| Chapter 7 |

Right to Liberty and Security

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ABSTRACT

The discussion of Article 5 of the ECHR emphasises the ECtHR's autonomous interpretation of the Convention. The latter, on the other hand, serves as a point of reference for the national legislator at both the lawmaking and law-in-action levels. It is, moreover, a point of ex post control, i.e., a subsidiary control, which the Strasbourg Court exercises in the context of a concrete application to examine in concreto whether there has been a violation of the Convention provisions.

Art. 5, refers to the various forms of application of detention measures under national law and, therefore, extends beyond criminal proceedings. However, some parts of the articles analysed refer exclusively to criminal procedural coercive measures. From a national regulatory perspective, the most problematic is the mosaic of isolative measures unrelated to criminal proceedings. The ratio legis of their applicability has to be linked to the issue of security in the broadest sense: of society, of persons or even of the state.

Moreover, Article 5 defines lawful detention and arrest; by highlighting in detail the issue of procedural guarantees, it addresses the correctness aspect. In the background of the use of coercive, isolating measures, the general guarantees of fairness flowing from Article 6 ECHR also remain.

The Strasbourg Court supports the primacy of national law, acting as a subsidiary authority and setting boundaries after national procedures are exhausted, particularly concerning non-criminal coercive measures. Its case law highlights concerns about the misuse of detention and arrest, focusing on arbitrariness and the importance of quality law to prevent negative instrumentalisation.

KEYWORDS

right to security and liberty, the ECHR, coercive measures, fair trail, instrumentalization

1. Article 5 ECHR – Right to Liberty and Security – Acknowledgement

Before we delve into a detailed analysis of the specific elements related to the right to liberty and security, it is essential to provide some foundational observations. First, it is crucial to highlight that Article 5 of the European Convention on Human Rights (ECHR) offers robust protection against unlawful detention. This provision safeguards individuals from arbitrary infringements on their personal liberty and security, ensuring that everyone has the right to be free from unjustified interference in their lives.

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Consequently, Article 5 of the ECHR operates with the concepts of "liberty" and the "right to security of person".[1] The meaning of the two guarantees and their relationship may be unclear for several reasons. One reason is that, after affirming the importance of liberty and personal security in Article 5(1), the remainder of the provision focuses solely on freedom. However, it is accepted in scholarly literature that there is a close connection between these concepts. Even so, the terms "freedom" and "security" must only be read together. On the one hand, freedom can only be restricted in strictly defined situations, including those related to the security of the individual; while on the other hand, the security of the person deprived of his or her liberty must be safeguarded in a sensitive manner, as he or she then becomes a vulnerable person. It is also recognised that both terms refer to physical freedom and security. A combined reading of the two concepts amounts to the fact that the essence of this right is to counteract the arbitrariness of state power against the individual. Thus, the right to personal security should be read as a guarantee that no one will be deprived of his or her liberty arbitrarily as it endangers personal security – that is, without an adequate legal foundation and a decision by a competent authority within the framework of a legally prescribed procedure that meets the standards set out in Article 5. It is essential to note that the right to liberty and security is of the utmost significance in a "democratic society".[2] The Court concludes that the unacknowledged detention of an individual completely negates the essential guarantees outlined in Article 5 of the Convention, revealing a serious violation of that provision.[3]

Although the focus of this analysis is on the ECHR regulations, it is worth pointing out that the guarantees of respect for the "right to liberty" and the "right to security of person" are now firmly established at the European level under Article 6 of the Charter of Fundamental Rights of the European Union, which states that

> 'Everyone has the right to liberty and security of person. The enshrinement of the protection of liberty and security in the Charter of Fundamental Rights will, therefore, imply the incorporation of the jurisprudential standard developed against the background of Article 5 ECHR into EU law'.[4]

Furthermore, it is generally recognised that personal liberty and security of the individual are components of natural rights, i.e. inherent and inalienable human rights. They stem from the idea of protecting the integrity and dignity of human beings. Combined with the principle of equality, human freedom is not an ancient civilisational achievement, as it is known throughout history that it has not been guaranteed to all humans. Accordingly, in the classical view of the right to liberty, the State's

1 Powell, 2007.
2 *Medvedyev and Others v. France* [GC], 2010, § 76; *Ladent v. Poland*, 2008, § 45.
3 *El-Masri v. the former Yugoslav Republic of Macedonia* [GC], 2012, § 233; *Al Nashiri v. Poland*, 2014, § 529; *Belozorov v. Russia and Ukraine*, 2015, § 113.
4 Guild and Lesieur, 1998.

contribution consists of creating guarantees to protect the individual against arbitrary action by its authorities that may result in an unlawful deprivation of liberty.[5]

Article 5 ECHR operates with the concept of "lawful" detention. As the case law of the ECtHR shows, it is understood in a multifaceted way. It also consists of pure legality, justiciability and correctness.

It is recognised that decisions to deprive an individual of his or her liberty must be taken based on the applicable legal provisions ("legality aspect"). In the context of a restriction of the right to liberty, the question of the legitimacy and regularity of the measures applied is also relevant. Justiciability implies that, in the specific factual situation, the measure applied was justified and the only one possible, that its application was necessary as well as indispensable, and thus that the application of a non-custodial measure was considered insufficient (proportionality aspect). Correctness, on the other hand, is a category that also refers to the set of actions accompanying the application of a coercive measure detrimental to an individual's freedom, which endangers his or her personal security.[6] Correctness means that the application and choice of a given measure were legal (there was a legal basis for its application), the measure was proportionate, and its execution (implementation) took place in a guarantee-oriented manner.[7]

The question of the legality of measures restricting the right to liberty is also linked to the risk of instrumentalisation. For the sake of clarity of the argument, let us point out that two major strands of instrumentalisation may be distinguished. First, the instrumental conception of law consists of treating the law as a tool or a means to achieve goals external to the essence of the law.[8] This understanding creates the notion of instrumentalisation in the broad sense and implies that law always has an instrumental character, as it serves to achieve or realise goals that can be understood as policy values. The instrumental conception of law is a rationalisation of the instrumental exercise of the law ("use of the law") by the legislator, the bodies applying the law, or the addressees of the law, which occurs in various guises. One shall point to the narrow understanding of instrumentalisation[9], according to which the law serves as a tool rather than a mechanism for realising policy goals.[10] For our consideration, when clarifying the notion of instrumentalisation, it must be added that the acts of instrumentalisation might be positive, indifferent or negative, with the latter meaning that the goals of an act are mutually reversed to the goals of the law itself.

Regardless of the many specific approaches to instrumentalization,[11] for the purpose of this study, we adopt the narrow sense of instrumentalisation, which

5 See cases: *Askoy v Turkey* 1996; *McKay v United Kingdom* 2006; *Engel v The Netherlands* 1976; *Nikolaishili v Georgia* 2009.
6 About the perception of correctness, see Janusz-Pohl and Wawrzyńczak, 2024, pp. 179–202.
7 Ibid., p. 180.
8 Wronkowska, 2017, pp. 107–112.
9 Gromski, 2018, pp. 95–106.
10 Cyuńczyk, 2019, pp. 40–50; Gribnau, 2013, pp. 89–109.
11 Atiyah and Summers, 1987, p. 404; Gillaerts, 2019, pp. 27–43; Summers, 1982, p. 120 et seq.

describes it as 'a tool for realising policy goals'. However, as mentioned before, it may take a positive, indifferent, or negative character. Due to the scope of this work, it is important to highlight the risks associated with acts of negative instrumentalisation of deprivation of liberty measures.

One may propose a three-fold understanding of the negative instrumentalisation phenomenon, corresponding to the specific regime of criminal law.[12] Consequently, instrumentalisation is a concept that encompasses both the abuse and the violation of law. Consequently, this concept is broader than the formula of the abuse of law, even in the widest sense. At the same time, the discussion on the legislative gaps connected with the use of coercive measures covers negative instrumentalisation. It must be said that the Article 5 ECHR, creating the prism of control by the ECtHR of deprivation of liberty by national enforcement authorities, shall be perceived as a unique tool for detecting negative instrumentalisation.

In this study, instrumentalisation is understood as situations in which (a) a given actor makes use of the powers granted to them, but the purpose of their action does not correspond to the aim designed by the legislator (abuse of law *sensu stricto*); (b) a given actor goes beyond the powers granted to them by the legislator with their action/inaction, but does not directly violate an existing legal norm, acts *ultra vires* (abuse of law *sensu largo*); and c) the entity concerned exceeds the existing legal norms with its action/inaction and violates a specific legal norm in extreme cases, by committing a criminal act (violation of the law).[13]

In the context of unlawful detention, abuse of law *sensu stricto* may refer to the issue of justiciability of detention; meanwhile, abuse of law *sensu largo* may include the issue of the correctness of detention and, due to the nature of coercive detention, also fall under the concept of illegality. In contrast, violation of law refers directly to the pure illegality of the act in question.

2. The Content of the Right

When starting the examination of Article 5, several points should be noted. The first paragraph of Article 5 establishes the right to liberty and security of the person. It absolutises this right, so to speak, in order to indicate in the second sentence that the only exceptions to it can be related to the lawful use of deprivation of liberty, which are further specified in subsequent paragraphs a–f. Furthermore, each exception under which a deprivation of liberty shall be lawfully applied may include detention, arrest, conviction, and other custodial measures.[14] As we know, the Court has already made a conclusive statement on how to interpret the term "detention under Article

12 Janusz-Pohl and Wawrzyńczak, 2024, p. 180.
13 Ibid., p. 109.
14 Patel, 2005, pp. 303–310.

5," opting for a broad interpretation.[15] The European Court has developed a method for determining whether there has been a deprivation of liberty within the terms of Article 5.

The leading interpretation regarding deprivation of liberty was established in the case of Guzzardi v. Italy. In this case, the applicant, who was suspected of being affiliated with the Mafia, was placed under special supervision by the Italian courts. This supervision required him to reside in a 2.5-km^2 area on a small island, Asinara, located off the coast of Sardinia. The order included various measures, such as a curfew and restrictions on social interaction with the local population. The key question before the European Court was whether this supervision regime constituted a deprivation of liberty under Article 5(1) of the ECHR. The Court concluded that the residence requirement did indeed amount to a deprivation of liberty, as the conditions resembled those of an open prison. In reaching this conclusion, the European Court made several important observations. It noted that the guarantee provided in Article 5(1) is focused on the physical liberty of individuals and aims to ensure that no one is arbitrarily deprived of this liberty. The Court emphasised that Article 5(1) is not concerned solely with basic restrictions on liberty of movement. To determine whether someone has been "deprived of his liberty" as defined by Article 5, it 'is essential to consider the individual's concrete situation, taking into account various factors such as the type, duration, effects, and manner of implementation of the measures in question'.

Additionally, the Court highlighted that the distinction between deprivation of liberty and mere restriction of liberty is one of degree or intensity rather than of nature or substance. Although classifying cases into these categories can sometimes be a subjective task, the Court has a duty to make a determination that will dictate the applicability or inapplicability of Article 5 in each case (*in concreto* assessment). Accordingly, it must be added that mere restrictions on liberty of movement are governed by Article 2 of Protocol No. 4.[16] In conclusion, deprivation of liberty is not limited to the classic case of detention following arrest or conviction but may take numerous other forms.[17] As a side note, it has been pointed out that, in the context of a variety of measures leading to restrictions of individual liberty, Article 5 impact on national law is insufficient.[18]

15 *Guzzardi v. Italy*, 1980, § 95.

16 *De Tommaso v. Italy* [GC], 2017; *Creangă v. Romania* [GC], 2012; *Engel and Others v. the Netherlands*, 1976; *Guzzardi v. Italy*, 1980; *Medvedyev and Others v. France* [GC], 2010.

17 *Guzzardi v. Italy*, 1980, § 95.

18 It is argued that: 'Today, in addition to the arrest, the citizen can be subject to a wide range of modern police powers that have clear implications for liberty. These powers come in many forms. For instance, notwithstanding powers enacted to deal with terrorism, police officers enjoy powers to stop and search powers, the power to conduct road traffic stops, the power to stop and check travel documents, and the common law power to control crowds. Yet, as will be shown below, the impact of Article 5 on such powers has been surprisingly limited. In several cases dealing with police powers the courts have decided that Article 5 simply does not apply' (Edwards, 2020, pp. 331–356).

3. Lawful Deprivation of Liberty General Remarks

The most important principle when deciding on the lawfulness of the detention relates to the principle of the autonomous assessment of the Strasbourg court.[19] Consequently, when examining the concept of lawful detention, it is important to note that the Court does not feel constrained by the legal conclusions of domestic authorities regarding whether a deprivation of liberty has occurred in a case at hand.[20] As we mentioned before, to determine if someone has been "deprived of his liberty" as defined by Article 5, the analysis begins with the individual's specific circumstances (concrete aspect of the assessment).

As an example of the principle of the autonomous assessment, one shall refer to the case Khlaifia and Others v. Italy [GC], 2016. This case involves three Tunisian nationals who attempted to reach Italy by boat during the "Arab Spring". After being intercepted by the Italian coastguard, they were taken to an overcrowded reception centre (CSPA) in Lampedusa, where they faced unacceptable sanitary conditions, lack of sleeping space, constant police surveillance, and no contact with the outside world. After an uprising at the reception centre, they were moved to a sports complex, then escaped to Lampedusa, participating in demonstrations with about 1,800 others. They were apprehended by police and returned to the CSPA before being flown to Palermo on September 22. In Palermo, they were confined to overcrowded ships with limited restroom access and no information from authorities; they claimed mistreatment by police. After 5 to 7 days, they were taken to Palermo airport for repatriation, identified by the Tunisian consul, and deported to Tunisia under a bilateral agreement. They alleged that they had never received any documents during their time in Italy. In court, the Italian government provided repatriation decrees in Italian with Arabic translations, noting the applicants had refused to sign. Despite a complaint from anti-racist organisations leading to a criminal investigation into their arrest, the case was shelved without charges. The applicants filed complaints with the European Court of Human Rights (ECtHR), alleging unlawful deprivation of liberty, inhumane treatment, and collective expulsion. In its September 2015 ruling, the ECtHR found their detention unlawful and the conditions degrading. It determined that their individual situations were not properly considered before their return to Tunisia.

The Grand Chamber of the ECtHR stated that the detention was arbitrary and lacked legal certainty, and the lack of information impaired the applicants' ability to challenge their detention. While the conditions did not violate Article 3 due to the short duration, there was no violation of Article 4, as they had opportunities to raise concerns about their repatriation. Their complaints about collective expulsion

19 Letsas, 2004, pp. 279–305.
20 See interpretation in cases: *Khlaifia and Others v. Italy* [GC], 2016; *H.L. v. the United Kingdom*, 2004; *H.M. v. Switzerland*, 2002; *Creangă v. Romania* [GC], 2012.

were rejected since there were no indications of real risk of inhumane treatment in Tunisia.

Additionally, it shall be said that when characterising the concept of lawful detention, the court drew attention to both subject-oriented and object-oriented aspects of the application of the measure in question.

The objective element of a person's confinement in a particular restricted space for a not negligible length of time, and an additional subjective element, is that the person has not validly consented to the confinement in question.[21] As relevant objective factors to consider in the possibility of leaving the restricted area, the degree of supervision and control over the person's movements, the extent of isolation, and the availability of social contacts were regarded.[22] Furthermore, the relatively short duration of the detention does not affect this conclusion.[23] Consequently, it was said that an element of coercion in the exercise of police powers of stop and search is indicative of a deprivation of liberty, notwithstanding the short duration of the measure.[24] As an example, one shall add that even measures taken for protective reasons or in the interest of the individual may still constitute a deprivation of liberty if they might be perceived as lawful based on Article 5. The intent behind the authorities' actions is not the deciding factor in assessing whether a deprivation of liberty has actually occurred. This intention is only relevant at a later stage of the Court's analysis, which examines the compatibility of the measures with Article 5 § 1.

The assessment of whether a coercive measure has been lawfully imposed thus encompasses both the primary plane – that is, the compliance of a given procedural act with the procedural rules – and the secondary plane – that is, the compliance of national rules with the standard set by the Convention. The analysis covers both the level of mere compliance with the Convention of a given legal regime and the practice of application of a given institution in a given (national) legal order. The primary and secondary levels reflect the two independent duties of the States Parties to the Convention, the duty to establish an adequately guarantee-oriented procedure (the law-making level) and the law-application level. Thus, in the framework of instrumentalisation phenomena, the concept of lawfulness must be understood as broadly as possible in terms of legality, correctness, and justiciability.

The broad understanding of lawfulness is justified by the Court's elaboration. One shall observe that the correctness criterion is referred to the overall procedural requirements of the detention. The court argued that the lack of records regarding key details – such as the date, time, and location of detention, the name of the detainee, the reasons for the detention, and the identity of the person carrying it out – must be viewed as fundamentally incompatible with the purposes of Article 5 of the

21 *Storck v. Germany*, 2005, § 74; *Stanev v. Bulgaria* [GC], 2012, § 117.
22 *Guzzardi v. Italy*, 1980; *H.M. v. Switzerland*, 2002; *H.L. v. the United Kingdom*, 2004; *Storck v. Germany*, 2005.
23 *Rantsev v. Cyprus and Russia*, 2010, § 317; *Zelčs v. Latvia*, 2020, § 40.
24 *Krupko and Others v. Russia*, 2014; *Foka v. Turkey*, 2008; *Gillan and Quinton v. the United Kingdom*, 2010; *Shimovolos v. Russia*, 2011; *Brega and Others v. Moldova*, 2012.

Convention. Additionally, this absence of documentation contradicts the requirement of lawfulness outlined in the Convention.[25]

The astonishing level of misconduct by investigation authorities was demonstrated, for example, in the case Anguelova v. Bulgaria, 2002. The applicant, Mrs. Assya Anguelova, a Bulgarian national, claimed that her son had been subjected to violations of the European Convention on Human Rights. On 29 January 1996, her son, Anguel Zabchekov, aged 17, who was known to the police as a suspect on theft charges, died after being in police custody in Razgrad for several hours following his arrest for attempted theft. Although it was routine procedure, no written order for his detention was issued upon his arrival at the police station at 12:50 a.m. He was left in the corridor to sober up. A police sergeant noticed he was shivering and moved him to a warmer room. Later that evening, at 3.50 a.m., the sergeant observed his condition had worsened. A doctor from the nearby hospital was summoned, who advised that he should be taken to the hospital and examined by the on-duty doctor. The doctors declared him dead due to a skull fracture, asserting that it generally takes about four hours for a person to die from such an injury. The subsequent investigations by the prosecution authorities concluded that the death was likely caused by an accidental injury that pre-dated Mr Zabchekov's arrest, based on a second medical report stating that such injuries can take up to 12 hours to cause death. The applicant disputed the investigation's conclusion. She claimed her son had died as a result of ill-treatment by the police, that the authorities had failed to conduct an effective investigation, and that discrimination had occurred against her son because he was of Roma origin.

When determining the lawfulness of detention based on the Court's case law, the repeated emphasis on the lawfulness of the detention, both procedural and substantive aspects, shall be reconsidered; among procedural aspects, the key role plays the promptness of the requisite judicial controls.[26]

In the case of Selahattin Demirtaş v. Turkey (No. 2) [GC], 2020, the Grand Chamber of the European Court of Human Rights (ECtHR) determined that the Turkish government violated Mr. Demirtaş's rights under several articles of the European Convention on Human Rights (ECHR), including Article 10 (freedom of expression) and Articles 5(1) and 5(3) (right to liberty). Mr. Demirtaş, the leader of the opposition and co-chair of the Peoples' Democratic Party, was arrested on November 4, 2016, following his political speeches against the government regarding the Kurdish-Turkish conflict. The Court found that his right to freedom of expression was violated, as the lifting of his parliamentary immunity and the charges against him lacked legal foreseeability. The Court held that his detention aimed to suppress political pluralism and debate essential to democracy. It ordered the Turkish government to secure his immediate release and stated that continued pre-trial detention would prolong the violations of the ECHR.

25 *Anguelova v. Bulgaria*, 2002; *Kurt v. Turkey*, 1998.
26 *Selahattin Demirtaş v. Turkey* (no. 2) [GC], 2020; *S., v. and A. v. Denmark* [GC], 2018; *Buzadji v. the Republic of Moldova* [GC], 2016.

To ensure compliance with legal requirements, detention must be "in accordance with a procedure prescribed by law." Article 5 § 1 does not solely reference domestic law; it also emphasises the "quality of the law." This means that if a national law permits deprivation of liberty, it must be sufficiently accessible, clear, and predictable in its application. Key factors in evaluating the "quality of law," often referred to as "safeguards against arbitrariness," include the existence of clear legal provisions regarding the ordering of detention, the extension of detention, and the establishment of time limits for detention. Additionally, there should be an effective remedy available for the applicant to challenge the "lawfulness" and "length" of their ongoing detention.[27] The concept of quality law allows us to refine our assessment of the legality of detention in relation to the plane we have called correctness.

The case J.N. v. the United Kingdom involved Mr. J.N., an Iranian national who sought asylum in the UK in 2003 but had his claim refused. Following a conviction for indecent assault, he was subjected to immigration detention for a total of 55 months across two periods, interrupted by conditions for his release. Mr. J.N. refused to cooperate with efforts for voluntary return to Iran, including signing a disclaimer. He was eventually released after the High Court granted him permission for judicial review, which found his detention unlawful and awarded him damages. The court emphasised a lack of effort in pursuing his deportation, stating it did not meet the required legal obligation of "reasonable diligence and expedition." Mr. J.N. complained about the excessive length and unclear time-limits of his detention, referencing Article 5 § 1 (f) regarding liberty and security. In this judgment the Court referred to the concept of quality law.

At the same time, domestic law must meet the requirements set in the convention. Reversely, the requirement for lawfulness is not satisfied merely by compliance with the relevant domestic law; rather, the domestic law itself must conform to broader legal principles that are either explicitly stated or implied within it. Specifically, the general principles referenced by the case law connected to Article 5 § 1 of the European Convention on Human Rights embody several key concepts. First, the rule of law necessitates that laws are applied consistently and fairly, ensuring that all individuals are subject to the same legal standards. This principle underpins a just society, where no one is above the law, thus fostering trust in legal institutions. Second, the principle of legal certainty requires that laws be clear, accessible, and predictable. This allows individuals to understand their rights and obligations, promoting stability and confidence in the legal framework. Moreover, the principle of proportionality mandates that any restrictions on individual rights must be necessary and proportionate to the aim pursued, preventing excessive or unjustified limitations on freedoms. Lastly, the principle of protection against arbitrariness is paramount, as it seeks to safeguard individuals from unfair or unpredictable governmental actions. This is particularly crucial in the context of Article 5, which aims to protect personal liberty and security. Together, these principles form a cohesive foundation that ensures legal processes

27 *J.N. v. the United Kingdom*, 2016.

respect individual rights while maintaining public order and safety.[28] It must be emphasised that the notion of "arbitrariness" in Article 5 § 1 extends beyond pure 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[29]. The concept of arbitrariness may instead refer to the plane of correctness and, as such, allude to the negative instrumentalisation mentioned in the introductory part of this study.

Article 5 indicates a precise, enumerative catalogue of legal formulas for arrest or detention. These categories relate to the various cases in which a person's liberty shall be restricted, and it should be clarified that they go beyond the scope of criminal law areas and, consequently, may be linked to the broader concept of security of the State or security of the society concerned, as well as of individuals. To sum up, Article 5 contains a catalogue in the nature of a numerus clausus specifying cases of authorised deprivation of liberty. In this sense, the catalogue cannot be interpreted in an expansive manner.

In the jurisprudence of the ECtHR,[30] it is indicated that the question of the applicability of Article 5 has arisen in a variety of circumstances, including: the placement of individuals in; psychiatric or social care institutions;[31] questioning in a police station;[32] placement in a police car to draw up an administrative offence report; [33] stops and searches by the police;[34] house search;[35] police escort;[36] crowd control measures adopted by the police on public order; grounds;[37] house arrest;[38] holding sea-migrants in reception facilities and on ships;[39] keeping irregular migrants in asylum hotspot facilities;[40] national lockdown on account of the Covid-19 pandemic;[41] taking of an individual by paramedics and police officers to hospitals, confinement in airport transit zones;[42] confinement in land border transit zones.[43]

28 *Khlaifia and Others v. Italy* [GC], 2016, § 92; *Del Río Prada v. Spain* [GC], 2013, § 125; *Creangă v. Romania*, 2012, § 120; *Medvedyev and Others v. France* [GC], 2010, § 80.
29 Trechsel, 1993, pp. 277–344.
30 See the official guidelines for the Article 5 interpretation by the ECtHR August 2024 Guide on Article 5 – Right to liberty and security.
31 *De Wilde, Ooms and Versyp v. Belgium*, 1971; *Nielsen v. Denmark*, 1988; *H.M. v. Switzerland*, 2002.
32 *Cazan v. Romania*, 2016; *I.I. v. Bulgaria*, 2005; *Osypenko v. Ukraine*, 2010; *Salayev v. Azerbaijan*, 2010; *Farhad Aliyev v. Azerbaijan*, 2010; *Creangă v. Romania* [GC], 2012.
33 *Zelčs v. Latvia*, 2020.
34 *Foka v. Turkey*, 2008; *Gillan and Quinton v. the United Kingdom*, 2010; *Shimovolos v. Russia*, 2011.
35 *Stănculeanu v. Romania*, 2018.
36 *Rozhkov v. Russia* (no. 2), 2017; *Tsvetkova and Others v. Russia*, 2018.
37 *Austin and Others v. the United Kingdom* [GC], 2012; *Auray and Others v. France*, 2024.
38 *Buzadji v. the Republic of Moldova* [GC], 2016; *Mancini v. Italy*, 2001; *Lavents v. Latvia*, 2002.
39 *Khlaifia and Others v. Italy* [GC], 2016.
40 *J.R. and Others v. Greece*, 2018.
41 *Terheş v. Romania* (dec), 2021.
42 *Z.A. and Others v. Russia* [GC], 2019; *Amuur v. France*, 1996; *Shamsa v. Poland*, 2003.
43 *Ilias and Ahmed v. Hungary* [GC], 2019; *R.R. and Others v. Hungary*, 2021.

3. Authorised Debrivations of Liberty under Article 5 § 1 as a *Numerous Clausus* List

3.1. Detention after Conviction

'a. The lawful detention of a person after conviction by a competent court.'

In this case, it is crucial to establish the meaning of the term "conviction." The case law established by the court clearly delineates that the term encompasses both a determination of guilt and the application of a penalty or other measures that result in the restriction of individual liberty.[44] However, it must be said that the phrase "after conviction" does not merely indicate that detention must occur at some point in time following a conviction. Instead, it signifies that the detention must be a direct result of the conviction; in other words, it must depend on or arise from the conviction itself. The Tribunal characterises this relationship as a necessary causal connection between the conviction and the deprivation of liberty in question.[45] Let us note that the provision being interpreted does not contain the term valid conviction, and therefore, detention can also follow such a conviction that can be overturned in a review (appeal) procedure.

An interesting case involves Inés del Río Prada, who was a member of the Basque separatist group ETA. She was convicted in 1989 for multiple terrorist attacks, resulting in cumulative sentences totalling over 3,000 years of imprisonment. Under Spanish law at the time, the maximum duration of actual imprisonment for such cases was 30 years. Del Río benefited from sentence reductions due to work and good behaviour while in prison, and she was scheduled for release in July 2008. However, before her release, Spain's Supreme Court applied a new interpretation of the sentence remission rules, known as the "Parot Doctrine," named after another ETA prisoner, Henri Parot. Established in 2006, this doctrine retroactively changed how remissions were calculated, specifying that they should apply to each individual sentence rather than the 30-year maximum. As a result, Del Río's release was delayed until 2017. Based on the Grand Chamber ruling of the European Court of Human Rights (ECtHR), the extension of her imprisonment was deemed unlawful under both Spanish and European law. Her detention after July 2008 lacked a legal basis that was foreseeable and accessible.

Following the court argumentation, a defendant is considered to be detained "after conviction by a competent court" within the meaning of Article 5 § 1 (a) once the judgment has been delivered at first instance, even where it is not yet enforceable and remains amenable to appeal. The phrase "after conviction" should not be narrowly construed to apply exclusively to cases of final conviction. This restricted

44 *Del Río Prada v. Spain* [GC], 2013; *James, Wells and Lee v. the United Kingdom*, 2012; *M. v. Germany*, 2009; *Van Droogenbroeck v. Belgium*, 1982; *B. v. Austria*, 1990.

45 *James, Wells and Lee v. the United Kingdom*, 2012; *Monnell and Morris v. the United Kingdom*, 1987; *Del Río Prada v. Spain* [GC], 2013.

interpretation neglects the circumstances surrounding individuals who have been apprehended following their conviction yet were free during the trial process. It is crucial to acknowledge that the guilt of a person held in custody during the appeal or review stages has already been established through a trial that complied with the essential requirements outlined in Article 6. This ensures that the judicial process was fair and thorough, reinforcing the integrity of the findings against such individuals.[46] Since the conviction is to be the result of an adjudication by a competent court, the condition of a competent court extends to the entire proceedings; it must be understood that the conviction is to be the result of proceedings conducted by a competent court.

Finally, it must be noted that the notion of conviction shall be perceived in a broad manner. Based on the court assessment, Article 5 § 1 (a) applies where persons of unsound mind are detained in psychiatric facilities after conviction.[47] Conviction, therefore, covers both those cases in which the guilt of the perpetrator of the offence is imputed and situations in which imputation cannot take place due to an obstacle (exculpation cases) related to the existence of circumstances excluding guilt.

Relevant interpretation is presented in *Klinkenbuß v. Germany* case. Andreas Klinkenbuß, a German national born in 1964, is currently confined in a psychiatric hospital in Lippstadt. As a minor in the late 1970s and early 1980s, Klinkenbuß committed serious sexual and violent offenses. National courts determined that he lacked criminal responsibility at the time and sentenced him to five years of imprisonment under juvenile law, with an order for placement in a psychiatric hospital under Article 63 of the German Criminal Code. Klinkenbuß alleged that his continued confinement in the psychiatric facility violated his right to liberty under Article 5 § 1 of the European Convention on Human Rights. The case involves a sensitive intersection of Article 5 § 1 – the right to liberty – and preventive or psychiatric detention. Such detentions must comply with the permissible grounds under the Convention, including the lawful detention of individuals deemed to be of "unsound mind" per Article 5 § 1(e). The European Court typically requires that such detention takes place in a suitable institution for mentally disordered individuals and is related to a genuinely serious mental disorder, rather than merely a predisposition to criminal behaviour. In Klinkenbuß's case, the central issue likely concerns whether his mental condition warranted continued detention and whether the conditions of his confinement met the standards set by the European Convention on Human Rights.

3.2. Detention for Failing to Comply with a Court Order or Legal Obligation

'b. The legal arrest or detention of a person for non-compliance with a lawful court order or to ensure the fulfilment of any legal obligation.'

Another case of lawful detention applies for failure to comply with a court order or with other legal obligations and covers a wide spectrum of situations. In the case

46 *Wemhoff v. Germany*, 1968.
47 *Klinkenbuß v. Germany*, 2016; *Radu v. Germany*, 2013; *X v. the United Kingdom*, 1981.

under consideration, the legality of detention is referred to separately in two categories. In the first, it covers non-compliance with the court order; and in the second, non-compliance with the legal obligation. In the first case the basis for the application of the isolative measure is the violation of a specific individual and concrete norm that has materialised in the court order. The second case concerns materialised legal obligations. In the second case, therefore, it is not in relation to abstract obligations but ones that have been concretised.

In reference to the first group, we can highlight several notable examples of non-compliance that underscore the challenges within the legal system. These include the failure to pay a court-imposed fine, which reflects a disregard for judicial authority; the refusal to undergo a court-ordered medical examination assessing mental health or a mandated blood test, indicating non-cooperation with legal directives; and the neglect of residence restrictions that are intended to ensure public safety and compliance with court mandates. Additionally, there is the alarming failure to comply with a court decision requiring the return of children to a parent. Violating binding-over orders demonstrates an unwillingness to adhere to preemptive measures designed to protect the community, while breaching bail conditions highlights a serious lack of accountability in the face of legal obligations. Lastly, the confinement in a psychiatric hospital, especially when domestic proceedings do not offer sufficient protections against arbitrary detention, raises significant concerns about individual rights and the potential for misuse of institutional powers. Collectively, these examples illustrate the various forms of non-compliance that challenge the integrity and effectiveness of the legal process.[48]

The second variant provided for in Article 5 § 1 (b) allows for detention only to "secure the fulfilment" of any obligation prescribed by law. Therefore, the use of an isolative measure is completely exceptional in this case.

When it comes to more precise interpretation, it shall be observed that it must the notion "prescribed by law" must point to domestic law. There must be an unfulfilled obligation on the part of the individual, and the arrest and detention should aim solely to ensure its fulfilment, not to punish. Once the obligation has been fulfilled, the grounds for detention under Article 5 § 1 (b) no longer apply. Therefore, the basis for depriving someone of their liberty in the current case is conditional; it is legitimate only as long as the detention is necessary for fulfilling a legal obligation.[49] Situations addressed under the second limb of Article 5 § 1 (b) encompass a range of obligations that individuals may face. These include the requirement to undergo a thorough security check upon entering a country, providing detailed information about one's personal identity, submitting to a psychiatric evaluation, vacating designated areas,

48 See cases: *Velinov v. the former Yugoslav Republic of Macedonia*, 2013; *Airey v. Ireland*, Commission decision of 7 July 1977; *Trutko v. Russia*, 2016 and *Beiere v. Latvia*, 2011; *X. v. Germany*, Commission decision of 10 December 1975; *X. v. Austria*, Commission decision of 13 December 1979; *Freda v. Italy*, Commission decision of 7 October 1980; *Paradis v. Germany* (dec.), 2007; *Steel and Others v. the United Kingdom*, 1998; *Gatt v. Malta*, 2010; *Ciulla v. Italy*, 1989.
49 *Vasileva v. Denmark*, 2003; *S., v. and A. v. Denmark* [GC], 2018.

appearing for questioning at a police station, maintaining public order by abstaining from criminal activities, or disclosing the whereabouts of attached property to facilitate the settlement of tax debts. Each of these obligations reflects a balance between individual rights and the necessity of maintaining safety and order within society.[50]

3.3. Detention on Remand

'c. The lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so.'

Earlier, we noted that Article 5 addresses detention and arrest in cases relevant to criminal law, as well as those related to security – whether concerning the state, society, or individuals. However, Article 5, paragraph 1(c), has a more limited scope and is specifically focused on criminal law. A person may only be detained under the first part of Article 5, paragraph 1(c) in connection with criminal proceedings.

This detention is intended to bring the individual before the appropriate legal authority on the suspicion that he or she has committed an offence.[51] Pre-trial detention functions as a preventive measure primarily when it is supported by reasonable suspicion of a specific offense for which criminal proceedings are underway. This means that authorities must have credible grounds to believe that a crime has been committed before an individual can be lawfully arrested and detained. The concept of reasonable suspicion is based on objective facts and circumstances that would lead a cautious person to believe that an offense has occurred. Consequently, establishing reasonable suspicion is a crucial prerequisite for the legality of any arrest within this context. This requirement not only protects the rights of individuals but also ensures that pre-trial detention is used judiciously and not arbitrarily. It safeguards against unjust imprisonment and upholds the integrity of the legal process, ensuring that detaining individuals is based on sound, evidence-based reasoning rather than mere conjecture or assumptions.

However, the provision under review also deals with the second ground for lawful arrest or detention, which states 'when it is reasonably considered necessary to prevent his committing an offence or fleeing after doing so.' A policy of general prevention that targets individuals or groups deemed dangerous or likely to commit unlawful acts is strictly prohibited. This means that authorities cannot detain individuals solely based on perceptions of risk. To lawfully justify a detention under the second clause of Article 5 § 1 (c) of the European Convention on Human Rights, the authorities must present compelling evidence. This evidence must clearly demonstrate that the

50 *McVeigh and Others v. the United Kingdom*, Commission report of 18 March 1981; *Vasileva v. Denmark*, 2003; *Novotka v. Slovakia* (dec.), 2003; *Sarigiannis v. Italy*, 2011; *Nowicka v. Poland*, 2002; *Epple v. Germany*, 2005; *Iliya Stefanov v. Bulgaria*, 2008; *Osypenko v. Ukraine*, 2010 and *Khodorkovskiy v. Russia*, 2011; *Ostendorf v. Germany*, 2013; *Göthlin v. Sweden*, 2014.

51 *Selahattin Demirtaş v. Turkey* (no. 2) [GC], 2020; *Şahin Alpay v. Turkey*, 2018; *Ječius v. Lithuania*, 2000; *Schwabe and M.G. v. Germany*, 2011.

individual in question would almost certainly have participated in a specific, concrete offence, had their detention not intervened to prevent such involvement. This requirement underscores the necessity for a clear link between the detention and the specific threat posed by the detained individual.[52]

The issue of the "factual background for detention" was illustrated in the case of *Selahattin Demirtaş v. Turkey* (no. 2) [GC], 2020. The applicant, Selahattin Demirtaş, is a prominent Kurdish politician and the leader of the Peoples' Democratic Party (HDP) in Turkey. He was detained in November 2016 alongside several other HDP members on charges that included terrorism-related offenses. The Turkish authorities claimed that Demirtaş's activities and speeches were connected to the Kurdistan Workers' Party (PKK), which is designated as a terrorist organisation by both Turkey and the EU. Demirtaş was kept in pre-trial detention for over four years, a period marked by ongoing legal proceedings, allegations of politically motivated prosecution, and suppression of political expression. In a unanimous ruling by the Grand Chamber on December 22, 2020, the Court found violations of Article 18 (limitation on the use of restrictions on rights) in conjunction with Article 5 (right to liberty and security) and Article 10 (freedom of expression). Regarding the violation of Article 5 – Right to Liberty and Security, the Court ruled that Demirtaş's pre-trial detention was unlawful and disproportionate. The duration of his detention violated his rights, and there was insufficient judicial oversight. The Court determined that the detention did not meet the standard of being based on reasonable suspicion of a crime under Article 5 §1 of the Convention. Furthermore, the detention was not aimed at ensuring a fair trial but rather at suppressing his political participation and freedom of expression. This constituted a violation of his right to liberty and security.

Detention under Article 5 § 1 (c) must be a proportionate measure designed to achieve a specific objective, such as ensuring the individual's presence at trial or safeguarding the integrity of the judicial process. It is incumbent upon the domestic authorities to convincingly demonstrate the necessity of such detention, including presenting clear justifications that outweigh the individual's rights and freedoms. When authorities decide to detain an individual pending trial based on their failure to appear before them when summoned, they are required to ensure that the individual has received timely and adequate notice of the summons. This notice should clearly inform them of the date, time, and location of the required appearance, as well as the consequences of failing to attend. Furthermore, the authorities should provide the individual with a reasonable amount of time to comply with the summons. In addition, it is crucial for authorities to take appropriate and reasonable steps to verify that the individual has, in fact, absconded or is intentionally avoiding the judicial process. This may involve investigating the circumstances surrounding the missed appearance, checking for any valid reasons for non-compliance, and considering whether alternatives to detention, such as bail or electronic monitoring, might suffice to ensure the individual's presence at trial. Through these measures, the authorities

52 *Kurt v. Austria* [GC], 2021; *S., v. and A. v. Denmark* [GC], 2018.

uphold the principles of fairness and justice while addressing the legitimate concerns of public safety and legal process integrity.[53] The "ultima ratio" rule states that, under the second limb of Article 5 § 1 (c), a necessity test must be conducted. This test requires that alternatives less severe than detention be considered and deemed insufficient to protect individual or public interests. The offense in question must be grave enough to pose a significant threat to life and safety or result in substantial material damage. Moreover, detention should conclude as soon as the associated risks have been thoroughly mitigated, necessitating vigilant and ongoing oversight. The duration of the detention is also a critical aspect that warrants careful consideration, as it balances the need for public safety with the rights of the individual involved.[54]

This implies that a specific procedure to ensure supervision, which depends on the stage of the proceedings under the model concerned, must be established, including the guarantee of the right to an effective remedy. In the context of this ground for lawful detention, it should be added that the Court did not exclude the premise of this measure linked to different types of "risks," ranging from individual and concrete risks – most often linked to the fear of fleeing of the perpetrator or of trial obstruction – to more abstract risks, more precisely the fear of committing another serious crime, or even exclusively the risk resulting from the fact that in the given proceedings, a crime or an offence involving long-term imprisonment has been charged. Particularly, the latter case, i.e. the abstract risk associated with the severe sanction of the offence that the accused is about to commit, raises doctrinal debates in the context of the excessive use of arrest and detention.[55]

Standards for pre-trial detention are set in a few leading judgments, inter alia in *Ladent v. Poland*, ECtHR judgment of 18 March 2008, which dealt with the right to liberty and security under Article 5 of the European Convention on Human Rights. The applicant, Mr. Ladent, a French national, was arrested in Poland in 2000 on suspicion of participating in fraud. The Polish authorities placed him in pre-trial detention, which was extended several times without proper judicial justification. Mr. Ladent claimed that his arrest was unlawful, his detention lacked reasonable suspicion, and the length and handling of his detention breached Article 5. The Court found that the Polish court that ordered his arrest had no valid legal basis, as the warrant was issued in connection with another person's case, and procedural safeguards were not met. Furthermore, the authorities failed to justify his continued detention with concrete evidence, such as risks of absconding or tampering with evidence. In addition, the Court noted that the review of detention decisions was not prompt and lacked effective judicial oversight.

In the case of *Mooren v. Germany [GC]*, 2009, Mooren was held in pre-trial detention on allegations of fraud. He challenged the lawfulness of his detention in domestic courts, arguing that it was invalid from the beginning due to procedural flaws.

53 *Ladent v. Poland*, 2008; *Vasiliciuc v. the Republic of Moldova*, 2017.
54 *S. and A. v. Denmark* [GC], 2018.
55 Janusz-Pohl and Wawrzyńczak, 2024, p. 111 et seq.; Lach, 2021.

According to Article 5 § 1, detention must be lawful under domestic law and must also be free from arbitrariness. Even if a detention complies with national law, it must not be arbitrary; there must be a genuine connection between the detention and the objectives it aims to achieve. The Court found a violation of Article 5 § 1, concluding that Mooren's detention was not sufficiently justified and had procedural defects that undermined its legality.

When examining the notion of deprivation of liberty, the ECtHR decides on the various forms of deprivation of liberty in relation to the use of new technologies, particularly electronic monitoring (E.M.). The Court applies a "degree and intensity" test, which involves assessing the specific circumstances surrounding the measure, including the type, duration, effects, and implementation of the monitoring. Key considerations include the extent of confinement or limitations on daily life, such as whether the individual can leave their home, work, socialise, and access public spaces. The Court focuses on the practical realities – the "de facto" situation. The jurisprudence of the ECtHR is not entirely consistent. On the one hand, the ECtHR has held that electronic tagging or house arrest under E.M. conditions generally does not constitute a deprivation of liberty if the individual can leave their home for specific hours or maintains some degree of autonomy. Factors that can mitigate the intensity of control include being allowed to go to work, shop, or receive visitors. On the other hand, electronic monitoring can be classified as a deprivation of liberty if the conditions are excessively stringent, resembling continuous house arrest. For example, suppose there is 24-hour confinement, constant surveillance, and no meaningful freedom of movement. In that case, it may cross the threshold and be considered a deprivation of liberty under Article 5(1).

Relevant cases that illustrate this issue include *Buzadji v. Moldova* (2016, Grand Chamber), which compared pre-trial detention with alternatives to detention. In this case, the court held that E.M. should be considered a form of detention under Article 5. Another significant case is *Suveges v. Hungary* (2016).

3.4. The Detention of a Minor

'd. The detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority.'

The rationale related to the deprivation of liberty for a minor is linked to the possibility of applying educational, educational, rehabilitative, and correctional measures to minors. The initial concept against the background of this provision is that of "minor". It encompasses persons under the age of 18 – in this sense, a standard identical to the UN Convention on the Rights of the Child. This provision outlines specific circumstances – though it is not an exhaustive list – under which minors may be detained. These circumstances include: (a) the necessity of educational supervision, such as ensuring that minors attend school and comply with educational regulations, and (b) the requirement to bring them before the appropriate legal authority, such as in cases where legal proceedings are initiated or when the minor is involved in

a situation requiring judicial intervention. These guidelines aim to ensure that the welfare of minors is considered while maintaining a structured legal framework for their supervision and protection.[56] Both grounds must be specified in national law, and their application must adhere to the principle of proportionality. The cases should be interpreted strictly.

The case of *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, decided by the ECtHR on 12 October 2006, addresses the treatment of unaccompanied migrant children and the obligations of States under the European Convention on Human Rights (ECHR). Ms. Mubilanzila Mayeka, a Congolese national with refugee status in Canada, and her five-year-old daughter, Kaniki Mitunga, who was born in the Democratic Republic of Congo (DRC), are at the centre of this case. The child travelled alone to Belgium to join her mother in Canada. Upon her arrival in Belgium, she was refused entry and placed in a closed detention facility for adults for two months, awaiting deportation to the DRC. During her detention, she had no relatives in Belgium and received minimal assistance. Ultimately, she was deported to the DRC. The Court found that detaining a very young child alone in an adult detention centre, without proper care or psychological support, constituted inhuman and degrading treatment under Article 3 of the ECHR. The detention was deemed unlawful given the child's extreme vulnerability and the authorities' failure to consider less restrictive alternatives, violating Article 5 § 1. Furthermore, the child's ability to challenge her detention was essentially non-existent due to her age and lack of legal assistance, which breached Article 5 § 4. Additionally, the Court found a breach of Article 8, as the Belgian authorities did not take adequate steps to reunite mother and daughter or facilitate family life, despite being aware of the mother's location and refugee status in Canada. The child was ultimately taken into foster care until Canada later granted her entry.

This case is frequently cited alongside *Rahimi v. Greece* (2011) and *Popov v. France* (2012) to reinforce the principle that the detention of migrant children must be exceptional, used as a last resort, and for the shortest possible duration.

3.5. Detention for Medical or Social Reasons

'e. The lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants.'

The cases of legal detention analysed relate strictly to the sphere of security – both public and individual security. Article 5 § 1 (e) explicitly identifies several categories of individuals who may be subject to deprivation of liberty: those who spread infectious diseases, individuals suffering from mental health disorders, individuals struggling with alcoholism, drug addicts, and homeless individuals, often referred to as vagrants. It is essential to emphasise that the Tribunal has established a significant link among these groups, as they may be deprived of their liberty to ensure they receive necessary medical treatment, due to broader social policy considerations, or for a combination

56 *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, 2006.

of both medical and social reasons. The rationale behind the Convention's allowance for the detention of these socially maladjusted individuals extends beyond concerns for public safety; it also encompasses the recognition that, in certain circumstances, their own health and well-being may necessitate their confinement. This dual consideration underscores the complexity of balancing individual rights with societal protection and the need for appropriate interventions in their lives.[57]

An example can be found in the case of *Ilnseher v. Germany*, involving Mr. Ilnseher, a German national who was convicted at the age of 19 for the murder of a child. He was initially sentenced to ten years in youth detention under German juvenile criminal law. However, shortly before his release, a court ordered preventive detention (Sicherungsverwahrung) based on the assessment that he still posed a serious risk to the public. This preventive detention was imposed under new legislation allowing such orders for young offenders deemed dangerous at the end of their sentence. Mr. Ilnseher argued that this post-sentence preventive detention violated his rights to liberty. The decision for preventive detention was informed by new psychiatric evidence indicating a high risk of reoffending due to a mental disorder characterised by sexual sadism. The court ruled that this situation fell under Article 5 § 1 (e), which allows for the detention of a person deemed "of unsound mind," provided that certain procedural safeguards are in place. The court regarded this measure not as a continuation of the criminal sentence, but as a separate preventive action justified by public safety concerns. The Grand Chamber concluded that German law included sufficient safeguards: a judicial decision made after an adversarial hearing, regular reviews of continued detention, access to appropriate therapy, and conditions distinct from prison punishment. Ultimately, the court determined that there was no violation of Article 5 § 1 – the detention was deemed lawful and proportionate. The court also distinguished this case from previous German preventive detention cases (such as *M. v. Germany*, 2009), which had raised concerns about detention conditions and retroactive application.

At the same time, the different categories of persons who are the source of specific threats have been subject to interpretation.

When evaluating the "lawfulness" of detaining a person to prevent the spread of infectious diseases, two essential criteria must be considered. First, we need to determine whether the infectious disease poses a significant danger to public health or safety. Second, it is crucial to assess whether detaining the infected individual is the last resort. This means that less severe measures should have been explored and deemed inadequate to protect the public interest. If these criteria are no longer met, the justification for depriving the individual of their liberty no longer exists.[58]

It may also be noted that the denotation of the term "persons of unsound mind" is not precisely defined. We might observe a rather "negative" interpretation by the

57 *Ilnseher v. Germany* [GC], 2018; *Stanev v. Bulgaria* [GC], 2012; *D.D. v. Lithuania*, 2012; *Kallweit v. Germany*, 2011; *Shtukaturov v. Russia*, 2008; *Varbanov v. Bulgaria*, 2000.
58 Feldman, 2020, pp. 80–93.

Tribunal that said what shall not be seen as rightful detention based on an "unsound mindset mind must refer to a specific state of a person that is covered by specific forensic opinions provided for in the national procedure. An individual cannot be deprived of his liberty as being of "unsound mind" unless the following three minimum conditions are satisfied:[59] '1) It is essential to provide clear evidence from qualified medical professionals demonstrating that the individual is of unsound mind, unless emergency detention is warranted. 2) The individual's mental disorder must be severe enough to justify involuntary confinement. It should be established that the restriction of liberty is necessary under the circumstances and that the mental disorder, supported by objective medical evidence, continues to persist throughout the duration of the detention.'

The case *Winterwerp v. the Netherlands*, decided by the European Court of Human Rights (ECtHR) on 24 October 1979, is a foundational case regarding the lawful detention of individuals with mental disorders under Article 5 § 1(e) of the European Convention on Human Rights (ECHR). The applicant, Mr. Winterwerp, a Dutch national, had been detained in a psychiatric hospital for several years after being declared legally incapable of managing his own affairs. He claimed that his detention was unlawful, arguing that he had not been given a real opportunity to challenge the medical justification for his confinement. He also stated that he was denied access to his case file and did not have effective legal representation. In its judgment, the Court established three minimum conditions for lawful psychiatric detention under Article 5 § 1(e): '1. Objective Medical Evidence: The person's mental disorder must be reliably established by a qualified medical expert. 2. Nature or Degree of Disorder: The mental disorder must be of a kind or severity that warrants compulsory confinement. 3. Persistence of Disorder: Continued confinement is only justified if the disorder persists; otherwise, the individual must be released'. Furthermore, the Court emphasised that judicial review under Article 5 § 4 must be meaningful. This means that the detainee must have the ability to contest the medical justification for their detention, which requires access to relevant documents and, where necessary, legal assistance.

Another example that could be referred to is the case of *Enhorn v. Sweden*, decided by the ECtHR on January 25, 2005, which addresses Article 5, which pertains to the right to liberty in the context of public health-related detention. Mr. Lennart Enhorn, a Swedish national diagnosed as HIV-positive in 1994, was detained by Swedish authorities on the grounds that he had not adhered to medical advice and had potentially jeopardised others by putting them at risk of infection. A court subsequently ordered his compulsory isolation under the Communicable Diseases Act. He was held for approximately a year and a half in a hospital's infectious diseases ward. While his detention was subject to periodic reviews, it was repeatedly extended. Mr. Enhorn argued that his detention was disproportionate and not the least restrictive means available. He claimed it violated Article 5 § 1 (e), which permits the detention of individuals for the prevention of the spread of infectious diseases. The Court concluded

59 *Enhorn v. Sweden*, 2005, § 43; *Guzzardi v. Italy*, 1980, § 98.

that although Mr. Enhorn did present some risk, the authorities had failed to establish that such a long period of detention was strictly necessary. Sweden did not demonstrate that it had explored less restrictive alternatives, such as regular monitoring or imposing restrictions short of detention. In the Court's view, the prolonged isolation without continuous reassessment exceeded what was justified for public health purposes.

As the literature points out, the isolation of persons on the grounds of mental disorder is a particularly sensitive matter and must therefore be reviewed in detail in terms of both temporality and legality per se. The detention of individuals with mental health conditions should be conducted in a hospital, clinic, or another authorised institution specifically designated for this purpose. The implementation of appropriate therapeutic measures has become essential for ensuring that such detention is lawful. The primary objective of detaining individuals with mental health issues must be therapeutic in nature, focusing on the treatment and alleviation of their condition. Additionally, it may involve efforts to mitigate or manage any potential risks they may pose to themselves or others.[60]

3.6. Detention of a Foreigner

'(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.'

The article being examined discusses two cases. The first case involves detaining individuals to prevent unauthorised entry, while the second case concerns deportation and extradition. Both cases involve the control of the liberty of non-citizens within the context of immigration.[61]

The initial segment of this provision allows for the detention of asylum seekers and other immigrants before the State grants authorisation for their entry. However, it is crucial that such detention aligns with the overarching principles of Article 5, which is designed to protect the fundamental right to liberty. This ensures that no individual is deprived of their freedom in an arbitrary manner, upholding the dignity and rights of every person involved in the immigration process.[62]

For the analysis of this provision, the interpretation of the expression "unauthorised entry into the country" is of fundamental importance. To put the problem synthetically, this issue is left to the sovereign states, which regulate at the national level the issue of formal authorisation and entry or stay.[63] However, it should be stressed that a pro-guarantee approach can be seen on the side of the ECtHR, which is sceptical of practices that may be abusive, such as the practice of the authorities to

60 *Rakevich v. Russia*, 2003; *L.B. v. Belgium*, 2012; *Ashingdane v. the United Kingdom*, 1985; *O.H. v. Germany*, 2011; *Rooman v. Belgium* [GC], 2019.
61 See more: Pinto Oliveira, 2021, pp. 97–117.
62 Lester, 2021; See also: *Saadi v. the United Kingdom* [GC], 2008.
63 *Khlaifia and Others v. Italy* [GC], 2016; *Suso Musa v. Malta*, 2013.

automatically place asylum seekers in detention without an individual assessment of their particular needs.[64]

The second part of the article under examination addresses detention aimed at deportation or extradition. Article 5 § 1 (f) does not require that the detention be viewed as necessary, for instance, to stop the individual from committing a crime or from fleeing. In this regard, the Court notes that Article 5 § 1 (f) offers a different level of protection compared to Article 5 § 1 (c): under subparagraph (f), all that is necessary is that 'action is being taken with a view to deportation or extradition.' Consequently, for the purpose of its application, it does not matter whether the foundational decision to expel can be supported by national or Convention.[65] The principle of proportionality is a fundamental legal concept that must be considered in cases involving deprivation of liberty. Specifically, under the second limb of Article 5 § 1 (f) of the European Convention on Human Rights, a person's detention is only justified for the duration that deportation or extradition proceedings are actively underway. This means that authorities must take prompt and decisive action to ensure that these legal processes are carried out without unnecessary delays. If there is a lack of diligence in pursuing the deportation or extradition, and if the proceedings are not advancing effectively, the justification for continued detention will lapse, rendering it impermissible under Article 5 § 1. Thus, it is crucial for legal authorities to adhere to a meticulous timetable and to respect the rights of the individual during such proceedings to maintain the law's integrity and uphold human rights standards.[66]

4. Guarantees for Persons Deprived of Liberty

From the perspective of the analysis of Article 5, it is crucial to consider not only the limits on the lawfulness of arrest or detention but also the guarantees afforded to individuals deprived of their liberty. Lawfulness, in a strict sense, refers to the legal grounds for arrest or detention, while procedural guarantees pertain to the proper application of these laws. In certain instances, these guarantees may also address the issue of justiciability, particularly regarding the availability of specific protective measures. This includes ensuring that individuals receive adequate information about their rights, such as the right to lodge an appeal and access the reasoning behind decisions related to isolation measures.

Article 5 outlines five levels of protection: the right to information, the right to adequate legal oversight, the right to a fair trial, the right to have the lawfulness of detention reviewed quickly by a court, and the right to effective compensation. In summary, these rights can be encapsulated as the right to a fair procedure, as well

64 *Thimothawes v. Belgium*, 2017; *Mahamed Jama v. Malta*, 2015.
65 *Chahal v. the United Kingdom*, 1996; *Čonka v. Belgium*, 2002; *Nasrulloyev v. Russia*, 2007; *Soldatenko v. Ukraine*, 2008; *Muzamba Oyaw v. Belgium* (dec.), 2017; *J.R. and Others v. Greece*, 2018.
66 *Khlaifia and Others v. Italy* [GC], 2016; *A. and Others v. the United Kingdom* [GC], 2009; *Amie and Others v. Bulgaria*, 2013; *Shiksaitov v. Slovakia*, 2020.

as an effective means of protection and remedy. The following sections will briefly discuss these five areas.

4.1. Right to Information

'Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.'

For a suitable interpretation of this provision, it is crucial to indicate the meaning of the term arrest. As with the rest of Article 5, the term arrest – in accordance with the principle of autonomous meaning of expressions in the Convention – has an autonomous meaning, subject to a functional interpretation. The term "arrest" extends well beyond the narrow confines of criminal law, indicating a broader range of situations where an individual's liberty may be restricted. The phrase "any charge" does not merely suggest a condition under which legal processes apply; rather, it signifies a potentiality that must be taken into account in various legal contexts. Importantly, Article 5, Section 2 of the European Convention on Human Rights, for example, introduces a fundamental safeguard: any individual who is arrested has the right to be informed clearly and promptly about the reasons for their detention. This right to information is not merely procedural; it serves as a critical component of the overall legal framework designed to protect personal freedoms. Ensuring that an arrested person understands the basis for their deprivation of liberty is essential for maintaining justice and accountability within the legal system. Thus, this requirement is integral to the protective measures outlined in Article 5, reinforcing the principle that the law should always uphold the dignity and rights of individuals.[67] If an individual has been informed about the specific reasons for their arrest or detention, they have the right to take legal action by applying to a court. This application allows them to challenge the lawfulness of their deprivation of liberty, as stipulated in Article 5 § 4 of the relevant legal framework. Such a challenge can help ensure that their rights are protected and that the reasons for their detention are examined thoroughly in a fair trial.[68]

4.2. Right to Appropriate Legal Control

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

Judicial control, as provided for in this article, may be exercised either by a court or by another competent authority. The control of interferences by executive authorities concerning an individual's fundamental right to liberty is a pivotal aspect of the protection enshrined in Article 5 § 3 of the European Convention on Human Rights. This provision ensures that any deprivation of liberty is subject to judicial oversight, reinforcing the principle that no one should be deprived of their freedom without

67 *Khlaifia and Others v. Italy* [GC], 2016.
68 *Fox, Campbell and Hartley v. the United Kingdom*, 1990; *Čonka v. Belgium*, 2002.

adequate legal safeguards. Judicial control is inherently tied to the rule of law, a cornerstone of democratic societies. As explicitly stated in the Preamble to the Convention, the rule of law underpins the entire framework of human rights protections. It serves as a guiding principle that inspires the development and implementation of the Convention, ensuring that individual rights are upheld and that any actions taken by the state are conducted through a transparent and accountable legal process. This cultivates a society where personal freedoms are protected from arbitrary state action, fostering trust in legal institutions and reinforcing democratic governance.[69] Judicial control is essential for ensuring effective safeguards against the risk of ill-treatment, which is particularly high during the early stages of detention. It also helps prevent the abuse of power and instrumentalisation by law enforcement officers and other authorities, who should only exercise their powers for narrowly defined purposes and strictly in accordance with established procedures.

From the perspective of the provision in question, judicial review is to be carried out in accordance with the principle of promptness. In the light of the case-law of the Court, speed must be assessed *in concreto*. In the light of such an assessment, the character of the coercive measure must also be taken into account.[70] In its interpretation of the term "promptness", the court concluded that any duration exceeding four days is generally deemed excessive. Furthermore, even shorter timeframes may constitute a breach of the promptness requirement if no special difficulties or exceptional circumstances hinder the authorities from presenting the arrested individual before a judge sooner.[71] The necessity for promptness is especially critical in situations where an individual is placed in police custody following a prior period of actual deprivation of liberty, such as detention or imprisonment. In these cases, timely action is essential to safeguard the rights of the detainee and to ensure that due process is followed. Any delay in formalising custody can exacerbate the psychological and emotional impact on the individual, making it imperative for law enforcement to act swiftly and transparently.

4.3. Right to Trial Within a Reasonable Time

'Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article (...) shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.'

The temporal aspect, which is linked to speed, is, of course, not only an attribute of the control concerning the use of detention but also concerns the realisation of the right to the court of the subject under an isolative measure. The guarantee described in Article 5(3) concerns the guarantee linked to the application of detention in relation to a pending trial. In such a configuration, arrest or detention is intended to ensure

69 *Brogan and Others v. the United Kingdom*, 1988; *Ladent v. Poland*, 2008.
70 *Vassis and Others v. France*, 2013.
71 *Oral and Atabay v. Turkey*, 2009; *McKay v. the United Kingdom* [GC], 2006; *Năstase-Silivestru v. Romania*, 2007, *Gutsanovi v. Bulgaria*, 2013; *İpek and Others v. Turkey*, 2009; *Kandzhov v. Bulgaria*, 2008.

the effectiveness of the criminal prosecution. It functions as a preventive measure in this regard. The jurisprudence of the court draws attention to the correlation between the duration of detention and the duration of the criminal proceedings concerned. The Court acknowledges that when establishing the duration of detention before trial in accordance with Article 5 § 3 of the Convention, the time frame considered starts from the date the accused is apprehended and concludes on the date the charges are resolved, even if that resolution comes only from a first-instance court.[72] The second limb of Article 5 § 3 of the European Convention on Human Rights establishes a clear mandate for judicial authorities: they must either ensure that an accused individual is brought to trial within a reasonable timeframe or grant provisional release pending trial. This provision underscores that the judicial process must respect the principle of presumption of innocence, which mandates that an individual is considered innocent until proven guilty. The central aim of this provision is to stipulate that provisional release must be granted as soon as the justification for continued detention wanes and is no longer reasonable or necessary. In practical terms, this means that if delays in the judicial process extend beyond what is acceptable – due to excessive duration, lack of justification, or procedural inefficiencies – the accused has a right to be released to ensure that their liberty is not unduly compromised. Furthermore, the application of pretrial detention can be viewed as a punitive measure that conflicts with the presumption of innocence. When an individual is isolated from society prior to a final judgment, it raises significant concerns regarding the infringement of their rights. Such measures – if not justified by compelling state interests or the urgency of the case – can violate the guarantees afforded by the presumption of innocence and threaten the integrity of the judicial process itself.

The Court also adopts the principle of assessment in concreto when it comes to assessing the duration of a measure detrimental to the right to liberty against the background of the provision under consideration. The question of whether a period of pre-trial detention is reasonable cannot be evaluated in isolation; it must be examined in the context of the unique facts and circumstances surrounding each individual case. The determination of reasonableness considers various factors such as the severity of the alleged offense, the potential risk to public safety, the possible flight risk of the accused, and the complexity of the case proceedings.

Continued detention can be justified only if there are compelling indicators of an urgent public interest that necessitates such action. This justification must be substantial enough to override the fundamental principle of the presumption of innocence and the right to personal liberty established in Article 5. In essence, the balance between the need for public safety and the protection of individual rights must be carefully navigated to ensure fair treatment under the law.

Bearing in mind the role that Article 5 ECHR plays from the perspective of counteracting the arbitrariness of a public authority towards a citizen, it should be stressed

72 *Selahattin Demirtaş v. Turkey* (no. 2) [GC], 2020; *Štvrtecký v. Slovakia*, 2018; *Solmaz v. Turkey*, 2007.

that the primary responsibility lies with the national judicial authorities to ensure that the pre-trial detention of an accused person is not prolonged beyond a reasonable timeframe. In each case, these authorities must carefully evaluate all relevant circumstances surrounding the detention while respecting the fundamental principle of the presumption of innocence. This evaluation process includes a thorough examination of both the arguments supporting and opposing the claim that public interest necessitates deviation from the protections guaranteed under Article 5. Furthermore, the judicial authorities are required to articulate their reasoning in detail when rendering decisions regarding applications for release. They must address the specific facts and circumstances that influence the necessity for continued detention. This explanation is crucial, as it forms the basis on which the Court will assess potential violations of Article 5 § 3, which mandates that any individual detained pending trial should be brought promptly before a judge. Therefore, the clarity and comprehensiveness of the reasoning provided by the national authorities directly impact the Court's determination of whether the rights of the accused have been compromised.[73]

Brogan and Others v. the United Kingdom, ECtHR judgment of 29 November 1988, is a landmark case regarding the interpretation of "promptly" in Article 5 § 3 of the European Convention on Human Rights (ECHR), which guarantees the right to be brought promptly before a judge. The case involved four men suspected of terrorist activities in Northern Ireland who were arrested under the Prevention of Terrorism (Temporary Provisions) Act 1984. Each man was detained by the police without being presented before a judge for periods ranging from four days and six hours to six days and sixteen and a half hours. Their detention was authorised internally by the Secretary of State (an executive authority), rather than by a judge or judicial officer. The detainees argued that this practice violated Article 5 § 3.

The key legal question was whether a detention of more than four days without an appearance before a judge could still be considered "prompt" under Article 5 § 3. The case examined whether a review by an executive authority could satisfy the requirements of the Convention. The Court concluded that Article 5 § 3 mandates a prompt appearance before a judge – typically within hours or, at most, a few days. Furthermore, it emphasised that judicial review must be independent of the executive. Consequently, even in cases related to terrorism, strict time limits must be adhered to. The Court ultimately determined that detentions exceeding four days without judicial oversight could not be justified as "prompt".

Counteracting the arbitrariness of public authority must presuppose the realisation of adequate protection both at the level of lawmaking and its application. Therefore, the legislator is obliged to introduce temporal limits for the application of isolation coercive measures at the statutory level. The use of pre-trial detention is, as is well known, a particularly controversial issue. Article 5 § 3 should not be interpreted as granting unconditional authorisation for pre-trial detention, even if it is limited to a specific minimum duration. This provision emphasises the need for

73 *Buzadji v. the Republic of Moldova* [GC], 2016; *McKay v. the United Kingdom* [GC], 2006.

safeguards in the application of detention, highlighting that any restriction on personal liberty must be justified and cannot be imposed arbitrarily or without proper legal grounds. The use of pre-trial detention must be reviewed on an ongoing basis as to its justification and necessity.[74] In this context, it is the justifiability of the detention that is examined; as we indicated at the outset, justifiability refers to the verification conducted in concreto whether the given grounds for applying the coercive measure have materialised. At the same time, justiciability must be fully substantiated in the authority's decision; it cannot be presumed.

Quality law creates a legal framework for isolated coercive measures in national law. In spite of the guarantee character of the Convention, it should be explicitly noted that in its jurisprudence, the Court has not forgotten the functions of coercive measures and their relationship to the achievement of the objectives of the criminal process; in particular, the directive of an adequate penal response and general and individual prevention. In this context, it should be noted that the Court's jurisprudence has developed a standard on the basis of which refusing bail is justified. Among these, the following categories should be pointed out:

(a) the risk that the accused may not appear for trial;
(b) the risk that the accused, if released, would take action to prejudice the administration of justice, or (obstruction);
(c) the risk of committing further offences. We must note, in line with the Court's position, the seriousness of a charge may lead judicial authorities to detain a suspect on remand to prevent any attempts to commit further offenses. However, it is crucial that the perceived danger is plausible and that this measure is appropriate given the circumstances of the case. This includes taking into account the individual's past history and personality. For instance, previous convictions may justify a reasonable fear that the accused could commit a new offense.[75]
(d) Finally, there is the risk connected with the special diligence. The complexity and unique characteristics of an investigation play a crucial role in determining whether the authorities exhibited "special diligence" throughout the legal proceedings. It is essential to recognise that while the right of an accused individual in detention to have their case reviewed expeditiously is fundamental, this urgency should not compromise the judicial authorities' ability to perform their duties with the necessary thoroughness and attention to detail. Ensuring a balanced approach is vital—one that respects the rights

74 *Idalov v. Russia* [GC], 2012; *Tase v. Romania*, 2008; *Castravet v. Moldova*, 2007; *Belchev v. Bulgaria*, 2004.
75 *Clooth v. Belgium*, 1991; *Selçuk v. Turkey*, 2006; *Matznetter v. Austria*, 1969; *Sulaoja v. Estonia*, 2005.

> of the accused while allowing the judicial system to conduct its investigations meticulously and effectively.[76]

The risks associated with pre-trial detention must be thoroughly substantiated, and the reasoning presented by the authorities must avoid being vague, overly general, or based on stereotypes. Nonetheless, national judicial authorities may choose to endorse or refer to the specific arguments put forth by the authorities requesting the imposition of pre-trial detention, ensuring a comprehensive evaluation of the situation at hand.[77]

Buzadji v. the Republic of Moldova [GC], ECtHR Grand Chamber judgment of 5 July 2016, is one of the Court's most significant modern rulings on Article 5 § 3 of the ECHR. The applicant, Mr. Buzadji, is a Moldovan businessman who was arrested in 2007 on suspicion of fraud and abuse of office while managing a state-owned company. He was placed in pre-trial detention for over nine months, followed by an additional year of house arrest. The detention orders were extended repeatedly with formulaic justifications, citing the gravity of the charges and public interest, but these lacked concrete evidence of any risk.

The Grand Chamber clarified the legal standards established in earlier case law (*Letellier v. France, Idalov v. Russia*). It stated that reasonable suspicion of an offense is required from the outset. However, after the initial period following arrest, continued detention must be supported by other relevant and sufficient reasons, such as the risk of absconding, reoffending, interfering with evidence, or public disorder. The Court emphasised that these reasons must be specific and backed by evidence, rather than relying on general references to the seriousness of the offense. Furthermore, the Court dismissed Moldova's argument that economic crimes justified lengthier preventive detention to maintain public confidence. It highlighted that Article 5 § 3 takes effect as soon as detention begins and that the "initial period" should be measured in days rather than months.

4.4. Right to Have the Unlawfulness of Detention Speedily Examined by a Court

'Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.'

The interpretation of the terms "the lawfulness of detention" and "decided speedily by a court" used therein is important against the background of the indicated wording unit. This provision is intended, first, to oblige the parties to the Convention to establish control procedures concerning the application of measures depriving (restricting) the right to liberty. Second, the mere existence of control procedures

76 *Scott v. Spain*, 1996; *Shabani v. Switzerland*, 2009; *Sadegül Özdemir v. Turkey*, 2005; *Buzadji v. the Republic of Moldova* [GC], 2016; *Tiron v. Romania*, 2009; *Smirnova v. Russia*, 2003; *Piruzyan v. Armenia*, 2012.

77 *Merabishvili v. Georgia* [GC], 2017.

in a given legal system cannot be considered sufficient. As we indicated earlier, an adequate formula for implementing the provisions of the Convention into national law is the introduction of quality law. Indeed, it is necessary to ensure that persons subject to measures excluding or restricting the right to liberty have real access to review procedures. Third, these procedures must be of a guarantee-oriented nature, the guaranteed nature encompassing, on the one hand, the status of the determining authority, in particular its independence, as well as the promptness of the control procedures. Indeed, it is recognised that deprivation and restriction of liberty must be subject to immediate ad hoc monitoring.

However, due to the diverse nature of the legal remedies that fall under the notion of "detention" and "arrest" as used in Article 5 of the ECHR, the nature of the review procedures may vary considerably. The concept of "court" as used in this provision should be interpreted broadly. Indeed, for a control procedure to comply with Article 5(4), it is essential that the procedure is guaranteed and that the person subjected to detention has real access to this procedure.

It should also be added that the existence of a control procedure is aimed at verifying the issue of "lawfulness" of detention, which means that the actualisation of this provision occurs, so to speak, in the foreground, and a violation of Article 5(4) is independent of the decision of the merits, i.e. there may be a violation of this provision even if the substantive decision on the application of detention is correct, but the control procedure is defective (primary defect, i.e. at the level of national regulation), or was implemented in a defective manner (secondary defect, arising in the process of law application). One must note here that the issue of speed of procedure will usually consist of a secondary defect. An overly dilatory implementation will instrumentalise the existing procedure.

The body of jurisprudence established by the European Court of Human Rights (ECHR) clearly demonstrates that Article 5 § 4 functions as the habeas corpus provision of the European Convention on Human Rights. This article guarantees detained individuals the fundamental right to actively seek a judicial review of the lawfulness of their detention. It ensures that anyone who is deprived of their liberty can challenge the reasons for their detention before a court, which is crucial for protecting personal freedoms and upholding the rule of law. This provision not only reinforces the principle of individual liberty but also fosters accountability within the justice system by allowing detainees to contest the legality of their confinement and obtain timely resolutions.[78] Article 5 § 4 ensures that individuals who are arrested or detained have the right to a swift court review of the lawfulness of their detention. If the court finds that the detention is not lawful, it must order the individual's release. The fact that the Court has determined there was no violation of Article 5, § 1 of the Convention does not exempt it from reviewing compliance with Article 5 § 4. It is crucial to highlight that in situations where detainees have not been adequately informed of the specific reasons for their deprivation of liberty, the Court has decisively concluded that this

78 *Mooren v. Germany* [GC], 2009; *Rakevich v. Russia*, 2003.

lack of information effectively nullifies their right to appeal against their detention. This principle is grounded in the protection afforded by Article 5 § 4, which grants arrested or detained individuals the legal entitlement to initiate proceedings for a thorough judicial review. Such a review must assess both the procedural and substantive conditions that are vital for establishing the "lawfulness" of their detention, as outlined in Article 5 § 1. Thus, the failure to communicate the reasons for detention undermines the detainees' ability to challenge the legitimacy of their confinement, diminishing the substantive protections intended by the law.[79]

Mooren v. Germany [GC], ECtHR Grand Chamber judgment of 9 July 2009, is a significant case concerning Article 5 related to the lawfulness of detention and the interpretation of "in accordance with a procedure prescribed by law." Mr. Mooren, a German national, was arrested in 2002 on suspicion of tax evasion and placed in pre-trial detention based on a warrant issued by a domestic court. He contended that the warrant was null and void from the outset due to a lack of proper reasoning and procedural flaws. He repeatedly sought release, but domestic courts upheld the detention. The Grand Chamber examined alleged violations of Article 5 § 1(c) by determining if the pre-trial detention was lawful under both domestic law and the Convention? And secondly, Article 5 § 4 by determining if the applicant had an effective and speedy means to challenge the lawfulness of his detention? Subsequently, the Court stated that, regarding Article 5 § 1, the term 'lawful' has a dual meaning: it must comply with both domestic law and Convention standards. The Court typically defers to domestic courts on the interpretation of national law unless their application is manifestly unreasonable or arbitrary. In Mooren's case, although there were some arguable defects, the detention order had been issued by a competent court, under a valid statute, and was subject to review; therefore, it was not deemed arbitrary. When it comes to the possible violation of Article 5 § 4, the Court stated that the review of detention must be speedy and allow the detainee to contest the factual and legal basis for detention. In this case, the review procedures provided by German law were sufficient; there was no undue delay. In its ruling, the Court determined that there was no violation of Article 5, sections 1 or 4, in this case. It clarified that Article 5, section 1 allows for a limited international review of how domestic laws are applied, particularly concerning issues of arbitrariness. A detention order that is flawed under domestic law does not necessarily violate the Convention unless that flaw makes the detention arbitrary.

As a side note, it must be emphasised that the notion of "lawfulness" under Article 5 § 4 has the same meaning as in Article 5 § 1 – the arrested or detained person is entitled to a review of the "lawfulness" of his detention in the light not only of the requirements of domestic law but also of the Convention, the general principles embodied therein and the aim of the restrictions permitted by Article 5 § 1.[80]

79 *Khlaifia and Others v. Italy* [GC], 2016; *Idalov v. Russia* [GC], 2012; *Reinprecht v. Austria*, 2005.
80 *Khlaifia and Others v. Italy* [GC], 2016; *Suso Musa v. Malta, 2013*; *A.M. v. France*, 2016.

The "court" that a detained individual can access according to Article 5 § 4 does not necessarily have to resemble a conventional court as found in the typical judicial framework of a country. Nevertheless, it is imperative that this court possesses a "judicial character" and adheres to specific procedural safeguards. This entails that the court must maintain its independence from both the executive branch of government and the parties involved in the case, ensuring that its decisions are free from external influence. Moreover, the "court" in the context of Article 5 § 4 must be interpreted as a body that exhibits the same essential qualities of independence and impartiality that are mandated for the "tribunal" referenced in Article 6. This means that it should operate without bias, provide fair access to legal representation, and afford individuals the opportunity to present their cases effectively. Such a structure is crucial for protecting the rights of the detained person and upholding the principles of justice and due process.[81]

The case of *Stephens v. Malta (no. 1)*, a judgment by the European Court of Human Rights (ECtHR) dated 21 April 2009, addresses issues related to extraterritorial arrest warrants, allegations of bad faith in extradition requests, and the safeguards outlined in Article 5. Mr. Stephens, a British national, was convicted in absentia in Malta of fraud and sentenced to 30 years in prison. In 2003, Maltese authorities issued an international arrest warrant through Interpol, leading to his arrest in Spain while he was on holiday. He was detained in Spain pending extradition to Malta. Mr. Stephens contended that the Maltese conviction was politically motivated and based on fabricated charges, asserting that the Maltese authorities acted in bad faith when requesting his extradition.

The Court concluded that his detention in Spain, resulting from the Maltese warrant, violated Article 5 § 1 of the ECHR because the conviction was fundamentally flawed. Although the arrest took place in Spain, Malta had extraterritorial jurisdiction under Article 1 of the ECHR, as the Maltese arrest warrant directly caused the detention. A conviction in absentia can be considered valid under Article 5 if the individual had a genuine opportunity for a retrial after surrender. In this case, doubts arose due to several factors. Firstly, the conviction was obtained without Mr. Stephens' participation, as he claimed he was not properly informed of the proceedings. The Maltese authorities failed to demonstrate that he would be guaranteed a retrial in Malta. The combination of these factors, along with the allegations of bad faith, indicated that his detention was not free from arbitrariness. The requirement of good faith is crucial: even if there is a conviction, detention may be deemed incompatible with Article 5 if it stems from proceedings marred by bad faith or abuse of process.

It should be noted that due to the wide range of measures depriving individuals of their right to liberty and personal security, the nature of adequate remedies meeting the "judicial review" criterion may vary. In the case of *Khlaifia and Others v. Italy*, the Court indicated that the types of judicial reviews that meet the standards of Article 5

81 *Weeks v. the United Kingdom*, 1987; *Stephens v. Malta* (no. 1), 2009; *Ali Osman Özmen v. Turkey*, 2016; *Baş v. Turkey*, 2020.

§ 4 can differ across various contexts and will be influenced by the specific nature of the deprivation of liberty in question.[82]

An interesting example is connected with the case *Z.A. and the Others v Russia* delivered by the European Court of Human Rights on 21 November 2019 (application no. 61411/15):

> 'Four foreign nationals from Iraq, Somalia, Palestine, and Syria sought asylum at Moscow airports between 2015 and 2016. Russian border authorities denied them entry, placing them in the airport's international transit zone due to immigration issues, despite their inability to return to their home countries. They were stuck in the transit zone for extended periods – ranging from months to nearly two years – living in poor conditions without formal recognition of their situation as detention or access to judicial review. The ECtHR found a violation of Article 5 §1 (Right to liberty and security). In court opinion, the confinement of applicants in transit zones was not legally justified, had no time limit, and was deemed arbitrary, violating Article 5 §4 (Right to Judicial Review). The Court clarified that "transit zones" are not legal voids; individuals held there remain under the state's jurisdiction. It reaffirmed that any deprivation of liberty – whether at a border or an airport – must be founded on clear legal grounds and require judicial oversight. This judgment enhanced protections for asylum seekers and migrants, preventing states from evading responsibility by detaining them in airport zones or "international areas".'

4.5. Right to Compensation for Unlawful Detention

'Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.'

The last area of guarantees includes ex-post guarantees, i.e. remedy for unlawful arrest of retention. In this sense, Article 5 § 5 creates a direct and enforceable right to compensation before the national courts.[83] The entitlement specified in the indicated provision is updated when the right related to the protection of liberty and personal security has been violated. It should be recalled that to the extent of this violation, the ECtHR alone decides autonomously and, therefore, independently of the position of the national authority.[84] However, this relationship is one-sided in that the ECtHR is not bound by the decision of the national authority, but at the same time, the right to compensation may only result from a finding of a violation by the national court. Consequently, the establishment of the right to compensation depends, therefore, on the prior determination of the infringement. However, the determination of the infringement may take place both by virtue of a national authority's decision and

82 *Khlaifia and Others v. Italy* [GC], 2016; *M.H. v. the United Kingdom*, 2013.
83 *A. and Others v. the United Kingdom* [GC], 2009; *Storck v. Germany*, 2005.
84 Letsas, 2004, pp. 279–305.

by virtue of a judgment of the ECtHR.[85] Moreover, it is said that the arrest or detention may be lawful under domestic law, but still in breach of Article 5, which makes Article 5 § 5 applicable.[86] Conversely, in jurisdictions where national laws establish a formal right to compensation for individuals who have been acquitted after a period of wrongful detention, this automatic entitlement does not automatically suggest that the detention itself is legally deemed as contrary to the provisions outlined in Article 5. This regulation emphasises the right to liberty and security, and while compensation may be available for those wrongfully imprisoned, the nuances of each case – such as the legality of the arrest or the circumstances leading to acquittal – must be carefully examined to determine whether the detention indeed violated the protections afforded by the article. This distinction highlights the complexity of balancing individual rights with the legal framework governing detention practices.[87]

It is important to highlight that Article 5 § 5 does not prevent Contracting States from conditioning the award of compensation on the individual's capacity to demonstrate the existence of damage, whether that damage is pecuniary (financial losses) or non-pecuniary (emotional or psychological harm) resulting from a breach of rights. However, the Court has clarified that imposing excessive formalistic requirements for proving non-pecuniary damages stemming from unlawful detention violates the fundamental right to compensation. This indicates that while states may seek to verify damages claimed, they must do so in a manner that does not undermine the victims' access to justice or the principles of fairness and equity inherent in the compensation process.[88] Article 5 § 5 of the Convention does not entitle the applicant to a particular amount of compensation.[89] The right to compensation primarily pertains to financial compensation. However, as the court points out, it does not grant the right to secure the release of a detained person, which is addressed by Article 5 § 4 of the Convention (*Bozano v. France*, Commission decision of 15 May 1984). Additionally, having a period of pre-trial detention counted towards a penalty does not qualify as the compensation required by Article 5 § 5, as it has a non-financial nature.[90] A reduction of sentence could be considered as a form of compensation under Article 5 § 5, provided that it is explicitly granted as a means to redress a specific violation of rights. For it to qualify as compensation, the reduction must not only be clearly articulated as a remedial measure but also have a demonstrable and proportionate effect on the overall length of the sentence served by the individual in question. This means that the reduction should directly correlate to the severity of the violation experienced, ensuring that the individual's right to fair treatment is effectively acknowledged and remedied through a tangible adjustment in their sentencing.[91]

85 *N.C. v. Italy* [GC], 2002; *Pantea v. Romania*, 2003; *Vachev v. Bulgaria*, 2004.
86 *Harkmann v. Estonia*, 2006.
87 *Norik Poghosyan v. Armenia*, 2020.
88 *Danev v. Bulgaria*, 2010.
89 *Damian-Burueana and Damian v. Romania*, 2009; *Şahin Çağdaş v. Turkey*, 2006.
90 *Włoch v. Poland* (no. 2), 2011.
91 *Porchet v. Switzerland*, 2019.

5. Conclusion

The discussion of Article 5 of the ECHR presented above primarily emphasises the question of the ECtHR's autonomous interpretation of the provisions of the Convention. The latter, on the other hand, is a point of reference for the national legislator both at the level of lawmaking and law in action. It is, moreover, a point of *ex-post* control, i.e. a subsidiary control, which the Strasbourg Court exercises in the context of a concrete application to examine *in concreto* the question of a violation of the Convention provisions.

The foregoing discussion gives rise to the conclusion that Article 5, first, refers to the various forms of application of detention measures under national law and, therefore, extends beyond criminal proceedings. However, some parts of the articles analysed refer exclusively to criminal procedural coercive measures. From the perspective of national regulations, the most problematic is the mosaic of isolative measures that are not related to criminal proceedings. The *ratio legis* of their applicability has to be linked to the issue of security in the broadest sense: of society, of persons or even of the state.

Second, Article 5, on the one hand, makes it possible to define lawful detention and arrest; on the other hand, by highlighting in detail the issue of procedural guarantees, it makes it possible to address the correctness aspect. In the background of the use of coercive measures of an isolating nature, the general guarantees of fairness flowing from Article 6 ECHR also remain. Third and final, in its interpretation, the Strasbourg Court seeks to respect the primacy of national law, as a body acting in a supportive and subsidiary capacity, and thus, after exhausting national control procedures, the court in its jurisprudence introduces boundary criteria, while respecting—especially with regard to isolative coercive measures applied outside criminal proceedings—the particularity of national regulations. It is noted that the court's interpretations are presented from the perspective of a possible negative instrumentalisation of detention and arrest. From a certain perspective of the jurisprudential lines, it is clear that particular manifestations of negative instrumentalisation in the three formulations indicated in the introduction to this chapter have also been diagnosed by the Court. In its case law, it emphasises the concept of arbitrariness in the application of arrest and detention as well as the issue of quality law, which is of primary importance in the context of negative instrumentalisation.

The context of instrumentalisation can be related to a broader issue of the functioning of public authority organs and therefore falls within the concept of the rule of law. [92]

According to the case law of the European Court of Human Rights (ECtHR), the concepts of abuse of power and the principles of legality are examined in various forms. First, these concepts are evaluated in the context of institutional guarantees

92 European Economic and Social Committee, 2024.

that public bodies must provide to prevent violations of human rights. This includes essential safeguards such as the independence of the judiciary, which ensures that judges can make decisions free from external pressures or influences. Such independence is crucial in maintaining public confidence in the legal system and protecting individual rights. Second, they are considered in terms of proportionality, which assesses whether the means used to deprive or restrict an individual's liberty are appropriate and necessary. This principle requires a careful balancing of interests to ensure that any restrictions on personal freedom are not excessive in relation to the intended objective. In the realm of formal guarantees of the rule of law, the institution of effective judicial remedies plays a pivotal role. An effective judicial remedy ensures that individuals have access to fair legal recourse when their rights are infringed upon. This includes the ability to challenge unlawful actions by authorities and seek redress, thus reinforcing the rule of law and protecting individual freedoms within the legal framework.

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