

### Right to liberty and security (Article 5)

The right not to be deprived of personal liberty without lawful cause is one of the keystones of the Convention system. So Article 5 strongly asserts a **presumption in favour of liberty** at the outset, both positively and negatively: "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...".

**Loss of liberty** has two elements: confinement in a particular place for a non-negligible length of time, and lack of consent by the detainee.

The Court has stressed that **protection from arbitrariness** is at the core of Article 5, which gives a right to security as well as liberty and requires that in all cases procedures prescribed by law be followed.

In contrast to Article 3, the **right to liberty is not absolute**; there are obviously legitimate reasons why society may need to deprive people of their liberty in the general interest, especially where their actions pose a danger to themselves or others. So the right is subject to **six specific exceptions**, set out in paragraph 1, sub-paragraphs a to f, which are **exhaustive**. Officials responsible for law enforcement and especially those with powers of arrest and detention have an especially important role to observe strictly the limits set by sub-paragraphs a to f, and submit their actions and decisions promptly to judicial control.

The **six exceptions where deprivation of liberty is permitted** are:

- ▶ (a) A person can be detained following conviction by a court with authority to decide the case.
- ▶ (b) A person can be detained for non-compliance with the order of a court or to secure the fulfilment of any obligation prescribed by law.
- ▶ (c) A person can be arrested and detained in order to bring him or her before a court on reasonable suspicion of having committed a criminal offence, or when reasonably necessary to prevent him from committing an offence or fleeing after having done so.
- ▶ (d) A minor (i.e. under 18) can be detained to ensure he or she receives education or pending non-criminal court proceedings (e.g. to commit the minor into care; criminal proceedings are covered by sub-paragraph c).
- ▶ (e) Persons with infectious diseases, persons of unsound mind, alcoholics, drug addicts and vagrants may be detained.
- ▶ (f) A person may be arrested or detained to prevent unauthorised entry into the country or for the purposes of deportation or extradition.

In all six situations there is a specific requirement that the detention be **lawful**. That means not only that it must conform to domestic law and procedure which are both accessible and foreseeable, but also the application of that law must conform to the Convention, i.e. be for a purpose sanctioned in sub-paragraphs a to f.

Detention to **secure the fulfilment of a legal obligation** (sub-paragraph b) covers such things as submitting to a road block, a random breath test or an identity check, and other common exercises of police powers. Any detention must be as a last resort, after the person has been given the opportunity to comply voluntarily. It must also be proportionate, and with the aim of securing compliance, not of punishment.

**Arrest and detention on suspicion of committing a crime** (sub-paragraph c) is the most common exceptional situation, and the one where problems most often arise. Arrest must be on **reasonable suspicion** with an intention to bring charges rather than to fish for information, which might lead to charges. But the Court accepts that a period of time for interrogation is permissible, which can be longer in some cases e.g. where terrorism acts are suspected, because of the difficulty of obtaining hard evidence on which to base charges.

The Court has not defined **“unsound mind”** (sub-paragraph e), because medical opinion and practice is always evolving. The only safe course for officials, therefore, is only to detain people (and keep them in detention) on authoritative, objective and recent medical advice. The place and conditions in which such persons are held must also be appropriate to their situation. Placing a person of unsound mind in a social care home can also amount to a deprivation of liberty.

In dealing with **persons of unsound mind, alcoholics, vagrants and drug addicts** (sub-paragraph e), the Court requires a **proportionate** response to the person’s behaviour.

Detention pending **deportation or extradition** (sub-paragraph f) can be in a detention centre specially set up for fast-track processing of such cases, but only for a short period. Detention can take place outside any recognised place of custody.

**Paragraph 2** of Article 5 requires that **a person who is arrested must be informed promptly, in a language he or she understands, of the reasons for his or her arrest and any charge against him or her.**

It is an elementary safeguard for a person to be told why he or she has been arrested, in simple and non-technical language, so that he or she can deny the offence or challenge his or her detention, if necessary in court.

**Paragraph 3** requires that a person arrested on suspicion of committing an offence **be brought promptly before a judge or other judicial officer and shall be entitled to trial within a reasonable time or to release pending trial.** This must happen automatically; the detainee does not have to apply for it. The person before whom the detainee is brought can be a judge or magistrate, or another judicial officer provided that person is independent of the authorities and the parties and is impartial. What satisfies “**promptly**” can vary, but normally it should be the next day. The Court requires that detention pending trial be shown to be necessary, based on proper examination of the circumstances of each individual case in accordance with the general presumption in favour of liberty.

**Paragraph 4** is the “*habeas corpus*” provision of the Convention, giving a person arrested or detained the right “**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**”. This right cannot be used to contest imprisonment as part of a criminal sentence. The proceedings have to be adversarial and the two sides must have equality of arms. “Speedily” implies that there should be no undue delay in bringing proceedings to the court. If detention has been ordered by a court, that will usually satisfy this right. The right normally entails a right periodically to initiate a review of the lawfulness of detention.

**Paragraph 5** guarantees a **right to compensation for everyone who has been the victim of arrest and detention in contravention of the provisions of Article 5**. Ensuring this right will fall to others than the officials whose job includes powers of arrest and detention, but it is a powerful incentive to those officials to respect the rights given by Article 5. Failure to do so can cost the State a lot of money.



The complete toolkit: <http://echr-toolkit.coe.int>

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE