a violation of Article 5 (1), observing that the respondent government did not advance any lawful basis for the applicants’ arrest and detention.<sup>17</sup>

### **Incompatibility with Convention provisions**

Deprivation of liberty legally justified at national level by grounds other than those exhaustively listed in Article 5 (1) will certainly be found “unlawful” as being contrary to Article 5 (1). The grounds do not, for example, permit preventive measures to be taken against suspected criminals where a prosecution is not the object of the detention.<sup>18</sup> Such deprivation of liberty, though legal at national level, runs contrary to Article 5 (1).

However, even where deprivation falls within a listed ground, the Convention can be seen to set a limit to the acceptability of its overall duration. Thus in the case of persons detained pending trial this is found in the explicit requirement in Article 5 (3) that the trial be within a reasonable time; whereas in the case of persons detained in connection with deportation, extradition and related proceedings it is derived from the implied obligation of the authority concerned to act with reasonable diligence.

### **Arbitrary use of power**

However, even if a national law authorising a deprivation does not give rise to any of these ob-

15 A similar finding of a violation of Article 5 (1) was made in *Grauslys v. Lithuania*, 10 October 2000.

16 28 May 1998.

17 23 May 2001.

18 *Jėčius v. Lithuania*.

jections and is in other respects entirely compatible with the European Convention standard, its use in particular circumstances might still not be regarded as lawful because it is considered to be arbitrary. This designation would certainly be seen as appropriate when a power is used in circumstances where a deprivation of liberty is not really needed or is designed to achieve an illegal objective. An instance of the former can be seen in *Witold Litwa v. Poland*,<sup>19</sup> where a person who was blind in one eye and whose sight in the other was severely impaired had been confined in a sobering-up centre after post office clerks – to whom he had complained about his boxes being opened and empty – had called the police, alleging that he was drunk and behaving offensively. However, although the applicant's detention was for a ground included in Article 5 (1) (e) – the detention of alcoholics – the use of the power was clearly unnecessary given the absence of any threat to the public or himself, his blindness and the rather trivial circumstances of the case. Furthermore the law provided for other, far less draconian measures for dealing with an intoxicated person – such as being taken to a public-care establishment or to his or her own home – and no consideration appeared to have been given to using them. As a result the deprivation of liberty was, notwithstanding its formal legal basis, to be regarded as an arbitrary use of power and thus unlawful.

19 4 April 2000.

20 29 May 1997.

A similar conclusion might, for example, be reached where a power of detention to establish identity was employed against someone already known to the police officer, notwithstanding that the person concerned was not carrying his or her identity papers at the time. The patently unnecessary use of the power in such circumstances would lead to it being found to be arbitrary. Such an unjustified use of power can also be seen in *Tsirlis and Kouloumpas v Greece*,<sup>20</sup> in which two Jehovah's Witnesses had been imprisoned following their conviction for insubordination after they had been summoned for military service and had refused to join their units or wear military uniform. At all times they had maintained that they were ministers of religion and as such exempt from military service. The applicability of such exemption to ministers who were Jehovah's Witnesses was well established in the case-law of the supreme administrative court, but the European Court found that it had been blatantly ignored by the military courts which had trailed the applicants. In these circumstances the proceedings against the applicants, leading to their loss of liberty, were to be regarded as arbitrary and thus unlawful for the purposes of Article 5 (1).

Furthermore, the use of a lawful power solely to achieve an illegal objective would not be acceptable under the Convention, regardless of whether such a use of a national legal provision is considered within the country concerned to be objectionable. Thus in

*Bozano v France*<sup>21</sup> a violation of Article 5 (1) was found where a person had been detained supposedly for the purpose of deportation but actually as a device to circumvent restrictions on extradition. In this case a request for extradition to Italy was rejected by a French court. However, over a month after being released by the French courts, the applicant was arrested and served with a deportation order that had actually been issued while he was still in custody during the extradition proceedings. The applicant was then taken to the Swiss frontier, even though the Spanish border was much nearer, and handed over to the police in Switzerland. Once in that country extradition proceedings to Italy were successfully concluded and the applicant was taken to an Italian prison to serve his sentence. The European Court found a violation of Article 5 (1) stating that this whole course of conduct was arbitrary. There were various factors which the Court emphasised in reaching this conclusion: the delay in the implementation of the deportation measure so that the applicant was not in a position to make use of any of the effective remedies available to him; the fact that Switzerland and Italy appeared to be apprised beforehand of the course of action taken; the failure to inform the applicant of the deportation order when an application for a residence permit was refused; and the suddenness of the applicant's apprehension and his inability to speak to his wife or his lawyer; the absence of any choice of destination upon his

expulsion. All of this made it inevitable that this "disguised extradition" would make the applicant's deprivation of liberty arbitrary and thus unlawful for the purpose of Article 5 (1). However, although the accumulation of factors was overwhelming, each of them individually evinced a disrespect for the idea of law in its most elemental sense and it is probable that the approach underlying any one of them would be sufficient for a finding of arbitrariness.<sup>22</sup>

### **Accessibility, foreseeability and other guarantees**

However, even if a power exists and is not misused, it will not be regarded by the European Court as providing the necessary legal basis for a deprivation of liberty if the legal provision lacks the quality which it considers essential for any law to be acceptable for European Convention purposes. This entails the law being accessible, foreseeable and certain, as well as containing other guarantees against the risk of arbitrariness in the way those subject to it might be treated.

The accessibility requirement is not met if a deprivation of liberty is based on a legal provision that was secret or unpublished. The accessibility requirement will also apply to subsidiary rules adopted in the enforcement of a law. If such subsidiary rules are not widely available the European Court might find a violation of Article 5 (1). An in-

21 18 December 1986.

22 See also *Murray v. the United Kingdom*, 28 October 1994, in which it was alleged that the purpose of an arrest was not to bring that person before the competent legal authority as a suspected criminal pursuant to Article 5 (1) (c) but merely for the purpose of interrogating her with a view to gathering general intelligence, for which there was no authorisation under the Convention. The Court concluded that no cogent elements had been produced that would lead it to depart from the findings of the domestic courts that such a covert and improper purpose had not been behind the arrest but there is no question that it would have, if it had existed, rendered the arrest unlawful for Convention purposes. It should also be noted that in *Jėčius v. Lithuania*, the absence of bad faith on the part of a domestic court was one of the considerations relied upon by the Court in finding that the one period of deten-

tion challenged which did have a clear legal basis was not unlawful for Convention purposes. Similarly in *Benham v. the United Kingdom*, 10 June 1996, the Court declined to find that a committal to prison by a court was arbitrary where it had not been suggested that the decision had either been taken in bad faith or following any neglect to attempt to apply the relevant legislation correctly. In *Perks v. the United Kingdom*, 12 October 1999, the Court suggested that a fettered exercise of discretion or a failure to have regard to a relevant piece of evidence might render arbitrary an otherwise formally lawful decision.

23 25 June 1996.

24 See also *Wloch v. Poland*, 19 October 2000, where the Court doubted that a deprivation of liberty would have been lawful if it had been based solely on a provision as to the interpretation of which there were many contradictory opinions and no decisive case-law.

stance of this might have been seen in *Amuur v. France*,<sup>23</sup> but for the fact that an unpublished circular – the only text which dealt specifically with the practice of holding aliens in the transit zone – was itself considered by the Court to be too brief and lacking in appropriate guarantees required to have the quality of law. It was immaterial, therefore, to this finding that the circular was actually unpublished and thus inaccessible but there is no doubt that there could be other instances where this would be the key consideration. In such cases the quality of content should be insufficient to prevent the inaccessibility of the rule being overlooked and the deprivation of liberty being found to be lawful.

Legal certainty requires that any rules relied upon must be sufficiently precise to allow a person – even with appropriate advice – to foresee to a degree that is reasonable in the circumstances the consequences which a given action might entail. The failure to satisfy this test – which might also be seen as a requirement to shape the law in such a way as to limit the scope for arbitrary treatment – can be seen in cases such as *Baranowski v. Poland* and *Jėčius v. Lithuania*, where the European Court was, notwithstanding the view advanced above, prepared to work on the assumption that the practices impugned in those cases did have a basis in national law. Nevertheless, the Court found that they were still un-

lawful. In *Baranowski* this was both because of the absence of any precise provisions laying down whether – and, if so, under what conditions – detention that had been ordered at the investigation stage could properly be prolonged at the stage of the court proceedings and because a person was detained under the practice – developed as a result of the statutory lacuna – for an unlimited and unpredictable time without this being based on a concrete legal provision or any judicial decision.

In *Jėčius* there was also a finding that legal certainty was absent because there were no clear rules governing the detainee's position. Detaining someone for an unlimited period without judicial authorisation, relying solely on the fact that the case had been referred to the trial court, was held to be contrary to Article 5 (1). However, legal certainty was also considered to be lacking when an attempt was made to justify the period of detention by invoking a provision in the criminal code. In so doing, three different explanations were advanced by the prosecutor, ombudsman, president of the supreme court criminal division and the government itself as to how this provision might authorise the detention concerned. Rather than try to resolve such a significant discrepancy in reasoning, the European Court understandably concluded that any provision which was vague enough to cause confusion amongst the competent State authorities must be incompatible with the requirements of lawfulness.<sup>24</sup>

The certainty requirement of the legal basis for deprivation of liberty might also be provided through associated rules, even if not of the same standing in the legal hierarchy<sup>25</sup> or by the development of case-law establishing the interpretation to be given to a particular provision. An example of the latter can be seen in the case of *Steel v. the United Kingdom*, which concerned an arrest for breach of the peace.<sup>26</sup> The European Court considered that the concept of “breach of the peace” had been clarified through two decades of domestic judicial decisions so that it only relates to persons who cause harm, or appear likely to cause harm to persons or property or who act in a manner where the natural consequence would be the provocation of others to violence. The effect of this development was thus to turn a fairly imprecise concept into one that was regulated with sufficient guidance and appropriate precision. In *Wloch v. Poland*, the interpretation of a provision for which there was no pertinent case law or a unanimous opinion of legal scholars was neither arbitrary nor unreasonable. However, such rulings are not an invitation to reject a challenge to a provision’s lawfulness on the basis that appropriate precision will ultimately be derived from cases to be decided in the future. Nevertheless it would be a perfectly legitimate to use the power of interpretation to give a broadly-cast provision the narrow construction required to keep it “lawful” for Convention purposes.

Certainly, the need for such guarantees can in particular contexts be quite extensive. Thus in *Amuur v. France* – where asylum-seekers had been detained for twenty days – the Court was unhappy that none of the legal texts applicable to the holding of aliens in the transit zone allowed the ordinary courts to review the conditions under which they were held or, if necessary, to impose a limit on the authorities as regards the length of time for which they were held. In addition, the European Court observed that legal texts did not provide for legal, humanitarian and social assistance and for any procedures and time-limits for access to such assistance so that asylum-seekers could take the necessary steps. Thus the laws were not regarded as having sufficiently guaranteed the right to liberty of a group of applicants who might be regarded as particularly vulnerable in the absence of such assistance.

Moreover, the requirements can also be quite basic and still invaluable. Thus the Court has repeatedly emphasised the importance of accurate and reliable data being recorded about any deprivation of liberty. This concern has been expressed by the Court in a number of cases where complaints had been made about persons being apprehended by law enforcement officers and there being no information available as to what happened to the person thereafter.<sup>27</sup> A particular difficulty in trying to discover what happened was the lack of any official custody records in respect of the persons concerned and this, of course, made it easier for those

25 The circular in *Amuur v. France* was insufficient for this purpose not because of its status but because of its own lack of precision.

26 Although not formally classified as an offence, it was so regarded because of the nature of the proceedings – involving the police and the first level of criminal courts – and power to imprison persons who refuse to be bound over to keep the peace.

27 See *Kurt v. Turkey*; *Çakıcı v. Turkey*, 8 July 1999, *Timurtaş v. Turkey*, 13 June 2000 and *Taş v. Turkey*, 14 November 2000. Such a disappearance is likely also to entail a violation of the right to life under Article 2.

responsible for the deprivation of liberty then to evade responsibility for what had occurred. Systematic recording of data with respect to deprivation of liberty from any initial apprehension to any transfer from one place of custody to another is thus a vital safeguard against arbitrary treatment. An institutionalised process of recording – even where there is no risk of such grave abuse as disappearance – is seen as essential requirement whenever a deprivation of liberty occurs.

### **3. What constitutes a deprivation of liberty?**

#### **“Arrest” and “detention”**

The terms *arrest* and *detention* are used interchangeably in almost all the provisions of Article 5 and they should therefore be seen as being essentially concerned with any measure – whatever designation is used by national law – that has the effect of depriving a person of his or her liberty. The guarantee afforded by the judicial supervision requirement in Article 5 is taken by the Court to arise as soon as the initial loss of liberty has happened, and any other approach will necessarily entail a violation of the Convention. The essential requirement is to concentrate on what is achieved by processes and not what they are called.

### **Elements to establish that detention exists**

It is important to be clear about what constitutes a deprivation of liberty – whether by means of arrest or detention – and when it starts, because it is only then that the requirements of Article 5 of the European Convention become applicable. This might seem self-evident but it still needs to be emphasised as there can certainly be situations where someone has been deprived of his or her liberty but this might still not be appreciated by the persons responsible, particularly if no physical restraint has been imposed. Identifying the moment at which liberty is lost is especially important in the context of the criminal process on account of the need to scrutinise both the delay before the person affected is first brought before a judge and the overall length of any detention prior to any trial that might take place.

Elements such as the nature of the confinement involved and the status of the person affected are essential in determining whether a particular measure constitutes deprivation of liberty.

### **The nature of the confinement**

The European Court will certainly look at the nature of the confinement. Deprivation of liberty will most obviously have occurred where a person is being forcibly kept in a police or prison cell but there are many other forms of confinement which can lead

to Article 5 becoming applicable. Certainly this will be the case where, for example, a law enforcement officer – whether or not force is actually used – makes it clear that a person either cannot leave a particular place or is obliged to come with the officer to some other place. Thus it would cover a person being stopped in the street or being required to stay in a police station after having originally come there of his or her own free will. It is the existence of compulsion that is important so that, as the European Court made clear in *De Wilde, Ooms and Versyp v Belgium*,<sup>28</sup> it is of no consequence that the person may have surrendered him or herself voluntarily. Moreover it is probably irrelevant that the person deprived of liberty is unaware of this fact; it is sufficient that he or she is no longer free to leave.

Article 5 is most commonly going to be relevant where the degree of confinement to a particular place is extreme in that the person affected cannot move from a certain spot – whether in the street or other open place – or is required to stay in a certain vehicle or room (not necessarily a cell). However, the fact that a person has a degree of liberty within a particular place will not necessarily mean that Article 5 has no application. Thus it was found in *Ashingdane v. the United Kingdom*<sup>29</sup> to cover a person who, although being kept compulsorily in a mental hospital, was placed in a ward which was not locked and was allowed to leave the hospital grounds during the day and over the weekend without being ac-

companied. Similarly in *Guzzardi v. Italy*<sup>30</sup> it was held applicable to a requirement that someone suspected of involvement in organised crime live in an unfenced area of 2.5 sq. km on a remote island with other such persons. Although his wife and child could live with him, the combination of constraint and isolation were sufficient in this case for it to be treated as a deprivation of liberty. These factors are more significant than the place, so a requirement that a person stay in their home would engage Article 5, whether – as in *Giulia Manzoni v. Italy*<sup>31</sup> – this was pending trial or – as in *Cyprus v. Turkey*<sup>32</sup> – pursuant to a particularly strict form of curfew under which persons could leave their homes only if escorted.

Where there is confinement to a particular area such as a village or district but there is no accompanying isolation – as there was in the *Guzzardi* case – it is much more likely to be regarded as an interference with freedom of movement rather than a deprivation of liberty.

Equally, restrictions on persons seeking entry to a country – such as a requirement that they stay in a particular area at the airport as opposed to being forcibly kept in a special detention centre for aliens – would not generally be regarded as a deprivation of liberty since they would still have the option of going to another country.

However, such an option must be a realistic one and would not exist if either there were no

28 18 June 1971.

29 28 May 1985.

30 6 November 1976.

31 1 July 1997.

32 Appl. Nos. 6780/74 and 6950/75 (Commission Report).

other country that would admit them or, where the person concerned was seeking asylum, there were no other country offering protection comparable to the protection which he or she expected to find in the one where it was being sought. Such a situation arose in the case of *Amuur v. France*, where the only possible alternative was Syria and admission was not only subject to the “vagaries of diplomatic relations” but, as that was a country which was not bound by the Geneva Convention on the Status of Refugees, there was no guarantee that the persons concerned would not then be returned to the country in which they feared being persecuted.

### **The status of the person affected**

The status of the person affected is also relevant to determining whether a deprivation of liberty has actually occurred. This has certainly been the view taken of the confinement to particular places of persons serving in the armed forces through the application of the normal disciplinary regime. Thus in *Engel v. the Netherlands*, Article 5 was found inapplicable to a form of “arrest” which led to the soldiers concerned, although required to carry out their normal duties, being confined to a designated but unlocked building within army premises in their off-duty hours. The soldiers were only able to invoke it when they were subjected to a more strict form of “arrest”, which entailed them being locked

in a cell and thus unable to carry out their normal duties. The assumption underlying this ruling is that, as military service inevitably leads to a lesser degree of liberty, the threshold to be reached before restrictions engage Article 5 must necessarily be greater than for civilians.

It is unlikely that the imposition of greater restrictions on the liberty of someone already in prison – such as a transfer from one with a light security regime to one where prisoners are very strictly confined – would be regarded as a deprivation of liberty for the purposes of Article 5, since liberty has already been lost as a result of the conviction or other order of confinement. The Court did not consider that there was any deprivation of liberty when a prisoner was confined in her cell rather than allowed the usual free association with other prisoners. However, in *Bollan v. the United Kingdom*<sup>33</sup> the Court accepted that measures adopted within a prison might disclose interference with the right to liberty in exceptional circumstances. It has also accepted that a prisoner released on licence could thus have regained his or her liberty so that a subsequent recall to prison would be a deprivation subject to the requirements of Article 5. It made it clear in *Weeks v. the United Kingdom*<sup>34</sup> that this was a matter of fact to be determined in each case but conditions imposed on such a person which required a degree of supervision and reporting to the authorities were not seen as sufficient to prevent the applicant from being regarded as at liberty for the purposes of

33 4 May 2000 (admissibility decision).

34 2 March 1987.

Article 5. It was undoubtedly significant that the applicant had not been released for a very specific purpose – such as attending a funeral – but could follow a normal life subject to a number of conditions.

### **Acts by private individuals**

Although most problems in satisfying the requirements of Article 5 are likely to arise from the acts and decisions of judges and public officials, the behaviour of private individuals may also be a source of concern. Any power given to private individuals in arresting someone must also be constrained by Article 5 requirements. A private individual who is empowered to arrest someone suspected of committing an offence (whether under a law of general applicability or one governing private security services) must ensure that the person deprived of liberty is then brought into the criminal process in the same manner that a law enforcement officer is obliged to do.

Moreover, public officials cannot stand by and allow a deprivation of liberty to be perpetrated where this is not compatible with the requirements of Article 5. Such acquiescence was found to have occurred in *Riera Blume and Others v. Spain*<sup>35</sup> when the families of the applicants – who were thought to have become members of a religious sect – had kept them in a hotel so that they could be “deprogrammed” by a psychologist and a psychiatrist. In

this particular case the action had been at the suggestion of a court following the arrest of the applicants in the course of a preliminary judicial investigation but there was no legal authority for either this or the action of the families. As the latter could not have taken place without the active cooperation of the authorities, Spain was found to have violated Article 5. No private action which leads to a deprivation of liberty contrary to this provision must be tolerated by public authorities and the latter should certainly never encourage the former to do what they are themselves barred from doing.<sup>36</sup>

### **Action overseas**

A State party to the European Convention makes a commitment in Article 1 of the European Convention to secure the rights and freedoms to everyone within its jurisdiction; and that means wherever it is in a position to exercise power, regardless of whether this occurs within its internationally recognised or constitutionally prescribed boundaries and regardless of whether there is any legal basis for acting there.

As the European Court made clear in *Loizidou v. Turkey*,<sup>37</sup> jurisdiction for the purposes of the Convention is not restricted to a State Party’s national territory, and thus responsibility could arise where the acts and omissions of its authorities produced

35 14 October 1999.

36 The Court also emphasised, in *Cyprus v. Turkey*, 10 May 2001, that any acquiescence or connivance by a State Party’s authorities in the acts of private individuals which violate the rights of other individuals within its jurisdiction would engage its responsibility under the Convention. In that case, however, claims of such acquiescence or connivance were not found to be substantiated.

37 18 December 1996.

effects elsewhere. In particular where, as in that case, military action was undertaken by a State Party in the territory of another State, the exercise of effective control by the former over a particular area would be sufficient to establish that it had jurisdiction and was thus under an obligation to secure the Convention rights and freedoms there.

This conclusion was reinforced in the case of *Cyprus v. Turkey* – which arose out of the same events – by virtue of the fact that the military operation and subsequent occupation prevented one State Party to the Convention from fulfilling its obligations under that instrument in the territory concerned. A failure to regard events there as within Turkey’s jurisdiction would result in a vacuum in the system of human rights protection available to the persons within it.

This exacting but realistic view of jurisdiction means that the requirements of Article 5 will always have to be satisfied wherever a deprivation of liberty takes place. It would, therefore, be applicable where law enforcement officers go to another country in order to bring someone back either to stand trial or to serve a sentence. Thus in *Reinette v. France*<sup>38</sup> Arti-

cle 5 was found applicable once an accused person was handed over in Saint Vincent to French police on board a military aircraft. Thereafter the applicant’s deprivation of liberty, although still occurring within Saint Vincent, was taking place under the authority of the French and thus within France’s jurisdiction for the purpose of Article 5.

Article 5 would be equally applicable where someone is illegally seized or abducted, whether to ensure that they are subjected to the criminal process or to reunite a child with one of its parents or for some other reason whenever such action is effected by State officials or it is in some other way attributable to the State Party. Furthermore, as was seen in the case of *Cyprus v. Turkey*, Article 5 would be applicable to any deprivation of liberty effected in the course of military action in some other country. The only reason that the Court found no violation of Article 5 as a result of the military operations by Turkey which were being impugned by Cyprus was that it had not been claimed by the latter that any members of the Greek-Cypriot population had actually been detained during the period under consideration.

38 63 DR 189 (1989) (admissibility decision).

## Section II: Deprivation of liberty as part of the criminal process

### 1. General considerations

Article 5 (1) acknowledges three situations in which deprivation of liberty may be justified as part of the criminal process: the apprehension of someone suspected of involvement in committing an offence (para. c); the imprisonment of someone as a penalty for having committed an offence (para. a); and the detention of someone pursuant to a request for his or her extradition to another country (para. f).

Although what constitutes an offence for these purposes is primarily a matter of national law,<sup>39</sup> this is a concept which it has already been seen to have an autonomous meaning for Convention purposes and it is conceivable that the use of the criminal law in some circumstances could be seen as disproportionate and thus arbitrary.

Certainly, imprisonment as a penalty is often the basis for regarding as excessive an interference with another Convention right or freedom<sup>40</sup> and the circumstances in which the apprehension of a suspected offender could similarly be so regarded. It should not, therefore, be taken for granted that the offence said to justify a deprivation of liberty is nec-

essarily compatible with the requirements of the Convention, even if this is unlikely to be a problem in most cases.

It should also be noted that the criminal process for the purpose of the Convention will include any discrete military criminal offences and proceedings,<sup>41</sup> which must, therefore, conform with the following requirements.<sup>42</sup> As has already been seen, the fact that a deprivation of liberty might fall in principle within one of the grounds specified in Article 5 does not mean that the need to ensure that the imposition of such a measure is not arbitrary can be overlooked. The succeeding sub-sections must, therefore, be read in the light of that overarching obligation.

### 2. Suspected offenders

The text of Article 5 (1) (c) makes it clear that deprivation of a suspected offender's liberty can be either prior to or following the offence concerned which is relied upon to justify this measure. However, as was seen in *Lukanov v. Bulgaria*, there must actually be an offence existing under national law for this ground to be legitimately invoked as a basis for depriving someone of liberty. This does not mean that there is a need to establish that an offence has actually been committed but that the conduct giving rise to the deprivation of liberty

39 In the case of extradition this will extend to the law of the requesting state.

40 See, for example, the significance attached to the possibility of imprisonment in *Hertel v Switzerland*, 25 August 1998, and *Sürek v Turkey*, 8 July 1999, when finding particular restrictions to be violations of the right to freedom of expression.

41 See *De Jong, Baljet and Van Den Brink v. the Netherlands*, 22 May 1984, and *Hood v. the United Kingdom*, 18 February 1999.

42 In *Engel and Others v. the Netherlands*, it was not significant that the proceedings were termed "disciplinary" when the penalty was sufficient for them to be regarded as "criminal" for Convention purposes. However, the differentiation in national law between disciplinary and criminal proceedings undoubtedly contributed to the failure to meet all the requirements of Article 5 (1).

must be alleged to fall within the scope of an offence already established by law.

In addition to this essential prerequisite, there are also two further key requirements. The first is that the objective of apprehending the suspected offender must be to bring him or her before the "competent legal authority" and the second is that the suspicion about the commission of the offence must be "reasonable". In addition to these requirements there is also a need to ensure that the overall length of any loss of liberty prior to the trial for the offence does not become excessive and that the possibility of release pending this has been properly considered.

### **Production before the competent legal authority**

Although the suspected commission of an offence, the need to prevent one from being committed or the possible flight of the suspected offender constitute the basis on which deprivation of someone's liberty can be contemplated, such a measure will only be compatible with Article 5 (1) (c) if it is also done with the object of bringing criminal proceedings against him or her. This is the consequence of the indissoluble link made in the Convention between Article 5 (1) (c) and 5 (3); the former authorising deprivation of liberty but the latter requiring that, where this ground is used for such

action, the person concerned must then be brought 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". The judge or other officer referred to in Article 5 (3) is a clarification of the term "competent legal authority" used in Article 5 (1) (c) but it is intended that the appearance before such a person be a stage in a process that leads ultimately to trial, underlining that the object of the deprivation is the criminal process.

This does not mean that there necessarily have to be criminal proceedings – whether a trial or even just the issuing of a formal accusation or charge – following from a deprivation of liberty in order for this to be compatible with Article 5 (1) (c). The crucial consideration is the purpose at the time when such a deprivation occurred, so whether or not it is ultimately fulfilled will not be significant. The recognition by the Court that the former is more important than the latter reflects an understanding of the factors bearing upon the criminal process; notwithstanding the validity of the suspicion at the time this measure was taken, the bringing of such proceedings may become unnecessary (e.g., because suspicious conduct has been clarified), impossible (e.g., because certain key evidence is not available) or undesirable (e.g., the poor health of the accused would make a trial oppressive). Thus in both *Brogan v. the United Kingdom*<sup>43</sup> and *Murray v. the United Kingdom* the

Court declined to find a violation of Article 5 (1) (c) simply because the persons deprived of their liberty were released without ever being charged or brought before the competent legal authority. In these cases it concluded that the authorities had concluded that after questioning the persons concerned it was impossible to pursue their suspicions against them and that in these circumstances charges could not be brought. This outcome did not, however, mean that the objective of a prosecution was called into doubt as it was recognised that the appropriateness of this might only be established once a person deprived of his or her liberty is questioned.<sup>44</sup>

It will not be acceptable, therefore, for the purposes of Article 5 (1) (c), for a person to be deprived of his or her liberty in purported reliance on a provision of the criminal law if there was never any intention to enforce that law against them insofar as that proves appropriate.<sup>45</sup> Similarly it would be inconsistent with Article 5 (1) (c) if, as in *Ciulla v. Italy*,<sup>46</sup> a person were to be deprived of his or her liberty and then brought before a judge where the legal basis for such action had some object other than ultimately to bring a prosecution against him or her. In that case the applicant had been apprehended and brought before a judge in order to obtain a compulsory residence order because of his Mafia-type behaviour. There was no doubt that such behaviour was likely to constitute various criminal offences, but the seeking and making of the order – and in-

deed the reason for establishing the procedure – was based on unproved suspicion; the order was based on past serious offences committed by the applicant and concerns about the future danger that he posed to society rather than his involvement in concrete and specific offences. The applicant's deprivation of liberty was thus a preventive procedure rather than something that could be equated with the detention prior to trial; the fact that he had been brought before a judge could not alter the fact that the measure was not part of the criminal process. In *Ciulla*, deprivation of liberty was also contrary to Article 5 (1) (c) because it was not possible to argue that such deprivation for the purpose of obtaining a compulsory residence order came within the ground permitting such a measure where it is "reasonably considered necessary to prevent... [someone]... committing an offence". This is because the acceptance of this preventive power by Article 5 (1) is also linked to the enforcement of the criminal law and its use must be directed at forestalling the commission of specific and concrete offences.<sup>47</sup> Such an objective clearly requires a degree both of particularity as to what is apprehended will be done by someone and of imminence as to his or her doing it. The ruling in *Ciulla* was also a further confirmation that Article 5 (1) (c) may justify a deprivation of liberty as a preventive measure under Article 5 (1) (c) only where it is directed at the prevention of a concrete and specified offence.

44 In these cases the success of a prosecution would have been heavily dependent upon statements made by the suspects and, as they had refused to answer any questions, there would have been no point in charging them.

45 The use of a power of apprehension where there was no such intention would not only be outside the specific terms of Article 5 (1) (c) but would also be contrary to the more general prohibition on arbitrary acts.

46 22 February 1989.

47 This requirement is such that the conduct justifying the deprivation of liberty is likely to be an attempt to commit the offence concerned, which in most jurisdictions is itself an offence.

The ruling in *Ciulla* was followed in *Jėčius v. Lithuania*, which concerned an applicant who had been suspected of murder; but the case had then been struck out for lack of evidence. Subsequently he was detained under a provision in the criminal procedure code connected with banditism, criminal association and terrorising a person, which permitted preventive detention. Acting under this provision the deputy prosecutor general ordered his detention for sixty days and an appeal against this was dismissed by a court. No specific charge was made against the applicant and no investigation was carried out in connection with this preventive detention. A month after the detention was ordered the murder charge was reopened and it became the basis for his detention. The Court had no hesitation in finding that the original preventive detention, as it had no connection with the conduct of criminal proceedings, was a violation of Article 5 (1). Article 5 (1) (c) does not, however, simply require that the object of the deprivation of liberty be, if appropriate, the institution of criminal proceedings. The legal framework must also be such that production of the person concerned, if not already released, before the competent legal authority is an automatic consequence of that measure being taken. The function of the competent legal authority will be to determine whether pre-trial detention should be continued and, if so, for how long. In the following sub-sections the grounds for such a continua-

tion and its overall length will be considered. However, it is essential that this process be an integral part of the arrangements for depriving suspected offenders of their liberty. Its absence was a key reason for finding a violation of Article 5 (1) in *Engel and Others v. the Netherlands*, where the characterisation of offences by soldiers as disciplinary meant that there was no supervision by the competent legal authority of their deprivation of liberty. As a consequence this deprivation could not be justified by reference to the authorisation to apprehend suspected offenders.

### **Reasonable suspicion**

The stipulation in Article 5 (1) (c) of the need for a reasonable suspicion that the person being deprived of liberty has committed an offence ensures that a deprivation only occurs where this is well-founded and is thus not arbitrary. A suspicion must always be genuinely held – the Court emphasised in *Murray v. the United Kingdom* that the honesty and *bona fides* of a suspicion was an indispensable element of its reasonableness – but it can only be regarded as reasonable if it is also based on facts or information which objectively link the person suspected to the supposed crime. There will, therefore, have to be evidence of actions directly implicating the person concerned or documentary or forensic evidence to similar effect. Thus there should be no deprivation

of liberty based on feelings, instincts, mere associations or prejudice (whether ethnic, religious or any other), no matter how reliable these may be regarded as an indicator of someone's involvement in the commission of an offence.

This does not mean that the evidence must either be sufficient to justify a conviction or even the bringing of a charge; as has already been seen, it was recognised in *Brogan v. the United Kingdom* and *Murray v. the United Kingdom* that the object of questioning during the deprivation of liberty permitted under Article 5 (1) (c) is simply to further the investigation of a possible offence through confirming or dispelling the suspicion that exists which inevitably cannot be conclusive at this stage. Nevertheless, there must be some basis for the suspicion that is relied upon.

The mere fact that a person has committed some offence – even if similar – in the past will not, therefore, be a sufficient basis for a reasonable suspicion, as the Court made clear in the case of *Fox, Campbell and Hartley v. the United Kingdom*.<sup>48</sup> In that case the applicants had previous convictions for acts of terrorism but, although the Court accepted that this might be something which could reinforce a suspicion deriving from other material, it appeared that this was the only basis on which they had been deprived of their liberty. It is essential that the suspicion be linked to the person's present conduct. A mere assertion that there was reliable but confidential information – as it was invoked in the *Fox* case –

would not be a sufficient basis for accepting that there was a reasonable suspicion if it is not made available to the court considering a challenge to the legality of a deprivation of liberty.

The reasonable suspicion was held to be established in *K.-F. v. Germany*, where tenants were arrested for rent fraud when, after their landlady had alleged to the police that they did not intend to perform their obligations, inquiries revealed that the address which they had given was merely a post office box and one of them had previously been under investigation for fraud. In *Punzelt v. the Czech Republic* the Court found a reasonable suspicion where reliance was placed on the inability of the vendor of two department stores to cash two cheques deposited as security in negotiations because they were dishonoured.<sup>49</sup>

In *Lukanov v. Bulgaria* the Court underlined that no fact or information had been provided which showed the applicant as having sought to obtain for himself or anyone else an advantage from his involvement in allocating public funds to other countries; a vague reference to certain "deals" was understandably regarded by the Commission as not having substantiated the existence of such an improper objective. However, the main problem in *Lukanov* was that most of the accusations brought against him did not amount to any criminal offence under Bulgarian law. In that case the absence of a criminal prohibition was relatively clear-cut but the

48 30 August 1990.

49 25 April 2000.

Court has recognised that there can be instances where there is some uncertainty as to whether known facts could reasonably be considered as falling within a particular prohibition on behaviour by the criminal law.

There is a need to be able to demonstrate not only a link between the person deprived of his or her liberty and the events supposed to constitute an offence but also a sufficient basis for concluding that those events fall within the scope of the offence alleged. This is most likely to be problematic with new or little-used offences but a particularly unusual interpretation of a particular prohibition could equally lead to a conclusion that the suspicion was unreasonable.

Although the reasonable suspicion test is not stipulated in respect of anticipated offences, the joint requirements that deprivation of liberty on this ground should only occur where specific and concrete offences are involved and that such deprivation be “reasonably considered necessary” for prevention purposes are undoubtedly going to mean that the same degree of suspicion will have to be demonstrated in order to avoid a violation of Article 5 (1) (c). There would thus have to be sufficient objective evidence linking the conduct of the person concerned with a likelihood of an offence thereby being committed; there is no scope for relying on either prejudice or unfocused fears as to what might happen.

50 *Stögmüller v. Austria*, 10 November 1969, *Clooth v. Belgium*, 12 December 1991, *Contrada v. Italy*, 24 August 1998, *Jėčius v. Lithuania*, (where the suspicion was actually found to be unsubstantiated by the trial court) and *Barfuss v. the Czech Republic*, 1 August 2000.

## The need for pre-trial detention

Although either the need to initiate the criminal process against someone suspected of committing an offence or the need to prevent an offence being committed can provide the initial justification for depriving suspected offenders of their liberty, this does not constitute a sufficient basis for its continuation thereafter. Continuation of detention must be subjected to prompt judicial scrutiny which should not only consider whether it was justified in the first place but also whether it was still appropriate. The latter question cannot be answered in the affirmative merely because there continues to be a reasonable suspicion that the person concerned has committed or attempted to commit an offence. The Court held that the reasonable suspicion can disappear soon after the initial deprivation of liberty because it becomes clear that either no offence has been committed or the person concerned is able to allay any suspicions regarding his or her involvement. The Court has repeatedly asserted that the existence of a suspicion is essential but not sufficient for any prolongation of detention after a certain lapse of time.<sup>50</sup> This is because there is an explicit right to release pending trial in Article 5 (3) and this can only be overcome if in addition one or more relevant and sufficient reasons for continued deprivation of liberty – notwithstanding the presumption of liberty – can also be established.

The reasons for prolongation of detention will only be admissible if they are actually applicable to the circumstances of the person concerned. There can, therefore, never be a rule which excludes persons who have a particular criminal record or who are accused of certain specified offences from being considered for release pending their trial. In *Caballero v. the United Kingdom*, where the applicant was arrested for attempted rape, the government conceded that there had been a violation of Article 5 (3) when a court refused the applicant bail pursuant to a law that precluded – without exception – all persons charged with, or convicted of, murder, manslaughter and rape from being granted bail.<sup>51</sup> Such a law was objectionable because it prevented the courts from considering the particular circumstances of someone who had been deprived of his or her liberty. It should be noted that the Court has found prolonged deprivation of liberty to be unjustified even in murder cases.<sup>52</sup>

Furthermore, it may be found that reasons which at first appear to justify a continued deprivation of liberty will become less compelling the longer this lasts and it is essential that applications for release be examined with an open mind. Where such reasons do not exist – whether initially or at a later stage – but there is still reasonable suspicion regarding the commission of an offence, the person concerned should be released on bail but this may be subject to guarantees designed to ensure that he or

she appears for trial. However, even if the reasons justifying continued deprivation of liberty can still be demonstrated to be applicable to a particular individual, there is also a need to ensure that he or she is brought to trial within a reasonable time and this necessarily sets limits to the overall period for which such a deprivation can be allowed to endure.

### **Justifying pre-trial detention**

The Court has recognised four reasons as relevant for continuing a person's pre-trial detention where there is still a reasonable suspicion of his or her having committed an offence.<sup>53</sup> These are:

- the risk of flight;
- the risk of an interference with the course of justice;
- the need to prevent crime;
- the need to preserve public order.

It is essential that there be no attempt to use one or other of these reasons to justify a continuation of a person's deprivation of liberty unless due and explicit<sup>54</sup> consideration has first been given as to the genuineness of their applicability to his or her particular situation. Where none is found applicable the release of the person concerned will then be required by virtue of Article 5 (3).

51 8 February 2000.

52 *I.A. v. France*, 23 September 1998; *Letellier v. France*, 26 June 1991.

53 The strength of the case against someone can be taken into account but is not in itself a sufficient basis for the continuation of detention; see *Kemmache v. France* (Nos. 1 and 2), 27 November 1991, *Mansur v. Turkey* and *Yağcı and Sargin v. Turkey*, 8 June 1995.

54 In *Trzaska v. Poland*, 11 July 2000, the Court refused to accept that the risk of re-offending must have been relied upon in refusing release when it was not expressly referred to in any of the decisions of the domestic authorities.

- 55 See *Stögmüller v. Austria*, where it was held that the risk of absconding does not arise from it being possible or easy for someone to cross the frontier.
- 56 See *Matznetter v. Austria*, 10 November 1969; *Letellier v. France, W v. Switzerland*, 26 January 1993; *Yağci and Sargin v. Turkey* and *Muller v. France*, 17 March 1997.
- 57 8 June 1995.
- 58 See *Punzelt v. the Czech Republic*, 25 April 2000, where the applicant had absconded from related criminal proceedings in Germany.
- 59 This was identified as significant in *Stögmüller v. Austria*, 10 November 1969.
- 60 *Matznetter v. Austria*, 10 November 1969, in which account had been taken of the transfer of funds out of the country and a visit abroad, as well as connections that had been established there. See also *Český v. the Czech Republic*, 6 June 2000, where the applicant had entrusted a large sum of money to an acquaintance, bought a car

## The risk of flight

The risk of flight is undoubtedly something that concerns law enforcement officers, particularly if the initial apprehension of a suspect was not easy, and there are certainly individuals who will flee if they are given an opportunity to do so. However, it is not enough to rely on this general possibility – let alone that there is no obstacle to flight<sup>55</sup> – to continue a deprivation of liberty; it will always be essential to examine all the factors specific to the particular case in order to determine whether such a risk exists. Those factors that ought first to be considered will obviously be those which might lead someone to flee despite the consequences that may follow and the hazards that might have to be endured. These could well include the nature of the penalty that can be imposed on someone convicted of the offence in issue but the Court has repeatedly made it clear that the fact that a severe sentence can be anticipated is not in itself sufficient to justify a continuation of detention.<sup>56</sup> Moreover, in *Mansur v. Turkey*, the Court found that the “state of evidence” could not substantiate an alleged risk of the applicant absconding.<sup>57</sup>

Relevant in suggesting a risk of flight would be previous instances when the person had fled after being charged with an offence; or where extradition had been required in order for the proceedings to be pursued;<sup>58</sup> a clear distaste for detention;<sup>59</sup> spe-

cific evidence of plans to flee;<sup>60</sup> his or her links with another country that might make flight easier or the absence of links with the country in which the proceedings are being brought;<sup>61</sup> or other problems that might arise for the person in connection with a country.

However, as with the severity of the sentence, it is not possible to invoke any of these factors pointing to the risk of flight as a justification in itself for continuing to deprive someone of liberty. There is a need to assess how significant such a factor (or combination of them) is in the particular circumstances of the case – on closer examination some may be found not even to exist, others may prove insubstantial and yet others may be contradicted by the person’s actual behaviour<sup>62</sup> – and to then weigh it (or them) against any of the factors present which might point against the person concerned being likely to flee. Since the risk decreases as time passes, the Court will be correspondingly more exacting in its scrutiny the longer pre-trial detention lasts. In *I.A. v. France*, the Court was unconvinced by the sketchiness of the reasoning for a risk of flight supposed to have persisted for more than five years.

Someone might be encouraged to stay or ought at least to be regarded as less likely to leave because of family considerations,<sup>63</sup> his or her particular character, morals, status or responsibilities,<sup>64</sup> the extent of the property that he or she would have to leave behind, past evidence of reliability when released<sup>65</sup>

and the extent of the guarantees given to ensure that he or she will appear for trial.<sup>66</sup> The need is to make an overall evaluation of the risk of flight once all the relevant factors – both for and against flight – have been taken into consideration. Certainly, a ruling which is based on a stereotyped form of words without any explanation as to why the risk of absconding exists will never be considered acceptable by the Court.<sup>67</sup>

Furthermore, if the risk of flight is the sole justification invoked for continuing a deprivation of liberty, the Court has emphasised that the effect of Article 5 (3)'s final sentence is to require the release of the person concerned if it is possible to obtain guarantees from him or her that would ensure his or her appearance at the pending trial.<sup>68</sup> However, even if such guarantees cannot be obtained or are not considered reliable, consideration ought to be given in all cases to the suitability of other measures than deprivation of liberty for ensuring that flight does not occur: e.g., requirements that the person concerned reside in a particular place, give up his or her travel documents or report frequently report to the police.<sup>69</sup>

## **The risk of interference with the course of justice**

The risk of interference with the course of justice is a legitimate concern of all involved in the ad-

using another person's identity card and obtained a false passport.

- 61 *W v. Switzerland*, 26 January 1993, where the applicant was a single man who had transferred his residence to Monte Carlo and had frequently visited Anguilla – where he was supposed to be the owner of a bank – England, Germany and the United States, appeared to have considerable funds at his disposal outside Switzerland and possessed several different passports; *Punzelt v. the Czech Republic*, where the applicant had numerous business contacts abroad; *Barfuss v. the Czech Republic*, 1 August 2000, where the applicant could have obtained German citizenship if he had fled to Germany, which would have made impossible extradition back to the Czech Republic.
- 62 In *Stögmüller v. Austria*, 10 November 1969, the applicant (who had a pilot's licence) had flown abroad several times during a period of provisional release and had always returned; a slight delay in doing so on one occasion had also been satisfactorily explained. Similarly, in *Letellier v. France* there had been no attempt to abscond when the applicant had previously been released for a four-week period.
- 63 See *Letellier v. France*, where the applicant was the mother of minor children.
- 64 See *Letellier v. France*, where the applicant was the manager of a business representing her sole source of income; *Matznetter v. Austria*, where reliance had not really been placed on a serious illness but which in another case could be a reason for doubting someone's capacity to flee, and; *Yağcı and Sargin v. Turkey*, where the applicants had returned to their country of their own accord even though they have been aware of the risk of prosecution.
- 65 See *W v. Switzerland*.
- 66 In *Wemhoff v. the Federal Republic of Germany*, the applicant had repeatedly given the impression that he was not prepared to provide security for a large amount in order to secure his release but in *Letellier v. France*, the national courts had failed to establish that adequate guarantees were not available. Furthermore in *Stögmüller v. Austria*, the Court noted that the applicant, although ultimately released subject to security, had actually first offered to provide such a security long before this occurred.
- 67 See *Yağcı and Sargin v. Turkey*.
- 68 *Wemhoff v. the Federal Republic of Germany*, 27 June 1968.
- 69 In *Stögmüller v. Austria* the Court observed that the applicant could have been asked to surrender his passport to prevent his crossing the frontier.
- 70 It was accepted in *Letellier v France* that there had been a genuine risk of pressure being brought to bear on witnesses at the outset of the preparation of the prosecution but this risk was considered to have diminished and to have actually disappeared with the passage of time. The failure of almost all the French courts to refer to this risk, after the initial refusals to release the applicant, clearly undermined any weight that could be attached to this ground for deprivation of liberty. The risk of pressure on witnesses was also considered to have existed in *I.A. v France*, but only at the early stage of the investigation.
- 71 In *W v. Switzerland* there was found to be a risk that the applicant would influence his employees to manufacture false evidence or to connive with witnesses.

- 72 The anxiety of the courts as to the suppression of evidence was considered justified in *Wemhoff v. the Federal Republic of Germany*, because of the character of the offences (breach of trust and misappropriation of funds held by a bank) and the extreme complexity of the case. However, the Court noted that even the domestic appeal court had doubted whether this risk had ceased to operate and it is unlikely that this concern will remain compelling the nearer the preparation of a prosecution case is to being finalised.
- 73 See *Clooth v. Belgium*, where the Court accepted that initially the applicant had made the investigation more complicated by the number and changing nature of his statements but it underlined that in general the needs of the investigation could not justify the continuation of detention. Where specific investigative measures are alleged to be threatened, the continuation of detention after their completion would not be appropriate; the failure of this to happen in *Clooth* was significant in finding a violation of Article 5 (3).
- 74 In *Trzaska v. Poland* no such circumstances were found to have been relied upon.
- 75 See *Muller v. France*, where the investigation and the committal of the applicant to stand trial had occurred almost a year before the conviction; and *I.A. v. France*, where the possibility that the applicant had not acted alone in murdering his wife was initially seen as reasonable but its relevance failed when no supporting evidence for the hypothesis appeared and thus any fears of collusion were no longer compelling.
- 76 A substantial risk of collusion until trial was considered to exist in *W v. Switzerland* because of the exceptional extent of the case (a fraud involving the management of sixty companies), the extraordinary quantity of the documents seized and their intentionally confused state, the large number of witnesses (including some abroad) to be questioned, the behaviour of the applicant before and after release reflecting an intention of systematically deleting all evidence of liability (e.g., by falsifying or destroying accounts), and the fear of the applicant's being able to eliminate items of evidence still hidden, to manufacture false evidence and to connive with witnesses, as well as the extension of the investigation to offences in Germany. It was undoubtedly significant in this regard that the case-file indicated that in other proceedings the applicant had manufactured exonerating evidence, antedated documents and manipulated witnesses. It should, however, be noted that this was not the sole justification for continued deprivation of liberty as there was also a risk of the applicant's fleeing; Switzerland had also relied on the need to prevent further offences being committed but this had not been examined by the appellate courts, as the risk of collusion and flight were considered justifications and the Court shared this view.

ministration of justice and it is not surprising, therefore, that this has been recognised as a possible reason for continuing to deprive someone of liberty. An accused person could well use the opportunity of his or her release to undermine the preparation of a case against him or her by putting pressure on witnesses not to testify,<sup>70</sup> tipping off others who might also be under investigation, colluding with anyone involved in the case as to how they will respond to the proceedings,<sup>71</sup> and even destroying documents and other material forms of evidence<sup>72</sup> or in some other disrupting the inquiry.<sup>73</sup>

However, these possibilities cannot be relied upon *in abstracto*; there must be some concrete factual circumstances supporting them in respect of the person deprived of his or her liberty.<sup>74</sup> Furthermore, in most cases this is a ground for continued deprivation of liberty which will become less and less compelling as the various stages of an investigation – such as the taking of statements and the carrying out of verifications – are completed, and it will not generally be an admissible justification once the whole process has been completed.<sup>75</sup> However, the Court will always make its assessment by reference to the facts of the particular case and these can sometimes be so exceptional as to justify deprivation of liberty until trial.<sup>76</sup>

## The need to prevent crime

The need to prevent crime has been recognised as a legitimate basis for continuing deprivation of liberty where a serious charge is involved, but it must be demonstrated that any concern about further offences being committed is a plausible one and that the measure in the particular case is appropriate. In making an assessment of these matters, all the circumstances of the case and especially the past history and personality of the person concerned must be taken into account. The fact that the person concerned had previous convictions for the same or similar offences to the one under investigation would thus be significant, as would other offences apparently being committed between the beginning of the investigation and the person being charged with the one (s) for which his or her detention is sought.<sup>77</sup> However, the continued detention of the person in such cases is likely to be inappropriate where the offences concerned were not comparable in either their nature or degree of seriousness.<sup>78</sup> Moreover, suggestions that further offences had been committed during any period of provisional release – which might be invoked to justify a resumption of detention – would certainly need to be substantiated<sup>79</sup> and the argument that financial difficulties would be a temptation to commit further offences is unlikely to be convincing.<sup>80</sup> Furthermore a psychiatric evaluation of the appli-

cant could be relevant but it should be borne in mind that these could indicate that therapeutic care is essential and that thereafter the continuation of detention without this would be inappropriate.<sup>81</sup> In addition it would be inappropriate to seek to justify prolonged deprivation of liberty by reference to the fear of repetition of an offence that by its very nature is likely to be a unique event.<sup>82</sup>

## The need to maintain public order

The need to maintain public order, including concern for the protection of an accused person, was recognized in *Letellier v. France* as something that could be a basis for continuing a deprivation of liberty. However, the Court underlined that it had in mind exceptional circumstances, namely, that it would only be applicable where it could be demonstrated that the release of the person concerned would actually disturb public order at that particular time. It could not, therefore, be invoked as a way of anticipating a custodial sentence which is really just another way of taking into account the severity of the sentence. Nor could it be relied upon simply because of the nature of the offence involved.<sup>83</sup>

Although the possibility of a reaction to a grave crime such as murder – whether on the part of relatives of the victim or the public in general – might be sufficient to justify fears of disturbance, the Court held in *Letellier* that no concrete manifestations of

- 77 As in *Assenov v. Bulgaria*.
- 78 *Clooth v. Belgium*, where in a murder and arson case the applicant had previous convictions for attempted aggravated theft and desertion; *Muller v. France*, where unspecified antecedents were invoked in respect of an applicant accused of several armed robberies.
- 79 In *Stögmüller v. Austria* the Court emphasised that only some of the complaints cited as a justification had actually led to a prosecution.
- 80 This was particularly so in *Stögmüller v. Austria*, where the applicant had changed his occupation from money-lender – with which activity the offences had been connected – to aviator.
- 81 In *Clooth v. Belgium* the psychiatrists reported that long-term care was needed for the applicant as he suffered from serious mental disturbances which made it impossible for him to control his actions.
- 82 See *I.A. v. France*, which concerned the applicant's alleged murder of his wife. There was in any

disorder had been cited and indeed the mother and sister of the deceased had not opposed the applicant's release. The invocation of concern about reprisals by a murder victim's relatives was ineffective in *I.A. v. France* because they were vague but also implausible, given that most of them lived in Lebanon. Furthermore, the Court emphasised that this ground could be invoked only for so long as public order continued to be threatened. It may well be that action by members of the public will become less likely or improbable once the initial shock at a particular offence has dissipated.

### **Bail conditions**

Article 5 (3) guarantees the right to bail and contains a strong presumption in favour of bail pending trial. The presumption grows stronger if the trial is delayed. The refusal of bail may only be justified under the four grounds identified by the Court – danger of flight, interference with the course of justice, prevention of crime and preservation of public order – under the circumstances discussed in the previous paragraphs.

Since the bail is designed to ensure the presence of the accused at the hearing, its amount must also correspond to this aim. In *Neumeister v. Austria*,<sup>84</sup> where the domestic authorities calculated the amount of bail solely in relation to the loss imputed to the applicant, the Court found this contrary to

Article 5 (3), holding that the guarantee of bail needs to ensure the presence of the person accused to the hearing and not the reparation of the loss caused by the accused. The guarantee asked for release must not impose on the accused a burden heavier than required for a reasonable degree of security. The nature and the amount of the security measure designated to ensure the accused's attendance at the trial must be related to and follow from the grounds which had justified the pre-trial detention. While a financial guarantee may be required to this end,<sup>85</sup> its amount must be calculated by reference to the accused, his or her assets and the relationship with the person providing the security. The accused must make available information related to his or her assets while the domestic authorities are under a duty to carefully assess this information for a proper assessment of the security to be calculated. The setting of an amount which is more than sufficient to reach the purpose of ensuring a "sufficient deterrent to dispel any wish on his part to abscond" would violate the right to bail.<sup>86</sup> Guarantees other than monetary, such as the surrender of a passport, can also be required to the same end of ensuring the accused's presence at the trial.<sup>87</sup>

Some particular circumstances justifying a high danger of absconding may, however, make any amount of bail look insufficient. In *Punzelt v. the Czech Republic*, the domestic courts refused to release the applicant on bail (he had offered to pay up to CZK 15 000 000)

event no substantiation of the fear in this case.

83 See *I.A. v. France*, where the Court was not convinced by references in domestic court decisions to either the nature of the crime (the murder of the applicant's wife) or the circumstances in which it was committed.

84 27 June 1968.

85 *Wemhoff v. the Federal Republic of Germany*.

86 *Neumeister v. Austria*.

87 *Stogmuller v. Austria*.

and on one occasion expressed the readiness to consider releasing the applicant, in view of his health problems, if he paid a bail of CZK 30 000 000. The European Court noted that given the scale of the applicant's transactions (he had issued two dishonoured cheques amounting to the equivalent of CZK 28 400 000; prior to his arrest he had intended to buy two department stores for CZK 338 856 000 and CZK 236 000 000, and he had undertaken to pay for them in instalments of CZK 150 000 000) the refusal of release on bail and the imposition of a security higher than he offered did not infringe Article 5 (3).<sup>88</sup>

### The length of pre-trial detention

Article 5 (3) requires that deprivation of liberty pending trial should never exceed a reasonable time. The European Court held repeatedly that *continued detention may be justified in a given case only if there are clear indications of a genuine public interest which, notwithstanding the presumption of innocence, outweighs the right to liberty.*<sup>89</sup>

Moreover, the Court argued that the persistence of a reasonable suspicion that the person arrested has committed an offence is a condition *sine qua non* for the lawfulness of the continued detention, but after a certain elapse of time it is no longer sufficient. The Court must then establish if the other grounds given by the judicial authorities continue to justify the deprivation of liberty. Where such grounds

exist and are "relevant and sufficient", the Court proceeds to the next step, which is to ascertain if the competent authorities displayed "special diligence" in the conduct of the proceedings.<sup>90</sup>

The period of the detention considered by the Court runs from the moment of the arrest until the moment the person is released. If the person is not released during the trial, the period to be considered ends when the first instance court issues a decision (of acquittal or conviction). The period of detention following conviction by the trial court – for example during the appeal proceedings – is not taken into account. As the Court held, Article 5 (3) ceases to apply to detention following conviction by the trial court, which will be founded on the basis of Article 5 (1) (a).<sup>91</sup> However, if an appellate court quashes the first judgment and a new trial is ordered, the detention during the period between the quashing and the new judgment is also considered.<sup>91</sup> This does not mean that the period of sentence served until the initial judgment is quashed will be considered as pre-trial detention for the purpose of Article 5 (3).<sup>93</sup>

It should also be noted that the Court is competent to consider only the periods of detention following the ratification of the European Convention by the respondent State, although it will consider the extent of a deprivation of liberty prior to that moment in assessing whether or not what follows is reasonable.<sup>94</sup>

- 88 25 April 2000; the Court also noted that the applicant would have been re-detained anyway given the extradition proceedings against him.
- 89 See, among others, *Punzelt v. the Czech Republic*.
- 90 See *W v. Switzerland, Assenov v. Bulgaria and Punzelt v. the Czech Republic*.
- 91 *B. v. Austria*, 28 March 1990.
- 92 *Punzelt v. the Czech Republic*.
- 93 *I.A. v. France*.
- 94 *Mansur v. Turkey, Trzaska v. Poland, Jėčius v. Lithuania and Kudla v. Poland*.
- 95 *Stögmüller v. Austria, W v. Switzerland, Wemhoff v. the Federal Republic of Germany*. It is worth bearing in mind the averages derived from comparative studies which were cited by Judge Pettiti in his dissent in *W v. Switzerland*. These were less than two or three months in general and less than a year with respect to economic offences and bankruptcies. These figures may not be accurate for the enlarged Council of

Europe but they are still likely to be a starting point for consideration of whether there are factors in a case that makes a much longer period of pre-trial detention unobjectionable. Furthermore, as the reasonableness guarantee in Article 5 (3) only applies to those deprived of their liberty, it is important to bear in mind that rulings of the Court as to reasonableness of the length of criminal proceedings under Article 6 (1) – which applies to all proceedings – should not be taken as a guide as to what is acceptable since the applicants will not always have been detained and more leeway might, therefore, be allowed to delay. In *I.A. v. France and B. v. Austria*, the Court found a violation of Article 5 (3) but not of Article 6 (1).

96 *Jėčius v. Lithuania* (14 months and 26 days).

97 *Letellier v. France* (2 years and 9 months); *Punzelt v. the Czech Republic* (2 years and 6 months), *Stögmüller v. Austria* (2 years and 1 day), *Kudla v.*

In determining what is “reasonable”, the Court has never accepted the idea that there is a maximum length of pre-trial detention which must never be exceeded since this would involve an assessment *in abstracto* and a judgment must always take into account all the special features of each case.<sup>95</sup> Any period, no matter how short, will always have to be justified. The Court’s jurisprudence has proved the significance of the particular circumstances of a case. While periods in excess of a year were considered excessive,<sup>96</sup> periods between two and three years were found both acceptable and objectionable.<sup>97</sup> A similar difference in the view can also be seen of periods between three and four years.<sup>98</sup> Periods beyond five years have not been found to be justified.<sup>99</sup>

A domestic law providing for a maximum period of pre-trial detention would raise no problems of compatibility with the Convention. However, it would undoubtedly be a mistake to be guided by such a maximum since it is the particular circumstances of a case that will determine whether or not a reasonable time has been exceeded.

The cases in which longer periods have been found unobjectionable have tended to be the ones in which there have been difficulties caused by the complexity of the case, as a result of the nature of the offence<sup>100</sup> and/or the number of potential suspects involved or the conduct of the accused person. However, factors which make a case

particularly complex can only justify the prolongation of a deprivation of liberty where the relevant authorities have actually shown “special diligence” in conducting the proceedings.<sup>101</sup> Many violations of Article 5 (3) are the result of long periods of inactivity in the handling of a case prior to trial,<sup>102</sup> or of delays caused by experts,<sup>103</sup> inadequate facilities or working practices,<sup>104</sup> staffing difficulties<sup>105</sup> and problems arising from the need to protect the identity of a witness.<sup>106</sup>

Violations of Article 5 (3) will definitely be found in cases where the courts extend the pre-trial detention for long periods of time under the argument of severity of the sentence faced with full disregard of the pertinent facts, such as: the arrested person has a family and a stable way of life and after the passage of time any possible danger of collusion and absconding had receded. This was the case in *Ilijkov v. Bulgaria*, where the applicant spent three years and four months in pre-trial detention.<sup>107</sup> In addition, in this case, the Court held that the domestic findings – that there were no exceptional circumstances warranting the release of the applicant – were unacceptable and shifted the burden of proof to the detained person. The duty to prove the grounds for prolongation of the pre-trial detention stays with the authorities and not with the detained person.

In the complex cases, long periods of time were found unobjectionable if the Court was satisfied that the investigators had carried out their inquiries with

the necessary promptness and that no delay had been caused by shortages or personnel or equipment.<sup>108</sup> In such cases it can be particularly significant that a special unit has been created to deal with the case or that additional resources have been provided for existing ones expected to handle a case of an exceptional character; but above all it will be essential to demonstrate that the overall length of proceedings had been kept under review and that all possible efforts to expedite them had been taken. The exercise of such review and the encouragement of expedition will be a particular responsibility of the court when considering applications for release.

A suspect is not considered by the Court to be under any obligation to co-operate but his conduct in not doing so will be recognised as a factor in slowing the overall progress of an investigation. Lack of co-operation, as well as actual obstruction, will thus also be considered in assessing whether or not the total period of pre-trial detention is excessive.<sup>109</sup> In any event no reliance can be placed on allegedly obstructive conduct to excuse the length of pre-trial detention that has already become unreasonable.<sup>110</sup> In *Jablonski v. Poland*,<sup>111</sup> the domestic courts extended the applicant's detention beyond the statutory time-limit (three years) because he had previously inflicted injuries on himself and had thus obstructed the progress of the trial. The European Court found a violation of Article 5 (3), arguing that the national courts – when they decided that the applicant should be kept in de-

*Poland* (two years, four months and three days).

- 98 Such a period was considered acceptable in *W v. Switzerland* (4 years and 3 days) but found objectionable in *Clooth v. Belgium* (3 years, 2 months and 4 days), *Muller v. France* (3 years, 11 months and 27 days), *Český v. the Czech Republic* (3 years, 3 months and 7 days), *Trzaska v. Poland* (3 years 6 months), *Barfuss v. the Czech Republic* (3 years, 5 months and 19 days).
- 99 *Birou v. France*, 27 February 1992 (5 years, 2 months and 27 days) (a friendly settlement); *I.A. v. France* (5 years 3 months) (in this case the justifications had, however, ceased to be effective long before the end of this period).
- 100 This will be particularly true of offences involving fraud but it will apply to any which entail a large volume of documentation and many witnesses. For example, *W v. Switzerland*, 26 January 1993 (an extensive fraud involving the management of sixty companies).
- 101 Although this is required in all cases, the Court saw it as particularly important in *Assenov v. Bulgaria*, 28 October 1998, where a minor was involved.
- 102 *Assenov v. Bulgaria*, where there was virtually no activity for a year; *Punzelt v. the Czech Republic*, where the trial court did not deliver its second judgment until ten months after the first one had been quashed; *Barfuss v. the Czech Republic*, where there was no explanation – other than that the case was complex – for an 11-month gap between being remanded in custody and being charged, as well as a further eight months' delay between the quashing of a decision ordering further investigations and the first substantive hearing of the case.
- 103 Generally the failure to submit a report within the deadline set; see *Clooth v. Belgium*.
- 104 *Assenov v. Bulgaria*, where the Court held that time was unnecessarily lost as a result of the investigation's being effectively suspended every time the applicant lodged an appeal for release because of the practice of sending the original file rather than a copy of it to the relevant authority.
- 105 *Stögmüller v. Austria*, in terms of the level being adequate; *Clooth v. Belgium* and *Muller v. France*, the change in persons responsible for a case arising from promotions, reassignments and retirements; *Trzaska v. Poland*, where proceedings came to a standstill for nine months when the composition of the court had to be changed after the judge rapporteur fell ill.
- 106 *Clooth v. Belgium*.
- 107 26 July 2001.
- 108 For example, *W v. Switzerland*.
- 109 *W v. Switzerland*, where the applicant refused to make any statement to those investigating a fraud arising out of his management of sixty companies.
- 110 *Stögmüller v. Austria*.
- 111 21 December 2000.

tention in order to ensure the proper conduct of the trial – failed to consider any alternative “preventive measure” such as bail or police supervision.

### **3. Convicted offenders**

Article 5 (1) (a) allows “the lawful detention of a person after conviction by a competent court”. For the purpose of this provision, a *conviction* means the finding of guilt for a committed offence. It clearly does not cover pre-trial detention or other preventive security measures. Along with the typical situation of serving a prison sentence following a conviction for an offence, Article 5 (1) (a) will also cover the detention in a mental institution for treatment as mentally disordered of a person found guilty of committing an offence. Convictions may follow proceedings establishing guilt for criminal as well as for disciplinary offences. In the Convention meaning, a conviction is one decided by a trial court (first instance court); and therefore detention pending appeals falls under this provision. In the *Wemhoff* case, the Court held that

*a person convicted at first instance, whether or not he has been detained up to this moment, is in the position provided for by Article 5 (1) (a), which authorises deprivation of liberty “after conviction”. This last phrase cannot be interpreted as being restricted to the case of final conviction.*

Further, in *B. v. Austria*, the Court held that *it could not be overlooked that the guilt of a person who is detained during the appeal or review proceedings has been established in the course of a trial conducted in accordance with the requirements of Article 6*, meaning a trial before the first instance court.

The conviction must be decided by a “competent court”, meaning a body with jurisdiction to hear the case as well as a body which is independent by the executive and the parties and which provides adequate judicial guarantees – although it is not necessary that its members be jurists.<sup>112</sup> Decisions adopted by the police, by a public prosecutor, by a military commander or by an administrative body will not satisfy these requirements. The conviction may be also be issued by a foreign court, whether that country is a party to the Convention or not. What is important for having Article 5 (1) (a) applied is that the convicted person serves the sentence in a country party to the Convention.<sup>113</sup> The issue of “adequate judicial guarantees” in cases where conviction is ordered by foreign courts was raised in *Drozd and Janousek v. France and Spain*, where the Court held that unless the conviction ordered by courts of a non-party country was “the result of a flagrant denial of justice”, its serving in a country party to the Convention falls under Article 5 (1) (a).<sup>114</sup>

The “lawfulness” of the detention does not require a lawful conviction but a lawful detention only,

112 *X v. Austria* (1968 and 1969); *De Wilde, Ooms and Versyp v. Belgium*; *Engel v. the Netherlands*; *Eggs v. Switzerland*; *Neumeister v. Austria*.

113 *X v. the Federal Republic of Germany*; *Drozd and Janousek v. France and Spain*, 26 June 1992.

114 In this case the applicants served in France a sentence ordered for a conviction established by courts in Andorra. See also *Perez v. France*, 24 October 1995.

meaning that the detention must be in accordance with the national law and the Convention. The lawfulness requirement means that the particular prison sentence must have a basis in a conviction by a “competent court” and that the facts to which the sentence relates constitute an offence permitting the imposition of the imprisonment in accordance with the domestic law at the time the offence was committed. Under Article 5 (1) (a), the European Court cannot review the legality of a conviction or of a sentence.<sup>115</sup> Equally, a person may not challenge the length and the appropriateness of a prison sentence under this provision<sup>116</sup> nor the conditions of detention.<sup>117</sup>

Article 5 (1) (a) requires a causative link – not only a chronological one – between the conviction and the detention. Therefore, if a person convicted is sentenced by a court to a term of imprisonment and thereafter to further detention as a result of an administrative decision, Article 5 (1) (a) will also cover the later detention if there is a sufficient connection between the administrative detention and the initial court sentence.<sup>118</sup> In order to fall under this provision, a detention must follow a conviction in terms of time but must also “result from, follow and depend on or occur by virtue of the conviction.”<sup>119</sup> In *Weeks v. the United Kingdom*, the Court held that the causal link might eventually be broken if “a decision not to release or to re-detain were based on grounds that were inconsistent with the objectives

of the sentencing court”. In such 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”.

## 4. Extradition

Article 5 (1) (f) permits “the lawful arrest or detention of a person... against whom action is being taken with a view to deportation or extradition”. Detention will fall under this provision even though deportation or extradition does not in fact occur or even in the absence of a formal request or order for extradition provided that inquiries have been made. Inquiries would amount to “action” being taken in the meaning of Article 5 (1) (f).

This provision contains certain guarantees where the authorities arrest or detain a person (most often an alien) pending a decision on his or her deportation or extradition. Thus, the arrest or detention must be “lawful”, meaning that it must be in accordance with the domestic law and the Convention and must not be arbitrary.

Although the Strasbourg organs distinguished between the lawfulness of the detention and the lawfulness of the extradition,<sup>120</sup> they also found that in reviewing the lawfulness of the detention, the lawfulness of the extradition would often be an issue, in particular when the national law itself pro-

- 115 *Krzycki v. the Federal Republic of Germany*; *Weeks v. the United Kingdom*.
- 116 In *Weeks v. the United Kingdom*, where the applicant had been convicted to harsh life imprisonment, the Court referred to the prohibition of inhuman punishment in Article 3 and not to Article 5.
- 117 *Bizzoto v. Greece*, 15 November 1996, where the applicant complained about the place and the conditions of detention. The Court held that although there must be some relationship between the ground of permitted deprivation of liberty and the place and conditions of detention, it found that the applicant’s detention followed a criminal conviction and fell therefore under Article 5 (1) (a). See also *Ashingdane v. the United Kingdom*. In *Bizzoto*, the Court pointed out that the place and conditions of detention may raise an issue under Article 3.
- 118 *Van Droogenbroeck v. Belgium*, 24 June 1982.

The applicant was sentenced by a criminal court to two years' imprisonment and was ordered to be placed at the disposal of the Government for ten years. After he had served the two-year prison sentence, the applicant was deprived of liberty on two occasions by Government decisions following his disappearances. The Court held that the sentence to imprisonment and the order to be placed at the Government's disposal constituted an "inseparable whole".

119 *X v. the United Kingdom*, 5 November 1981; *Van Droogenbroeck v. Belgium*; *Weeks v. the United Kingdom*.

120 *Caprino v. the United Kingdom* (1975), where the Commission held that the outcome of the deportation proceedings is irrelevant for the justification of the detention, if a lawful deportation procedure has been instituted and is being seriously pursued.

121 6 March 2001

vides for dependency between the lawfulness of the detention and that of the extradition. This is why it is very important to postpone the extradition or deportation until the legality of the detention is reviewed, since the result could affect the legality of the extradition or deportation itself. Moreover, in view of the guarantees provided in Article 5 (4), the extradition or deportation should always be postponed until a court has had the opportunity to review the legality of the detention and, if appropriate, order the release.

The lawfulness of the detention with a view to extradition was an issue in *Bozano v. France*, where the Court found that the applicant's detention was unlawful and therefore contrary to Article 5 (1) (f). The Court decided that the deportation of the applicant from France to Switzerland was arbitrary: although a French court had refused Italy's request for the applicant's extradition, the French government made a deportation order against him; the authorities waited about a month before serving the deportation order, prevented the applicant to use any judicial avenue, to contact his wife and lawyer or to nominate a country for deportation; the applicant was forcibly taken by police across France to the Swiss border, taken into custody in Switzerland and later extradited to Italy. The Court found that the circumstance of the case proved that the applicant's detention was a disguised form of extradition that could not be justified

under the Convention.

The lawfulness of the detention with the view to deportation was recently examined in *Dougoz v. Greece*, where the Court found a violation of Article 5 (1) (f). Although there was a legal basis for deportation in the national law, the Court observed that the expulsion was ordered by another body than the one provided by the national law – following the opinion of a senior public prosecutor concerning the applicability by analogy of a ministerial decision on the detention of persons facing administrative expulsion – and that the "public danger" requirement in the national law was not fulfilled. In addition, the Court held that the opinion of a senior public prosecutor concerning the applicability by analogy of a ministerial decision on the detention of persons facing administrative expulsion did not constitute a "law" of sufficient "quality" within the meaning of the Convention.<sup>121</sup>

Although Article 5 (1) (f) does not set time-limits on the length of the detention, the Commission stated that extradition or deportation proceedings must be conducted with "requisite diligence." In *Lynas v. Switzerland* the Commission made it clear that if

*the proceedings are not conducted with requisite diligence or if the detention results from some misuse of authority it ceases to be justifiable under 5 (1) (f). Within these limits the Commission might therefore have cause to consider the length of time spent in deten-*

*tion pending extradition...*<sup>122</sup>

However, if the detention pending extradition is delayed in the interest or at the request of the person concerned, the latter could not claim to be a victim of a prolonged detention. For instance, in *X v. the Federal Republic of Germany*<sup>123</sup> the 22 months of detention pending extradition were found justifiable since the German authorities used this time to make attempts to obtain guarantees from the Turkish Government that the applicant would not be subjected to the death penalty once extradited. Or, in

*Kolompar v. Belgium*,<sup>124</sup> the almost three years of detention pending extradition were also found justifiable as the applicant himself had in various ways delayed or contributed to postponing the proceedings.

The lawfulness requirement includes the quality of the national law, meaning that this should be accessible and foreseeable, and formulated with sufficient precision. However, although such claims were declared ill-founded,<sup>125</sup> this issue could be successfully raised before the Court.

122 Appl. No. 7317/76.

123 Appl. No. 9706/83. The applicant was not extradited in the absence of such assurances.

124 24 September 1992.

125 *Zamir v. the United Kingdom*, Appl. No. 9174/80.

## Section III: Other justifications for deprivation of liberty

Arrest and detention may follow in circumstances other than those involving criminal proceedings. These are exhaustively listed in Article 5 (1) and they have to be given a narrow interpretation. The “lawfulness” requirement discussed above<sup>126</sup> is equally applicable to all the situations where the deprivation of liberty is permitted. Arrest and detention must be in accordance with the national law and the Convention and must not be arbitrary.

### 1. Court order and obligation prescribed by law

Article 5 (1) (b) permits 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”. The first situation where arrest and detention is allowed could follow, for instance, a person’s failure to pay a court fine or to undertake a medical examination or to appear as a witness, or failure to observe the residence restrictions or to make a declaration of assets.<sup>127</sup> In all

cases, the obligation must necessarily arise from a legal order of the court. In *Slavimir Berlinki v. Poland*, the Court found that the applicant’s compulsory placement in a mental hospital was carried out in the context of criminal proceedings against him in order to secure the court order to examine his mental state for determining his criminal responsibility. Once satisfied that the detention followed a court order, the Court verified the lawfulness requirement and found that the detention had complied with a procedure prescribed by law and it was not arbitrary.<sup>128</sup>

The second categories of situations covered by this provision appear to be less clear. However, the Strasbourg organs held that the expression “any obligation prescribed by law” relates to a specific or concrete obligation.<sup>129</sup> Where authorities invoke just prevention of violation of norms in general the specificity requirement is not fulfilled. Such a specific obligation could be to carry out military or civilian service, to carry an identity card, to make a customs or tax return, or to live in a designated locality.<sup>130</sup> In *Engel v. the Netherlands*, where the authorities invoked this provision in order to justify “strict arrest” as a provisional measure, the Court found that the general obligation to comply with military discipline was not sufficiently specific. In *Ciulla v. Italy* the applicant’s detention was justified by his failure to comply with the obligation to change his behaviour and that was not considered a specific and concrete obligation. In the *McVeigh* case the

126 Section I.2.

127 *Airey v. Ireland*; *X v. Austria*; *Freda v. Italy*; *X v. the Federal Republic of Germany*.

128 18 January 2001.

129 *Lawless v. Ireland*, 1 July 1961; *Ciulla v. Italy*.

130 *Johansen v. Norway*; *B v. France*; *Ciulla v. Italy*; *McVeigh, O’Neill and Evans v. the United Kingdom*.

Commission found that a person's obligation, when entering the United Kingdom, to submit to an examination by an officer is a specific and concrete obligation and consequently, the detention to secure its fulfilment was in principle permitted under Article 5 (1) (b). In this case, the Commission framed the test to be applied to facts raising issues under this provision of the Convention:

*In considering whether such circumstances exist, account must be taken... of the nature of the obligation. It is necessary to consider whether its fulfilment is a matter of immediate necessity and whether the circumstances are such that no other means of securing fulfilment is reasonably practicable.... The duration of the period of detention is also a relevant factor in drawing such a balance.*

The refusal to execute a contractual obligation, even where imposed by a civil sentence, does not fall under Article 5 (1) (b). According to Article 1 of Protocol No. 4, deprivation of liberty for the failure to fulfil a contractual obligation is prohibited.

## **2. Detention of minors**

Article 5 (1) (d) permits "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." Under the Convention, the term "minor" has an autonomous meaning and covers all persons under 18.

The first ground of detention applies in cases where a court or an administrative body decides by a lawful order to place a minor under supervision combined with a restriction of liberty such as an enforced stay in a reformatory institution or in a clinic. In *Boumar v Belgium*<sup>131</sup> the Court held that the detention of a minor in a reformatory institution or in a prison prior to his speedy transfer to a reformatory was authorised under Article 5 (1) (d). However, the Court found a breach of this provision since the minor – a seriously disturbed and a delinquent boy – was confined nine times in a remand prison for a total of 119 days in less than one year. The Court held that the authorities were under an obligation to provide for appropriate facilities in order to achieve the educational objectives; the detention of a juvenile

*in conditions of virtual isolation and without the assistance of staff with educational training cannot be regarded as furthering any educational aim.*

In *Nielsen v Denmark* the Court held that the detention of a child in a psychiatric hospital against his will but following the request of his mother was not a deprivation of liberty but a "responsible exercise by his mother of her custodial rights in the interests of the child".<sup>132</sup> In *Suzie Koniarska v. the United Kingdom*, where the orders to place the minor in secure accommodation were made by the courts, the Court found that the applicant had been deprived of her liberty as the courts did not have custodial rights over the applicant. However, the Court found

131 29 February 1988.  
132 28 November 1988.

that the detention had been ordered “for the purpose of educational supervision” and was therefore in accordance with Article 5 (1) (d) since the applicant – a minor suffering from a psychopathic disorder – was sent to a specialist residential facility for seriously disturbed young people with a serious educational programme.<sup>133</sup>

The second ground is concerned with the detention of minors for the purpose of bringing them before a court to secure their removal from harmful surroundings. This situation will not cover the detention of a minor suspected of or charged with a criminal offence. It will cover, however, the detention of a minor accused of a crime during the psychiatric observation and preparation of the report recommending a decision with regard to the minor or the detention during the court proceedings placing the minor in child care.<sup>134</sup>

### 3. **Detention of persons of unsound mind, alcoholics, drug addicts, vagrants or in order to prevent the spread of infectious diseases**

Article 5 (1) (e) permits the lawful detention of “persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, al-

coholics or drug addicts or vagrants”. For the reason why persons belonging to some of these categories may be detained, the Court held “not only that they have to be considered as occasionally dangerous for public safety but also that their own interests may necessitate their detention.”<sup>135</sup>

With regard to the meaning of “persons of unsound mind” the Court held that this term may not be given a “definitive interpretation” following the continuing development of the medical understanding of mental disorder.<sup>136</sup> Definitely, a person may not be detained under this provision “simply because his views or behaviour deviate from the norms prevailing in a particular society”.<sup>137</sup> Whether a person is of unsound mind or not shall be determined in accordance with the national law, its application in a particular case and the current psychiatric knowledge.

However, the detention must be “lawful”, meaning that it has to be in accordance with the law, including both substantive and procedural norms, with the Convention and must not be arbitrary. In the *Winterwerp* case the Court laid down the criteria to be fulfilled in order to qualify the detention of a person of unsound mind as “not arbitrary”:

- i. the mental disorder must be established by objective medical expertise;
- ii. the nature or degree of the disorder must be sufficiently extreme to justify the detention;
- iii. detention should only last as long as the medi-

133 12 October 2000.

134 *X v. Switzerland* (1979) and respectively *Bouamar v. Belgium*.

135 *Guzzardi v. Italy* (persons of unsound mind, alcoholics and drug addicts).

136 *Winterwerp v. the Netherlands*, 24 October 1979.

137 *Idem*.

- cal disorder and its required severity persist;
- iv. in cases where the detention is potentially indefinite, periodical reviews must take place by a tribunal which has to power to discharge;
- v. detention must take place in a hospital, clinic or other appropriate institution authorised to detain such persons.<sup>138</sup>

The first condition does not apply in emergencies. For instance, the applicant in the *Winterwerp* case was taken to a psychiatric hospital by a burgo-master, without prior medical advice, after he had been found lying naked in a police cell.<sup>139</sup> However, it is expected that while some circumstances might allow the emergency detention, a medical confirmation, at least provisional, must be obtained in a very short time following the detention. In *Varbanov v. Bulgaria* the applicant was detained pursuant to a prosecutor's order which had been issued without consulting a medical expert. The Court found that the detention was unlawful as the applicant "was not reliably shown to have been of unsound mind". The Court reached this conclusion after observing that in the instant case "a prior appraisal by a psychiatrist, at least on the basis of the available documentary evidence, was possible and indispensable". The Court noticed that there was no claim that the case involved an emergency, that the applicant did not have a history of mental illness and had apparently presented a medical opinion that he was mentally healthy. Under these circumstances, the Court

found unacceptable the applicant's arrest and detention based on the views of a prosecutor and a police officer on the applicant's mental health, in the absence of an assessment by a psychiatrist.<sup>140</sup>

It is also important to note that Article 5 (1) (e) does not carry with it an implied "right to treatment" as claimed by the applicant in the *Winterwerp* case, who had argued that appropriate treatment was implied "in order to ensure that he is not detained longer than absolutely necessary". In the *Ashingdane* case, however, the Court held that there must be "some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention", meaning that the execution of the order depriving a person of unsound mind of his or her liberty is also part of the lawfulness requirement. However, the failure to provide medical treatment to a person of unsound mind detained could well raise an issue under the prohibition of "inhuman treatment" in Article 3.

The issue of vagrants came before the Court in the case of *De Wilde, Ooms and Versyp v. Belgium*. The Court accepted in principle, for the meaning of Article 5 (1) (e), the definition of vagrants in the Belgian Penal Code: "persons who have no fixed abode, no means of subsistence and no regular trade or profession". In *Guzzardi v. Italy* the Court rejected the government's claim that suspected members of the mafia lacking identifiable sources of income fell under the term of "vagrants". In the Belgian case,

138 See also *X v. the United Kingdom* (1981); *Ashingdane v. the United Kingdom* (1985).

139 Although the Court found this emergency detention "legal", Dutch law has been changed in the sense that prior medical advice is needed.

140 5 October 2000.

where the applicants were detained further to their own wish, the Court held that the right of liberty may not be given up and a judicial decision was needed even where the detainee consented to deprivation of liberty.

Although there have been few complaints related to detention of drug addicts, alcoholics or in order to prevent the spread of infectious diseases, it is implicit that the Court adopts an approach similar to that of persons of unsound mind where evaluating the validity of detention. Determining the meaning of "alcoholics" for the purpose of Article 5 (1) (e), in the case of *Witold Litwa v. Poland*, the Court held that

*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.*

However, the Court also held that this does not mean that "the detention of an individual merely because of his alcohol intake" is permitted under Article 5 (1) (e). Further, the Court found that the applicant's detention in a sobering-up centre was arbitrary as his behaviour had not been shown to pose a threat to the public or to himself, and that the alternative measures provided for by the domestic law for an intoxicated person were not considered. The Court observed that in accordance with the domestic law "an intoxicated person does not necessarily have to be deprived of his liberty since he may well be taken by the police to a public-care establishment or to his place of residence". Concluding, the Court found the applicant's detention in a sobering-up centre unlawful.<sup>141</sup>

## Section IV: Duty to give reasons promptly for arrest

Paragraph 2 of Article 5 contains a key safeguard against abuse of power to deprive someone of his or her liberty: 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. This should enable the person affected to understand what is happening to him or her and to consider the appropriate challenge of this measure. In many cases of justified deprivation of liberty an explanation may have the beneficial effect of making it clear that resistance is not appropriate and thereby facilitate the task of the officials involved. In addition, the need to explain why such a measure is being taken is likely to encourage public officials to consider whether they are acting within the limits of their powers and to avoid taking action for which no adequate justification can be given. Certainly the reasons given – or the lack of them – will ultimately be a significant factor for the judicial body called to decide on the acceptability of the deprivation of liberty. In fulfilling the obligation to give reasons, the key considerations are the circumstances in which the duty arises, the nature of the explanation that must be given, the extent to which this explanation must be intelligible to the person actually affected and the amount of time that can elapse before it is given.

### 1. When the duty arises

In imposing the obligation to give reasons, Article 5 (2) refers to a person who is “arrested” and to the existence of a “charge”. This wording should not lead to the conclusion that the need to give reasons only arises in the context of criminal proceedings. It is now well established that reasons must be given in any situation where someone has been deprived of his or her liberty. A person cannot exercise the right to challenge the lawfulness of any and every deprivation of liberty without being aware of the reasons for it. Furthermore, it should be kept in mind that the duty is applicable to each and every deprivation of liberty so that the reimposition of such a measure after some form of provisional release – whether in the form of bail or the release of a convicted offender on licence – would require an explanation, even though the original deprivation had been explained.<sup>142</sup>

### 2. The nature of the explanation

In *Fox, Campbell and Hartley* the Court emphasised that the explanation must offer the person concerned the essential legal and factual grounds for the deprivation of liberty which would then allow the person to apply to a court in order to challenge the lawfulness of the arrest or detention. Therefore

<sup>142</sup> See Appl. No 4741/71, *X v. Belgium*, 43 CD 14 (1973). The Court did not find it necessary to rule on this point in *X v. the United Kingdom*, 5 November 1981, but it did emphasise the importance of an explanation for the effective exercise of the right under Article 5 (4) to challenge the legality of any deprivation of liberty.

it would be insufficient simply to refer to the formal statutory provision authorising a deprivation of liberty as initially occurred in *Fox, Campbell and Hartley*. There is a need to give some indication of the substantive basis for using that provision, since this will indicate whether the particular circumstances come within its ambit and whether or not its use in the specific context is arbitrary. In *Fox, Campbell and Hartley* the requirements of Article 5 (2) were ultimately satisfied in the view of the Court because the reasons were regarded as having been made clear through the applicants' having been questioned about specific criminal acts and suspected membership of a proscribed organisations. The ruling in this case underlined that a degree of specificity is required in order to satisfy Article 5 (2). Without some indication of the particular conduct which forms the basis for a deprivation of liberty, the person affected is unlikely to be able to determine whether there has been a justifiable use of the power being invoked.<sup>143</sup>

In many instances the explanation is perhaps best given by a direct statement to the person affected by the official depriving him or her of his liberty. For example, telling the person that he or she has been suspected of involvement in the theft of something from a particular house on a given day.

In a criminal case the duty to give reasons is likely to entail some information being given both about the offence of which the person is suspected and the way in which he or she is involved in its com-

mission. Similarly, where the deprivation is based on a person's mental illness, there would have to be some indication of his or her behaviour considered to give rise to concern and the diagnosis regarded as justifying the course of action which is being taken. Equally, in the case of detention prior to extradition, the person affected would need to be apprised of the particular offence involved and the existence of a request for this by a particular country.

The obligation under Article 5 (2) is more limited than the duty imposed by Article 6 (3) (a) to inform an accused person of the nature and cause of the accusation against him; much more detail is required in the latter situation because this will be essential for the preparation of a defence at the forthcoming trial.

### **3. The intelligibility of the explanation**

It is important that the explanation be worded in non-technical language. Many people deprived of their liberty will not have either the intellectual capacity or professional experience to disentangle the complexities of the law. The overriding consideration is that the person affected must understand what is happening to him or her and therefore there will always be a need to take into account the specific capacities of an individual. Such an objective may be achieved where offi-

143 *Cf Raišelis v. Lithuania*, where it was alleged that either no reasons were given or that reference was made to a number of statutory provisions but no concrete offences; 2 March 1999 (admissibility decision) and 29 February 2000 (friendly settlement).

cial documents – such as a warrant or court order – authorising deprivation of liberty are expressed in language that is generally intelligible. However, this is not always feasible and, since no precise form of communication is required by Article 5 (2), clarifications by officials relying on the official documents can be entirely acceptable. Of course, this may sometimes require extra efforts by them to communicate in straightforward and simplified language. In cases where effective communication is not possible because of a person's age or mental state, the explanation ought to be given to a person having custody over him or her – such as a parent in the case of a very young child – or someone otherwise authorised to represent the interests of the person concerned.

Where the person deprived of liberty does not understand the official language, the explanation must be given in a language that the person understands (this would include Braille or signing). This should not, however, be problematic in most cases since the explanation need not be given at the initial moment of apprehension and there will thus be an opportunity to find someone who can give an explanation in a language that the person does understand.<sup>144</sup>

#### **4. Timing**

Article 5 (2) stipulates that that the reasons must be given “promptly” rather than “immedi-

ately”. A failure to give an adequate explanation where one is possible might in itself be sufficient for the deprivation of liberty to be seen as arbitrary and thus unlawful for the purposes of Article 5.

The acceptability of the interval between the initial apprehension and the moment when an adequate explanation is given will depend very much on the circumstances of the particular case. In cases where the subsequent questioning of a suspect has been found to have been enough for someone to understand the reasons for being deprived of liberty, the Court has not objected to intervals lasting between two and nineteen hours. The former occurred in *Murray v. the United Kingdom* and the latter was the period in *Dikme v. Turkey*.<sup>145</sup> However, in these and other cases the Court has emphasised that the interval was just a few hours.<sup>146</sup> It is unlikely that intervals of more than a day would now be acceptable in most cases. However, it is conceivable that a longer period might be acceptable where there are practical difficulties in effecting communication, such as where an interpreter cannot readily be obtained. Nevertheless there is no reason to assume that, outside of the criminal process, greater latitude will be allowed when interpreting “promptly”; certainly in *Van der Leer v. the Netherlands* a ten-day delay in informing someone of the reasons why she was being confined in a mental hospital was readily regarded as unacceptable. Certainly the reasons for knowing why one has been deprived of liberty are

144 See Appl. No. 2689/65, *Delcourt v. Belgium*, 10 YB 238 (1967), where the warrant under which a French-speaking person was arrested was in Dutch, but the subsequent interrogation was conducted in French.

145 11 July 2000.

146 See *Fox, Campbell and Hartley* (seven and a half hours) and *Kerr v. the United Kingdom* (admissibility decision).

just as pressing even if criminal proceedings are not involved and the right to challenge the legality of such a measure is equally applicable. However, no special efforts at communication will be required where the person being deprived of liberty – for whatever reason – has made it impossible to give him or her an explanation; thus in *Keus v. the Netherlands*<sup>147</sup> no violation of Article 5 (2) was established

where a mentally disordered person had absconded before being told about the decision to confine him in a hospital. The reasons for the confinement were considered as being adequately communicated when he telephoned the hospital concerned and there was no additional duty laid on the authorities to notify his lawyer before this that such a decision had been taken.

147 25 October 1990.

## Section V: Duty to bring detained persons promptly before a judicial officer and for trial within a reasonable time or release

Paragraph 3 of Article 5 incorporates a number of essential guarantees in order to make deprivation of liberty an exception to the rule of liberty and to ensure that judicial supervision over arrest and detention is in place. This paragraph is only concerned with detention pursuant to Article 5 (1) (c).

The obligation in Article 5 (3) to ensure that judicial supervision is exercised over arrest and detention comprises three elements: the character of the person exercising that supervision; the authority to bring that detention to an end, in other words to release the person concerned; and the timeliness within which the supervision occurs.

### 1. The character of the competent legal authority

Article 5 (3) firstly requires that a person arrested or detained in accordance with the provision of paragraph 1 (c) shall be brought promptly before a judge or other officer authorised by law to exercise judicial power. While the term “judge” does not raise questions, the expression “officer authorised by law to exercise judicial power” obliged the Court to identify such an “officer” who is someone other than a judge.

There is no doubt that many people, when the Convention was initially adopted, thought that this “officer” could be the prosecutor. This was, after all, the practice in a number of Council of Europe countries and concern was given to ensuring that the position of the prosecutor satisfied the criterion specified in Article 5 (3), namely, that the prosecutor be a person “authorised to exercise judicial power”. Particular emphasis was placed on ensuring that the office of prosecutor had the same sort of independence from the executive as that enjoyed by a judge.

However, in practice, it has proved impossible for prosecutors to be able to play this role consistently with the requirements of the Convention. The condition that the “officer” must be able to exercise judicial power means that the respective “officer” is independent of the executive as well as impartial. This approach has led the Court to find

that the conferment on a prosecutor of the power to decide whether a suspect's detention should be continued at any point prior to trial was not compatible with Article 5 (3). The problem has always arisen out of the possibility of the prosecutor – who decides on the issue of detention – subsequently having a role in the prosecution of the person concerned. In the Court's view the two functions of investigation and prosecution could not be performed by the same person. The basic problem is that the prosecutor is a party to the proceedings and the person taking that role could not, therefore, be expected to be impartial when performing a judicial function in the same case. The important concern is whether or not there is a possibility of the prosecutor's later becoming involved in the actual prosecution of the case. This was sufficient in *Huber v. Switzerland* for the Court to conclude that the district attorney in Zurich did not satisfy the requirements of Article 5 (3). Similarly in *Brincat v Italy*,<sup>148</sup> a violation of Article 5 (3) occurred in a case where the detention of the accused had been confirmed by a prosecutor who subsequently concluded that he did not have territorial jurisdiction over the case and it was handed over to the prosecutor in another district. The Court emphasised that, as the objective appearance when the first prosecutor confirmed the detention was that he might intervene in the subsequent proceedings, doubts about his impar-

tiality were justified and it was immaterial that it later became clear that he lacked jurisdiction. The fact that the prosecutor did not become one of the parties was purely fortuitous and the ruling led to the removal from the Italian code of procedure of the power of prosecutors to order or confirm detention.

It should be emphasised that the problem of impartiality can also affect the position of judges; there is an extensive body of case-law concerned with whether a judge's involvement in pre-trial decisions is such that he or she lacks objective impartiality to preside over the trial; and this will invariably be the case where some judgment has to be formed as to whether the detained person is or is not guilty.

However, the problem of objective impartiality is likely to be much more acute given the structure of prosecution systems and it is not surprising that many countries have followed the example of Italy, since it is hard to guarantee in advance that a person taking a detention decision will not subsequently be involved in the prosecution. If there is certainty that this is not going to be a problem, then there will also be a need to ensure that the prosecutor is truly independent and that means not only from political pressures but also from superiors. In some circumstances, subordinates may be expected to follow their superior's instructions regarding an individual case and they will not, therefore, have the requisite independence.

In *Assenov and Others v. Bulgaria* the applicant was brought before an investigator who questioned him, formally charged him and took the decision to detain him on remand. The investigator's decision was approved by a prosecutor and other prosecutors decided the continuation of the detention. The Court held that since any of these prosecutors could subsequently have acted against the applicant in criminal proceedings they were not sufficiently independent or impartial for the purpose of Article 5 (3).<sup>149</sup>

The prosecutor's powers were extensively examined and discussed by the Court in the case of *Niedbala v. Poland*. The Court firstly observed that under Polish law at the material time, the tasks of the prosecution during criminal proceedings were carried out by prosecutors. The latter were subordinated to the Prosecutor General who at the same time carried out the function of the Minister of Justice. This made it indisputable that prosecutors, in the exercise of their functions, are subject to supervision of an authority belonging to the executive branch. The Court also held that their role as guardians of the public interest – invoked by the Polish government – cannot be regarded as conferring on them a judicial status. Since the prosecutors performed investigative and prosecuting functions, they must be seen as a party to the criminal proceedings. Consequently, the Court found that the prosecutor – in the Polish legal system – was not an "officer authorised by law to exercise judicial

power". The fact that the persons arrested and detained by the prosecutors' orders could lodge an application with a judge against the detention was not seen as a remedy to the shortcoming that the detention orders were made by prosecutors. The Court argued that the judicial review was not automatic as it depended on the application lodged with the court by the applicant. In addition, the Court noted that Polish law did not offer any safeguards against the risk that the same prosecutor who decided on the applicant's detention on remand might later take part in the prosecution.<sup>150</sup>

## 2. The role of the competent legal authority

The judge before whom the person is to be brought should be responsible for determining whether his or her detention can be continued (subject to the requirement that anyone in detention be tried within a "reasonable time") or should be terminated. Any order on this matter must have binding effect. This is a critical point: Article 5 (3) establishes a choice between release or trying the detained person within a reasonable time, but even the prolongation of detention will only be justified so long as there are relevant and sufficient reasons for it (such as the risk of flight, interference with the course of justice, re-offending or public distur-

149 28 October 1998.

150 4 July 2000.

bance). Although one or more of these reasons may exist when the person is initially detained, they may become less pressing with the passage of time and in such circumstances the person concerned should be released.<sup>151</sup>

Furthermore, even if there is a justifiable reason for continuing a person's detention, there is still an overall requirement that the period of pre-trial detention should not be unreasonable. This is to be judged by the complexity of the proceedings but also the degree of activity in preparing the case. Prolonged inactivity, as in the case of *Toth v. Austria*, will inevitably lead to a finding of a violation; the same judgment underlines the judicial responsibility for ensuring that a case is brought to trial without delay. In order to fulfil this responsibility the judge must be prepared to scrutinise closely both the basis on which the initial detention took place – it may turn out to have been wholly inappropriate – and the reasons submitted for its continuation. Fears about judicial supervision often stem from a mistaken belief that it will necessarily lead to criminals being released before trial and thus free to undermine it, escape or commit further crimes. However, there should be nothing automatic about release, and the role of the judge is to test the case for detention and to authorise it if valid and well-supported reasons are submitted. It is not enough for it to be claimed that there is a fear of flight or interference with witnesses; evidence of this possibility has

to be brought forward and like all evidence its cogency must be examined. Thus interference with witnesses is a scarcely credible reason where sworn statements have already been taken. Moreover the reasoning given by the judge must be real and not a ritual incantation of a formula,<sup>152</sup> demonstrating that no consideration was given to the merits of the application for release. Automatic refusal and well as unreasoned decisions are therefore not acceptable.

### **3. The time-frame for supervision**

A key part of the requirement of judicial supervision is that its initial exercise should occur "promptly". This term comes from the overarching prohibition of any arbitrariness with respect to a person's detention. The promptness requirement sets an outer limit to the interval between the initial detaining act and the point at which this is first subjected to judicial supervision. It also suggests that international standards require the detaining authorities to accord the courts an opportunity to exercise that supervision at the earliest practicable opportunity within the maximum interval permitted. In other words, the outer limit must be applied with due regard to circumstances of the individual case.

There have been some cases where the detention concerned lasted far longer than could ever reasonably be regarded as acceptable. Thus there was

151 *Letellier v. France*;  
*Tomasi v. France*.

152 As in *Mansur v. Turkey*,  
8 June 1995.

no hesitation on the part of the European Court in finding a violation in *McGoff v. Sweden*, where fifteen days had elapsed between the accused being taken into custody and first being brought before a court. The lapse of three months before judicial supervision in *Assenov and Others v. Bulgaria* and in *Jėčius v. Lithuania* were thus held to violate the promptness requirement. A violation was also found in *Van der Sluijs, Zuiderveld and Klappe v. the Netherlands*, where the delay ranged from eleven to fourteen days (this was a case of breach of military orders and allowances had been made for the exigencies of military life and justice). However, violations of the obligation will arise where the intervals are not quite so extreme. Thus it has been impossible to persuade the European Court that delays of five and six days could be acceptable<sup>153</sup> and it is also notable that there was a friendly settlement following a complaint about a six-day delay in bringing someone before a court in *Skoogström v. Sweden*.

The leading case on the setting of a time-limit on judicial supervision is the case of *Brogan v. the United Kingdom*, which not only found a period of four days and six hours to be too long, but also shed some useful light on the very objective underlying the obligation that a person should be brought before a court following his or her initial detention. The arrest in the *Brogan* case concerned a suspected terrorist and although the Court accepted that the specific circumstances of the fight against terrorism

could have an impact on the length of detention prior to its being subjected to judicial supervision, it found under the particular circumstances of the case a violation of the promptness requirement. The Court was prepared to show some appreciation of the need to respond to certain problems, such as the difficulties faced in gathering admissible and usable evidence, the time needed for certain forensic testing and the sensitivity of the information involved. But it was willing to do so only to a limited extent because of its understanding both of the notion of “promptness” and the significance of this requirement. The Court said that

*to attach such importance to the special features of this case as to justify so lengthy a period of detention without appearance before a judge or other judicial officer would be an unacceptably wide interpretation of the plain meaning of the word “promptly”.*

An interpretation to this effect would import into Article 5 (3) a serious weakening of a procedural guarantee to the detriment of the individual and would entail consequences impairing the very essence of the right protected by this provision.

It was thus not surprising that, in another case concerning the problems posed by terrorists the Court considered detention for twelve to fourteen days without judicial supervision to be unacceptable.<sup>154</sup>

In cases involving the detention of soldiers for military offences, although the Court has made some allowances for the exigencies of military life,<sup>155</sup>

- 153 *Koster v. the Netherlands and De Jong, Baljet and Van den Brink v. the Netherlands*, respectively.
- 154 *Sakik and Others v. Turkey*, 26 November 1997.
- 155 As in the cases of *De Jong, Baljet and Van den Brink, Koster, Van der Sluijs, Zuiderveld and Klappe v. the Netherlands*.

it still held to the importance of the promptness requirement.

Deprivation of liberty prior to judicial authorisation for its continuance should not last any longer than is genuinely required for the purpose of processing of a suspect. The principal elements involved in such processing will be the need to: bring person to a police station when he or she has been detained elsewhere; gather any relevant forensic evidence from his or her person; carry out an interview to confirm his or her identity and to see whether initial suspicions can be satisfactorily allayed, as well as establish the location of evidence which is at risk of otherwise being destroyed; prevent other suspects about to be detained from being alerted and thus escaping; and bring him or her to the court from the police station. Although the precise time taken by such preliminaries (as opposed to the full investigation) will vary with the circumstances of the individual case, it should be feasible in the general run of cases for all of them to be dealt with in at most one or two days and this is reflected in the use of this sort of period as the deadline in criminal procedure laws, as well as by the European Commission having regarded the production of a detainee before a court within this period as unproblematic.<sup>156</sup>

The fact that the interval in a given case between detention and judicial supervision has exceeded this period will not automatically lead to a

breach of the international standard but the extra time taken would have to be shown to be a necessary consequence of its particular circumstances in order for it to be viewed as acceptable. Such a situation might be regarded as having arisen where the detention occurred in some place that was more than a day's travel to the nearest police station<sup>157</sup> or where there was a particularly complex arrest operation involving many suspects or where the recovery of vital evidence from a suspect required a considerable time (such as where it has been swallowed) or where the illness of the defendant made impossible to bring him before a judge during his hospitalisation.<sup>158</sup> Nevertheless, the sense of immediacy recognised as critical by the European Court would clearly be lost in the overwhelming majority of cases if the delay in producing someone before a court exceeded forty-eight hours by more than a few hours and the latter period ought to be the norm by which the need for any flexibility ought to be determined.

It is important to bear in mind that the practicalities of processing a case will not be considered to have been justifiably prolonged by institutional or procedural obstacles which could, with appropriate planning and reorganisation, have been surmounted. Thus in *Koster v. the Netherlands* a violation of Article 5 (3) was found even though it had been claimed that military manoeuvres had prevented the detainee from being brought before a military court for five days. The Court was emphatic that manoeu-

156 *X v. the United Kingdom, X v. Belgium*.

157 See *Rigopoulos v. Spain*.

158 *X v. Belgium*.

vres were not unexpected but took place at *periodical intervals and were thus foreseeable, they in no way prevented the military authorities from ensuring that the Military Court was able to sit soon enough to comply with the requirements of the Convention, if necessary on Saturday or Sunday.*

The same response would undoubtedly arise if a shortage of judges were invoked as an excuse, unless this was a temporary matter caused by illness (such as a flu epidemic). It also means that the occurrence of a public holiday cannot be used to prolong the lapse of time before a detainee is brought before a court. The Court's explicit reference to the holding of hearings at weekends makes it abundantly clear that a State has a responsibility to ensure that a judge can be made available to exercise supervision over detention during the general closure of the courts. This reasoning is equally applicable to the timing of a detention; the fact that it begins after the normal close of business in the courts could not in itself be a justification for postponing the bringing of the person concerned before them to the second working day thereafter. In such a case there would have to be judges available to supervise the detention the following evening or night. Even budgetary considerations cannot provide any justification for the absence of sufficient judges to exercise supervision over detention.

## 4. Emergencies

The situation in which the detention giving rise to the *Brogan* case occurred was an undeclared emergency and thus it could not be argued that any failure to meet the requirements of Article 5 (3) could be excused by reference to a derogation under Article 15 of the European Convention. However, the *Brogan* ruling led the United Kingdom to make such a derogation and its effectiveness was subsequently scrutinised by the European Court in *Brannigan and McBride v. the United Kingdom*.<sup>159</sup> The intervals between detention and judicial supervision in this case had ranged from four days, six hours and twenty-five minutes to six days and fourteen and a half hours. The Court did accept both that there was a genuine emergency and that detention for up to seven days without judicial supervision could fall within the acceptable limits of a derogation. In doing so it was particularly influenced by the United Kingdom's concerns regarding the sensitive nature of the information that might have to be disclosed in any judicial supervision of the detention and the risk that judicial involvement in any extension of detention might undermine public confidence in the independence of the judiciary, not least because it was small in numbers and vulnerable to terrorist attack. The acceptability of the derogation in this case was also justified by the continued availability of *habeas corpus* (which would not require disclosure of the same details as to the basis on which

159 26 May 1993.

someone was being detained) and the absolute right of access to a lawyer after forty-eight hours of detention. Although this ruling was opposed by vigorous dissents from four of the Court's judges, it demonstrates that there are circumstances in which automatic judicial supervision of detention can be deferred for such a significant period. Nevertheless the exceptional nature of such a step is underlined both by the need to demonstrate that an emergency actually does exist – which itself must be susceptible to judicial supervision – and the importance attached to the existence of other safeguards against potential abuse of the vulnerability of those who are detained. Furthermore the ruling did not authorise an unlimited suspension of judicial supervision; seven days was the maximum permitted. The importance of this limit was demonstrated in subsequent cases where the nature and scale of a terrorist threat were not, despite a derogation under Article 15, sufficient to justify detention without judicial control for periods ranging from fourteen to twenty-three days.<sup>160</sup> In both cases the Turkish government submitted that the investigation into terrorist activities posed special problems for the authorities but the Court found that no actual explanation had been offered as to why any investigation would be prejudiced by judicial scrutiny of the detentions concerned. A further basis in both cases for not allowing Turkey to invoke the derogation as an excuse for not complying with Article 5 (3) was the absence of adequate alternative

safeguards; the detainees had no access to lawyers and doctors (except on a very limited basis in *Demir*) or to relatives and friends and there was no realistic possibility of testing the legality of their detention in the courts. Although in *Demir* there was the possibility of a complaint being lodged by the applicants' lawyer, this was understandably rejected as a guarantee against arbitrary treatment since the detainees were being held incommunicado and were thus deprived of all contact with him. In any event it is very unlikely that even the presence of safeguards such as those found in *Brannigan and McBride* would have justified detention without judicial supervision for the extended periods involved in these two cases; the longer the absence of scrutiny endures the greater the risk of arbitrary treatment and the less likely that such detention will in itself red to be essential consequence of the state of emergency no matter how grave that may be.

Judicial scrutiny plays a significant role in ensuring that the risk of arbitrary detention is minimised. Arbitrariness is a necessary characteristic of any detention that cannot be objectively justified and this would not be possible where the detaining authorities have completed all the appropriate preliminaries so that they are in a position to put their case for its continuation to a judge but then fail to do so for some time. This conclusion would be equally applicable where their handling of a case has been clearly dilatory and as a consequence the time taken to

160 *Aksoy v Turkey*, 18 December 1996 and *Demir and Others v. Turkey*, 23 September 1998.

bring the case before a court is much longer than that required for comparable cases processed in a regular fashion.

This view is reinforced by the European Court's recognition that the need for judicial supervision will only arise if there is a wish on the part of the authorities to continue the detention. As it made clear in *De Jong, Baljet and Van den Brink v the Netherlands*, there would be no violation of Article 5 (3) if the detained person were "released 'promptly' before any judicial control of his detention would have been feasible". Similarly in *Brogan v. the United Kingdom*, the Court underlined that the State had an obligation either "to ensure a prompt release or a prompt appearance before a judicial authority". There is no need for release to receive judicial approval. This effectively means that there is a continuing obligation on the detaining authorities throughout the period of detention to consider whether its continuation is really justified and, if not, to release the person concerned there and then. Furthermore this approach is echoed in that taken with respect to the reasonableness of continuing someone's detention on remand, i.e., after the initial judicial supervision. As we have already seen, prolongation of detention prior to trial can only be justified so long as there are relevant and sufficient reasons for it. As the overriding requirement is to prevent unnecessary detention, it follows that there will be a breach of the specific obligation to bring someone before a court "promptly"

where the detaining authorities conduct themselves in such a way that this occurs later than was feasible in the particular circumstances of the case. Just as a case which is particularly complex or involves the military might require a little more time than an average one, so should less time be needed where the case is extremely simple and there are no practical considerations which might otherwise prevent the person concerned from being brought to court straightaway.

Observance of the "promptness" requirement remains a vital guarantee against detention which is either arbitrary from its outset or becomes so with the passage of time and changing circumstances. There is no requirement that the detaining authorities rush a case through the preliminaries before the detained person's appearance in court but there is unquestionably a duty of due diligence, namely, to ensure that it takes place as soon as is practicable and certainly no later than the outer limit already discussed.

## **5. Continuing supervision**

A final point on this aspect of judicial supervision is the periodical review where the judge decides that continued detention is justified. This necessarily follows from the point already made that circumstances can change and, while grounds

for detention may exist in the early stages of an investigation, these may no longer be compelling at a later stage. It is incumbent on the detaining authorities, therefore, to submit the case for detention to judicial supervision at regular intervals and these ought not to exceed a month or two. Without this continuing supervision – which must be as rigorous as that at the initial examination – a person could be kept in detention when this is not compatible with the Convention. In *Jėčius v. Lithuania* the only reas-

ons given for the applicant's detention on remand were the gravity of the offence and the strength of evidence against him in the case file. The Court held that the suspicion against the applicant of having committed murder may initially have justified his detention but it could not justify the applicant's custody for almost fifteen months, particularly when the suspicion was proved unsubstantiated by the trial court which acquitted the applicant, and therefore found the applicant's detention as excessive.

## Section VI: Challenging the legality of the detention

In addition to the judicial supervision under Article 5 (3) which must come from the detaining authorities, Article 5 (4) guarantees the option of the detainee to bring proceedings challenging the lawfulness of the detention before a court, which must decide speedily and order the release if the detention is found unlawful. The requirement in Article 5 (4) is that there be something comparable to *habeas corpus* so that the legality of one's detention can be tested. The crucial elements of the obligation in this provision are that the supervision must be by a court, must entail an oral hearing with legal assistance in adversarial proceedings, must address the legality of the detention in the widest sense, and must take place speedily.

The obligation in Article 5 (4) applies whatever ground for detention is given. The domestic authorities must provide recourse to courts in all cases including in those justified under Article 5 (1).<sup>161</sup>

### 1. The need for a court

The express reference to a court in Article 5 (4) excludes any debate as to whether this is a matter that can be determined by a prosecutor. In

*Vodenicarov v. Slovakia* the Court held that the possibility open to the applicant to seek redress before the public prosecutor does not meet the requirements of Article 5 (4) as the "procedure followed by a prosecutor lacks judicial character."<sup>162</sup> In *Varbanov v. Bulgaria*, the applicant's detention was ordered by a district prosecutor, who then became a party to the proceedings against him seeking the applicant's psychiatric internment. The district prosecutor's order was subject to appeal to higher prosecutors only. Here the Court found that the applicant was deprived of his right to have the lawfulness of his detention reviewed by a court, contrary to Article 5 (4).<sup>163</sup>

It is essential that the proceedings be before a judge and meet all the fair trial requirements in Article 6, but particularly those relating to independence and impartiality. The independence requirement will obviously not be satisfied if the review is carried out by a body which in some way is answerable to the executive. The impartiality requirement will be doubtful if the judge has in some way had a previous involvement with the case, for example, by agreeing that the person's remand in custody after his initial apprehension was warranted. This has not led the Court to find unacceptable the performance of this role by an investigating judge even though there might seem to be a conflict between such a judge's interest in carrying out the investigation effectively and being open to a claim

161 However, its application to Article 5 (1) (f) and (a) is limited.

162 21 December 2000.

163 5 October 2000.

that the accused should be released. In any event, whatever the nature of the court, it must be one that has the power to order a person's release; if it is restricted to making recommendations or providing other remedies for the illegal detention (such as in *Van Droogenbroeck v. Belgium*, where a criminal penalty could be imposed on the official responsible), then it will not satisfy the requirements of Article 5 (4). The whole point of this provision is that a person should be able to secure his or her release if the detention is shown to be unlawful.

## **2. Personal appearance**

As has already been indicated, one of the benefits of judicial supervision is that abuses other than illegal detention can be discovered and this flows in particular from the requirement that a detained person should normally be brought before the court in order to determine whether the detention is lawful. Thus a violation of Article 5 (4) was found in *Kampanis v. Greece*, where a person detained in custody in connection with an alleged fraud had not been allowed to appear before the court when this was possible under the criminal procedure code. The Court emphasised the importance of the detainee being able to resist the submissions of the prosecutor regarding his detention, because the detainee is seeking to allege that the detention was in-

compatible with the law and because the personal appearance before a court diminishes the potential for abuse in detention.

## **3. Access to legal advice, adversarial proceedings and equality of arms**

In making the case for release it is more than likely that the basis for the claim will involve difficult legal issues, and most detainees are unlikely to be in a position to prepare all the necessary arguments. It is, therefore, an inevitable consequence that a detainee should be allowed access to legal assistance for the purpose of mounting a challenge. Where the detainee cannot afford a lawyer the expense will have to be borne by the State. In *Woukam Moudefo v. France* the Court found a breach of Article 5 (4) because the accused was not allocated a lawyer for his appeal to the Court of Cassation for release when the appeal involved points of law. Or, in *Megyeri v. Germany* the Court held that a person detained as being mentally disordered was entitled to legal representation at the hearings unless there were particular circumstances suggesting otherwise. Moreover, the Court said that the person concerned should not be required to take the initiative for obtaining legal assistance.

The need for assistance goes well beyond the preparation of a claim and entails representation in the court proceedings. These proceedings must also be adversarial and observe the requirements of equality of arms which the Court has elaborated when applying Article 6: that is to say the person seeking release must be aware of the submissions made to justify detention, including the supporting evidence, and have an adequate opportunity to respond to them. It is entirely unacceptable, as occurred in *Toth v. Austria*, for the court to hear from the prosecuting authority in the absence of the detainee. A violation of Article 5 (4) was similarly established in *Lamy v. Belgium*, where the State's lawyer had access to the official file in preparing the case but the detainee did not. A fair opportunity for preparation also means that the detainee must have the necessary time for this purpose; if the possibility of challenge is too speedy then the remedy might be more apparent than real. Similarly the detainee must be allowed access to facilities needed to prepare his or her case; this might mean providing legal books, the opportunity to prepare submissions (which could affect the way in which the prison regime is applied) and, of course, the opportunity to discuss the case with his lawyer out of the hearing of the detaining authorities.

In *Niedbala v. Poland* the Court held that although it was not always necessary that the procedure under Article 5 (4) be attended by the same guaran-

tees as those required by Article 6 (1), it must nevertheless "have a judicial character and provide guarantees appropriate to the kind of deprivation of liberty in question". The Court further said that

*in particular, in the proceedings in which an appeal against detention order is being examined, "equality of arms" between the parties, the prosecutor and the detained person must be ensured.*<sup>164</sup>

In the case of *Niedbala* the Court found that the law in force at that time did not entitle the applicant or his lawyer to attend the court session and it did not require that the prosecutor's submission supporting the applicant's detention be communicated to the applicant or his lawyer. Consequently, the applicant did not have the opportunity to comment on the prosecutor's arguments. Moreover, while the applicant or his lawyer were not entitled to attend the courts' session in which the court examined the lawfulness of the detention, the law in force at that time allowed the prosecutor to do so. Therefore, the Court found a breach of Article 5 (4).<sup>165</sup>

In *Ilijkov v. Bulgaria* the Court recalled the proceedings by which an appeal against detention is examined "must be adversarial and must adequately ensure 'equality of arms' between the parties, the prosecutor and the detained." Since in the proceedings before the Supreme Court the prosecution authorities had the privilege of addressing the judges with arguments which were not communicated to the applicant,

164 See also *Nikolova v. Bulgaria*, 25 March 1999.

165 4 July 2000. Similar findings in *Trzaska v. Poland*, 11 July 2000; *Kawka v. Poland*, 9 January 2001.

those proceedings were not adversarial and violated Article 5 (4).<sup>166</sup>

#### **4. Determining legality**

In judging whether the requirements of Article 5 (4) are fulfilled, the concept of legality is always one of compatibility with the Convention standards. The detained person must have the opportunity to question whether his detention is consistent with national law and the Convention and is not arbitrary. Thus if someone is being detained for a statement which is said to be criminally libelous, there would have to be an openness to consideration of arguments that, as the offence is inconsistent with the right to freedom of expression under the Convention, the detention prior to a prosecution for that offence could not be justified. This thus goes a long way beyond being able to allege that there is no power of detention or that the power has been exercised in an improper way. Furthermore, it is also essential that the procedure enable the detainee to challenge the reasonableness of any suspicions about his or her having committed an offence.

In *Jėčius v. Lithuania* the Court recalled that Article 5 (4)

*entitles arrested and detained persons to a review bearing upon the procedural and substantive condition which are essential for the "lawfulness", in Convention*

*terms, of their deprivation of liberty. This means that the competent court has to examine not only the compliance with the procedural requirements of domestic law but also the reasonableness of the suspicion underpinning the arrest and the legitimacy of the purpose pursued by the arrest and the ensuing detention.*

In this case the Court noted that the courts authorising the applicant's remand in custody made no reference to the applicant's grievances about the unlawfulness of his detention. Moreover, the higher courts, although they acknowledged that the lawfulness of the applicant's detention was open to question, failed to examine his complaints by reference to the statutory bar then in force.

In the recent case of *Ilijkov v. Bulgaria* the Court held that while Article 5 (4) does not require that judges address every argument in the applicant's submission when they examine the lawfulness of a detention, the right in Article 5 (4) will be deprived of its substance if the judge disregards or treats as irrelevant concrete facts invoked by the detainee which are capable of placing a doubt on the existence of the conditions essential for the "lawfulness" in the meaning of the Convention. In the instant case the courts had refused to consider the applicant's arguments and the supporting evidence concerning the persistence of a reasonable suspicion against him, arguing that if they would comment on these issues they would pre-judge the merits of the criminal case and thus become partial. Under the Bulgarian law

166 26 July 2001.

the decisions on the accused's detention were entrusted to the same trial judge who will examine the merits of the case. The Court held that

*the mere fact that a trial judge has made decisions on detention on remand cannot be held as in itself justifying fears that he is not impartial. Normally questions which the judge has to answer when deciding on detention on remand are not the same as those which are decisive for his final judgement. When taking a decision on detention on remand and other pre-trial decisions of this kind the judge summarily assesses the available data in order to ascertain whether the prosecution have prima facie grounds for their suspicion; when giving judgment at the conclusion of the trial he must assess whether the evidence that has been produced and debated in court suffices for finding the accused guilty.*

Following this argument the Court found a violation of Article 5 (4), since the authorities' concern to protect the principle of impartiality could not justify the limitation imposed on the applicant's right under this provision.

## 5. **Decisions must be taken speedily**

Given the presumption against deprivation of liberty already discussed, it is not surprising that Article 5 (4) also requires that any determination as to whether detention is lawful should take place "speed-

ily". This is undoubtedly not intended to be as peremptory as the promptness requirement in Article 5 (3), and this is not surprising since the legal issues can be more complex where Article 5 (4) is invoked. Thus there is little doubt that an interval of a week or two between an application and its determination would be considered acceptable in many cases. However, there is likely to be particular concern about the length of the interval where the challenge to the legality is made at the outset of the detention and there has also been a failure to comply with the promptness requirement of Article 5 (3).

Although there is greater leeway in deciding what is an acceptable interval between initial detention and judicial supervision under Article 5 (4), it is clear from a vast array of cases that – notwithstanding any allowance that should be made for a particularly complex case – the time taken should still be no more than a matter of weeks. Periods exceeding a month have been condemned on numerous occasions, such as in the cases of *Bezicheri v. Italy* and *Sanchez-Reisse v. Switzerland*. Delays attributable to factors such as a judge's being on holiday or having an excessive workload are not acceptable. On the other hand, delays attributable to the detained person will not count: examples are *Navarra v. France*, where the applicant took his time to file an appeal, and *Luberti v. Italy*, where the detained person actually disappeared. It is also important to note that, should a decision on legal aid be required for the

detained person to be provided with legal assistance, this must also be dealt with quickly; seven weeks was understandably seen as far too long in *Zamir v. the United Kingdom*.

For the purpose of Article 5 (4) the time begins to run when the proceedings challenging the lawfulness of the detention are instituted, and ends when the final decision on the detention is made. However, there may be a violation of Article 5 (4) when a detained person has to wait for a period of time before a remedy is available.

As has been explained, the decision on the speedy proceedings depends on the particular circumstances of the case. In *Ilowiecki v. Poland* the Court held that the complexity of medical or other issues involved in the determination of the lawfulness of the detention can be a factor which may be taken into account. The Court further stated that

*this does not mean, however, that the complexity of a given dossier – even exceptional – absolves the national authorities from their essential obligation under this provision.*

In this case the Court found that even the undisputed need to obtain medical evidence in the course of the proceedings to assess the lawfulness of the detention could not explain their overall length which was from about three to seven months for each of the applicant's claims for release.<sup>167</sup>

The complexity of the medical issues involved in the decision on the continuation of the detention

was also raised in *Baranowski v. Poland*. While the Court accepted that this could be a factor to be taken into account when deciding the speediness, it observed that the courts needed some six weeks to obtain a report from a cardiologist, a further month to obtain evidence from a neurologist and a psychiatrist and another month to obtain some unspecified evidence. In the Court's view these lengthy intervals did not appear to be consistent with the "special diligence" in the conduct of the proceedings and amounted to a breach of Article 5 (4).<sup>168</sup>

Complexity was not an issue in the case of *Jablonski v. Poland*, where the Court found that a period of forty-three days to decide on the lawfulness of the detention was, in the particular circumstances of the case, contrary to the speediness requirement. The argument of the Polish Government that the Supreme Court (which was called to decide on the matter) had an excessive workload was not accepted by the Court.<sup>169</sup> Moreover, in the case of *Rehbock v. Slovenia* the Court found that two periods of twenty-three days for deciding on the two applications for release filed by the detainee did violate the speediness requirement.<sup>170</sup>

## **6. Link with Article 5 (3)**

As has been seen, the requirements of Article 5 (4) are more exacting than those of Arti-

167 4 October 2001.  
168 28 March 2000.  
169 21 December 2000.  
170 28 November 2000.

cle 5 (3), notably as regards legal representation and the adversarial procedure, but if the judicial supervision provided by the State of its own motion fulfils these requirements then that supervision will also be regarded as having fulfilled the obligation under Article 5 (4), at least at that point in time. This point is made because the possibility of challenging the legality of one's detention is not a once and for all opportunity; as circumstances change so does the possibility that a previous legal justification for a detention is no longer applicable. It follows, therefore, that there must be a continuing possibility of mounting a challenge so long as one is in detention. This does not mean, however, that the detainee must be able to bring proceedings at any and every moment; that could obviously lead to paralysis in the criminal justice system. The Court has, therefore, come to the conclusion that the possibility of challenge should exist at reasonable intervals. This in itself is a variable context and periods of up to a

year have been found acceptable where a person was being detained on account of being of unsound mind. That should not, however, be taken as a guide to the situation of someone being detained pending trial and the case law points to much shorter intervals being appropriate in this situation. Thus there was no objection to an interval of one month in the *Bezicheri* case and shorter periods than that will obviously be regarded as acceptable. The crucial thing is that the court is put in a position to test the justification for a person's detention where that person is likely to have grounds for arguing that it is improper and, prior to conviction, this is increasingly likely as the weeks pass by.

The two forms of judicial supervision are complementary and they are both fundamental requirements of the Convention's guarantee of personal liberty. Without them the scope for abuse is great. They are not inimical to an effective criminal justice system as this will always work best where it respects the rule of law.

## Section VII: Compensation

Article 5 (5) requires that those who have been the victim of arrest or detention in breach of the other provisions of this article should have an enforceable right to compensation. The absence of such a right will inevitably give rise to liability in proceedings before the European Court. Like Article 5 (4), this provision is a specific manifestation of the more general obligation in Article 13 of the Convention to provide an effective remedy where any of the guaranteed rights and freedoms have been violated.

The terms of Article 5 (5) do not leave a State any discretion as to the body from which the remedy of compensation is to be obtained. Article 5 (5) requires a remedy before a court, meaning that the remedy must be awarded by a legally binding decision. With regard to the form of the legal procedure by which the right to compensation can be vindicated, the national authorities enjoy a fair amount of latitude. A remedy by other bodies (such as the ombudsman) or an *ex gratia* payment by the government is not sufficient for the purpose of Article 5 (5).

In practice, the remedy will normally consist in financial compensation. There is scope for national variations as to the assessment of the amount of compensation that is payable but not as to the pre-

cise elements of loss that should be recognised in making an award. Prior to deciding the compensation, the national authorities may require evidence of the damages which had resulted from the breach of Article 5. The Court held that although a person may be a victim of an Article 5 breach, "there can be no question of 'compensation' where there are no pecuniary or non-pecuniary damages to compensate".<sup>171</sup>

An Article 5 (5) remedy is required only where the alleged victim had been arrested or detained contrary to any of the provisions in Article 5 paragraphs 1 to 4. A claim under Article 5 (5) alone will be exceptional in the absence of a prior decision finding a non-compliance with Article 5 at the national or the Convention level. Most often, the Court will consider a claim under Article 5 (5) only if it finds that another paragraph of Article 5 has been violated.<sup>172</sup> Moreover, when doing this, the Court will not require the victims to exhaust the local remedies in order to find out whether they could obtain a remedy before the national authorities. However, if a state can show "with a sufficient degree of certainty" that a remedy of the type required by Article 5 (5) is available to the victim, the Court will find no violation of this provision.<sup>173</sup> In *Rehbock v. Slovenia*, where the national law reserved the right to compensation to cases where the deprivation of liberty was unlawful or resulted from an error, the Court found a violation of Article 5 (5)

171 *Wassink v. the Netherlands*.

172 *Ciulla v. Italy*.

173 *Idem*.

since the applicant's right to compensation deriving from the infringement of Article 5 (4) – the detainee's right to bring proceedings challenging the lawfulness of the detention before a court, which must decide speedily and order the release if the detention is found unlawful – was not ensured with a sufficient degree of certainty.<sup>174</sup>

In countries where the Convention has been incorporated into the national law, the courts must be empowered to award such compensation where they find a violation of Article 5 and they must be prepared to exercise this power; any failure on their part will only further compound the violation of Article 5 that has occurred.



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**These human rights handbooks are intended as a very practical guide to how particular articles of the European Convention on Human Rights have been applied and interpreted by the European Court of Human Rights in Strasbourg. They were written with legal practitioners, and particularly judges, in mind, but are accessible also to other interested readers.**