RIGHTS OF THE DETAINED PERSONS WHILE REVIEWING LAWFULNESS OF DETENTION

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Review of the lawfulness of the pre-trial detention

It is a fundamental requirement under Article 5(3) of the European Convention on Human Rights that any use of pre-trial detention must at all times – i.e., both at its inception and for as long as it is continued - be lawful. Compliance with this requirement is ultimately dependent upon effective judicial control over any instance of its use.

The exercise of such control is primarily a matter for the courts. However, it should be kept in mind that prosecutors and lawyers for the detained person also play a crucial role in the discharge of this judicial responsibility as it is through their submissions that the courts should gain the relevant information and the identification of the relevant issues that will need to be examined.

It is in the process of judicial control that the merits of arguments for the imposition (or continuation) of pre-trial detention must be put to the test. Judges need to be well-prepared for this process and scrutinise carefully the submissions that they receive - reviewing them for possible weaknesses - so that they can determine how to respond to them in a manner that is consistent with the requirements of the European Convention.

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In particular, judges must be alert to the possibility that prosecutors arguing for the imposition or continuation of pre-trial detention have not prepared their cases sufficiently well or have not given insufficient regard to the standards elaborated by the European Court in applying Article 5 of the European Convention.

Ensuring the possibility of judicial control under Article 5(3) is the responsibility of the prosecutor whereas that control pursuant to Article 5(4) is a right exercisable by or on behalf of the person deprived of his or her liberty.

While the institution of proceedings for the purpose of Article 5(3) may sometimes just have the need for the imposition or continuation of pre-trial detention as their focus, in many instances they may also be required to consider the issue of whether the use of pre-trial detention is even lawful, as would be the case in any separate challenge brought on behalf of a detained person pursuant to the right under Article 5(4).

In both instances, however, it will be the judge who has the responsibility for ensuring that the requirements of the European Convention are fulfilled.

What then does review of lawfulness entail?

Certainly, the nature of the review must be broader in scope than that considering whether the imposition or continuation of pre-trial detention is needed.

Lawfulness is in the first place dependent upon there being a formal legal basis for the use of pre-trial detention. In most cases, this should not be problematic. However, there is always a need to be sure that there actually is a legal provision that can be relied upon for this purpose.

Thus, in Boicenco v. Moldova, no. 41088/05, 11 July 2006, the European Court found that none of the provisions in the Criminal Procedure Code being relied upon actually authorised the pre-trial detention imposed in that case.

Moreover, even where one legal provision might appear applicable, there may be other ones that make reliance on it in a given case unjustified.

For example, in Gusinsky v. Russia, no. 70276/01, 19 May 2004, the applicant came within the scope of an amnesty, which meant that the proceedings against him should have been stopped. However, this did not occur and he was, in fact, detained. The European Court considered that it would be irrational to interpret the Amnesty Act as permitting pre-trial detention in respect of persons against whom proceedings must be stopped and so the applicant's pre-trial detention had to be regarded as being in breach of national law.

Moreover, it must be kept in mind that "lawfulness" for this purpose is to be understood in the sense elaborated by the European Court, going beyond the mere formal applicability of a legislative provision.

Thus, as the European Court has emphasised on many occasions detained persons are entitled to a review bearing upon the procedural and substantive conditions which are essential for the "lawfulness", in the sense of the Convention, of their deprivation of liberty.

This means that the competent court has to examine not only compliance with the procedural requirements set out in domestic law but also the reasonableness of the suspicion grounding the arrest and the legitimacy of the purpose pursued by the arrest and the ensuing detention.

As a result, there will then be a need to address the relevance of particular facts to any issues affecting the lawfulness of the deprivation of liberty of the person concerned.

For example, in Nikolova v. Bulgaria [GC], no. 31195/95, 25 March 1999, the European Court found a violation of Article 5(4) where the Bulgarian court determining an appeal against the use of pre-trial detention did not consider a number of concrete facts which put in doubt the existence of conditions essential for the lawfulness of the applicant's detention, namely, that she had not attempted to abscond or obstruct the investigation, that she had a family and a stable way of life and the evidence against her was weak. Instead, the Bulgarian court had simply considered whether she had been charged with a "serious wilful crime" within the meaning of the Criminal Code and whether her medical condition required her release.

Thus, the Bulgarian court, by not taking submissions that were not implausible or frivolous into account, had failed to provide the judicial review of the scope and nature required by Article 5(4).

Furthermore, addressing the lawfulness of pre-trial detention can even require constitutional arguments to be considered, as well as those relating to rights under the European Convention.

This is well-illustrated by the European Court's endorsement in Mehmet Hasan Altan v. Turkey, no. 13237/17, 20 March 2018 of the Constitutional Court's ruling that, notwithstanding the existence of an emergency situation, the guarantees of the right to liberty and security would be meaningless if it were accepted that people could be placed in pre-trial detention without any strong evidence that they had committed an offence.

In all cases, there must always be real substance to the review of arguments about the lawfulness of a person's pre-trial detention. This will not be regarded as being satisfied where there are technical limitations on the ability of the courts to consider a particular challenge to the lawfulness of a person's detention, as can be seen in a case such as Piruzyan v. Armenia, no. 33376/07, 26 June 2012.

In that case, the appeal court had decided not to examine the applicant's appeal against his detention because the investigation had been completed and the case therefore fell outside the scope of judicial control of the pre-trial stage of the proceedings. However, the European Court emphasised that Article 5(4) enshrined the right of access to a court, which can only be subject to reasonable limitations that do not impair its very essence.

In its view, a denial of judicial review of the applicant's detention on the sole ground that the criminal case was no longer considered to be in its pre-trial stage had to be regarded as an unjustified restriction on his right to take proceedings under Article 5(4) and so it concluded that there had been a violation of that provision.

There will also be no genuine review where submissions are simply not taken into account, as was the case in Nikolova v. Bulgaria.

Furthermore, the review will also be considered inadequate for the purpose of Article 5(4) where courts limit themselves to copying the prosecution's written submissions and using short, vague and stereotyped formulae for rejecting the applicant's complaints as unsubstantiated.

As the European Court has stated in many cases – most recently in Mirgadirov v. Azerbaijan, no. 62775/14, 17 September 2020 - the domestic courts were limiting their role to one of mere automatic endorsement of the prosecution's applications. They could not,

therefore, be considered to have conducted a genuine review of the "lawfulness" of the applicant's detention since there had been a consistent failure by the domestic courts to verify the reasonableness of the suspicion against the applicant.

Finally, the review must also always address all the periods of detention that are being challenged.

For example, as found recently in G.B. and Others v. Turkey, no. 4633/15, 17 October 2019, the European Court observed that, although the Constitutional Court had found that the unlawfulness of the applicants' detention had already been established by the Gaziantep Magistrates' Court and that compensation would therefore provide them with an effective remedy, it had failed to note that the magistrates' court decision concerned solely the unlawfulness of the detention order delivered by the Gaziantep governor's office, and did not concern the applicants' previous detention in Istanbul.

This effectively meant that the question of the lawfulness of the applicants' detention during their initial three months in Istanbul was never subject to an effective judicial review as required under Article 5(4) of the Convention.

Speediness

The European Court has repeatedly emphasised that the “effectiveness” of judicial control in matters of detention has a time element; i.e., delayed judicial review of detention will not be effective.

This is reflected in the requirement in Article 5(4) that a challenge to the lawfulness of any deprivation of liberty in proceedings instituted by the person detained must be decided speedily.

Time runs for this purpose from when the proceedings are instituted and ends when the final decision as to the person’s pre-trial detention is made and published.

When determining whether an application for release on the basis that a person’s pre-trial detention is unlawful was decided “speedily”, the European Court applies the same approach as with the reasonable time guarantees of Articles 5(3) and 6(1), i.e., it must be determined in the light of the circumstances of the individual case.

Thus, what is to be taken into account is the diligence shown by the authorities, the complexity of the proceedings, what is at stake for the applicant, the delay attributable to the applicant, any factors causing delay for which the State cannot be held responsible and the fact that a trial is pending.

However, it is clear from the case law of the European Court that the period concerned should generally last no more than a matter of days if it is to be considered “speedy”.

For example, in Rehbock v. Slovenia, no. 29462/95, 28 November 2000, the applicant's first application for release was dismissed after twenty-three days after its submission and a further application was dismissed twenty-three days later. The European Court considered that nether application for release introduced by the applicant had been examined "speedily" as required by Article 5 § 4.

Although the assessment of the length of the period can take account of any delays caused by the detained person, these need to be demonstrated and cannot just be asserted.

In Mamedova v. Russia, no. 7064/05, 1 June 2006, the European Court found a violation of Article 5(4) where the domestic courts took thirty-six, twenty-six, thirty-six, and twenty-nine days to examine the applicant's appeals against detention orders and there was nothing to suggest that the applicant, having lodged the appeals, caused delays in their examination.

In the Court's view none of these periods could be considered compatible with the "speediness" requirement of Article 5(4), especially taking into account that their entire duration was attributable to the authorities.

The European Court is prepared to accept that a longer period might be consistent with the speediness requirements such as where the judicial system is facing exceptional difficulties such as those resulting from the coup attempt.

Thus, in Baş v. Turkey, no. 66448/17, 3 March 2020 it considered that measures implemented in the aftermath of the that attempt which meant that the elapse of a period of eight months and eighteen days before persons appeared before the judges to decide on their detention could reasonably be said to have been strictly required for the protection of public safety. However, such an indulgence is not unlimited and it has also emphasised that the

reasoning that could justify such a delay inevitably becomes less relevant with the passage of time, in view of the changing circumstances.

As a result, while 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 gradually became less forceful and relevant as the public emergency threatening the life of the nation, while still persisting, declined in intensity. This meant that the e exigency criterion must therefore be applied more stringently.

Thus, while it might still not have been possible to hold a hearing during the automatic 30-day review of detention and of applications for release, this did not preclude the possibility of holding any hearing. In its view the fact that the applicant did not appear before a court for approximately one year and two months could not reasonably be regarded as having been strictly required for the preservation of public safety.

The duty of expedition also applies to the hearing of any appeals.

Nonetheless, the European Court is prepared to tolerate longer periods of review in proceedings before a second-instance court where the original detention order or subsequent decisions on continued detention were given by a court (that is to say, 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.

For example, in the case of Khodorkovskiy v. Russia, no. 5829/04, 31 May 2011, the European Court considered appeals against two different detention orders. As regards the first, it found that the Government was responsible for delays of five and sixteen days respectively. However, it considered that as the original detention order was imposed by a

judicial authority such delays did not amount to a breach of the “speediness” requirement of Article 5(4).

On the other hand, in the case of the second detention order, the delay had amounted to one month and nine days. This period was said to be explicable only by the need to obtain written submissions from the prosecution. In the European Court’s view, the delay involved in the examination of the appeal against this detention order was excessive and thus in violation of Article 5(4).

More recently, it was made clear by the Grand Chamber in Ilnseher v. Germany [GC], no. 10211/11, 4 December 2018 that delays in determining an appeal that exceed three to four weeks are, where they are ones for which the authorities must be held responsible, liable to raise an issue under the speediness requirement unless a longer period of review was exceptionally justified in the circumstances of the case.

An example of such a circumstance can be seen in S.T.S. v. Netherlands, no. 277/05, 7 June 2011, in which an appeal court took sixty-one days to render its decision on account of the need to gather information from a variety of sources and allow various parties in addition to the applicant to participate effectively in the proceedings.

However, much longer periods awaiting the determination of an appeal will almost certainly be regarded as unacceptable.

A particularly serious example of excessive delay can be seen in Strazmiri v. Albania, no. 34602/16, 21 January 2020, a delay of more than three years for appeal proceedings to be determined before the Supreme Court which was entirely attributable to the authorities could not be considered compatible with the “speediness” requirement of Article 5(4).

Even the somewhat shorter period of 294 days for a ruling by the Supreme Court in the S.T.S. case was also considered to be in violation of Article 5(4). This was not merely because of its length but also because the lack of expedition had deprived the proceedings of their effectiveness, since it had led the Supreme Court to declare the applicant's appeal on points of law inadmissible for lack of interest on account of the Court of Appeal's six-month authorisation for his custodial placement having expired.

The considerations leading the European Court to tolerate somewhat longer periods of delay in appellate proceedings are seen as applicable a fortiori to complaints under Article 5(4) concerning proceedings before constitutional courts which were separate from proceedings before ordinary courts. It has thus emphasised that the special features of those proceedings – not acting as a fourth-instance body but determining the compliance of detention decisions with the Constitution and existing concurrently with the continued availability of review in the ordinary courts - must be taken into account in assessing compliance with the "speediness" requirement.

This was indeed the position in the Ilnseher case, in which the European Court concluded that the speediness requirement was met in respect of proceedings before the constitutional court that had lasted for eight months and twenty-three days. It reached this conclusion after having regard to the complexity of the proceedings, the conduct of the proceedings, including the adoption of a reasoned interim decision on the continuation of the applicant's detention and the possibility of the applicant obtaining a fresh judicial review of his detention by the ordinary courts while the proceedings at issue were still pending before the constitutional court.

Nonetheless, as the European Court has indicated most recently in Kavala v. Turkey, no. 28749/18, 10 December 2019, the possibility of some indulgence for a constitutional court does not exempt it the obligation under Article 5(4) to decide speedily on the lawfulness of the applicant's detention in order to guarantee that the right to a speedy decision remains

practical and effective, especially as the exhaustion of this remedy unlocks the possibility of lodging an application with the European Court. In view of that possibility, the European Court saw the time taken by the constitutional court in that case to examine individual appeals to be intrinsically linked to the right of individual petition within the meaning of Article 34 of the Convention and thus the remedy that that affords.

In determining whether the requirement of speediness has been met, allowance will be made for the complexity of constitutional issues – as seen in the Ilnseher case. In particular, as in Kavala and a number of other Turkish cases allowance should also be made so as to enable a constitutional court to take a comprehensive view of them when there is a multiplicity of pending appeals, as well as of the deployment of additional resources to deal with the resulting backlog.

However, while the European Court did not find a violation for a delay of one year and sixteen days in Akgün v. Turkey (dec.), no. 19699/18, 2 April 2019 and one year, four months and three days Şahin Alpay v. Turkey, no. 16538/17, 20 March 2018, which were amongst the first of a series of cases raising new and complicated issues concerning the right to liberty and security and freedom of expression following the attempted military coup, it did consider in Kavala that a period of one year, five months and twenty-nine days was in violation of Article 5(4).

In so doing it took account of the fact that the applicant had been held for sixteen months without being charged, the fact that the Constitutional Court had been inactive for about ten months despite the applicant's request to obtain priority processing of his case and that the Constitutional Court delivered its judgment eleven months after the state of emergency had been lifted. In consequence, the European Court considered that the overall duration in question cannot in any way be justified by the special circumstances of the state of emergency.

Presence of the defendant at the hearing and assistance of lawyer

There is no absolute requirement for a defendant to be present at proceedings where her/his pre-trial detention is being challenged. Rather, the European Court has established that either she/he should be heard in person or through some form of representation.

Nonetheless, there are many cases in which it has considered that, in their particular circumstances, the attendance of the defendant was required even though she/he may have been legally represented.

Thus, such attendance has been considered necessary in cases such as Grauzinis v. Lithuania, no. 37975/97, 10 October 2000 and Mamedova v. Russia, no. 7064/05, 1 June 2006 in hearings concerned with the continuation of pre-trial detention.

The European Court emphasised the nature of what was at stake for the applicants in those cases, namely, their liberty, but it also pointed to the lapse of time from the initial decision and the re-assessment thus needed for the detention to be continued. In such circumstances, the presence of the defendants was necessary in order that they could give satisfactory information and instructions to their lawyer.

However, the absence of a defendant from one review was not considered in Jankauskas v. Lithuania (dec.), no. 59304/00, 16 December 2003 to be in violation of Article 5(4). In the European Court's view, the defendant's absence, while unfortunate – a request to attend not having been forwarded to the court concerned – as it had no significant consequences on his ability to contest the lawfulness of his detention in accordance with the requirements of Article 5(4).

It reached this conclusion on the basis that: personal presence at the hearing was not mandatory under the domestic criminal procedure; the defendant had brought before and personally heard by the judge who had extended the term of his detention three weeks before the hearing from which he was absent; the earlier detention order had been made on the same grounds as the previous ones and there was no evidence that in his appeal against the above order the defendant had presented any factual arguments requiring his personal presence at the hearing; and his lawyer had been present at the hearing from which he had been absent.

Nonetheless, in cases where a defendant was not present, the European Court will be particularly concerned to see whether the domestic court had even considered whether her/his personal participation was required for the effective review of the lawfulness of her/his continued detention.

No such consideration of the need for the defendant's participation was seen in Idalov v. Russia [GC], no. 5826/03, 22 May 2012. As a result, the absence of this – together with the absence of the defendant from five separate reviews of the detention – was the basis on which the European Court concluded that there had been a violation of Article 5(4).

It should also be noted that personal presence will also be seen as necessary in proceedings that are the mirror image of a challenge to the lawfulness of pre-trial detention, namely, where the prosecution appeal against the release of the defendant on bail or other conditions.

As the European Court made clear in Allen v. United Kingdom, no. 18837/06, 30 March 2010, in proceedings where the court could then order the pre-trial detention of the defendant where the prosecution's appeal is granted, the defend should be afforded the same guarantees as would have been enjoyed when the initial decision was taken, namely, a hearing in her/his presence.

It is also worth noting that in that case the European Court was mindful of the inherent logistical difficulties involved in ensuring a detainee's personal attendance at a court hearing. However, this would not be an excuse for not allowing her/him to attend the hearing in the absence of any evidence of any compelling reasons in the present case which might have rendered her/his presence undesirable or impracticable.

Indeed, in that case, the contrary was the position as the defendant's representatives had made arrangements for her to be present at the court building on the day of the prosecution appeal hearing, and that no inconvenience would have been caused in allowing her to attend.

Nonetheless, even where there might be reasons why a defendant's presence at an ordinary court could be undesirable or impracticable – such as for considerations of public order and safety – it should be recalled that the European Court has made it clear in Reinprecht v. Austria, no. 67175/01, 15 November 2005 that requiring a hearing for the review of the lawfulness of pre-trial detention does not as a general rule require such a hearing to be public, even if it accepted that there might be circumstances in which that would be necessary.

Indeed, the European Court saw some force in the Government's argument that the requirement of public hearings could have negative effects on speediness. This was because either granting the public effective access to hearings held in prison or transferring detainees to court buildings for the purpose of public hearings could require arrangements running counter to the requirement of speediness, which is seen as having greater importance than a public hearing in proceedings for the purpose of Article 5(4).

There should, therefore, be no obstacle to allowing the presence of a defendant at the hearing where this is considered necessary.

It should be added that, although the European Court has yet to deal with a case as to whether attendance must be physical or could be virtual, it has accepted in Marcello Viola v. Italy, 45106/04, 5 October 2006 that a defendant's participation in a trial through videoconference was not incompatible with the right to fair trial under Article 6 of the European Convention.

The crucial considerations for this purpose will be the existence of difficulties of seeing and hearing and the defendant's ability to communicate out of earshot with her/his lawyer during the proceedings, as well as there being no other factor that would put the defendant at a substantial disadvantage as compared with the other parties to the proceedings. There is no reason to imagine that it would not reach a similar conclusion in respect of the conduct of Article 5(4) proceedings through videoconference.

Legal assistance for a defendant in connection with Article 5(4) proceedings will also be necessary in almost all instances.

Indeed, in Chahal v. United Kingdom [GC}, no. 22414/93, 15 November 1996, the European Court considered that the absence of entitlement to legal representation was a factor in concluding that the body reviewing the applicant's detention could not be regarded as a court for the purpose of compliance with Article 5(4).

Moreover, in Öcalan v. Turkey [GC], no. 46221/99, 12 May 2005, the European Court considered that there could be no effective recourse to the remedy required by Article 5(4) in circumstances that included the absence of legal training.

Nonetheless, in Lebedev v. Russia, no. 4493/04, 25 October 2007, it was accepted – having regard to the consideration of speediness - that a judge may decide not to wait until a

detainee avails himself of legal assistance, and the authorities are not obliged to provide her/him with free legal aid in the context of the detention proceedings.

However, this approach will not always be regarded as appropriate and account must be taken of the specific features of the individual case. Indeed, it was not followed in the Lebedev case itself.

This was because, firstly, the detention hearing took place on the day after the applicant's arrest and on the same day as he was informed about the charges against him, when he was least prepared to counter the arguments of the prosecution.

Secondly, the applicant had been brought before the judge almost directly from the hospital where he had been admitted in connection with his chronic diseases. Even if he had been able to participate personally in the detention proceedings, he was not in his normal state of health, and some form of legal representation was therefore at least desirable, especially given that the representatives of the prosecution were present in the courtroom.

Thirdly, the applicant had already engaged lawyers who were informed by the investigator about the detention hearing and were prepared to participate in it.

Fourthly, it appeared that the court was in principle prepared to hear the lawyers and waited for them for some time.

Fifthly, the exclusion of the lawyers on the basis the hearing had already started and was closed for those who did not participate in it was irrational as the exclusion concerned the public and so did not as such apply to the applicant's lawyers.

Finally, there was no other reason why the presence of the lawyers at this stage could have been contrary to the interests of justice. Although the late arrival of the lawyers might have made it acceptable to start the hearing without waiting for them. However, there was no reason to exclude them from the proceedings when they arrived even if this could have prolonged the hearing.

Thus, the importance attached to speediness may in very limited circumstances preclude legal assistance in proceedings to review the lawfulness of pre-trial detention. However, this is not going to be the situation in most cases where a person is doing so. As the European Court has often emphasised, the right to receive legal assistance is implicit in the very notion of an adversarial procedure.

Wherever there are no circumstances precluding legal assistance, access to it should not therefore be denied.

Moreover, that legal assistance must be available in conditions that enable it to be effective.

Thus, there should not be arrangements that unjustifiably preclude confidential meetings between the detained person and her/his lawyer. No such justification existed in Istratii and Others v. Moldova, no. 8721/05, 27 March 2007, a case in which the applicants had no criminal record and were being prosecuted for non-violent offences. As a result, the security reasons invoked were not convincing.

In any event, as the European Court underlined, in exceptional circumstances where supervision of lawyer-client meetings would be justified, visual supervision of those meetings would be sufficient for such purposes.

The crucial point about this case – and indeed that of Lebedev – was that the essential issue before the European Court was not the positive duty of the State to secure legal assistance to a detainee, but the negative obligation of the State not to hinder effective assistance from lawyers in the context of detention proceedings.

Finally, those providing legal assistance to a detained person should not only be able to make submissions on her/his behalf, but they should also be able to respond to all the submissions made by the prosecutor.

This was not the case, for example, in Wloch v. Poland, no. 27785/95, 19 October 2000, in which after being allowed to address the court, the detainee's representatives were ordered to leave the courtroom. Thus, it was open to the prosecutor, who remained, to make in their absence further submissions in support of the detention order, while neither the detainee nor his lawyers had any opportunity to become acquainted with them, to formulate any objections or to comment thereon. Such a situation clearly renders meaningless the legal assistance that was provided.