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The time parameter within article 5 ECHR
Towards reasonable timeframes for judicial proceedings

Research on the European Court of Human Rights case-law pertaining to the requirement for reasonable time of proceedings in the ambit of article 5 ECHR

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Summary

Introduction

The relevant case-law of the European Court of Human Rights with regard to Article 5 of the ECHR has been recently summarized by the Grand Chamber in *S., V. and A* case:

"*Article 5 of the Convention is, together with Articles 2, 3 and 4, in the first rank of the fundamental rights that protect the physical security of the individual (…), and as such its importance is paramount. Its key purpose is to prevent arbitrary or unjustified deprivations of liberty (…). Three strands of reasoning in particular may be identified as running through the Court's case-law: the exhaustive nature of the exceptions, which must be interpreted strictly (…) and which do not allow for the broad range of justifications under other provisions (Articles 8 to 11 of the Convention in particular); the repeated emphasis on the lawfulness of the detention, both procedural and substantive, requiring scrupulous adherence to the rule of law (…);* ***and the importance of the promptness or speediness of the requisite judicial controls****[1] (under Article 5 §§ 3 and 4) (…)*"[2].

Insofar as the different types of deprivation of liberty envisaged by Article 5 § 1 constitute derogations to the fundamental right enshrined in the same provision (the right to liberty and security of person), all the components of their regime must be construed in a narrow and strict manner. Accordingly, the time parameter within the frame of Article 5 ECHR is also subject to very stringent interpretation. The time parameter presents five different aspects:

- a relevant factor for the ECrHR in assessing the lawfulness of the detention (*Article 5 § 1*);
- the individual right to be informed promptly of the reasons of the deprivation of liberty (*Article 5 § 2*);
- the State obligation of prompt and automatic judicial control of the lawfulness of the decision of detention (*Article 5 § 3, first limb*);
- the individual right to regular review of the lawfulness of continued detention (*Article 5 § 3, second limb*);
- the individual right to challenge the lawfulness of the detention through prompt judicial review (*Article 5 § 4*)

The requirement of promptness or speediness covers all of these aspects and presents an inherent element of the strict interpretation of derogations to the fundamental right to liberty and security of person. The **time parameter** is taken into account in the case law of the European Court of Strasbourg on Article 5 as a criterion for assessing the lawfulness of deprivation of liberty (**1.**), as well as a prerequisite guaranteeing the fundamental right to a trial within a reasonable time (**2.**).

1. The time parameter – a criterion for assessing the lawful character of the deprivation of liberty

The core individual right enshrined in Article 5 ECHR is the right to liberty and security of person. The foreseen derogations to this fundamental right, namely the possibilities of deprivation of liberty enumerated within the first paragraph, are subject to the stringent requirement for protecting the individual from arbitrariness[3]. In compliance with the settled case law of the European Court of Human Rights, "*the list of exceptions to the right to liberty secured in Article 5 § 1 is an exhaustive one and only a narrow interpretation of those exceptions is consistent with the aim of that provision, namely to ensure that no one is arbitrarily deprived of his or her liberty*"[4] (A). In the specific field of deportation, extradition and immigration, the Court makes sure that the length of the detention does not exceed that reasonably required for the purpose pursued (B).

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[1] ECrHR, *Buzadji v. the Republic of Moldova*, [GC], app. n° 23755/07, 5 July 2016, § 84; ECrHR, *McKay v. the United Kingdom*, [GC], app. n° 543/03, 3 October 2006, § 34.

[2] ECrHR, *S., V. and A v. Denmark*, [GC], app. n° 35553/12, 36678/12 and 36711/12, 22 October 2018, § 73; ECrHR, *Buzadji v. the Republic of Moldova*, [GC], *op.cit.*, § 84.

[3] ECrHR, *Witold Litwa v. Poland*, app. n° 26629/95, 4 April 2000, § 78: "*(…) a necessary element of the "lawfulness" of the detention within the meaning of Article 5 § 1 (e) is the absence of arbitrariness*"; ECrHR, *Lukanov v. Bulgaria*, app. n° 21915/93, 20 March 1997, § 41; *Assanidze v. Georgia*, [GC], app. n° 71503/01, 8 April 2004, § 171; *Ilaşcu and Others v. Moldova and Russia*, [GC], app. n° 48787/99, 8 July 2004, § 461.

[4] ECrHR, *Labita v. Italy*, app. n° 26772/95, 6 April 2000, § 170; *Blokhin v. Russia*, app. n° 47152/06, 23 March 2016, § 166; *Ciulla v. Italy*, app. n° 11152/84, 22 February 1989, § 41.

A. The general rule of reasonable length of deprivation of liberty (Article 5 § 1)

The European Court of Human Rights ensures within the frame of its review that the detention in issue was "***lawful***" and "***free from arbitrariness***". On the one hand, under Article 5 ECHR, any deprivation of liberty must be "***lawful***", *i.e.* effected "*in accordance with a procedure prescribed by law*" (substantive and procedural provisions of the national law)[5]. On the other hand, any measure depriving the individual of his/her liberty must be compatible with the purpose of Article 5, namely to protect the individual from arbitrariness[6]. In the *Saadi* case, the Grand Chamber referred to the "*fundamental principle that no detention which is arbitrary can be compatible with Article 5 § 1 and the notion of "arbitrariness" in Article 5 § 1 extends beyond lack of conformity with national law, so that a deprivation of liberty may be lawful in terms of domestic law but still arbitrary and thus contrary to the Convention*"[7].

While the Court has not formulated a global definition as to what types of conduct on the part of the authorities might constitute "***arbitrariness***" for the purposes of Article 5 § 1, key principles have been developed on a case-by-case basis[8]. It is moreover clear from the case-law that the notion of arbitrariness in the context of Article 5 varies to a certain extent depending on the type of detention involved. The Court recalled recently the general principle according to which "*detention will be "arbitrary" where, despite complying with the letter of national law, there has been an element of bad faith or deception on the part of the authorities (…) or where the domestic authorities neglected to attempt to apply the relevant legislation correctly*"[9].

To be found "***free from arbitrariness***", the deprivation of liberty has to be executed in conformity with national law, but it must also be **necessary** in the circumstances, namely there must be relevant and sufficient reasons, and **the national authorities must display "*special diligence*"** in the conduct of the proceedings[10]. Accordingly, justification for **any period of detention, no matter how short, must be convincingly demonstrated by the authorities**[11].

The principle of proportionality dictates that where detention is to secure the fulfilment of an obligation provided by law, a balance must be struck between the importance in a democratic society of securing the immediate fulfilment of the obligation in question, and the importance of the right to liberty; **the duration of the detention is a relevant factor in striking such a balance**[12]. Accordingly, among other parameters of review[13], the Court accepts that **the speed with which the domestic courts replace a detention order which has either expired or has been found to be defective is a relevant element in assessing whether a person's detention must be considered arbitrary**[14].

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[5] ECrHR, *Winterwerp v. the Netherlands*, app. n° 6301/73, 24 October 1979, § 39.
[6] ECrHR, *K.-F. v. Germany*, app. n° 144/1996/765/962, 27 November 1997, § 63.
[7] ECrHR, *Saadi v. the United Kingdom* [GC], app. n° 13229/03, 29 January 2008, § 67; *Nasirov and others v. Azerbaijan*, app. n° 58717/10, 20 February 2020, § 47; *S., V. and A v. Denmark*, [GC], *op.cit.*, §74.
[8] ECrHR, *Saadi v. the United Kingdom* [GC], *op. cit*., § 68; *J.N. v. the United Kingdom*, app. n° 37289/12, 19 August 2016, § 79.
[9] ECrHR, S*., V. and A v. Denmark*, [GC], *op.cit.,* § 76.
[10] *Idem.,* § 77.
[11] *Ibid*.
[12] *Idem*, § 70; *Vasileva v. Denmark*, app. n° 52792/99, 25 September 2003, § 37: "*(…) What remains is to determine whether in the circumstances of the present case a reasonable balance was struck between the importance of securing the fulfilment of the obligation in general and the importance of the right to liberty. In this assessment the Court considers the following points relevant; the nature of the obligation arising from the relevant legislation including its underlying object and purpose; the person being detained and the particular circumstances leading to the detention; **and the length of the detention**".*
[13] According to the settled European case law, detention will be "arbitrary" where, despite complying with the letter of national law, there has been an element of bad faith or deception on the part of the authorities. Besides, both the order to detain and the execution of the detention must genuinely conform with the purpose of the restrictions permitted by the relevant sub-paragraph of Article 5 § 1. There must in addition be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention. The notion of arbitrariness in the contexts of sub-paragraphs (b), (d) and (e) also includes an assessment whether detention was necessary to achieve the stated aim. The detention of an individual is such a serious measure that it is justified only as a last resort where other, less severe measures have been considered and found to be insufficient to safeguard the individual or public interest which might require that the person concerned be detained.
[14] ECrHR, *Mooren v. Germany*, [GC], app. n° 11364/03, 9 July 2009, § 80.

- For example, the Court considered that:
  - The time that elapsed (**14 days**) between the Court of Appeal's finding that the detention order was defective and the issuing of a fresh detention order by the District Court did not render the applicant's detention arbitrary[15].
  - A **period of less than a month** between the expiry of the initial detention order and the issuing of a fresh, reasoned detention order following a remittal of the case from the appeal court to a lower court did not render the applicant's detention arbitrary[16].
  - In contrast, a **period of more than a year** following a remittal from a court of appeal to a court of lower instance, in which the applicant remained in a state of uncertainty as to the grounds for his detention on remand, **combined with the lack of a time-limit for the lower court to re-examine his detention**, was found to render the applicant's detention arbitrary[17].

It is obvious that measuring the length of detention requires an **explicitly established starting point in time**. Thus, the Court has recently seized the opportunity to specify that "***the absence of a record of such matters as*** *the date,* ***time*** *and location of detention (…) must be seen as incompatible with the requirement of lawfulness and with the very purpose of Article 5 of the Convention*"[18].

Generally, the detention order should be based on concrete grounds and should determine a specific time-limit. Therefore, "*permitting a prisoner to languish in detention on remand without a judicial decision based on concrete grounds and without setting a specific time-limit would be tantamount to overriding Article 5, a provision which makes detention an exceptional departure from the right to liberty and one that is only permissible in exhaustively enumerated and strictly defined cases*"[19].

As to the end of the detention on remand, the Court recognises that **some delay in carrying out a decision to release a detainee is understandable and often inevitable**[20], in view of practical considerations relating to the running of the courts and the observance of particular formalities[21]. Nevertheless, the national authorities must attempt to **keep it to a minimum**[22]. The Court admitted that administrative formalities connected with release cannot justify a **delay of more than a few hours**[23]. In the Court's view, it is up to the Contracting States to organise their legal system in such a way that their law-enforcement authorities can meet the obligation to avoid unjustified deprivations of liberty[24]. A delay of eleven hours[25] and twelve hours[26] in executing a decision to release the applicant "forthwith" was found to be incompatible with Article 5 § 1 of the Convention. A fortiori, a delay of two days[27], as well as of 5 days[28] led to a violation of Article 5 § 1.

Naturally, the Court applies a different approach towards the principle that there should be no arbitrariness in cases of detention under Article 5 § 1 (a), where, in the absence of bad faith or other grounds, as long as the detention follows and has a sufficient causal connection with a lawful

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[15] *Idem,* § 96.
[16] ECrHR, *Minjat v. Switzerland*, app. n° no 38223/97, 28 January 2004, §§ 46 and 48.
[17] ECrHR, *Khudoyorov v. Russia*, app. n° 6847/02, 12 April 2006, §§ 136-137.
[18] ECrHR, *Nasirov and others v. Azerbaijan*, *op. cit.*, § 49.
[19] ECrHR, *Khudoyorov v. Russia*, app. n° 6847/02, 12 April 2006, § 142; *Vasiliy Vasilyev v. Russia*, app. n° 16264/05, 19 May 2013, § 73.
[20] As a rule, it is deemed inconceivable that in a State subject to the rule of law a person should continue to be deprived of his liberty despite the existence of a court order for his release (ECrHR, *Assanidze v. Georgia*, [GC], app. n° 71503/01, 8 April 2004, § 173).
[21] ECrHR, *RuslanYakovenko v. Ukraine*, app. n° 5425/11, 4 September 2015, § 68; ECrHR, *Butkevich v. Russia*, app. n° 5865/07, 2 July 2018, § 67.
[22] ECrHR, *Giulia Manzoni v. Italy*, app. n° 19218/91, 1 July 1997, § 25; *Labita v. Italy*, *op. cit*., § 171.
[23] ECrHR, *G.B. and others v. Turkey*, app. n° 4633/15, 17 January 2020, § 154.
[24] ECrHR, *Ruslan Yakovenko v. Ukraine*, *op.cit.*, § 68.
[25] ECrHR, *Quinn v. France*, app. n° 18580/91, 22 March 1995, §§ 39-43.
[26] ECrHR, *Labita v. Italy*, *op. cit*., §§ 172-174.
[27] ECrHR, *Ruslan Yakovenko v. Ukraine*, *op.cit.*, § 69.
[28] ECrHR, *G.B. and others v. Turkey*, *op.cit.*, § 155.

conviction, **the decision to impose a sentence of detention and the length of that sentence are matters for the national authorities rather than for the Court under Article 5 § 1**[29].

Finally, it should be mentioned that **the sole short length of detention** is not sufficient to conclude to the lawfulness of the detention. Thus, the Court could consider in the *Nasirov* case that the applicant's deprivation of liberty was "*unjustified, arbitrary and unnecessary irrespective of its duration*" (**less than three hours**)[30].

B. The application of the general rule within the specific field of deportation, extradition and immigration

Recently, the Court recalled that "*Contracting States have the right, as a matter of well-established international law and subject to their treaty obligations including the Convention, to control the entry, residence and expulsion of aliens*[31]*. It is a necessary adjunct to this right that States are permitted to detain would-be immigrants who have applied for permission to enter, whether by way of asylum or not. Deprivation of liberty of asylum-seekers to prevent their unauthorised entry into a State's territory is not in itself in contravention with the Convention*"[32].

a) Deportation and extradition

The second limb of Article 5 § 1 (f) allows States to carry out detentions with a view to deportation or extradition. To avoid being branded as arbitrary, detention under Article 5 § 1 (f) must be carried out in good faith; it must be closely connected to the ground of detention relied on by the Government; the place and conditions of detention should be appropriate; and **the length of the detention should not exceed that reasonably required for the purpose pursued**[33]. More precisely, Article 5 § 1 (f) does not demand that detention be reasonably considered necessary, for example, to prevent the individual from committing an offence or fleeing; it is therefore immaterial whether the underlying decision to expel can be justified under national or Convention law[34]. Any deprivation of liberty under the second limb of Article 5 § 1 (f) will be justified, however, only for as long as deportation or extradition proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible under that provision[35].

In other words, the length of the detention should not exceed that reasonably required for the purpose pursued[36]. The European Court of Justice has adopted a similar position in relation to Article 15 of Directive 2008/115/EC. It should, however, be pointed out that unlike that provision, **Article 5 § 1 (f) of the European Convention does not lay down maximum time-limits** (6 months with the possibility of extension for another 12 months); the question whether the length of deportation proceedings could affect the lawfulness of detention under Article 5 § 1 (f) thus depends solely on the particular circumstances of each case[37]. Consequently, even where domestic law does

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[29] ECrHR, *Saadi v. the United Kingdom* [GC], *op. cit.*, § 71; *T. v. the United Kingdom* [GC], app. n° 24724/94, 16 December 1999, § 103.
[30] ECrHR, *Nasirov and others v. Azerbaijan*, *op. cit.*, §§ 49 and 51.
[31] ECrHR, *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, app. n° 9214/80; 9473/81; 9474/81, 28 May 1985, § 67.
[32] ECrHR, *Z.A. and others v. Russia* [GC], app. n° 61411/15, 61420/15, 61427/15 and 3028/16, 21 November 2019, § 160.
[33] ECrHR, *A. and Others v. the United Kingdom*, [GC], app. n° 3455/05, 19 February 2009, § 164; *Amie and Others v. Bulgaria*, app. n° 58149/08, 12 May 2013, § 72; *Yoh-Ekale Mwanje v. Belgium*, app. n° 10486/10, 20 March 2012, §§ 117-119.
[34] ECrHR, *Amie and Others v. Bulgaria*, *op. cit.*, § 72; *Chahal v. the United Kingdom* [GC], app. n° 22414/93, 15 November 1996, § 112; *Slivenko v. Latvia*, [GC], app. n° 48321/99, 9 October 2003, § 146; *Raza v. Bulgaria*, app. n° 31465/08, 11 February 2010, § 72;
[35] ECrHR, *Amie and Others v. Bulgaria*, *op. cit.*, § 72; *Chahal v. the United Kingdom* [GC], *op. cit.*, § 113; ECrHR, *A. and Others v. the United Kingdom*, [GC], *op. cit.*, § 164; *Raza v. Bulgaria*, *op. cit.*, § 72; *Mikolenko v. Estonia*, app. n° 10664/05, 8 October 2009, § 63.
[36] ECrHR, *Amie and Others v. Bulgaria*, *op. cit.*, § 72; *Saadi v. the United Kingdom* [GC], *op. cit.,* § 74.
[37] ECrHR, *Amie and Others v. Bulgaria*, *op. cit.*, § 72; *Auad v. Bulgaria*, app. n° 46390/10, 11 October 2011, § 128; *J.N. v. the United Kingdom*, *op. cit.*, § 83; *A.H. and J.K. v. Cyprus*, app. n° 41903/10 and 41911/10, 21 July 2015, § 190.

lay down time-limits, compliance with those time-limits cannot be regarded as automatically bringing the applicant's detention into line with Article 5 § 1(f) of the Convention[38].

- For example:
  - In a series of Russian cases the Court has considered the existence - or absence – of time-limits on detention pending extradition to be relevant to the assessment of the "quality of law"[39]. It has identified a recurring problem of uncertainty over whether a provision of domestic law laying down the procedure and specific time-limits for reviewing detention applied to detention pending extradition. In light of this uncertainty, in a number of those cases the Court held that the domestic law was not sufficiently precise or foreseeable to meet the "quality of law" standard. Put differently, the deprivation of liberty was not circumscribed by adequate safeguards against arbitrariness.
  - Following a similar approach, the Court found that the Maltese legal system did not provide for a procedure capable of avoiding the risk of arbitrary detention pending deportation. Namely, in the absence of time-limits, the applicant was subject to an indeterminate period of detention, and the necessity of procedural safeguards (e. g. an effective remedy to contest the lawfulness and length of the detention) therefore became decisive[40].
  - Besides, in *Abdolkhani and Karimnia*[41] and *Garayev* cases, the Court held that in the absence of clear legal provisions establishing the procedure for ordering and extending detention or extradition with a view to deportation and setting time-limits for such detention, the deprivation of liberty to which the applicants were subjected was not circumscribed by adequate safeguards against arbitrariness.
  - Similarly, in respect of Greece, although the Court's conclusions refer to the fact that "*the relevant provisions of domestic law governing the detention of persons under judicial expulsion do not set the maximum length of such detention*", it also viewed as significant the fact that the applicant had been detained for an unreasonably long period (more than two years), during which time his expulsion had not been possible[42]. Consequently, the relevant authorities had failed to exercise "due diligence".
  - In *Amie* case, even though the applicant did not spend such a long time in detention as the applicants in some other cases, the grounds for his detention – action taken with a view to his deportation – did not remain valid for the whole period of his detention due to the lack of a realistic prospect of his expulsion and the domestic authorities' failure to conduct the proceedings with due diligence[43].
  - Conversely, in *Chahal* case, the applicant has undoubtedly been detained for a length of time which was bound to give rise to serious concern. However, in view of the exceptional circumstances of the case and the facts that the national authorities have acted with due diligence throughout the deportation proceedings against him and that there were sufficient guarantees against the arbitrary deprivation of his liberty, this detention complied with the requirements of Article 5 § 1 (f)[44].

b) Immigration

At the outset, it should be mentioned that Article 5 § 1 does not cover *mere restrictions on liberty of movement*, which are governed by Article 2 of Protocol No. 4, with regard to persons lawfully within the territory of the State. Accordingly, the Court summarized the factors it takes into

[38] *J.N. v. the United Kingdom*, *op. cit.*, § 83; *Auad v. Bulgaria*, *op. cit.*, § 131; *Gallardo Sanchez v. Italy*, app. n° 11620/07, 24 March 2015, § 39.
[39] For example, *Azimov v. Russia*, app. n° 67474/11, 18 April 2013, § 171; *Ismoilov and Others v. Russia*, app. n° 2947/06, 24 April 2008, §§ 139-140; *Ryabikin v. Russia*, app. n° 8320/04, 19 June 2008, § 129; *Muminov v. Russia*, app. n° 42502/06, 1 December 2008, § 121; and *Nasrulloyev v. Russia*, app. n° 656/06, 11 October 2007, §§ 73-74.
[40] ECrHR, *Louled Massoud v. Malta*, app. n° 24340/08, 27 October 2010, § 71.
[41] ECrHR, *Abdolkhani and Karimnia v. Turkey*, app. n° 30471/08, 1 March 2010, § 135; *Garayev v. Azerbaijan*, app. n° 53688/08, 10 September 2010, § 99.
[42] ECrHR, *Mathloom v. Greece*, app. n° 48883/07, 24 April 2012, § 71.
[43] ECrHR, *Amie and Others v. Bulgaria*, *op. cit.*, §§ 78 and 79.
[44] ECrHR, *Chahal v. the United Kingdom* [GC], *op. cit.*, §§ 114 and 123 (the overall detention took place between 16 August 1990 and 3 March 1994).

consideration when determining the distinction between a *restriction on liberty of movement* and *deprivation of liberty* in the context of confinement of foreigners in airport transit zones and reception centres for the identification and registration of migrants, as follows: "*i) the applicants' individual situation and their choices, ii) the applicable legal regime of the respective country and its purpose, iii)* ***the relevant duration,*** *especially in the light of the purpose and the procedural protection enjoyed by applicants pending the events, and iv) the nature and degree of the actual restrictions imposed on or experienced by the applicants*"[45].

The first limb of Article 5 § 1 (f) allows States to control the liberty of aliens in an immigration context. Insofar as, subject to their obligations under the Convention, States enjoy an "*undeniable sovereign right to control aliens' entry into and residence in their territory*", the detention of potential immigrants, including asylum-seekers, is capable of being compatible with Article 5 § 1 (f)[46]. While the first limb of that provision permits the detention of an asylum seeker or other immigrant prior to the State's grant of authorisation to enter, such detention must be compatible with the overall purpose of Article 5, which is to safeguard the right to liberty and ensure that no-one should be dispossessed of his or her liberty in an arbitrary fashion[47].

The Court was called upon for the first time to interpret the meaning of the words in the first limb of Article 5 § 1 (f), in 2008, in *Saadi* case. It considered that the principle that detention should not be arbitrary must apply to detention under the first limb of Article 5 § 1 (f) in the same manner as it applies to detention under the second limb[48]. Namely, since States enjoy the right to control equally an alien's entry into and residence in their country, it would be artificial to apply a different proportionality test to cases of detention at the point of entry than that which applies to deportation, extradition or expulsion of a person already in the country. Put differently, any deprivation of liberty, must comply with the procedure prescribed by law that meets the "quality of law" criteria, as well as be free from arbitrariness[49].

Accordingly, the rule of thumb in this particular field is that to avoid being branded as arbitrary, therefore, such detention must be carried out in good faith; it must be closely connected to the purpose of preventing unauthorised entry of the person to the country; the place and conditions of detention should be appropriate, bearing in mind that "*the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country*"; and **the length of the detention should not exceed that reasonably required for the purpose pursued**[50].

The Court declares itself "*fully conscious of*" the difficulties that member States may face during periods of massive arrivals of asylum-seekers at their borders. Accordingly and subject to the prohibition of arbitrariness, the Court admitted that the lawfulness requirement of Article 5 § 1(f) may be considered generally satisfied by a domestic legal regime that provides, for example, for no more than the name of the authority competent to order deprivation of liberty in a transit zone, the form of the order, its possible grounds and limits, **the maximum duration of the confinement** and, as required by Article 5 § 4, **the applicable avenue of judicial appeal**. More specifically, the Court highlights that "*subparagraph 1(f) does not prohibit deprivation of liberty in a transit zone for a limited period on grounds that such confinement is generally necessary to ensure the asylum seekers' presence pending the examination of their asylum claims or, moreover, on grounds that there is a need to examine the admissibility of asylum applications speedily and that, to that end, a structure and adapted procedures have been put in place at the transit zone*"[51].

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[45] ECrHR, *Ilias and Ahmed v. Hungary* [GC], app. n° 47287/15, 21 November 2019, § 217. In the present case, the Court found that the applicants were not deprived of their liberty within the meaning of Article 5 and that this provision did not apply.

[46] ECrHR, *Saadi v. the United Kingdom* [GC], *op. cit.,* § 64; *Amuur v. France*, app. n° 19776/92, 25 June 1996, § 41; *Chahal v. the United Kingdom* [GC], *op. cit.*, § 73.

[47] ECrHR, *Saadi v. the United Kingdom* [GC], *op. cit*., § 66.

[48] *Idem.,* § 73.

[49] ECrHR, *Z.A. and others v. Russia* [GC], *op.cit.*, § 161: "*(…) Where deprivation of liberty is concerned, it is essential that the general principle of legal certainty be satisfied and therefore that the conditions for deprivation of liberty under domestic law be clearly defined and that the law itself be foreseeable in its application (…). Furthermore, the detention of a person constitutes a major interference with individual freedom and must always be subject to rigorous scrutiny*".

[50] ECrHR, *Saadi v. the United Kingdom* [GC], *op. cit.,* § 74.

[51] ECrHR, *Z.A. and others v. Russia* [GC], *op.cit.*, § 162.

The fact of "detaining" a person in a transit zone for an **indefinite and unforeseeable period** without that detention being based on a specific legal provision or a valid decision of a court and **with limited possibilities of judicial review** on account of the difficulties of contact enabling practical legal assistance, has been deemed in itself contrary to the principle of legal certainty, which is implicit in the Convention and is one of the fundamental elements of a State governed by the rule of law[52].

In the case *Z.A. and others*, the sole lack of legal basis was sufficient to conclude to a violation of Article 5 §1(f). However, the Grand Chamber decided to go beyond this finding and stressed several additional parameters among which the fact that "*the duration of each applicant's stay in the airport transit zone was considerable and clearly excessive in view of the nature and purpose of the procedure concerned, ranging from five months to over a year and nine months*"[53].

2. The reasonable length of pre-trial proceedings - an essential prerequisite for guaranteeing the right to trial within a reasonable time

Criminal proceedings appear as an obvious crossroad of the guarantees enshrined in article 5 and 6 of the European Convention (A). Namely, the effective implementation of the fundamental right to a trial within a reasonable time covered by Article 6 § 1 proves to be very often conditioned by the length of pre-trial proceedings regulated by Article 5. The latter provision contains initial (B) and continuous (C) guarantees of reasonable length of pre-trial proceedings.

A. The time parameter of Article 5 - an integral part of the length of proceedings of Article 6

According to the settled case law of the European Court of Human Rights, in criminal matters, the "*reasonable time*" may begin to run prior to the case coming before the trial court[54]. Put differently, the period to be taken into consideration in determining the length of criminal proceedings begins with the day on which a person is "*charged*", within the autonomous and substantive meaning to be given to that term[55]. A "*criminal charge*" exists from the moment that an individual is officially notified by the competent authority of an allegation that s/he has committed a criminal offence, or from the point at which his/her situation has been substantially affected by actions taken by the authorities as a result of a suspicion against him/her[56]. In the light of this autonomous definition, the starting point for measuring the overall length of criminal proceedings could be for example the time of arrest[57], the time at which a person is charged[58] or the institution of the preliminary investigation[59].

Accordingly, the protection of the right to judicial hearing within a reasonable time (Article 6-1) must be effective starting from the investigation stage (Article 5 §§ 3 and 4). Thus the **requirement of speediness** binds national judicial authorities **from the pre-trial proceedings to the end of the trial** and constitutes a crossroads point between Article 6-1, Article 5 §§ 3 and 4, and Article 13 of the Convention.

The Court does not hesitate to make an explicit bridge between Article 5 and Article 6, establishing a sort of *core curriculum* in terms of "reasonable time proceedings". It is paragraph 4 of Article 5 on which is based the Court's reasoning. Firstly, the right to institute proceedings to challenge the lawfulness of a detention implies the right to a speedy judicial decision concerning the lawfulness of detention and the ordering of its termination if it proves unlawful[60]. Secondly, the question whether the right to a speedy decision has been respected must – as is the case for the

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[52] ECrHR, *Riad and Idiab v. Belgium*, app. n° 29787/03 and 29810/03, 24 January 2008, § 78.
[53] ECrHR, *Z.A. and others v. Russia* [GC], *op.cit.*, § 169.
[54] ECrHR, *Deweer v. Belgium*, app. n° 6903/75, 27 February 1980, § 42.
[55] *Idem*, §§ 42-46 ; ECrHR, *Neumeister v. Austria*, app. n° 1936/63, 27 June 1968, § 18; *Pirgurban v. Azerbaijan*, app. n° 39254/10, 20 December 2016, § 108.
[56] ECrHR, *Deweer v. Belgium*, *op. cit.*, §§ 42-46; *Eckle v. Germany*, app. n° 8130/78, 15 July 1982, § 73; *McFarlane v. Ireland* [GC], app. n° 31333/06, 10 September 2010, § 143; *Ibrahim and others v. the United Kingdom*, 13 September 2016, app. n° 50541/08, 50571/08, 50573/08 and 40351/09, § 249; *De Tommaso v. Italy*, app. n° 43395/09, 23 February 2017, § 33; *Kosteychuk v. Ukraine*, app. n° 19177/09, 16 February 2017, § 30.
[57] ECrHR, *Wemhoff v. Germany*, app. n° 2122/64, 27 June 1968, § 19; *Kosteychuk v. Ukraine*, *op. cit*., § 30.
[58] ECrHR, *Neumeister v. Austria*, *op. cit*., § 18.
[59] ECrHR, *Ringeisen v. Austria*, app. n° 2614/65, 16 July 1971, § 110.
[60] ECrHR, *Kavala v. Turkey*, app. n° 28749/18, 10 December 2019, § 176.

"reasonable time" stipulation in Article 5 § 3 and Article 6 § 1 of the Convention – be determined in the light of the circumstances of each case, including the complexity of the proceedings, their conduct by the domestic authorities and by the applicant and what was at stake for the latter[61].

The Court specified that even if the general approach to the "promptness" or "speediness" requirements of Article 5 § 3 and Article 5 § 4 respectively is broadly similar to the method used in cases concerning the "reasonable time" requirement of Article 6 § 1 of the Convention, the results are often different and the Court's conclusions are largely determined by the nature of the proceedings concerned[62].

It is noteworthy to pinpoint that the Court has explicitly admitted that **the requirement of speediness is stronger in the scope of Article 5 § 4 compared to Article 6-1**. In fact, the Court explains that despite their connection, these two dispositions pursue different purposes. On the one hand, the aim of Article 5 § 4 is to protect against arbitrary detention by guaranteeing a speedy review of the lawfulness of any detention. On the other hand, Article 6 deals with the "determination of a criminal charge" and is aimed at guaranteeing that the merits of the case, that is, the question whether or not the accused is guilty of the charges brought against him, receive a "fair and public hearing". The Court concludes that this difference of aims explains why "***Article 5 § 4** contains more flexible procedural requirements than Article 6 while being **much more stringent as regards speediness***"[63].

Finally, the Grand Chamber asserted that Article 5 § 4 provides a *lex specialis* in relation to the more general requirements of Article 13[64] (*effective remedy before a national authority*). Against this background, the Court explains that the principle of "*protection from arbitrariness*" founding Article 5 of the Convention "*is realised through more specific guarantees, both substantive and procedural. Procedural safeguards are contained primarily in §§ 3 and 4 of Article 5 and are based on the **philosophy of effective judicial control** in matters of detention. **"Effectiveness"** of such control, in turn, **has a time element**: delayed judicial review of detention would not be effective*". (…) *The Court considers that, in respect of judicial review of the deprivation of liberty of a detained person, it is essential that this review be carried out speedily. **The passage of time will inevitably erode the effectiveness of the review***"[65].

In the light of this explicit connection between Article 5 and Article 13, the Court specifies that "*Article 5 § 4 refers to domestic remedies that are sufficiently certain*" ("*not only in theory but also in practice*"[66]) and that, "*otherwise the requirements of accessibility and effectiveness are not fulfilled*"[67].

B. Initial guarantees of reasonable length of pre-trial proceedings

The initial guarantees of reasonable length of pre-trial proceedings provided for by Article 5 encompass the right to be informed promptly of the reasons of the deprivation of liberty (Article 5 § 2) and the requirement for prompt and automatic judicial control of the lawfulness of the decision of detention (Article 5 § 3, first limb).

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[61] *Idem*., § 179; ECrHR, *Strazimiri v. Albania*, app. n° 34602/16, 21 January 2020, § 127; *Mooren v. Germany* [GC], app. n° 11364/03, 9 July 2009, § 106.
[62] ECrHR, *Shcherbina v. Russia*, app. n° 41970/11, 17 November 2014, § 62.
[63] ECrHR, *Reinprecht v. Austria*, app. n° 67175/01, 12 April 2006, §§ 39 and 40; *Rizzotto v. Italy (n°2)*, app. no 20983/12, 5 December 2019, § 46.
[64] ECrHR, *A. and Others v. the United Kingdom* [GC], app. n° 3455/05, 19 February 2009, § 202.
[65] ECrHR, *Kavala v. Turkey, op.cit*., § 177; *Shcherbina v. Russia*, app. n°41970/11, 17 November 2014, § 62.
[66] ECrHR, *G.B. and others v. Turkey*, *op. cit.*, § 163.
[67] ECrHR, *Kavala v. Turkey*, *op.cit*., § 178: "(…) *The remedies must be made available during a person's detention with a view to that person obtaining a speedy judicial review of the lawfulness of his or her detention capable of leading, where appropriate, to his or her release*"; ECrHR, *Suso Musa v. Malta*, app. n° 42337/12, 23 July 2013, § 51.

a) The right to be informed promptly of the reasons of the deprivation of liberty (Article 5 § 2)

According to the second paragraph of Article 5, everyone who is arrested **shall be informed promptly**, in a language which s/he understands, of the reasons for his/her arrest and any charge against him/her. Basically, compliance with this procedural requirement conditions the effectiveness of the right to challenge before a court the regularity of the deprivation of liberty (Article 5 § 4). In other words, any person who is entitled to take proceedings (Article 5 § 4) to have the lawfulness of his/her detention decided *speedily* cannot make effective use of that right unless s/he is *promptly and adequately informed* of the reasons why s/he has been deprived of his liberty[68]. In the Court's view, Article 5 § 2 provides an elementary, *i.e.* minimum safeguard against arbitrary treatment.

Whether the content and promptness of the information conveyed were sufficient is to be assessed in each case according to its special features[69]. However, the reasons need not be related in their entirety by the arresting officer at the very moment of the arrest[70]. The arrested person must be told, in simple, non-technical language which he or she can understand, the essential legal and factual grounds for the measure[71].

- For example:
  - The Court considered that intervals of a **few hours** cannot be regarded as falling outside the constraints of time imposed by the notion of promptness in Article 5 § 2[72].
  - *A fortiori*, the **interval of twenty minutes** cannot be regarded as falling outside the time constraints imposed by the notion of promptness in Article 5 § 2[73].
  - Conversely, in *Zuyev* case, the failure of the Russian government to indicate any exceptional circumstances which could have explained the delay in notifying the applicant, the Court admitted that an **interval of approximately fourteen hours** must be deemed incompatible with the constraints of time imposed by the notion of promptness in Article 5 § 2 of the Convention[74].
  - In the specific context of extradition proceedings, the Court concluded that **an interval of four days** must be deemed incompatible with the constraints of time imposed by the notion of promptness in Article 5 § 2[75].

b) The requirement for prompt and automatic judicial control of the lawfulness of the decision of detention (Article 5 § 3, first limb)

While Article 5 enshrines the fundamental human right of protection of the individual against arbitrary interferences by the State with his right to liberty, judicial control of interferences by the executive with the individual's right to liberty is an essential feature of the guarantee embodied in Article 5 § 3, which is intended to minimise the risk of arbitrariness[76]. In other words, by virtue of this provision, persons arrested or detained on suspicion of having committed a criminal offence are granted a guarantee against any arbitrary or unjustified deprivation of liberty[77].

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[68] ECrHR, *Van der Leer v. the Netherlands*, app. n° 11509/85, 21 February 1990, § 28; *Shamayev and Others v. Georgia and Russia*, app. n° 36378/02, 12 October 2005, § 413.
[69] ECrHR, *Galuashvili v. Georgia*, app. n° 40008/04, 17 October 2008, § 38; *Zuyev v. Russia,* app. n° 16262/05, 19 May 2013, § 82.
[70] ECrHR, *Fox, Campbell and Hartley v. the United Kingdom*, app. n° 12244/86; 12245/86; 12383/86, 30 August 1990, § 40; *Murray v. the United Kingdom* [GC], app. n° 14310/88, 28 October 1994, § 72.
[71] ECrHR, *Fox, Campbell and Hartley v. the United Kingdom*, *op. cit.*, § 40; *Galuashvili v. Georgia*, *op. cit.*, § 38.
[72] ECrHR, *Fox, Campbell and Hartley v. the United Kingdom*, *op. cit.*, § 42; *Murray v. the United Kingdom* [GC], *op. cit.*, § 78.
[73] ECrHR, *Galuashvili v. Georgia*, *op. cit.*, § 39.
[74] ECrHR, *Zuyev v. Russia, op. cit.*, § 84.
[75] ECrHR, *Shamayev and Others v. Georgia and Russia*, *op. cit.*, § 416.
[76] ECrHR, *Brogan and Others v. the United Kingdom*, app. n° 11209/84; 11234/84; 11266/84; 11386/85, 29 November 1988, § 58: "*Judicial control is implied by the rule of law, one of the fundamental principles of a democratic society, which is expressly referred to in the Preamble to the Convention*" (…) and "*from which the whole Convention draws its inspiration*".
[77] ECrHR, *Aquilina v. Malta* [GC], app. n° 25642/94, 29 April 1999, § 47; *Assenov and Others v. Bulgaria*, app. n° 90/1997/874/1086, 28 October 1998, § 146.

The proposed analyses are focused on three main issues: the general regime of the requirement for prompt and automatic judicial control (*1)*); the extension of the scope of Article 5 beyond criminal proceedings based on the time parameter (*2)*); and the right of derogation under Article 15 of the ECHR (*3)*).

1) The general regime of the requirement for prompt and automatic judicial control

The first limb of Article 5 § 3 is aimed at ensuring **prompt and automatic judicial control** of police or administrative detention ordered in accordance with the provisions of paragraph 1 (c)[78]. The language of paragraph 3 ("shall be brought promptly before"), read in the light of its object and purpose, makes evident its inherent "procedural requirement": the judge or judicial officer (autonomous meaning within the ECrHR case law) must actually hear the detained person and take the appropriate decision[79]. **Judicial control on the first appearance of an arrested individual must above all be prompt**, to allow detection of any ill-treatment and to keep to a minimum any unjustified interference with individual liberty; **the strict time constraint imposed by this requirement leaves little flexibility in interpretation**, otherwise there would be a serious weakening of a procedural guarantee to the detriment of the individual and the risk of impairing the very essence of the right protected by this provision[80]. Furthermore, the Court highlights that the use in the French text of the word "*aussitôt*", with its constraining connotation of immediacy, confirms that **the degree of flexibility attaching to the notion of "*promptness*" is limited**, even if the attendant circumstances can never be ignored for the purposes of the assessment under paragraph 3[81]. **Article 5 § 3 does not provide for any possible exceptions from the requirement that a person be brought promptly before a judge or other judicial officer after his or her arrest or detention**, ot even on grounds of prior judicial involvement; to conclude otherwise would run counter to the plain meaning of the text of the provision[82].

In the light of the settled case law of the ECrHR, **the strict time constraint imposed for detention without judicial control is a maximum of four days**[83], **save in wholly exceptional circumstances**[84]. Accordingly, **any period in excess of four days is prima facie too long**[85].

The fight against terrorism, regardless of its specific character, does not coincide automatically with the definition of "*exceptional circumstances*". If the Court admits that the investigation of terrorist offences undoubtedly presents the authorities with special problems, the latter are not granted *carte blanche* under Article 5 to arrest suspects and detain them in police custody, free from effective control by the domestic courts and, in the final instance, by the Convention's supervisory institutions, whenever they consider that there has been a terrorist offence[86]. Similarly, the requirements of the investigation cannot absolve the authorities from the obligation to bring any person arrested in accordance with Article 5 § 1 (c) "*promptly*" before a judge,

[78] ECrHR, *De Jong, Baljet and Van den Brink v. the Netherlands*, app. n° 8805/79; 8806/79; 9242/81, 22 May 1984, § 51; *Aquilina v. Malta* [GC], *op. cit.,* §§ 48-49.
[79] ECrHR, *De Jong, Baljet and Van den Brink v. the Netherlands*, *op. cit.*, § 51; *Harkmann v. Estonia*, app. n° 2192/03, 11 October 2006, § 38.
[80] ECrHR, *McKay v. the United Kingdom*, [GC], *op. cit.*, § 33.
[81] ECrHR, *Koster v. the Netherlands*, app. n° 12843/87, 28 November 1991, § 24; *Brogan and Others v. the United Kingdom*, *op. cit.*, § 59.
[82] ECrHR, *Bergmann v. Estonia*, app. n° 38241/04, 29 August 2008, § 45; *Harkmann v. Estonia*, *op. cit.*, § 38.
[83] ECrHR, *Brogan and Others v. the United Kingdom*, *op. cit.*, § 60; *McKay v. the United Kingdom* [GC], *op. cit.,* § 47; *Ipek and others v. Turkey*, app. n° 17019/02 and 30070/02, 3 May 2009, § 36.
[84] ECrHR, *Năstase-Silivestru v. Romania*, app. n° 74785/01, 4 January 2008, § 32; *Rigopoulos v. Spain* (dec.), app. n° 37388/97, 12 January 1999: the applicant's detention on a vessel lasted for 16 days because the vessel was boarded on the high seas of the Atlantic Ocean at a considerable distance from Spanish territory and no less than sixteen days were necessary to reach the port of Las Palmas. Once he had arrived at Las Palmas, the applicant was transferred to Madrid by air and was brought before the judicial authority on the following day.
[85] ECrHR, *Oral and Atabay v. Turkey*, app. n° 39686/02, 23 September 2009, § 43; *Năstase-Silivestru v. Romania*, *op. cit.*, § 32 (18 days); *Harkmann v. Estonia*, *op. cit.*, § 39 (15 days); *Bergmann v. Estonia*, *op. cit.*, § 46 (26 days).
[86] ECrHR, *Demir and Others v. Turkey*, app. n° 71/1997/855/1062-1064, 23 September 1998, § 41; *Brogan and Others v. the United Kingdom*, *op. cit.*, § 61; *Aksoy v. Turkey*, app. n° 21987/93, 18 December 1996, § 78; *Murray v. the United Kingdom*, app. n° 14310/88, 28 October 1994, § 58.

as required by Article 5 § 3; where necessary, it is for the authorities to develop forms of judicial control which are adapted to the circumstances but compatible with the Convention[87].

The same applied to the fight against drug trafficking on the high seas[88].

- For example:
  - In *Brogan* case, the Court concludes that even the period of **four days and six hours** falls outside the strict constraints as to time permitted by the first part of Article 5 § 3. In the Court's view, 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"**[89].
  - A similar approach was adopted in *Oral and Atabay* case in respect of periods of **four days and two hours** and **four days and four hours**[90].

Periods shorter than four days can also breach the promptness requirement if there are no special difficulties or exceptional circumstances preventing the authorities from bringing the arrested person before a judge sooner[91]. In the *Gutsanovi* judgment for example, the Court found that the circumstances militated in favour of finding a breach in respect of a period of **three days**, **five hours and thirty minutes**, taking into account the specific facts of the case, and in particular the applicant's fragile state of mind in the first days following his arrest, and the absence of any persuasive argument for not bringing him before a judge in the course of the second and third days of his detention[92].

Generally, with regard to periods shorter than 4 days, the Court concludes that the procedure was conducted with due expedition[93].

The requirement of promptness is even stricter in a situation where the placement in police custody follows on from a period of actual deprivation of liberty[94].

It is noteworthy that in the Court's view, **it is highly desirable in order to minimise delay**, that the judicial officer who conducts the first automatic review of lawfulness and the existence of a ground for detention, also has the competence to consider release on bail. It is not however a requirement of the Convention and there is no reason in principle why the issues cannot be dealt with by two judicial officers, within the requisite time frame. In any event, as a matter of interpretation, **it cannot be required that the examination of bail take place with any more speed than is demanded of the first automatic review, which the Court has identified as being a maximum four days**[95].

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[87] ECrHR, *Demir and Others v. Turkey*, *op. cit.*, § 41; *Chahal v. the United Kingdom*, *op. cit.* [GC], §§ 131 and 144.
[88] ECrHR, *Medvedyev v. France* [GC], app. n° 3394/03, 29 March 2010, § 126.
[89] ECrHR, *Brogan and Others v. the United Kingdom*, *op. cit.*, § 62.
[90] ECrHR, *Oral and Atabay v. Turkey*, *op. cit.*, § 44.
[91] ECrHR, *İpek and Others v. Turkey*, *op. cit.*, §§ 36 (The applicants were minors; they were incarcerated for more than three days in the absence of any safeguards - such as access to a lawyer – against possible arbitrary conduct by the State authorities; the only investigative measures taken by the police were limited to questioning them some two days after their arrest and a day before they were brought before a judge. In such circumstances, the Court, especially in view of the applicants' young age, found that none of the arguments put forward by the Government was sufficient to justify their detention in police custody for 3 days and 9 hours, even in the context of terrorist investigations.); *Kandzhov v. Bulgaria*, app. n° 68294/01, 6 February 2009, § 66 (The Court did not see any special difficulties or exceptional circumstances which would have prevented the authorities from bringing the applicant before a judge much sooner (3 days and 23 hours*)*).
[92] ECrHR, *Gutsanovi v. Bulgaria*, app. n° 34529/10, 15 October 2013.
[93] ECrHR, *McKay v. the United Kingdom* [GC], *op. cit.,* §§ 48-51 (3 days).
[94] ECrHR, *Vassis and Others v. France*, app. n° 62736/09, 27 September 2013, § 60 (18 days of detention of a crew on the high seas).*"(…) In view of the length of that period, without judicial supervision, there was no justification for subsequently placing the applicants in police custody for the initial forty-eight hours; moreover, the specific circumstances of the case meant that the promptness requirement of Article 5 § 3 of the Convention was even stricter than in a situation where the beginning of police custody coincided with the initial deprivation of liberty*".
[95] ECrHR, *McKay v. the United Kingdom* [GC], *op. cit.,* § 47.

- *Along with the requirement of promptness, the following case-law **acquis** should be pointed out:*
  - The fact that an arrested person had access to a judicial authority is not sufficient to constitute compliance with the opening part of Article 5 § 3[96]. The judicial authority must hear the individual brought before it in person and review, by reference to legal criteria, whether or not the detention is justified; if it is not so justified, the authority must have the power to make a binding order for the detainee's release[97].
  - Judicial control of detention must be automatic and cannot be made to depend on a previous application by the detained person[98]. Such a requirement would not only change the nature of the safeguard provided for under Article 5 § 3, a safeguard distinct from that in Article 5 § 4, which guarantees the right to institute proceedings to have the lawfulness of detention reviewed by a court. It might even defeat the purpose of the safeguard under Article 5 § 3 which is to protect the individual from arbitrary detention by ensuring that the act of deprivation of liberty is subject to independent judicial scrutiny[99].
  - The expression "judge or other officer authorised by law to exercise judicial power" is a synonym for "competent legal authority" in article 5 § 1 (c); the exercise of "judicial power" is not necessarily confined to adjudicating on legal disputes; article 5 § 3 includes officials in public prosecutors' departments as well as judges sitting in court; the "officer" referred to in paragraph 3 must offer guarantees befitting the "judicial" power conferred on him by law[100].

2) The extension of the scope of Article 5 beyond criminal proceedings based on the time parameter

It is worth mentioning that the **time parameter** was at the heart of the Court's reasoning which led it recently to review/clarify its case-law on the scope of Article 5. Namely, in 2018, the Court's Grand Chamber accepted that the second limb of sub-paragraph (c) of Article 5 § 1 can be seen as a distinct ground for deprivation of liberty, independently of the first limb. Put differently, the lawful detention of a person **outside the context of criminal proceedings** can fall under Article 5 § 1 (c) of the Convention, provided that it is a **short-term preventive detention**. The compliance of such short-term preventive detention with the Convention depends on "*whether the detainee, as required by Article 5 § 3, is intended to be brought **promptly before a judge** to have the lawfulness of his or her detention reviewed or to be released before such time*"[101].

It must be pinpointed that the **promptness requirement is reinforced** in respect of a detainee under the second limb of Article 5 § 1 (c) where there is no criminal investigation and no suspicion to confirm or dispel. The Court highlighted that the period needed between a person's detention for preventive purposes and the person's prompt appearance before a judge or judicial officer should be shorter than in the case of pre-trial detention in criminal proceedings. Whereas for a person deprived of his or her liberty "*on reasonable suspicion of having committed an offence*" **under the first limb of Article 5 § 1 (c), any period in excess of four days is prima facie too long a significantly shorter period might be required in order to be viewed as "*prompt*" in the case of a person deprived of his or her liberty outside the context of criminal proceedings** "*when it is reasonably considered necessary to prevent his committing an offence*"[102]. The Court

[96] ECrHR, *De Jong, Baljet and Van den Brink v. the Netherlands*, *op. cit.*, § 51; *Pantea v. Romania*, app. n° 33343/96, 3 September 2003, § 231.
[97] ECrHR, *Assenov and others v. Bulgaria*, app. n° 90/1997/874/1086, 28 October 1998, § 146.
[98] ECrHR, *McKay v. the United Kingdom* [GC], *op. cit.*, § 34; *Varga v. Romania*, app. n° 73957/01, 1 July 2008, § 52; *Viorel Burzo v. Romania*, app. n° 75109/01 et 12639/02, 30 September 2009, § 107.
[99] ECrHR, *Aquilina v. Malta* [GC], *op. cit.*, § 49.
[100] ECrHR, *Schiesser v. Switzerland*, app. n° 7710/76, 4 December 1979, §§ 29-31.
[101] ECrHR, *S., V. and A v. Denmark*, [GC], *op. cit.*, § 137: "(…) *Furthermore, in the event of failure to comply with the latter requirement, the person concerned should have an enforceable right to compensation in accordance with Article 5 § 5*". The extension of the guarantees of article 5 beyond the criminal law scope is justified by the wish not to make it impracticable for the police to fulfil their duties of maintaining order and protecting the public.
[102] *Idem*., § 133.

concluded that release at a time before prompt judicial control in the context of preventive detention should be a **matter of hours rather than days**[103].

For example, in the *S., V. and A* case, the Court **did not find a violation** of Article 5 § 1 (c) as concerns a preventive detention of almost **8 hours**, given that the domestic courts struck a fair balance between the importance of the right to liberty and the importance of preventing the applicants from organising and taking part in a hooligan brawl[104].

3) The right of derogation under Article 15 of the ECHR

Concerning Article 15 of the ECHR and the right of derogation of Member States, the practice consists in stating that the adopted measures "*may*" involve derogation from the Convention. For this reason, in any case where an applicant complains that his Convention rights were violated during a period of derogation, the Court will first examine whether the measures taken can be justified under the substantive articles of the Convention; it is only if it cannot be so justified that the Court will go on to determine whether the derogation was valid[105]. For example, on several occasions, the Court found internment and preventive detention without charge to be incompatible with the fundamental right to liberty under Article 5 § 1, in the absence of a valid derogation under Article 15[106].

According to the settled case-law, "*it falls in the first place to each Contracting State, with its responsibility for 'the life of [its] nation', to determine whether that life is threatened by a 'public emergency' and, if so, how far it is necessary to go in attempting to overcome the emergency. By reason of their direct and continuous contact with the pressing needs of the moment, the national authorities are in principle in a better position than the international judge to decide both on the presence of such an emergency and on the nature and scope of derogations necessary to avert it. In this matter Article 15 § 1 (…) leaves those authorities a wide margin of appreciation*"[107]. Nevertheless, the States do not enjoy an unlimited power in this respect: the Court is empowered to rule on whether the States have gone beyond the "*extent strictly required by the exigencies of the crisis*"[108]. In determining whether a State has gone beyond what is strictly required, the Court will give appropriate weight to factors such as the nature of the rights affected by the derogation, the circumstances leading to, and the duration of, the emergency situation[109].

By means of *a contrario* interpretation, the Court admitted that since derogation from Article 5 is possible "[i]n *time of war or other public emergency threatening the life of the nation*" under the conditions set by Article 15, no derogation can be permitted under any other conditions. Therefore, apart from such exceptional situations which may apply only temporarily in time of emergency, the right under Article 5 § 1 of the Convention may not be affected adversely by any provision of the Convention other than Article 15. However, any derogation from the obligations of a High Contracting State under Article 15 does not have the effect of extending the list of exceptions to any of the rights under the Convention, including Article 5 § 1 of the Convention[110].

It is noteworthy that, in *Hassan* case, the lack of a formal derogation under Article 15 of the Convention did not prevent the Court from taking account of the context and the provisions of international humanitarian law when interpreting and applying Article 5. It nonetheless considered that even in situations of international armed conflict, the safeguards under the Convention continued

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[103] *Idem*., §134.
[104] *Idem.*, §173. The Court took into consideration the fact that there was a careful monitoring of whether the risk had passed and that the applicants were released as soon as the imminent risk had passed (§§ 171 and 172).
[105] ECrHR, *A. and Others v. the United Kingdom* [GC], app. n° 3455/05, 19 February 2009, § 161; *Lawless v. Ireland* (no. 3), app. n° 332/57, 1 July 1961, § 15.
[106] ECrHR, *Lawless v. Ireland* (no. 3), *op. cit.*, §§ 13-14; *Ireland v. the United Kingdom*, app. n° 5310/71, 18 January 1978, §§ 194-196 and 212-213.
[107] ECHR, *Ireland v. the United Kingdom*, *op. cit.*, § 207; *Demir and Others v. Turkey*, app. n° 71/1997/855/1062-1064, 23 September 1998, § 43.
[108] *Idem.*
[109] ECrHR, *Brannigan and McBride v. the United Kingdom*, app. n° 14553/89; 14554/89, 26 May 1993, § 43; *A. and Others v. the United Kingdom* [GC], *op. cit.*, § 173; ECrHR, *Bas v. Turkey*, app. n° 66448/17, 3 March 2020, § 214.
[110] ECrHR, *Kasparov and Others v. Russia* (No. 2), app. n° 51988/07, 13 December 2016, § 30.

to apply, albeit interpreted against the background of the provisions of international humanitarian law[111].

The detention's length appears to be a decisive element in the Court's reasoning when determining if derogation from Article 5 § 4 under the conditions of Article 15 of the Convention is acceptable. For example, in the context of the attempted military coup in Turkey organized on 15 July 2016, the Court considered the difficulties faced by Turkey in the aftermath of the attempted coup as a contextual factor to be fully taken into account in interpreting and applying Article 15 of the Convention[112]. It adhered to the Turkish Constitutional Court's conclusions according to which restriction of the right of detainees to appear before the judges deciding on their detention was undoubtedly a genuine response to the state of emergency and was justified in the light of the very special circumstances of the emergency. However, on the one hand, the European Court admitted that detention for a period of **eight months and eighteen days without the possibility to appear before the judges** deciding on the detention "*could reasonably be said to have been strictly required for the protection of public safety*"[113]. On the other hand, a detention of a much longer period (approximately **one year and two months**) implies in the Court's view a more stringent application of the exigency criterion[114] and led to a violation of Article 5 § 4 of the Convention **on account of the length of time** during which the applicant did not appear in person before a judge[115].

- Examples:
  - In the *Ireland v. the United Kingdom* case, the Court came to the conclusion that, since the requirements of Article 15 were met, the derogations from Article 5 were not, in the circumstances of the case, in breach of the Convention (the police powers relating to extrajudicial deprivation of liberty which were applied in Northern Ireland from 9 August 1971 to March 1975)[116].
  - The example of the United Kingdom.
    - Before the derogation of 23 December 1988:
      - In the *Brogan* case (29 November 1988), the Court admitted that the difficulties of judicial control over decisions to arrest and detain suspected terrorists may affect the manner of implementation of Article 5 § 3, for example in calling for appropriate procedural precautions in view of the nature of the suspected offences; however, they cannot justify dispensing altogether with "*prompt*" judicial control. Thus, the Court concluded that none of the applicants was either brought "*promptly*" before a judicial authority or released "*promptly*" following his arrest. The undoubted fact that the arrest and detention of the applicants were inspired by the legitimate aim of protecting the community as a whole from terrorism was not on its own sufficient to ensure compliance with the specific requirements of Article 5 § 3[117].
    - The United Kingdom activated Article 15 on 23 December 1988:
      - In *Brannigan and McBride* case[118], both of the applicants were detained for longer periods than the shortest period found by the Court to be in breach of Article 5 § 3, namely 4 days. Their detention lasted for periods of **six days, fourteen hours and thirty minutes**, and **four days, six hours and twenty-five minutes** respectively. The Court found that Article 5 § 3 had not been respected and examined the validity of the Government's derogation in the light of Article 15[119]. Implicitly, the Court held that the United Kingdom Government

[111] ECrHR, *Hassan v. the United Kingdom* [GC], app. n° 29750/09, 16 September 2014, §§ 100-107.
[112] ECrHR, *Bas v. Turkey*, *op. cit.*, § 221.
[113] *Idem*., § 222.
[114] *Idem.*, § 224: "*While it is true that the difficulties with which the country, and specifically its judicial system, had to contend in the first few months after the coup attempt were such as to justify a derogation under Article 15 of the Convention, the same considerations have gradually become less forceful and relevant as the public emergency threatening the life of the nation, while still persisting, has declined in intensity*".
[115] *Idem.,* §§ 223 to 231. The Court noted that restrictions were not eased during the emergency state (about two years); legislation and practice have not evolved in the direction of increasing respect for individual liberty. It highlighted that the interpretation of Article 15 of the Convention must leave a place for progressive adaptations.
[116] ECHR, *Ireland v. the United Kingdom*, *op. cit.*, § 224.
[117] ECrHR, *Brogan and Others v. the United Kingdom*, *op. cit.*, §§ 61 and 62.
[118] ECrHR, *Brannigan and McBride v. the United Kingdom*, *op. cit.*, § 36.
[119] *Idem*, § 38.

had not exceeded their margin of appreciation by derogating from their obligations under Article 5 to the extent that individuals suspected of terrorist offences were allowed to be held for up to **seven days without judicial control**. Namely, in the Court's view, the central issue in this case was not the existence of the power to detain suspected terrorists for up to seven days but rather the exercise of this power without judicial intervention[120]. Having regard to the nature of the terrorist threat in Northern Ireland, the limited scope of the derogation and the reasons advanced in support of it, as well as the existence of basic safeguards against abuse, the Court concluded that "*the Government has not exceeded its margin of appreciation in considering that the derogation was strictly required by the exigencies of the situation*"[121]. Eight years later, the Court confirmed its position in *Marshall* case, declaring the application manifestly ill-founded.

- Conversely, in the *Aksoy* case, the violation of Article 5 § 3 of the ECHR could not be covered by Article 15, given that insufficient safeguards were available to the applicant who was held in custody for **14 days without access to a judge or other judicial officer**. Namely, the denial of access to a lawyer, doctor, relative or friend and the absence of any realistic possibility of being brought before a court to test the legality of the detention meant that he was left completely at the mercy of those holding him[122]. The Court recognized the unquestionably serious problem of terrorism in South-East Turkey and the difficulties faced by the State in taking effective measures against it, but **did not consider the long deprivation of liberty without judicial intervention proportionated to the situation**[123]. The Court adopted the same conclusion in *Belin* case where the applicant was held in **custody without judicial intervention for 18 days**[124]. Similarly, in the *Demir and others* case, the Court found a breach of Article 5 § 3, not being convinced that the applicants' incommunicado **detention for at least sixteen or twenty-three days, without any possibility of seeing a judge or other judicial officer**, was strictly required by the crisis relied on by the Government[125]. The Court adopted the same position in *Nuray Sen* case: the applicant's detention for **eleven days before being brought before a judge or other judicial officer** was not strictly required by the crisis relied on by the Government[126].
- In *Elci and others* case, the Court deemed that it had not been sufficiently shown that the applicants' apprehension and their detention by the gendarmerie for **periods of 7 to 25 days** was duly authorised by a Prosecutor in accordance with the domestic law within the meaning of Article 5 § 1 of the Convention. Besides, it found that **the Government had not shown how the applicants' detention without adequate authorisation could have been strictly required by the exigencies of the situation envisaged by Article 15 § 1 of the Convention**[127].
- In *Sadak* case, the Court concluded to the inapplicability *ratione loci* of the derogation of Article 15 and accordingly found that there was a breach of Article 5 § 3 of the Convention (**11 days of detention without judicial intervention**)[128].

[120] *Idem*, § 48. The power of extended detention without such judicial control (in force since 1974) and the derogation of 23 December 1988 being clearly linked to the persistence of the emergency situation, there was no indication that the derogation was other than a genuine response.
[121] *Idem*, § 66.
[122] ECrHR, *Aksoy v. Turkey*, app. n° 21987/93, 18 December 1996, § 83.
[123] *Idem*, § 84.
[124] ECrHR, *Belin v. Turkey*, app. n° 34482/97, 21 February 2006, §§ 44-50.
[125] ECrHR, *Demir and Others v. Turkey*, *op. cit.*, §§ 57-58.
[126] ECrHR, *Nuray Sen v. Turkey*, app. n° 41478/98, 17 June 2003, § 28.
[127] ECrHR, *Elci and others v. Turkey*, app. n° 23145/93 and 25091/94, 13 November 2003, §§ 682-684.
[128] ECrHR, *Sadak v. Turkey*, app. n° 25142/94 and 27099/95, 8 April 2004, §§ 56, 63 and 64. A similar conclusion has been adopted in *Sakik and others* case (the applicants' detention being respectively of 12 and 14 days) – *Sakik and others v. Turkey*, app. n° 87/1996/706/898-903, 26 November 1997, §§ 39, 45 and 46.

c) Continuous guarantees of reasonable length of pre-trial proceedings

The continuous guarantees of reasonable length of pre-trial proceedings encompass the requirement for regular review of the lawfulness of continued detention (Article 5 § 3, second limb) on the one hand (*a)*) and the right to challenge the lawfulness of the detention through prompt judicial review (Article 5 § 4) (*b)*), on the other hand (*b)*).

a) The requirement for regular review of the lawfulness of continued detention (Article 5 § 3, second limb)

In compliance with the settled case-law of the Court, while paragraph 1 (c) of Article 5 sets out the grounds on which pre-trial detention may be permissible in the first place, paragraph 3, which forms a whole with the former provision, lays down certain procedural guarantees, including **the rule that detention pending trial must not exceed a reasonable time, thus regulating its length**[129].

At the outset, before analysing the settled European case-law (*2)*) and its recent developments (*3)*), it is important to recall the period taken into consideration by the Court (*1)*).

1) The period taken into consideration by the Court

In determining **the length of detention** pending trial under Article 5 § 3 of the Convention, **the period to be taken into consideration starts when the person is arrested**[130]**or remanded in custody**[131], **and ends on the day when the charge is determined, even if only by a court of first instance**[132].

However, in principle, neither Article 5 § 3 nor any other provision of the Convention creates a general obligation for a Contracting State to take into account the length of a period of pre-trial detention undergone in another State[133].

Moreover, the Court considers that where detention is broken into several non-consecutive periods and applicants are free to lodge complaints about detention while they are at liberty, those non-consecutive periods should be assessed separately[134].

In terms of competence of the European Court, it is interesting to mention that in the *Idalov* judgment concerning an applicant's detention pending trial which was broken down into several non-consecutive periods, the Court clarified its case-law on the application of the six-month rule (Article 35 § 1). As a rule, periods of pre-trial detention which ended more than six months before an applicant lodged a complaint with the Court could not be examined. However, where such periods formed part of the same set of criminal proceedings, the Court, when assessing the reasonableness of the detention for the purposes of Article 5 § 3, could take into consideration the fact that an applicant had previously spent time in custody pending trial[135].

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[129] ECrHR, *Buzadji v. the Republic of Moldova*, [GC], *op. cit.*, § 86.
[130] ECrHR, *Tomasi v. France*, app. n° 12850/87, 27 August 1992, § 83; *Buzadji v. the Republic of Moldova*, [GC], *op. cit.*, § 85.
[131] ECrHR, *Letellier v. France*, app. n° 12369/86, 26 June 1991, § 34; *Buzadji v. the Republic of Moldova*, [GC], *op. cit.*, § 85.
[132] ECrHR, *Wemhoff v. Germany*, app. n° 2122/64, 27 June 1968, § 9; *Buzadji v. the Republic of Moldova*, [GC], *op. cit.*, § 85; *Solmaz v. Turkey*, app. n° 27561/02, 16 April 2006, § 24; *Kalashnikov v. Russia*, app. n° 47095/99, 15 October 2002, § 110; *Labita v. Italy, op. cit.*, § 147. According to the settled case-law, a person who had cause to complain of continued detention after conviction pending a delayed appeal may not be able to rely on Article 5 § 3 but could possibly allege a breach of the "reasonable time" requirement of Article 6 § 1 of the Convention.
[133] ECrHR, *Zandbergs v. Latvia*, app. n° 71092/01, 20 December 2011, § 86.
[134] ECrHR, *Velecka and others v. Lithuania*, app. n° 56998/16 and 3 others, 26 June 2019, § 96.
[135] ECrHR, *Idalov v. Russia* [GC], app. n° 5826/03, 22 May 2012, §§ 135-136.

2) The settled European case-law

Even if the duration of the preliminary investigation is not open to criticism, that of the detention must not exceed a reasonable time[136].

According to the Court's settled case-law, the presumption under Article 5 is in favour of release[137]. The second limb of Article 5 § 3 does not give judicial authorities a choice between either bringing an accused to trial within a reasonable time or granting him/her provisional release pending trial; until conviction, he must be presumed innocent, and **the purpose of the provision under consideration is essentially to require his provisional release once his continuing detention ceases to be reasonable**[138].Continued detention can be justified in a given case only if there are actual indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty laid down in Article 5 of the Convention[139].

The responsibility falls in the first place to the national judicial authorities to ensure that, in a given case, the pre-trial detention of an accused person does not exceed a reasonable time[140]*.* To this end they must, paying due regard to the principle of the presumption of innocence, examine all the facts arguing for or against the existence of the above-mentioned demand of public interest justifying a departure from the rule in Article 5 and must set them out in their decisions on the applications for release[141]. It is essentially on the basis of the reasons given in these decisions and of the established facts stated by the applicant in his appeals that the Court is called upon to decide whether or not there has been a violation of Article 5 § 3.

The persistence of reasonable suspicion that the person arrested has committed an offence is a condition *sine qua non* for the lawfulness of the continued detention, **but with the lapse of time** this no longer suffices and the Court must then establish whether the other grounds given by the judicial authorities continued to justify the deprivation of liberty. *A contrario*, **the existence of a strong suspicion of the involvement of a person in serious offences, while constituting a relevant factor, cannot alone justify a long period of pre-trial detention**[142]. This dictum was enunciated for the first time in *Stögmüller* case[143] and later became better known as one of the more comprehensive "***Letellier principles***", which were reaffirmed in a number of successive Grand Chamber judgments[144]. It enabled a distinction to be drawn between a first phase, when the existence of reasonable suspicion is a sufficient ground for detention, and the phase coming after a "*certain lapse of time*", where reasonable suspicion alone no longer suffices and other "*relevant and sufficient*" reasons to detain the suspect are required[145].

Where the grounds on which the detention is based are deemed "*relevant*" and "*sufficient*", **the Court must also be satisfied that the national authorities displayed "special diligence" in the conduct of the proceedings**[146].

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[136] ECrHR, *Stögmüller v. Austria*, app. n° 1602/62, 10 November 1969, § 5; *Buzadji v. the Republic of Moldova*, [GC], *op. cit.*, § 89.
[137] ECrHR, *Bykov v. Russia* [GC], app. n° 4378/02, 10 March 2009, § 61; *Zherebin v. Russia*, app. n° 51445/09, 12 September 2016, § 49.
[138] ECrHR, *Neumeister v. Austria*, app. n° 1936/63, 27 June 1968, § 4; *McKay v. the United Kingdom* [GC], *op. cit.*, § 41.
[139] *Idem*, § 42; *Kudła v. Poland* [GC], app. n° 30210/96, 26 October 2000, §§ 110 et s. ; *Buzadji v. the Republic of Moldova*, [GC], *op. cit.*, § 90.
[140] ECrHR, *McKay v. the United Kingdom* [GC], *op. cit.*, § 43; *Zherebin v. Russia*, *op. cit.*, § 53.
[141] *Ibid.*
[142] ECrHR, *Kalashnikov v. Russia*, *op. cit.*, § 116.
[143] ECrHR, *Stögmüller v. Austria*, *op. cit.*, § 4.
[144] ECrHR, *Labita v. Italy*, *op. cit.*, § 153; *Kudła v. Poland* [GC], *op. cit.*, § 111; *McKay v. the United Kingdom* [GC], *op. cit.*, § 44; *Bykov v. Russia* [GC], *op. cit.*, § 64; *Idalov v. Russia* [GC], app. n° 5826/03, 22 May 2012, § 140.
[145] ECrHR, *Buzadji v. the Republic of Moldova*, [GC], *op. cit.*, § 92.
[146] ECrHR, *Idalov v. Russia* [GC], *op. cit.*, § 140; *Labita v. Italy*, *op. cit.*, § 152; *Contrada v. Italy*, app. n° 92/1997/876/1088, 24 August 1998, § 54.

Domestic courts are under an obligation to review the continued detention of persons pending trial with a view to ensuring release when circumstances no longer justify continued deprivation of liberty. **For at least an initial period**, the existence of reasonable suspicion may justify detention but there comes a moment when this is no longer enough; **as the question whether or not a period of detention is reasonable cannot be assessed in the abstract but must be assessed in each case according to its special features, there is no fixed time-frame applicable to each case**[147]. In this respect, in *Shishkov case,* the Court admitted that the majority of length-of-detention cases decided in its judgments concern longer periods of deprivation of liberty and that against that background **seven months and three weeks may be regarded as a relatively short period in detention**; **Article 5 § 3 of the Convention, however, cannot be seen as authorising pre-trial detention unconditionally provided that it lasts no longer than a certain period**[148].

Justification for any period of detention, no matter how short, must be convincingly demonstrated by the authorities [149]. Justifications which have been deemed "*relevant*" and "*sufficient*" reasons (in addition to the existence of reasonable suspicion) in the Court's case-law, have included such grounds as the danger of absconding, the risk of pressure being brought to bear on witnesses or of evidence being tampered with, the risk of collusion, the risk of reoffending, the risk of causing public disorder and the need to protect the detainee[150].With particular regard to the risk of absconding, consideration must be given to the character of the person involved, his or her morals, assets, links with the State in which he or she is being prosecuted and the person's international contacts[151].

More specifically, **the pre-trial detention of minors** should be used only as a measure of last resort; it **should be as short as possible** and, where detention is strictly necessary, minors should be kept apart from adults[152].

3) The recent development of the European case-law

Only recently, the Court recognised that **there was no fixed time-frame applicable to the "certain lapse of time"** and that it has not attempted to translate this concept into a fixed number of days, weeks, months or years, or into various periods depending on the seriousness of the offence[153]. However, one should notice that in a number of cases the Court has taken the view that even after a relatively short period of a few days, the existence of reasonable suspicion cannot on its own justify pre-trial detention and must be supported by additional grounds[154].

In 2016, on the occasion of the *Buzadji* case, the Court took the initiative to further develop its case-law as to the requirement on national judicial authorities to justify continued detention for the purposes of the second limb of Article 5 § 3[155], namely concerning the interpretation of the term "*a certain lapse of time*"[156]. The Court built its rational on two axes – the connection between the first

[147] ECrHR, *McKay v. the United Kingdom* [GC], *op. cit.*, § 45; *Bykov v. Russia* [GC], *op. cit*., §§ 61-64; *Idalov v. Russia* [GC], *op. cit.*, 22 May 2012, §§ 139-141; *Labita v. Italy* [GC], *op. cit.*, §§ 152-153; and *Kudła v. Poland* [GC], *op. cit.*, §§ 110-111; *Süveges v. Hungary*, app. n° 50255/12, 2 May 2016, § 88.
[148] ECrHR, *Shishkov v. Bulgaria*, app. n° 38822/97, 9 April 2003, § 66.
[149] ECrHR, *Idalov v. Russia* [GC], *op. cit.*, § 140; *Shishkov v. Bulgaria*, *op. cit.*, § 66; *Zherebin v. Russia*, *op. cit.*, § 54; *Sergey Denisov and others v. Russia*, app. n° 1985/05, 18579/07, 21748/07, 21954/07 and 20922/08, 12 September 2016, § 94; *Castravet v. Moldova*, app. n° 23393/05, 13 March 2007, § 33; *Belchev v. Bulgaria*, app. n° 39270/98,8 April 2014, § 82.
[150] ECrHR, *Buzadji v. the Republic of Moldova*, [GC], *op. cit.*, § 88.
[151] *Idem.*, § 90; *Neumeister v. Austria*, *op. cit*., § 10.
[152] ECrHR, *Nart v. Turkey*, app. n° 20817/04, 6 May 2008, § 31; *Güveç v. Turkey*, app. n° 70337/01, 20 January 2009, § 109.
[153] ECrHR, *Magee and Others v. the United Kingdom*, app. n° 26289/12, 29062/12 and 29891/12, 12 May 2015, § 88.
[154] ECrHR, *Ţurcan and Ţurcan v. Moldova*, app. n° 39835/05, 23 October 2007, § 54; *Patsuria v. Georgia*, app. n° 30779/04, 6 November 2007, § 67; *Osmanović v. Croatia*, app. n° 67604/10, 6 November 2012, §§ 40-41; *Zayidov v. Azerbaijan*, app. n° 11948/08, 20 February 2014, § 62.
[155] ECrHR, *Buzadji v. the Republic of Moldova*, [GC], *op. cit*., § 96.
[156] *Idem*, § 100. The Court emphasizes that the period during which the persistence of reasonable suspicion may suffice as a ground for continued detention under the second limb is subject to a different and far less

and second limbs of article 5 § 3[157] and the emerging consensus between member States with regard to the obligation of national judicial authorities to give "*relevant and sufficient*" reasons for continued detention if not immediately then only a few days after the arrest, namely when a judge examines for the first time the necessity of placing the suspect in pre-trial detention[158]. On the basis of such "*compelling arguments*", the Court decided to synchronize the second limb of guarantees with the first one, implying that **the requirement on the judicial officer to give relevant and sufficient reasons for the detention – in addition to the persistence of reasonable suspicion – applies already at the time of the first decision ordering detention on remand, that is to say "*promptly*" after the arrest**[159].

The Court recalls regularly 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 lapse of time**, it no longer suffices alone[160].

Put differently, when the Court faces a case with "*considerable length of detention*" it expects from the national authorities to put forward **very weighty reasons** for keeping the applicant in detention for an extended period of time. If the Court can accept that the nature and the gravity of offences could have played a role in the choice of preventive measure at the initial stage of the investigation, these alone are not sufficient to continue justifying the detention's extension. Therefore, the Court concluded recently that "*by failing to address the specific facts or to consider alternative preventive measures, the authorities extended the first applicant's detention on grounds which, although "relevant" for the initial period, cannot be regarded as "sufficient" to justify remanding him in custody for a period of* **over one year and nine months**"[161].

Even when the grounds given by the national authorities to justify the continuance of the detention are deemed as "*relevant*" and "*sufficient*", the Court must also ascertain whether the competent national authorities displayed "*special diligence*" in the conduct of the proceedings[162].

In the *Velecka and others* case, every step of the Court's reasoning is exhaustively developed. Namely, at the outset, the Court noticed that a period of **four years, ten months and twenty-eight days** is **such inordinate length of detention on remand** that it is already a matter of grave concern and requires the domestic authorities to put forward **very weighty reasons** in order for it to be justified[163]. Despite the acknowledgement of the existence of such *reasons,* the Court stated that the "*assessment of the "relevant and sufficient" reasons cannot be detached from the actual length of pre-trial detention*"[164]. Accordingly, the Court addressed the issue whether the domestic authorities displayed requisite diligence in the conduct of the proceedings. On the one hand, the Court concluded that the actions of the national authorities during the pre-trial investigation period, "*could be considered as falling* **within the standard of requisite diligence** *under Article 5 § 3*"[165]. Conversely, it found that judicial authorities failed to display requisite diligence in the conduct of criminal proceedings. The Court explained that they "*could fix a tighter and more efficient hearing schedule in order to avoid repeated adjournments or cancellations*"[166].

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precise temporal requirement – "*a certain lapse of time*" (as developed in the Court's case-law) – than under the first limb – "*promptly*" (as provided in the text of the Convention).

[157] *Idem,* § 100.

[158] *Idem*, § 101. In the Court's view, such an approach, would not only simplify and bring more clarity and certainty into the Convention case-law in this area, but would also enhance the protection against detention beyond a reasonable time.

[159] *Idem*, § 102.

[160] ECrHR, *Batishvili v. Georgia*, app. n° 8284/07, 10 January 2020, §55.

[161] ECrHR, *Razvozzhayev v. Russia and Ukraine and Udaltsov v. Russia*, app. n° 75734/12, 19 February 2020, § 205. As to the second applicant, the Court concluded that "*the authorities failed to convincingly demonstrate the persistence of the risks of the second applicant's absconding and reoffending such as to justify the extensions of his detention for a period of over seventeen months*", § 219.

[162] ECrHR, *Batishvili v. Georgia*, *op. cit.*, § 55. The complexity and special characteristics of the investigation are factors to be considered in this respect.

[163] ECrHR,*Velecka and others v. Lithuania*, *op. cit.,* § 99.

[164] *Idem*., § 102.

[165] *Idem*., § 103.

[166] *Idem*., § 105.

- *Along with the requirement of promptness, the following case-law **acquis** should be pointed out:*
  - The arguments for and against release must not be "*general and abstract*"[167], but contain references to the specific facts and the applicant's personal circumstances justifying his detention[168].Quasi-automatic prolongation of detention contravenes the guarantees set forth in Article 5 § 3[169].
  - The burden of proof in these matters should not be reversed by making it incumbent on the detained person to demonstrate the existence of reasons warranting his release. In the Court's view, shifting the burden of proof to the detained person in matters of detention is tantamount to overturning the rule of Article 5 of the Convention, a provision which makes detention an exceptional departure from the right to liberty and one that is only permissible in exhaustively enumerated and strictly defined cases[170].
  - Where circumstances that could have warranted a person's detention may have existed but were not mentioned in the domestic decisions it is not the Court's task to establish them and to take the place of the national authorities which ruled on the applicant's detention[171]. It is only by giving a reasoned decision that there can be public scrutiny of the administration of justice[172].
  - When deciding whether a person should be released or detained, the authorities are obliged to consider alternative measures of ensuring his appearance at trial[173].
  - The right of an accused in detention to have his case examined with particular expedition must not hinder the efforts of the courts to carry out their tasks with proper care[174].
- Against the background of the core principles characterizing the European case-law in the matter, the following relevant examples can be emphasized:
  - In *Giorgi Nikolaishvili* case, insofar as specific, relevant facts warranting the applicant's deprivation of liberty were not set out in the relevant domestic decisions, **the 10 months of pre-trial detention** were considered by the Court as a **too long period** showing that the national authorities failed to deal with the case with special diligence[175].
  - Similarly, in *Shishkov* case, given that the applicant's detention was prolonged on grounds that could not be regarded as sufficient, its duration (**7 months and 3 weeks**) was deemed **unjustified**[176].
  - In *Aleksanyan* case, even if the applicant's detention (**2 years and 10 months**) could initially have been justified, the authorities prolonged the applicant's detention on grounds which cannot be regarded as "*relevant" and "sufficient*", even taking into account their cumulative effect[177].

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[167] ECrHR, *Boicenco v. Moldova*, app. n° 41088/05, 11 October 2006, § 142; *Smirnova v. Russia*, app. n° 46133/99 and 48183/99, 24 October 2003, § 63; *Khudoyorov v. Russia*, app. n° 6847/02, 12 April 2006, § 173.
[168] ECrHR, *Aleksanyan v. Russia*, app. n° 46468/06, 5 June 2009, § 179; *Panchenko v. Russia*, app. n° 45100/98, 8 February 2005, § 107.
[169] ECrHR, *Tase v. Romania*, app. n° 29761/02, 10 September 2008, § 40.
[170] ECrHR, *Aleksanyan v. Russia*, *op. cit.*, § 179; *Bykov v. Russia* [GC], *op. cit.*, § 64.
[171] ECrHR, *Giorgi Nikolaishvili v. Georgia*, app. n° 37048/04, 13 April 2009, § 77; *Labita v. Italy*, *op. cit.*, § 152. "*It is not the Court's task to take the place of the national authorities and establish such facts in their stead*".
[172] ECrHR, *Tase v. Romania*, *op. cit.*, § 41.
[173] ECrHR, *Idalov v. Russia* [GC], *op. cit.*, § 140; *Jablonski v. Poland*, app. n° 33492/96, 21 December 2000, § 83.
[174] ECrHR, *Contrada v. Italy*, *op. cit.,* § 67; *Shabani v. Switzerland*, app. n° 29044/06, 5 February 2010, § 65; *Sadegül Özdemir v. Turkey*, app. n° 61441/00, 2 November 2005, § 44; *Pêcheur v. Luxembourg*, app. n° 16308/02, 11 December 2007, § 62.
[175] ECrHR, *Giorgi Nikolaishvili v. Georgia*, *op. cit.*, §§ 77-78. The charge of storing and transporting firearms and ammunition was retained against the applicant.
[176] ECrHR, *Shishkov v. Bulgaria*, *op. cit.*, § 65. "(…) *It follows that it is not necessary to examine whether the authorities displayed the special diligence required in the handling of criminal proceedings against remand prisoners*". The offence with which the applicant was charged constituted a "serious" offence (theft), within the meaning of the Penal Code.
[177] ECrHR, *Aleksanyan v. Russia*, *op. cit.*, §§ 182-196. In the Court's view, the applicant's detention could initially (6 April 2006) have been justified by two reasons: the risk of interference with the course of justice, and the risk that the applicant might abscond. As from 23 August 2006, the national courts also referred to the risk of reoffending. However, as from December 2006, the prolonged detention of the applicant was not any more justified. The applicant was prosecuted in connection with his alleged participation in the embezzlement of the property and shares of several oil companies and refineries, constituting elements of criminal offence.

- In *Idalov* case, the Court concluded that by failing to address specific facts or consider alternative preventive measures and by relying essentially and routinely on the gravity of the charges, the authorities extended the applicant's detention pending trial on grounds which, although "*relevant*", cannot be regarded as "*sufficient*" to justify its duration (approximately **1 year and 1 month**)[178].
- In *Labita* case, the accusations were based on evidence which, with time, had become weaker rather than stronger[179]; accordingly, the grounds stated in the impugned decisions were deemed by the Court not sufficient to justify the applicant's being kept in detention for **2 years and 7 months**[180].
- Conversely, in *Galuashvili case*, in the light of the specific circumstances[181], the Court found that the applicant was tried **speedily** – **within 5 months** and that, consequently, the authorities dealt with the case with special diligence[182].
- The complexity of the *Contrada* case has also led the Court to conclude that the applicant's detention (**2 years, 7 months and 7 days**, approximately 14 months during the investigation and the remainder during the trial before the court) was based on relevant and sufficient grounds and that the national authorities conducted the proceedings **without delay**[183].
- In *Kalashnikov* case, with regard to the duration of the criminal investigation, the Court drew the attention to the fact that the case was not particularly complex and that its investigation had been of poor quality contributing to a delay in the proceedings; that the protracted proceedings were attributable neither to the complexity of the case nor to the conduct of the applicant. Accordingly, it concluded that the authorities did not act with all due expedition and the period spent by the applicant in detention pending trial (**4 years and almost 4 months**) exceeded a "reasonable time"[184].
- In *Tase* case, the applicant's initial detention for 30 days was extended by the competent court five times by using the same formula and without giving details of the grounds for its decisions, which was sufficient to enable the Court to conclude that, "given the lack of concrete reasons in the domestic court's decisions, the repeated extension of the applicant's detention (all in all **4 months**) pending trial infringed Article 5 § 3 of the Convention"[185].
- In *Süveges* case, the applicant's potential to abscond and the fear that he would commit new offences, at least initially, were "relevant" and "sufficient", but with the passage of time, these initial grounds become less and less relevant. Furthermore, when detention pending trial is extended beyond the period generally accepted under the Court's case-law (the applicant was deprived of his liberty pending trial for **2 years and 9 months**, preceded by another **3 years long detention on remand**), even in the specific circumstances of the case, particularly strong reasons would be required to justify this. The Court concluded that while it is true that neither the risk of absconding nor that of reoffending can completely be negated by the lapse of time, the domestic authorities failed to assess whether after this very long time spent in pre-trial detention and house

[178] ECrHR, *Idalov v. Russia* [GC], *op. cit.*, § 148.The applicant was arrested on suspicion of abduction involving an organised criminal group and afterwards officially charged.
[179] Even though the grounds stated in the impugned decisions were reasonable, at least initially, they were too general.
[180] ECrHR, *Labita v. Italy*, *op. cit.*, § 163. The applicant was suspected of being a member of a mafia-type organization.
[181] The detention decision relied, in addition to the existence of a reasonable suspicion against the applicant, on the need to secure the proper conduct of the proceedings (given that the applicant was found in possession of firearms and ammunition, there was a reasonable suspicion that the applicant had committed the serious offence with which he had been charged and which could warrant his detention; the severity of the sentence was a relevant element in the assessment of the risk of absconding or otherwise jeopardizing the investigation at the early stages of the proceedings; the need to test the seized gun in order to establish whether it had been used in any other crimes was another reasonable ground justifying the applicant's detention).
[182] ECrHR, *Galuashvili v. Georgia*, *op. cit.*, § 50. The applicant was convicted of the unlawful transportation and storage of firearms and ammunition and sentenced to one year's imprisonment, suspended.
[183] ECrHR, *Contrada v. Italy*, *op. cit.,* §§ 66-68.
[184] ECrHR, *Kalashnikov v. Russia*, *op. cit.*, §§ 119-120. The applicant was convicted of embezzlement and sentenced to a term of imprisonment.
[185] ECrHR, *Tase v. Romania*, *op. cit.*, §§ 41-42. The applicant was convicted of aggravated theft (a one-year suspended sentence).

arrest, the grounds of detention still retained their sufficiency, outweighing the applicant's right to be tried within a reasonable time or release pending trial[186].

In all these cases, the length of the pre-trial detention was deemed to be a factor of further importance in assessing the compatibility of pre-trial detention with Article 5 § 3 of the Convention.

b) The right to challenge the lawfulness of the detention through prompt judicial review (Article 5 § 4)

Article 5 § 4 provides a *lex specialis* in relation to the more general requirements of Article 13[187]. It is the *habeas corpus* provision of the Convention, insofar as it provides detained persons with the right to actively seek a judicial review of their detention[188]. By virtue of this provision, a detainee is entitled to apply to a "***court***" having jurisdiction to decide "***speedily***" whether or not his deprivation of liberty has become "*unlawful*" in the light of new factors which have emerged subsequently to the initial decision depriving a person of his liberty[189].

Recently, the Court ascertained the applicability of Article 5 § 4 to proceedings which could not result in the applicant's freedom but can lead instead to another form of detention[190].

According to the settled case-law, **Article 5 § 4**, in guaranteeing to detained persons a right to institute proceedings to challenge the lawfulness of their detention, **also proclaims their right**, following the institution of such proceedings, **to a speedy judicial decision concerning the lawfulness of detention and the ordering of its termination if it proves unlawful**[191]. In the Court's view, "*the concept of "speedily" cannot be defined in the abstract; the matter must - as with the "reasonable time" stipulation in Article 5 § 3 and Article 6 § 1 - be determined in the light of the circumstances of each case*"[192]. Put differently, the question whether the right to a speedy decision has been respected must be determined depending on the particular features of each case[193], including the complexity of the proceedings, their conduct by the domestic authorities and by the applicant and what was at stake for the latter[194].

With regard to the speediness requirement, the Court examines each case in the light of the "*strict standards*"[195] **it has laid down in its case-law**.

After defining the period taken into consideration by the Court (*1)*), it is important to identify the notion of speedily in the Court's case-law (*2)*), as well as its assessment parameters of the speediness requirement (*3)*), before drawing the attention on the recent evolution of the Court's case law in the specific field of minors' rights and the appearance of the notion of urgency (*4)*).

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[186] ECrHR, *Süveges v. Hungary*, *op. cit.*, §§ 98-99: "(…) *The decisions extending the deprivation of liberty were worded in a rather stereotypical and summary form, not evolving to reflect the developing situation*".
[187] ECrHR, *A. and Others v. the United Kingdom* [GC], app. n° 3455/05, 19 February 2009, § 202.
[188] ECrHR, *Mooren v. Germany* [GC], app. n° 11364/03, 9 July 2009, § 106; *Rakevich v. Russia*, app. n° 58973/00, 28 October 2003, § 43; *Musial v. Poland*, app. n° 24557/94, 25 March 1999, § 43.
[189] ECrHR, *Azimov v. Russia*, app. n° 67474/11, 18 April 2013, §§ 151-152; *Khodzhayev v. Russia*, app. n° 52466/08, 12 May 2010, §§ 125-131.
[190] ECrHR, *Kuttner v. Austria*, app. n°7997/08, 16 July 2015, § 31.
[191] ECrHR, *Kavala v. Turkey*, *op.cit*., § 176; *Idalov v. Russia* [GC],*op. cit.*, § 154; *Baranowski v. Poland*, app. n° 28358/95, 28 May 2000, § 68; *Khudoyorov v. Russia*, *op. cit.*, § 193; *Musiał v. Poland* [GC], app. n° 24557/94, 25 March 1999, § 43; *Mooren v. Germany* [GC], *op. cit.*, § 106.
[192] ECrHR, *Sanchez-Reisse v. Switzerland*, app. n° 9862/82, 21 October 1986, § 55; *Mooren v. Germany* [GC], *op. cit.*, § 106; *G.B. v. Switzerland*, app. n° 27426/95, 30 November 2000, § 33; *Strazimiri v. Albania*, *op. cit.*, § 127.
[193] ECrHR, *Rehbock v. Slovenia*, app. n° 29462/95, 28 November 2000, § 84; *R.M.D. v. Switzerland*, app. n° 81/1996/700/892, 26 September 1997, § 42.
[194] ECrHR, *Mooren v. Germany* [GC], *op. cit.*, § 106; *G.B. v. Switzerland*, *op. cit.*, §§ 34-39; *M.B. v. Switzerland*, app. n° 28256/95, 30 November 2000, §§ 38-43.
[195] ECrHR, *Mooren v. Germany* [GC], *op. cit.*, § 107.

1) The period taken into consideration by the Court

The Court takes as a starting point the moment that the application for release is made/proceedings are instituted. The relevant period comes to an end with the final determination of the legality of the applicant's detention, including any appeal[196]. If the proceedings have been conducted over two levels of jurisdiction, an overall assessment must be made in order to determine whether the requirement of "*speedily*" has been complied with[197]. If an administrative remedy has to be exhausted before recourse can be had to a court, time begins to run when the administrative authority is seized of the matter[198].

2) The judge-made definition of the notion of speedily

The opportunity for legal review must be provided soon after the person is taken into detention and thereafter at reasonable intervals if necessary[199].

Article 5 § 4 does not require that a detained person be heard every time he lodges an appeal against a decision extending his detention, but that it should be possible to exercise **the right to be heard at reasonable intervals**[200]. Even if a detainee has made several applications for release, Article 5 § 4 does not give the authorities either a "*margin of discretion*" or a choice in respect of which of them should be handled more expeditiously and which at a slower pace; **all such habeas corpus proceedings are to run "speedily"**[201]. Detention on remand in criminal cases calls for short intervals between reviews[202]. Similarly, a person of unsound mind who is compulsorily confined in a psychiatric institution for a lengthy period is entitled to take proceedings "*at reasonable intervals*" to put in issue the lawfulness of his detention[203]. A system of periodic review in which the initiative lies solely with the authorities is not sufficient on its own[204].

The notion of "speedily" (à bref délai) indicates a lesser urgency than that of "promptly" (aussitôt) in Article 5 § 3[205].What is important in the Court's view is the type of official body which authorised the detention.

The Court had also the occasion to specify that in order to determine whether the speediness requirement has been complied with, it is necessary to perform an overall assessment where the proceedings were conducted at more than one level of jurisdiction[206]. Naturally, where domestic law provides for a system of appeal, the appellate body is also bound by the requirements of Article 5 § 4, in particular, as concerns the speediness of the review of a detention order. However, where the initial detention order or subsequent decisions on continued detention were issued by an independent and impartial judicial body in a procedure offering appropriate guarantees of due process, and where the domestic law provides for a system of appeal, "*the Court is prepared to tolerate longer periods of review in proceedings before a second-instance court*"[207].

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196 ECrHR, *Sanchez-Reisse v. Switzerland*, app. n° 9862/82, 21 October 1986, § 54; *E. v. Norway*, app. n° 11701/85, 29 August 1990, § 64.
197 ECrHR, *Hutchison Reid v. the United Kingdom*, app. n° 50272/99, 20 February 2003, § 78; *Navarra v. France*, app. n° 13190/87, 23 November 1993, § 28.
198 ECrHR, *Sanchez-Reisse v. Switzerland*, *op. cit.*, § 54.
199 ECrHR, *Molotchko v. Ukraine*, app. n° 12275/10, 26 April 2012, § 148.
200 ECrHR, *Çatal v. Turkey*, app. n° 26808/08, 17 April 2012, § 33; *Knebl v. the Czech Republic*, app. n° 20157/05, 28 October 2010, § 85.
201 ECrHR, *Iłowiecki v. Poland*, app. n° 27504/95, 4 October 2001, § 78.
202 ECrHR, *Bezicheri v. Italy*, app. n° 11400/85, 25 October 1989, § 21.
203 ECrHR, *M.H. v. the United Kingdom*, app. n° 11577/06, 22 October 2013, § 77; *Winterwerpv. the Netherlands*, *op. cit.*, § 55; *Stanev v. Bulgaria* [GC], app. n° 36760/06, § 171.
204 ECrHR, *Raudevs v. Latvia*, app. n° 24086/03, 17 December 2013, § 82.
205 ECrHR, *E. v. Norway*, *op. cit.*, § 64; *Brogan and Others v. the United Kingdom*, *op. cit.*, § 59.
206 ECrHR, *Navarra v. France*, app. n° 13190/87, 23 November 1993, § 28; *Mooren v. Germany* [GC], *op. cit.*, § 106; *Kavala v. Turkey*, *op.cit.,* § 180.
207 ECrHR, *Kavala v. Turkey*, *op.cit.,* § 180; *Lebedev v. Russia*, app. n° 4493/04, 25 October 2007, § 96; *Shcherbina v. Russia*, app. n° 41970/11, 26 June 2014, § 65; *Shakurov v. Russia*, app. n° 55822/10, 5 June 2012, § 179.

On the one hand, a State which institutes a second level of jurisdiction for the examination of the lawfulness of detention and for hearing applications for release, must in principle accord to the detainees the same guarantees on appeal as at first instance, the requirement that a decision be given "*speedily*" being undeniably one such guarantee[208]. On the other hand, the Court would not be concerned, to the same extent, with the speediness of the proceedings before the court of appeal, if the detention order under review was imposed by a court and on condition that the procedure followed by that court had a judicial character and afforded to the detainee the appropriate procedural guarantees[209]. In fact, if the detention is confirmed by a court it must be considered to be lawful and not arbitrary, even where appeal is available; subsequent proceedings are less concerned with arbitrariness, but provide additional guarantees aimed primarily at an evaluation of the appropriateness of continuing the detention[210].

Conversely, where a decision to detain a person has been taken by a non-judicial authority rather than a court, the standard of "speediness" of judicial review under Article 5 § 4 comes closer to the standard of "promptness" under Article 5 § 3[211].

Proceedings before constitutional courts fall *a fortiori* within the scope of this case-law standard[212].

3) The assessment parameters of the speediness requirement

Where an individual's personal liberty is at stake, the Court has very strict standards concerning the State's compliance with the requirement of speedy review of the lawfulness of detention. Accordingly, **where one year per instance may be a rough rule of thumb in Article 6 § 1 cases, Article 5 § 4, concerning issues of liberty, requires particular expedition**[213].

As stated above, **the term "speedily" cannot be defined in the abstract**. As with the "*reasonable time*" stipulations in Article 5 § 3 and Article 6 § 1 **it must be determined in the light of the circumstances of the individual case**[214].

According to the **settled case-law**, although the number of days taken by the relevant proceedings is obviously an important element, it is not necessarily in itself decisive for the question of whether a decision has been given with the requisite speed[215]. In assessing the speedy character required by Article 5 § 4, comparable factors may be taken into consideration as those which play a role with respect to the requirement of trial within a reasonable time under Article 5 § 3 and Article 6 § 1 of the Convention such as, the diligence shown by the authorities, any delay caused by the detained person [216] and any other factors causing delay that do not engage the State's

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[208] ECrHR, *Navarra v. France*, *op. cit.*, § 28; *Toth v. Austria*, app. n° 11894/85, 12 December 1991, § 84; *Khudoyorov v. Russia*, *op. cit*., § 193.

[209] ECrHR, *Shakurov v. Russia*, app. n° 55822/10, 5 June 2012, § 179. "*(…) Where domestic law provides for appeal, the appellate body must also comply with the requirements of Article 5 § 4, for instance as concerns the speediness of the review by appeal proceedings. At the same time, the standard of "speediness" is less stringent when it comes to the proceedings before the court of appeal*"; *Lebedev v. Russia*, app. n° 4493/04, 25 October 2007, § 96.

[210] ECrHR, *Lebedev v. Russia*, *op. cit.*, § 96; *Tjin-a-Kwi and Van Den Heuvel v. the Netherlands*, app. n° 17297/90, 31 March 1993.

[211] ECrHR, *Shcherbina v. Russia*, *op. cit.*, §§ 65-70.

[212] ECrHR, *Kavala v. Turkey*, *op.cit.,* § 180; *Žúbor v. Slovakia*, app. no. 7711/06, 8 March 2012, § 89.

[213] ECrHR, *Khudoyorov v. Russia*, *op. cit*., § 193; *Hutchison Reid v. the United Kingdom*, *op. cit*., § 79; *Panchenko v. Russia*, app. n° 45100/98, 8 February 2005, § 117; *Moiseyev v. Russia*, app. n° 62936/00, 9 October 2008, § 160.

[214] ECrHR, *Sanchez-Reisse v. Switzerland*, app. n° 9862/82, 21 October 1986, § 55; *Mooren v. Germany* [GC], *op. cit.*, § 106; *G.B. v. Switzerland*, app. n° 27426/95, 30 November 2000, § 33; *Rehbock v. Slovenia*, app. n° 29462/95, 28 November 2000, § 84; *R.M.D. v. Switzerland*, app. n° 81/1996/700/892, 26 September 1997, § 42.

[215] ECrHR, *Shakurov v. Russia*, *op. cit.*, § 180; *Merie v. the Netherlands* (dec.), app. n° 664/05, 20 September 2007.

[216] ECHR, *Rokhlina v. Russia*, app. n° 54071/00, 7 April 2005, § 79: the global duration of the proceedings was 41 days for two levels of jurisdiction but the applicant had requested leave to appear in person at the appeal court, due to what court proceedings were adjourned for one week. Accordingly the Court found no violation of Article 5 § 4 of the Convention.

responsibility[217]. If the complexity of medical – or other – issues involved in a determination of whether a person should be detained or released can be a factor which may be taken into account, that does not imply, however, that the complexity of a given dossier – even exceptional – absolves the national authorities from their essential obligation under Article 5 § 4[218]. Besides, **even in complex cases, there are factors which require the authorities to carry out a particularly speedy review**, including the presumption of innocence in the case of pre-trial detention[219].

As to the forms of judicial review satisfying the requirements of Article 5 § 4, they may vary from one domain to another, and will depend on the type of deprivation of liberty. *Generally speaking*, a system of automatic periodic review of the lawfulness of detention by a court may ensure compliance with the requirements of Article 5 § 4. Nevertheless, long intervals in the context of automatic periodic review may lead to a violation of Article 5 § 4. As to the interpretation of the term "*reasonable interval*" in the context of periodic judicial review, it varies from one domain to another, depending on the type of deprivation of liberty in issue[220].

In the Court's view, **shorter intervals between reviews** are necessary for detention pending deportation or extradition, as compared to detention after conviction by a competent court or detention of persons of unsound mind[221]. At the same time, given the limited scope of the judicial review of the lawfulness of detention required under Article 5 § 4 in extradition cases – which does not extend, for example, to the questions whether the detention was "*necessary*" for the prevention of crime or fleeing – the review **need not be as frequent** as in cases of deprivation of liberty under Article 5 § 1 (c).

At any rate, it is not the Court's task to attempt to rule as to the **maximum period of time** between reviews which should automatically apply to a certain category of detainees[222]. The question of whether periods comply with the requirement must be determined in the light of the circumstances of each case.

Thus, the Court has, for example found, that intervals between periodic reviews of detention ranging **from two to four months** were compatible with the requirements of Article 5 § 4[223]. Recently, the Court concluded that despite certain irregularities, namely the fact that the applicant did not have his initial automatic review within seven working days of the start of his detention as provided by domestic law, nor was this period extended in line with the regular practice, the time which elapsed until his first review, i.e. twenty running days - which due to a postponement became **twenty-five running days** - cannot be considered unreasonable[224].

Neither an excessive workload nor a vacation period can justify a period of inactivity on the part of the judicial authorities[225].

If the length of time before a decision is taken is prima facie incompatible with the notion of speediness, the Court will look to the State to explain the reason for the delay or to put forward exceptional grounds to justify the lapse of time in question[226].

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[217] ECrHR, *Mooren v. Germany* [GC], *op. cit.*, § 106; *Kolompar v. Belgium*, app. n° 11613/85, 24 September 1992, §§ 42 and 46; ECrHR, *Shakurov v. Russia*, *op. cit.*, § 180.
[218] ECrHR, *Jablonski v. Poland*, app. n° 33492/96, 21 December 2000, §§ 91-94; *Baranowski v. Poland*, *op. cit.*, § 72; *Musiał v. Poland* [GC], app. n° 24557/94, 25 March 1999, § 47.
[219] ECrHR, *Frasik v. Poland*, app. n° 22933/02, 5 January 2010, § 63; *Jablonski v. Poland*, *op. cit.*, § 93.
[220] ECrHR, *Aboya Boa Jean v. Malta*, app. n° 62676/16, 2 April 2019, §76.
[221] *Idem*., § 77: "(…) *Indeed, the factors affecting the lawfulness of detention are likely to evolve faster in situations where the proceedings are continuing (as in cases of detention with a view to extradition) than in situations where the proceedings have been closed after the establishment of all relevant circumstances (as in cases where a conviction has been pronounced by a competent court or compulsory psychiatric treatment ordered by a court on the basis of medical reports confirming the person's dangerousness)*".
[222] ECrHR, *Aboya Boa Jean v. Malta*, *op. cit.,* § 77.
[223] ECrHR, *Soliyev v. Russia*, app. n° 62400/10, 5 June 2012, §§ 57-62; *Khodzhamberdiyev v. Russia*, app. n° 64809/10, 5 June 2012, §§ 108-114.
[224] ECrHR, *Aboya Boa Jean v. Malta*, *op. cit.,*§ 80.
[225] ECrHR, *E. v. Norway*, *op. cit.*, § 66; *Bezicheri v. Italy*, *op. cit.*, § 25.
[226] ECrHR, *Musiał v. Poland* [GC], app. n° 24557/94, 25 March 1999, § 44; *Koendjbiharie v. the Netherlands*, app. n° 11487/85, 25 October 1990, § 29.

*4) Recent evolution of the ECrHR case law in the specific field of minors' rights: the appearance of the notion of **urgency***

In 2019, in the *G.B. and others v. Turkey* case, the Court recalled the existence of a broad consensus in international law (referring to UN bodies, CoE bodies and the Inter-american Court of Human rights) against the administrative detention of minors in the context of immigration controls, in keeping with the principle of the "best interests of the child". In the light of such consensus, the Court stated that "*in circumstances where minors have nevertheless been deprived of their liberty,* **particular expedition and diligence** *are required on the part of the domestic courts in reviewing the lawfulness of their detention*"[227].

The Court further notes that **the move in international law towards** adopting alternative measures to the administrative detention of migrants appears to concern not only children, but also their parents[228].

Thus, given the particular circumstances of the present applicants – a single mother with her three very young children – the Court qualified their request under Article 5 § 4 as **particularly urgent**.

Against this background, the Court stressed that: "*(…) in exceptional circumstances where the national authorities nevertheless decide to detain a child and his or her parents for immigration-related purposes, the lawfulness of such detention should be examined with* **particular expedition at all levels**"[229](even before the Constitutional Court – in contrast with the case-law standard according to which the *Court* is prone to tolerate longer periods of review in proceedings before a second-instance court and Constitutional courts (*Kavala v. Turkey*, *op.cit.,* § 180)).

- Few relevant examples based on the European case law:
  - In the *Khudoyorov* case, the Court observed that there is a special need for a swift decision determining the lawfulness of detention in cases where a trial is pending because the defendant should benefit fully from the principle of the presumption of innocence[230]. The Court concluded that **a period of 125 days** cannot be deemed compatible with the "*speediness*" requirement of Article 5 § 4, especially as the legal basis for the applicant's detention had shifted[231].
  - In *Rutten* case[232], the Court found a breach of the speed requirement of Article 5 § 4 of the Convention where the first-instance court took **2 months and 17 days** to issue its decision and the appellate court took **a further 3 months** to give judgment concerning the applicant's application for release from the secure institution where he was receiving treatment. The longer delays which appear in the *Hutchison Reid* case (3 months and 11 days in first instance and 3 years 9 months and 25 days for appeal decisions) could

[227] ECrHR, *G.B. and others v. Turkey*, *op. cit.*, § 167.
[228] *Idem.,*§ 168: "(..) *The Advisory Opinion of the Inter-American Court of Human Rights and the joint general comment of the Committee on the Rights of the Child and the Committee on Migrant Workers have both stated that "when the child's best interests require keeping the family together, the imperative requirement not to deprive the child of liberty extends to the child's parents and requires the authorities to choose non-custodial solutions for the entire family" (see paragraphs 79 and 70 above, respectively). The PACE in its Resolution 2020 has similarly called on Member States to adopt alternatives to detention that meet the best interests of the child and allow children to remain with their family members in non-custodial, community-based contexts while their immigration status is being resolved. In addition, the UN Special Rapporteur on the human rights of migrants emphasised that States must carefully evaluate the need to detain migrants who are accompanied by their children (see paragraphs 72 and 69 above, respectively). The Court itself has acknowledged, albeit as part of discussions under Article 8, that the child's best interests cannot be confined to keeping the family together and that the authorities have to take all the necessary steps to limit, as far as possible, the detention of families accompanied by children (see Popov, cited above, § 147)*".
[229] *Idem.,* § 186: " (…) *In the absence of any information in the case file to explain why the Constitutional Court could not have examined the lawfulness of the applicants' detention while they remained in detention – which was a not insignificant period –* ***the Court cannot hold that that court displayed the necessary diligence called for by the circumstances of the case****. This is particularly so considering that the case was not complex and the applicants had presented clear arguments challenging the lawfulness of their detention, the accuracy of which could easily be verified from the case file without the need for further investigation*".
[230] ECrHR, *Iłowiecki v. Poland*, *op. cit.*, § 76.
[231] ECrHR, *Khudoyorov v. Russia*, *op. cit.*, § 198.
[232] ECrHR, *Rutten v. the Netherlands*, app. n°32605/96, 24 July 2001, §§ 53-55.

not be justified either by the complexity of the case or the exigencies of internal procedure[233].

- In *Shcherbina* case, a **delay of sixteen days** in the judicial review of the applicant's detention order issued by the prosecutor (who was not a part of the judiciary) was found to be excessive[234]. On the one hand, the decision-making process which resulted with the detention order did not offer the guarantees of due process: the decision was taken in camera and without any involvement of the applicant; the prosecutor acted *ultra vires* and had no powers to order the applicant's detention. On the other hand, the applicant's case was not very complex and the courts should have had all necessary information to deal with it. Besides, there was no evidence that after the lodging of the application for release the applicant contributed in any way to the duration of the detention proceedings and to the delay in the judicial review.
- In *E. v. Norway* case, it was ruled that even if the notion of "*promptly*" indicates greater urgency than that of "*speedily*", a period of **approximately 8 weeks** from the filing of summons to judgment does appear, *prima facie*, difficult to reconcile with the notion of *speedily*. Given that the delays were due to the administrative organisation of the national judicial authorities, the Court concluded to the violation of Article 5 § 4[235].
- In *Karimov* case, the Court found that the circumstances of the case disclosed a violation of Article 5 § 4, noting that the applicant in that case had lodged five appeals against court extension orders and that all of them had been examined by the appeal court with **delays ranging from thirteen to twenty-five days**, for which the Government provided no convincing justification[236].
- In *Shakurov* case, the **delays of thirteen and thirty-four days** in examining the appeals against the detention orders were deemed to be incompatible with the "*speediness*" requirement of Article 5 § 4 (the entire length of the appeal proceedings was attributable to the domestic authorities; the case was not a complex one)[237].
- In *Lebedev* case[238], the Court found a violation of Article 5 § 4 of the Convention because the authorities were responsible for at least **27 days** out of the overall duration (44 days) of the appeal proceedings. It pointed out that even if the courts had spent the whole of that period dealing with the case file that would not exempt them from the obligation to examine the appeal quickly.
- In *Iłowiecki* case, the Court considered that even the undisputed need to obtain medical evidence in the course of the impugned proceedings cannot explain their overall length which was – respectively – **from about 3 to about 7 months**[239].
- In *Moiseyev* case, the Court considered the periods of appeal proceedings (respectively, **71, 63 and approximately 50 days**) being excessively long and falling short of the "*speediness*" requirement of Article 5 § 4, especially taking into account that their entire duration appeared to have been attributable to the authorities[240].
- In *Kadem* case, the Court considered a time-period of **seventeen days** in deciding on the lawfulness of the applicant's detention to be excessive[241].
- In *Mamedova* case, the length of appeal proceedings lasting, inter alia, **twenty-six days**, was found to be in breach of the "*speediness*" requirement[242].
- In *Jablonski* case, the Court admitted that the period of **43 days** may *prima facie* appear not to be excessively long. However, the court at only one instance made a decision in the applicant's case and at the time of that decision he had already spent in custody a period twice as long as the maximum term of pre-trial detention foreseen by Polish law. Furthermore, the Government did not plead before the Court that complex issues had been involved in the determination of the lawfulness of the applicant's detention (and it was not the case in the Court's view). Thus, the Court considered that the Polish

[233] ECrHR, *Hutchison Reid v. the United Kingdom*, *op. cit.*, § 79.
[234] ECrHR, *Shcherbina v. Russia*, *op. cit.*, §§ 68-69.
[235] ECrHR, *E. v. Norway*, *op. cit.*, §§ 64-67.
[236] ECrHR, *Karimov v. Russia*, app. n° 54219/08, 29 July 2010, §§ 124-128.
[237] ECrHR, *Shakurov v. Russia*, *op. cit.*, §§ 182-188.
[238] ECrHR, *Lebedev v. Russia*, *op. cit.*, § 102.
[239] ECrHR, *Iłowiecki v. Poland*, *op. cit.*, §§ 77-80.
[240] ECrHR, *Moiseyev v. Russia*, *op. cit.*, §§ 164-166.
[241] ECrHR, *Kadem v. Malta*, app. n° 55263/00, 9 January 2003, §§ 44-45.
[242] ECrHR, *Mamedova v. Russia*, app. n° 7064/05, 1 June 2006, § 96.

authorities failed to decide "*speedily*" the lawfulness of the applicant's continued detention.

- In *Frasik* case[243], the delay in the appeal proceedings was justified by the Polish Government by the fact that at about the same time other proceedings relating to the applicant's detention were pending. In the Court's view, this by no means absolved the Regional Court from handling the applicant's appeal in a manner compatible with Article 5 § 4 (all such proceedings are to run "speedily"). Therefore, if it is true that the period of **46 days** may appear *prima facie* not to be excessively long, that delay resulted in the applicant's appeal being of no legal or practical effect and cannot, therefore, be considered compatible with the requirement of "speediness" laid down in Article 5 § 4.
- In *Makdoudi*[244]case, the Court draws the attention on the fact that the applicant lodged a first request for release on 23 May 2014 and that no final decision on the lawfulness of his detention was taken before his release on 11 September 2014. The Court also notes that the last judicial decision on the merits of the release application handed down by the competent court on 13 August 2014 was favourable to the applicant and that that decision was overturned by the Court of Cassation on a ground that did not concern the lawfulness of the detention within the meaning of the Convention. Therefore, the Court recognized a violation of Article 5 § 4.
- In the *Strazimiri*[245]case, the Court finds that the period before the Supreme Court (**delay of more than three years**) cannot be considered compatible with the "*speediness*" requirement of Article 5 § 4, which requires particular expedition of the proceedings.
- In the *Mamedova* the Court found the **delays of 36, 29 and 26 days** to be incompatible with Article 5 § 4, stressing that the entire duration of the appeal proceedings was attributable to the authorities[246].

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The derogatory regime of the deprivation of liberty under article 5 does not allow confining the requirement of promptness or speediness to specific time-frames, but rather implies the duty of national authorities to act with "*due diligence*" – concept assessed in the light of the specific features of each case. Thus the reasonableness of the length of proceedings under Article 5 is measured against the background of the particular circumstances of each case, varying from a length of time which was bound to give rise to serious concern but eventually complied with the promptness requirement of article 5[247], to a connotation of immediacy[248].

Put differently, because the core purpose of Article 5 is to protect individuals from arbitrariness and the presumption under this provision is in favour of release, the promptness or speediness of the judicial controls are of paramount importance. The length of proceedings must be the shortest one possible, while delays must be kept to a minimum. Accordingly, the domestic authorities have to act with special diligence.

In the light of the above, the approach adopted by the European Court of Human Rights is without surprise a case by case assessment in respect of the promptness and speediness requirement. It has always confined itself from determining precise time-frames which member States would be bound by. Moreover, when State laws set up specific time-limits, the Court does not hesitate to go beyond such national regulations when carrying out its review.

In conclusion, three observations could be advanced:

- In the frame of its case by case approach, the Court has established, rather than time-limits, some thresholds (standards) that constitute the European *acquis* in the matter:
  - With regard to the requirement for lawful character of the deprivation of liberty (Article 5 § 1): *the duration of the detention* is a relevant factor in striking a balance between the importance in a democratic society of securing the immediate fulfilment of an obligation

[243] ECrHR, *Frasik v. Poland*, *op. cit.*, §§ 64–66.
[244] ECrHR, *Makdoudi v. Belgium*, app. n° 12848/15, 18 February 2020, §§ 71 and 73.
[245] ECrHR, *Strazimiri v. Albania*, *op.cit.,* § 129.
[246] ECrHR, *Mamedova v. Russia*, app. n° 7064/05, 23 October 2006, §96.
[247] ECrHR, *Chahal v. the United Kingdom* [GC], app. n° 22414/93, 15 November 1996, §§ 114 and 123.
[248] ECrHR, *Koster v. the Netherlands*, app. n° 12843/87, 28 November 1991, § 24. See the recent development of the European case-law relating to the notion of "*certain lapse of time*" of article 5 § 3, ECrHR, *Buzadji v. the Republic of Moldova*, [GC], *op. cit*., § 102.

provided by law and the importance of the right to liberty[249].The Court assesses two main parameters: the diligence with which State authorities have acted during the period of detention[250]; if the detention order is based on concrete grounds and if it determines *a specific time-limit*[251].

- With regard to the right to be informed promptly of the reasons of the deprivation of liberty (Article 5 § 2): the thresholds identified in the European case-law can be summarized as follows: *intervals of a few hours* (*a fortiori* the interval of twenty minutes[252]) cannot be regarded as falling outside the constraints of time imposed by the notion of promptness in Article 5 § 2 [253] ; conversely, in the absence of any exceptional circumstances, an interval of approximately 14 hours must be deemed incompatible with the promptness requirement of Article 5 § 2 of the Convention[254].
- With regard to the requirement for prompt and automatic judicial control of the lawfulness of the decision of detention (Article 5 § 3, first limb): the strict time constraint imposed by article 5 § 3 (first limb) for detention without judicial control is *a maximum of four days*[255], save in wholly exceptional circumstances[256]; however, periods shorter than four days can also breach the promptness requirement if there are no special difficulties or exceptional circumstances preventing the authorities from bringing the arrested person before a judge sooner[257]; likewise, periods longer than four days can be deemed justified in the light of the specific features of the case, for example under the derogation of Article 15 ECHR. It should be emphasized here that since 2018, the Court accepts that in the case of a person deprived of his or her liberty outside the context of criminal proceedings, a significantly shorter period might be required in order to be viewed as "*prompt*", namely it should be a matter of hours than days[258].
- With regard to the requirement for regular review of the lawfulness of continued detention (Article 5 § 3, second limb): as the question whether or not a period of detention is reasonable cannot be assessed in the abstract but must be assessed in each case according to its special features, *there is no fixed time-frame applicable to each case*[259]; it should be recalled that Article 5 § 3 of the Convention, however, cannot be seen as authorising pre-trial detention unconditionally provided that it lasts no longer than a certain period[260]. *Justification for any period of detention, no matter how* short*, must be convincingly demonstrated by the authorities*[261]. The existence of a strong suspicion of the involvement of a person in serious offences, while constituting a relevant factor,

[249] ECrHR, *Saadi v. the United Kingdom* [GC], *op. cit.*, § 70.
[250] ECrHR, *Mooren v. Germany*, [GC],*op. cit.*, § 80; *Khudoyorov v. Russia*, *op. cit.*, §§ 136-137.
[251] ECrHR, *Meloni v. Switzerland*, app. n° 61697/00, 10 July 2008, § 53.
[252] ECrHR, *Galuashvili v. Georgia*, *op. cit.*, § 39.
[253] ECrHR, *Fox, Campbell and Hartley v. the United Kingdom*, *op. cit*., § 42; *Murray v. the United Kingdom* [GC], *op. cit.*, § 78.
[254] ECrHR, *Zuyev v. Russia, op. cit.*, § 84.
[255] ECrHR, *Brogan and Others v. the United Kingdom*, *op. cit.*, § 60; *McKay v. the United Kingdom* [GC], *op. cit.,* § 47; *Ipek and others v. Turkey*, app. n° 17019/02 and 30070/02, 3 May 2009, § 36.
[256] ECrHR, *Năstase-Silivestru v. Romania*, app. n° 74785/01, 4 January 2008, § 32; *Rigopoulos v. Spain* (dec.), app. n° 37388/97, 12 January 1999: the applicant's detention on a vessel lasted for 16 days because the vessel was boarded on the high seas of the Atlantic Ocean at a considerable distance from Spanish territory and no less than sixteen days were necessary to reach the port of Las Palmas. Once he had arrived at Las Palmas, the applicant was transferred to Madrid by air and was brought before the judicial authority on the following day.
[257] ECrHR, *İpek and Others v. Turkey*, *op. cit.*, §§ 36 (The applicants were minors; they were incarcerated for more than three days in the absence of any safeguards - such as access to a lawyer – against possible arbitrary conduct by the State authorities; the only investigative measures taken by the police were limited to questioning them some two days after their arrest and a day before they were brought before a judge. In such circumstances, the Court, especially in view of the applicants' young age, found that none of the arguments put forward by the Government was sufficient to justify their detention in police custody for 3 days and 9 hours, even in the context of terrorist investigations.); *Kandzhov v. Bulgaria*, app. n° 68294/01, 6 February 2009, § 66 (The Court sees no special difficulties or exceptional circumstances which would have prevented the authorities from bringing the applicant before a judge much sooner (3 days and 23 hours));
[258] ECrHR, *S., V. and A v. Denmark*, [GC], *op. cit.*, §§ 133 and 134.
[259] ECrHR, *McKay v. the United Kingdom* [GC], *op. cit.*, § 45; *Bykov v. Russia* [GC], *op. cit*., §§ 61-64; *Idalov v. Russia* [GC], *op. cit.*, 22 May 2012, §§ 139-141; *Labita v. Italy* [GC], *op. cit.*, §§ 152-153; and *Kudła v. Poland* [GC], *op. cit.*, §§ 110-111; *Süveges v. Hungary*, app. n°50255/12, 2 May 2016, § 88.
[260] ECrHR, *Shishkov v. Bulgaria*, app. n° 38822/97, 9 April 2003, § 66.
[261] ECrHR, *Idalov v. Russia* [GC], *op. cit.*, § 140.

cannot alone justify a long period of pre-trial detention[262]. This dictum enabled a distinction to be drawn between a first phase, when the existence of reasonable suspicion is a sufficient ground for detention, and the phase coming after a "*certain lapse of time*", where reasonable suspicion alone no longer suffices and other "relevant and sufficient" reasons to detain the suspect are required. *Till 2016, there was no fixed time-frame applicable to the "certain lapse of time" and consisting in a fixed number of days, weeks, months or years, or into various periods depending on the seriousness of the offence*[263]. In *Buzadji* case, the Court made a step forward, concluding that the requirement on the judicial officer to give relevant and sufficient reasons for the detention – in addition to the persistence of reasonable suspicion – applies already at the time of the first decision ordering detention on remand, *i. e. promptly after the arrest*[264].

- With regard to the right to challenge the lawfulness of the detention through prompt judicial review (Article 5 § 4): In assessing the speedy character of the judicial control required by Article 5 § 4, if the complexity of medical – or other – issues involved in a determination of whether a person should be detained or released can be a factor which may be taken into account, that does not imply, however, that the complexity of a given dossier – even exceptional – absolves the national authorities from their essential obligation under article 5 § 4[265]. Besides, even in complex cases, there are factors which require the authorities to carry out a particularly speedy review, including the presumption of innocence in the case of pre-trial detention[266]. At this stage, the case by case approach of the Court does not allow identifying specific time-limits depending on the complexity of the cases.

- As to the nature of the case – *complex or simple*, this characteristic is one of the criteria of the Court's assessment concerning compliance with the speediness requirement. Insofar as it is one element among others, it appears impossible to carry out a general distinction between simple and complex cases in terms of length of judicial proceedings or maximum time-frames. The Court's conclusions vary considerably, depending on the specific circumstances of each case. Naturally, it has a narrower interpretation of the speediness requirement with regard to simple cases.
  With regard to *urgent* cases, no maximum time-limits are identifiable within the Court's case-law. Once again, in such cases, national authorities are expected to act with special diligence[267] and the reasonableness of the length of the detention depends on the overall circumstances of the particular case. However, *the length of the detention should not exceed that reasonably required for the purpose pursued*. This dictum has been developed especially in respect of extradition, deportation and immigration matters. Any deprivation of liberty under the second limb of Article 5 § 1 (f) will be justified, only for as long as deportation or extradition proceedings are in progress; if such proceedings are not prosecuted with due diligence, the detention will cease to be permissible under that provision[268]. This rational has been transposed by the Court in respect of Article 5 § 1 (f), first limb[269].

  It should be recalled that, in 2019, the Court made a step forward, recognising that "*in circumstances where minors have nevertheless been deprived of their liberty,* **particular expedition and diligence** *are required on the part of the domestic courts in reviewing the lawfulness of their detention* " and this at all levels, even before the Constitutional court[270].

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[262] ECrHR, *Stögmüller v. Austria*, *op. cit.*, § 4; ECrHR, *Labita v. Italy*, *op. cit.*, § 153; *Kudła v. Poland* [GC],*op. cit.*, § 111; *McKay v. the United Kingdom* [GC], *op. cit.*, § 44; *Bykov v. Russia* [GC], *op. cit.*, § 64; *Idalov v. Russia* [GC], app. n° 5826/03, 22 May 2012, § 140.
[263] ECrHR, *Magee and Others v. the United Kingdom*, app. n° 26289/12, 29062/12 and 29891/12, 12 May 2015, § 88.
[264] ECrHR, *Buzadji v. the Republic of Moldova*, [GC], *op. cit*., § 102.
[265] ECrHR, *Jablonski v. Poland*, app. n° 33492/96, 21 December 2000, §§ 91-94; *Baranowski v. Poland*, *op. cit.*, § 72; *Musiał v. Poland* [GC], app. n° 24557/94, 25 March 1999, § 47.
[266] ECrHR, *Frasik v. Poland*, app. n° 22933/02, 5 January 2010, § 63; *Jablonski v. Poland*, *op. cit.*, § 93.
[267] ECrHR, *Amie and Others v. Bulgaria*, *op. cit.*, § 72: "*If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible under that provision*".
[268] ECrHR, *Amie and Others v. Bulgaria*, *op. cit.*, § 72; *Chahal v. the United Kingdom* [GC], *op. cit.*, § 113; ECrHR, *A. and Others v. the United Kingdom*, [GC], *op. cit.*, § 164; *Raza v. Bulgaria*, *op. cit.*, § 72; *Mikolenko v. Estonia*, app. n° 10664/05, 8 October 2009, § 63.
[269] ECrHR, *Saadi v. the United Kingdom* [GC], *op. cit.,* § 73.
[270] ECrHR, *G.B. and others v. Turkey*, *op. cit.*, §§ 167 and 186.

It is noteworthy that the EU law in this matter is inspired by the same core principles: "*any detention shall be for as short a period as possible and only maintained as long as removal arrangements are in progress and executed with due diligence*"[271]. Nevertheless, the Directive 2008/115/EC goes further by defining maximum time-limits pertaining to the length of deportation proceedings: 6 months with the possibility of extension for another 12 months (article 15 §§ 5 and 6).

- Finally, it is possible to identify different degrees of speediness in the European case-law:
  - ***Promptly*** (Article 5 § 3, first limb):
    - the strict time constraint imposed by this requirement leaves little flexibility in interpretation[272].
    - the use in the French text of the word "aussitôt", with its constraining connotation of immediacy, confirms that the degree of flexibility attaching to the notion of "*promptness*" is limited, even if the attendant circumstances can never be ignored for the purposes of the assessment under paragraph 3[273];
    - the notion of "*promptly*" indicates greater urgency than that of "*speedily*"[274].
  - ***Speedily*** (Article 5 § 4)
    - the concept of "*speedily*" cannot be defined in the abstract; the matter must - as with the "*reasonable time*" stipulation in Article 5 § 3 and Article 6 § 1 - be determined in the light of the circumstances of each case[275];
    - the notion of "*speedily*" indicates a lesser urgency than that of "*promptly*" in Article 5 § 3[276]; nevertheless, where a decision to detain a person has been taken by a non-judicial authority rather than a court, the standard of "*speediness*" of judicial review under Article 5 § 4 comes closer to the standard of "*promptness*" under Article 5 § 3[277];
    - where one year per instance may be a rough rule of thumb in Article 6 § 1 cases, Article 5 § 4, concerning issues of liberty, requires particular expedition[278];
    - although the number of days taken by the relevant proceedings is obviously an important element, it is not necessarily in itself decisive for the question of whether a decision has been given with the requisite speed[279]; in assessing the speedy character required by Article 5 § 4, comparable factors may be taken into consideration as those which play a role with respect to the requirement of trial within a reasonable time under Article 5 § 3 and Article 6 § 1 of the Convention such as, the diligence shown by the authorities, any delay caused by the detained person and any other factors causing delay that do not engage the State's responsibility[280].
  - ***A reasonable time*** (Article 5 § 3, second limb) – the duration of the detention must not exceed a reasonable time[281]. The Court recalls regularly that the question whether or not a period of detention is reasonable cannot be assessed in the abstract but must be assessed in each case in the light of its special features. Accordingly, there is no fixed

[271] Directive 2008/115/EC of the European Parliament and of the Council, of 16 December 2008, on *common standards and procedures in Member States for returning illegally staying third-country nationals*, article 15 § 1.
[272] ECrHR, *McKay v. the United Kingdom*, [GC], *op. cit.*, § 33.
[273] ECrHR, *Koster v. the Netherlands*, app. n° 12843/87, 28 November 1991, § 24; *Brogan and Others v. the United Kingdom*, *op. cit.*, § 59.
[274] ECrHR, *E. v. Norway*, *op. cit.*, §§ 64-67.
[275] ECrHR, *Sanchez-Reisse v. Switzerland*,app. n° 9862/82, 21 October 1986, § 55; ECrHR, *Mooren v. Germany* [GC],*op. cit.*, § 106; *G.B. v. Switzerland*, app. n° 27426/95, 30 November 2000, § 33.
[276] ECrHR, *E. v. Norway*, *op. cit.*, § 64; *Brogan and Others v. the United Kingdom*, *op. cit.*, § 59.
[277] ECrHR, *Shcherbina v. Russia*, *op. cit.*, §§ 65-70.
[278] ECrHR, *Khudoyorov v. Russia*, *op. cit.*, § 193; *Hutchison Reid v. the United Kingdom*, *op. cit.*, § 79; *Panchenko v. Russia*, app. n° 45100/98, 8 February 2005, § 117; *Moiseyev v. Russia*, app. n° 62936/00, 9 October 2008, § 160.
[279] ECrHR, *Shakurov v. Russia*, *op. cit.*, § 180; *Merie v. the Netherlands* (dec.), app. n° 664/05, 20 September 2007.
[280] ECrHR, *Mooren v. Germany* [GC], *op. cit.*, § 106; *Kolompar v. Belgium*, app. n° 11613/85, 24 September 1992, §§ 42 and 46; ECrHR, *Shakurov v. Russia*, *op. cit.*, § 180.
[281] ECrHR, *Stögmüller v. Austria*, app. n° 1602/62, 10 November 1969, § 5; *Buzadji v. the Republic of Moldova*, [GC], *op. cit.*, § 89.

time-frame applicable to each case[282]. The Court examines if the national authorities displayed "*special diligence*" in the conduct of the proceedings[283].

- ***In a certain lapse of time*** (Article 5 § 3, second limb) – the expression has been recently construed by the Court as implying the duty of the judicial officer to give relevant and sufficient reasons for the detention – in addition to the persistence of reasonable suspicion - *if not immediately then only a few days* after the arrest, namely when a judge examines for the first time the necessity of placing the suspect in pre-trial detention[284].

[282] ECrHR, *McKay v. the United Kingdom* [GC], *op. cit.*, § 45; *Bykov v. Russia* [GC], *op. cit*., §§ 61-64; *Idalov v. Russia* [GC], *op. cit.*, 22 May 2012, §§ 139-141; *Labita v. Italy* [GC], *op. cit.*, §§ 152-153; and *Kudła v. Poland* [GC], *op. cit.*, §§ 110-111; *Süveges v. Hungary*, app. n° 50255/12, 2 May 2016, § 88.

[283] ECrHR, *Idalov v. Russia* [GC], *op. cit.*, § 140; *Labita v. Italy*, *op. cit.*, § 152; *Contrada v. Italy*, app. n° 92/1997/876/1088, 24 August 1998, § 54.

[284] ECrHR, *Buzadji v. the Republic of Moldova*, [GC], *op. cit*., § 101. In the Court's view, such an approach, would not only simplify and bring more clarity and certainty into the Convention case-law in this area, but would also enhance the protection against detention beyond a reasonable time.