Right to Liberty and Security under the European Convention on Human Rights (Article 5)

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Using this Manual

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The manual includes judgments of the European Court of Human Rights up to September 2007. Any errors, omissions or faults are those of the authors.

Alternative formats of the manual are available upon request.

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1 INTRODUCTION

ARTICLE 5 – RIGHT TO LIBERTY AND SECURITY

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;
(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
(c) the lawful arrest or detention of a person effected for the purpose of bringing 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;
(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

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

3. Everyone arrested or detained in accordance with the provisions of paragraph 1.c of this article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

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

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

1.1 The meaning and importance of the right to liberty and security

The importance of the right to liberty and security has been recognised for centuries. It finds expression in a number of important antecedents to international human rights treaties, such as the Magna Carta of 1215, and the American and French Constitutions of the 1700s. The essential purpose of Article 5 is to guarantee the protection of the individual's physical liberty against arbitrary detention. It is not concerned with mere restrictions on a person's freedom of movement, which is governed by Article 2 of Protocol 4.

Pursuant to Article 14 of the Convention, the right to liberty and security is guaranteed to everyone, without distinction on grounds such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property birth or other status (as to further non-discrimination provisions, see also Protocol No. 12 (ratified by 15 states as at August 2007)).

The Court has consistently stressed the importance of the right to liberty and security in a democratic society. For example, in **De Wilde Ooms and Versyp v Belgium (1971)**, where the applicants had *voluntarily* given themselves into police custody, the Court held that the right to liberty and security is too important in a democratic society for a person to lose the benefit of its protection on account of having given himself up to be taken into detention.

Article 5 offers protection not only at the point when a person is first detained, but also periodically thereafter until the person is released, or is sentenced to a period of imprisonment by a criminal court.

1.1.1 The notion of "security of person"

The Court has made clear in a number of cases, including in the case of **Altun v Turkey (2004)**, that the notion of *security* of person in Article 5 is not to be given any independent (i.e. separate) interpretation from the right to *liberty*. The Court noted that the primary concern of Article 5 is protection from arbitrary deprivation of liberty. The applicant in **Altun** alleged that he was compelled to abandon his home and village in breach of the right to the exercise of liberty and the enjoyment of security of person. The Court considered that the applicant's insecure personal circumstances arising from the loss of his home did not fall within the notion of "security of person" under Article 5.

In other cases, the Court has suggested the notion of "security of person" can be equated to the obligation to prevent the arbitrary deprivation of liberty: see, for example, the cases of **Bozano v France** and **Ocalan v Turkey (2005)**, which are both discussed below.

1.2 The right and its permissible restrictions

The first sentence of Article 5 sets out the right to liberty and security, a right guaranteed to everyone; the second sentence permits exceptions only in carefully prescribed circumstances. First, any detention must have followed a "procedure prescribed by law" and second, it must have been authorised on the basis of one of sub-paragraphs (a)–(f) of paragraph 1. The list of grounds of detention under these sub-paragraphs is exhaustive; no other basis of detention is lawful under Article 5. Accordingly, a deprivation of a person's liberty which does not take place in accordance with a procedure prescribed by law, or on the basis of sub-paragraphs (1)(a)–(f), is arbitrary and unlawful. Authorities holding persons detained in circumstance contrary to Article 5 are under an obligation to release them immediately (as to redress before the European Court, see further **Assanidze v Georgia (2004)** and **Ilascu and others v Moldova and Russia (2004)** which are discussed below at 5.4). Persons detained in violation of any aspect of Articles 5(1) to 5(4) are entitled to compensation, by virtue of Article 5(5).

The right to liberty and security can be subject to derogation in times of national emergency in accordance with Article 15 of the Convention, providing certain procedures are followed (see section 5.3 below).

2 DEPRIVATION OF LIBERTY

2.1 Factors indicating deprivation of liberty

The Court has made a fundamental distinction between a deprivation of liberty, which attracts the protection of Article 5, and a mere restriction on movement which does not, as mentioned above. The difference between deprivation of liberty and mere restriction on a person's movement is a question of degree or intensity rather than nature or substance (see **Guzzardi v Italy (1980)**). Therefore, few generalisations can be made and the circumstances relating to each individual case must be examined closely. Account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question (see the **Engels** case discussed below).

The following points are relevant to this assessment:

- the degree of coercion used;
- the area of confinement (the smaller, the more the likelihood of a finding of deprivation of liberty), and the degree of security with which confinement is ensured;
- the frequency and degree of intrusiveness of the means of supervision;
- the extent to which contact with the outside world is permitted, and supervised; and
- the length of time for which such measures are applied.

2.2 Cases on indicia of detention

The following cases illustrate the Court's approach:

- In **Litwa v Poland (2000)**, a person who was found to be drunk and abusive in a public place, was sent by police to a sobering-up centre and detained there for six and a half hours. This was held to be a deprivation of liberty for the purposes of Article 5.

- In **Guzzardi v Italy (1980)**, a Mafia suspect was ordered by a criminal court to live on a small island where he was subject to strict police supervision, as a preventative measure. He could not leave his house at night without giving prior notice to the police, to whom he had to report twice daily. The area in which he could move freely extended to little more than a radius of 800 metres and represented a tiny fraction of the island. This area contained, for the most part, other individuals subject to the same regime of compulsory residence, and police officers. The applicant had little, if any, contact with the permanent population of the island, and his telephone communications and rare visits to the outside world were supervised by the police. He remained in this situation for more than sixteen months. On the basis of these factors, taken cumulatively and in combination, the Court concluded that the situation amounted to a deprivation of liberty.

- In **Engel and others v the Netherlands (1976)**, a case concerning disciplinary measures taken against various Dutch national servicemen, the Court, on the basis of the permissibility of compulsory national service under Article 4(3)(b) of the Convention, noted (at paragraph 59) that:

  > "A disciplinary penalty or measure which on analysis would unquestionably be deemed a deprivation of liberty were it to be applied to a civilian may not possess this characteristic when imposed upon a serviceman. [To establish when it does possess the characteristic,] account should be taken of a whole range of factors such as the nature, duration, effects and manner of execution of the penalty or measure in question."

Various categories of measures were considered:

- "*Light arrest*" involving continuing performance of duties with off-duty confinement to dwelling or barracks without being locked up was not a deprivation of liberty.
- "*Aggravated arrest*" differed only in that whilst off-duty, soldiers were confined to a specially designated place which they could not leave to visit the canteen or recreation facilities, but since they were not locked up there was no deprivation of liberty.
- "*Strict arrest*", under which the subject was excused duties and confined to a locked cell, day and night: this constituted deprivation of liberty,
- "*Committal to a disciplinary unit*," served in a separate establishment alongside criminal convicts, involved being locked up at night and was for a far longer duration than "aggravated arrest"; thus, despite its less harsh regime, it also amounted to deprivation of liberty.

- In **Ashingdane v United Kingdom (1985)**, a man suffering from mental illness was authorised to be transferred from a high security regime 'special hospital' to an ordinary psychiatric hospital when his condition improved. However, he was unable to be moved immediately because of industrial action at the receiving hospital. He alleged that since the regime in the special hospital amounted to detention whereas that in the other did not, the failure to transfer him upon authorisation amounted to an unlawful deprivation of liberty. Referring to the **Guzzardi** and **Engel** cases, the Court held that the applicant had merely gone from one regime of hospital detention to another, albeit more liberal, one. The delay in his transfer just extended detention under the stricter regime, not the overall period of deprivation of liberty.

- In **Amuur v France (1996)**, the applicants were Somali asylum seekers who arrived at Paris-Orly airport from Syria. They spent the next twenty days in the 'international' or 'transit' zone without technically entering France. They had no access to legal representation until the fifteenth day. On day 16 they applied for asylum, and on day 17, they applied for release from detention. The French authorities declined jurisdiction over their asylum claims on the basis that they did not have temporary residence permits. On day 20, they were deported to Syria by diplomatic agreement between the two governments; two days later, a French court ordered their release on the grounds that their (previous) detention was not provided for by legislation and thus was an arbitrary and unlawful deprivation of liberty. The Court, firmly rejecting an argument that the applicants could have brought their detention to an end at any time by abandoning their applications to enter France, stated (at para. 48) that:

  > "The mere fact that it is possible for asylum-seekers to leave voluntarily the country where they wish to take refuge cannot exclude a restriction on liberty, the right to leave any country, including one's own, being guaranteed, moreover, by Protocol No. 4 to the Convention. Furthermore, this possibility becomes theoretical if no other country offering protection comparable to the protection they expect to find in the country where they are seeking asylum is inclined or prepared to take them in."

  (Syria was not a signatory to the 1951 Refugee Convention). Given the facts that the applicants were not criminals, but asylum seekers, that they were under strict and constant police surveillance, that for much of the time they were left to their own devices, without social or legal assistance, what might have been merely a *restriction* of liberty became a *deprivation* because of the degree of restriction of movement and its duration. Labelling the area 'international' did not make it extraterritorial or place it outside France's jurisdiction, and the legal mechanisms available to the applicants to challenge their detention within it did not meet the requirements of the Convention.

- In **H.M. v Switzerland (2002)**, the applicant was an elderly woman who was taken into care in a foster home against her will on account of serious neglect; she was deemed unable to look after herself. She claimed that her placement in the foster home amounted to detention under Article 5, and that Article 5 did not permit detention on the grounds of neglect. The Court examined all the circumstances, noting that the applicant had been given the opportunity to accept the assistance of an Association for House and Sick Visits in lieu of being taken into foster care, but that she had refused to co-operate. It also noted that once she had moved, the applicant agreed to stay, and that she was not sure whether she was better or worse off than living in her own house. In the circumstances, the Court held that the applicant was not detained, for the purposes of Article 5.

- In **Lavents v Latvia (2002)**, the applicant was subjected to house arrest for a period of 11 months. He was kept under constant supervision and was forbidden to leave his home at any time during the period. The Court held that this amounted to deprivation of liberty within the meaning of Article 5.

- By way of comparison to **Amuur** see the admissibility decision in **Mahdid & Haddar v Austria (2005)**, which involved a family of 4 Algerian nationals who sought asylum at Vienna airport. They had passports and tourists visas to Slovakia but they destroyed them. Their request was considered within three days and refused. The applicants stayed in the transit zone from November 4 until December 13, 1996. The authorities attempted to deport them to Tunisia several times during that time. They submitted that their situation following the rejection of their application at the border control amounted to an unlawful deprivation of liberty which they were unable to challenge effectively as the Austrian authorities refused to acknowledge it as such. The Court distinguished their situation from that of **Amuur** and stated that there was no deprivation of liberty. The Court observed that the request for asylum was adjudicated within 3 days and nonetheless the applicants decided to stay. The Court further noted that the applicants declined the offer to be housed in a specially arranged zone, and were left to their own devices. They remained without any police surveillance, and they could organize their daily life, correspond, and enter into contact with third persons without interference or control of the authorities. Since the very beginning, they were in contact with a humanitarian organization that provided them with social and legal support. The attempt to deport them to Tunisia failed twice as, once, they could not be found, and once because they refused to board the plane. The Court further emphasized that the applicants made a deliberate choice to destroy their passports and refused to go to another country to force their entry into Austria, for which Austria could in no way be held responsible.

In considering whether a person has been detained under Article 5, the Court is less concerned with the nature of the place of detention, than it is with the factors mentioned above. Thus, persons held in churches, houses, hospitals, restricted areas of an airport, and cars, for example, have all been held to have been deprived of their liberty.

Questions

1. Is there a definition of "detention" or "deprivation of liberty" under domestic law?
2. If so, does the provision clearly specify what amounts to a detention or deprivation of liberty?
3. Is there a clear distinction between deprivation of liberty and restriction on freedom of movement?
4. Does the right to liberty and security apply to members of the armed forces?
5. Does the right to liberty and security apply to everyone, including temporary residents or visitors, without discrimination on the basis of race, colour, political or other opinion, ethnic origin, sex, etc. (contrary to Article 14 or Protocol No. 12)?

3 EXCEPTIONS: THE PERMISSIBLE GROUNDS FOR DEPRIVATION OF LIBERTY

3.1 The nature of the exceptions

The right to liberty and security is not absolute, but the essential presumption under Article 5 is in favour of liberty. The exceptions provided for in Article 5, like all exceptions in the Convention, must be construed narrowly. In **Quinn v France (1995)**, the applicant was detained in connection with allegations of fraud. A domestic court ordered his release "forthwith" but he was not actually released until eleven hours later. The Court held that this delay violated Article 5, emphasising that the purpose of Article 5 is to ensure that no one is arbitrarily deprived of their liberty.

As will be more fully explained later, the only exceptions to the right to liberty and security are those specifically provided for in Article 5; any other grounds which may be permitted by domestic law are contrary to Article 5.

While the list of exceptions in Article 5 is exhaustive, the applicability of one exception in any case, does not necessarily exclude another exception. A detention may, depending on the circumstances, be justified by more than one sub-paragraph of Article 5(1). In other words, two exceptions may be relevant to the one case (see **Eriksen v Norway (1997)**).

3.1.1 The principle of legality

The notion of legal certainty, based on the rule of law, pervades Article 5 of the Convention, in particular Article 5(3). All deprivations of liberty under Article 5 must be carried out "in accordance with a procedure prescribed by law" and be "lawful". These phrases refer back to domestic law and the notion underlying them is one of fair and proper procedure. This means that any measure depriving a person of their liberty should issue from, and be executed by, an appropriate authority and should not be arbitrary (see **Bizzotto v Italy (1989)** at para. 31).

3.1.1.1 Quality of the law

The notion of 'lawfulness' also relates to the *quality* of the law concerned. The law authorising the detention must therefore be compatible with the rule of law and must be sufficiently accessible, precise and foreseeable as to its effects, in order to avoid all risk of arbitrariness.

- In **Amuur v France (1996)**, an unpublished circular, which consisted of instructions given by Ministers and Police Chiefs concerning aliens who were refused leave to enter at frontiers, was held by the Court not to constitute "law of sufficient quality", since it was not "accessible."

- In **Varbanov v Bulgaria (2000)**, the applicant was compulsorily detained for 25 days in a psychiatric hospital, on the order of a prosecutor. The Court noted several shortcomings in the domestic law. It stated that the law was not remedied by the existence of guidelines issued by the public prosecutor, since these were contained in an unpublished document and had no formal legal force. The Court noted that the expressions "in accordance with the law" and "in accordance with a procedure prescribed by law" require that the measure in question should have a basis in domestic law and also refer to the quality of the law in question, requiring that it should be accessible to the person concerned and foreseeable as to its effects.

- In **Jecius v Lithuania (2000)** the Court considered the detention order issued by the domestic court to be "lawful", although the order lacked precision. The Court concluded that the

Regional Court had jurisdiction and the meaning of the order was clear to all present. In addition, the Court stated that the domestic court could not be said to have acted in bad faith or have failed to apply the domestic law correctly.

- In **Shamsa v Poland (2003)** the Court considered that detention in the transit area for an indeterminate and unforseeable period without legal basis or a valid court decision was contrary to the principle of legal certainty.

- In **Kepenerov v Bulgaria (2003)**, in the course of legal proceedings involving the applicant, the prosecutor ordered him to undergo a psychiatric examination. When he failed to comply, the prosecutor ordered the police to arrest and detain the applicant. He was arrested and forcibly taken to a hospital where he was detained for 30 days. The Court held that the domestic law governing confinement on mental health grounds, did not empower a prosecutor to commit a person to compulsory confinement in a psychiatric clinic for the purpose of carrying out a psychiatric examination. In addition, the relevant law in force did not stipulate the necessity for a medical opinion prior to confinement. The Court concluded that the detention was neither lawful, in accordance with Article 5(1), since it had no basis in domestic law, nor did it offer protection against arbitrariness, in failing to require an expert medical opinion prior to detention.

- In **Tkacik v Slovakia (2003)**, the applicant was taken against his will by police to a mental hospital for the administration of drugs and in order to undergo tests. He was held there for a number of days. The applicant claimed a violation of Article 5(1), arguing that domestic law had not been complied with. The Court agreed, stating that time limits for detention provided by Slovakian law had not been respected. The detention had accordingly not been 'lawful' and there was a violation of Article 5(1).

- In **Ahmet Özkan and others v Turkey (2004)** the complete lack of custody records at one of the gendarme stations and the unreliability of such records at another implied that the detention of the applicants was arbitrary and in breach of Article 5.

- In **Gusinskiy v Russia (2004)** although the Code of Criminal Procedure permitted measures of restraint in "exceptional circumstances", such as remanding the applicant in custody before being charged, the Government had not submitted any examples of cases which had been considered to disclose such "exceptional circumstances" in the past. Thus, it had not been shown that the basis on which a person could be deprived of his liberty in these circumstances met the "quality of law" requirement of Article 5. The Court also found a violation of Article 18 (the limitation on the use of restrictions on rights), in conjunction with Article 5, on the basis that the applicant had been detained not only because of a reasonable suspicion of his involvement in an offence (and therefore in order for him to be taken before a competent legal authority) but also in order to intimidate the applicant into transferring certain shares in his media company to a state-controlled company.

- In **Hilda Hafsteinsdóttir v Iceland (2004)** the Court considered that there was a legal basis for the detention in police custody of the applicant for drunkenness and disorderly conduct, but concluded that the provisions were not sufficiently precise as to the type of measures that the police were authorised to take in respect of a detainee, nor did they specify a maximum duration for the detention. Moreover, the police instructions had not been made accessible to the public. Hence, the exercise of discretion by the police and the duration of the detention had been governed by administrative practice alone, not by a legal framework. For these reasons, the Court was not satisfied that the law was sufficiently precise and accessible to avoid all risk of arbitrariness. Accordingly, the applicant's deprivation of liberty had not been "lawful".

- In **Svipsta v Latvia (2006)** the applicant's pre-trial detention had been ordered on the basis of a provision in the Code of Criminal Procedure (KPK) which stipulated that "the time taken for all the defendants to take cognisance of the documents in the investigation file shall not be taken into account in calculating the length of detention pending trial". This wording was found to be too vague and imprecise: it did not clearly state that there was a requirement to keep the defendant in detention. The provision therefore failed to satisfy the requirements of "lawfulness" laid down by Article 5(1). In reality the automatic extension of the applicant's pre-trial detention was found to have been the result of a generalised practice on the part of the Latvian authorities which had no precise basis in legislation and had been designed to compensate for the deficiencies in the KPK.

- In **Garabayev v Russia (2007)** the applicant was detained in Russia pursuant to a detention order issued by a prosecutor in Turkmenistan. His detention was not confirmed by a Russian court, as was required by the domestic law. Therefore the applicant's detention pending extradition was not found to be in accordance with a "procedure prescribed by law" as required by Article 5(1).

Thus, any detention which is ordered in a manner which is contrary to domestic law or procedure, or where the domestic law lacks accessibility, clarity and forseeability, will always constitute a violation of Article 5(1).

- In **Conka v Belgium (2002)** the measures taken by the domestic authorities were incompatible with Article 5(1). The applicants were lured to the police station by being told that their presence was needed to complete their asylum applications. However, when arriving at the police station the applicants were issued with a fresh order to leave the territory and an order for their detention for that purpose. The Court stated that a conscious decision by the authorities to facilitate or improve the effectiveness of a planned operation for the expulsion of aliens by misleading them about the purpose of a notice, so as to make it easier to deprive them of their liberty, was not compatible with Article 5.

Unacknowledged detention (i.e., where the authorities keep no record of detention) is regarded by the Court as a particularly egregious form of violation of the 'lawfulness' requirement of Article 5.

- In **Fedotov v Russia (2005)** the Court observed that no records of the applicant's arrests had been drawn up and that the officer in charge of the police station expressly refused a request for a record. The Court considered this a very serious failing, as it has been the Court's traditional view that the unacknowledged detention of an individual is a complete negation of the fundamentally important guarantees contained in Article 5 and discloses a most grave violation of that provision. It concluded that the absence of a record of such matters as the date, time and location of detention, the name of the detainee, the reasons for the detention and the name of the person effecting it is incompatible with the requirement of lawfulness and with the very purpose of Article 5. See also **Menesheva v Russia (2006)**.

The Court has stated that a period of detention will in principle be lawful if it is carried out pursuant to a national court order. The only circumstances in which it will regard such periods of detention as unlawful, is where detention is ordered in excess of jurisdiction, or where there is evidence that the order is made arbitrarily. An order for detention may be quashed by a higher court at a later stage. However, this will not necessarily result in a finding that the original order for detention was invalid and therefore contrary to Article 5(1).
See, **Benham v the United Kingdom (1996)**.

- In **Ilascu and others v Moldova and Russia (2004)** the applicants, relying on the 'legality' provision in Article 5(1)(a), alleged that their detention in the 'Moldavian Republic of Transdniestra' (MRT), a region of Moldova which declared its 'independence' in 1991 but which has not been recognised by the international community, had not been lawful and that the court which had convicted them was not a competent court. The Court noted that the notion underlying the expression "in accordance with a procedure prescribed by law" in Article 5(1)(a) is one of fair and proper procedure, namely that any measure depriving a person of his liberty should issue from, and be executed by, an appropriate authority and should not be arbitrary. In addition, as the purpose of Article 5 is to protect the individual from arbitrariness a "conviction" cannot be the result of a flagrant denial of justice. In this case, the Court found that none of the applicants was convicted by a "court", and that a sentence of imprisonment passed by a judicial body such as the "Supreme Court" of the MRT at the close of proceedings could not be regarded as "lawful detention" ordered "in accordance with a procedure prescribed by law".

Emergency measures often fail to satisfy the test of 'lawfulness'. Such measures where purportedly introduced under a discretionary power will fail the test where they are made in excess of lawful powers.

3.1.1.2 International legal obligations

When assessing the legality of the detention, the Court takes into account not only the national legislation, but also existing international obligations of the State.

- In **Ocalan v Turkey (2005)** the Court acknowledged that the Convention does not prevent co-operation between States, within the framework of extradition treaties or in matters of deportation, for the purpose of bringing fugitive offenders to justice, provided that it does not interfere with any specific rights recognised in the Convention. The co-operation between the States concerned was also a relevant factor to be taken into account in determining whether the arrest that led to the subsequent complaint to the Court was lawful. The Court stated that it had to decide in the light of the parties' arguments whether the applicant's interception in Kenya immediately before he was handed over to Turkish officials on board the aircraft at Nairobi Airport was the result of acts by Turkish officials that violated Kenyan sovereignty and international law (as the applicant submitted) or resulted from co-operation between the Turkish and Kenyan authorities in the absence of any extradition treaty between Turkey and Kenya laying down a formal procedure (as the Government submitted). The Court considered that at the material time the Kenyan authorities had decided either to hand the applicant over to the Turkish authorities or to facilitate such a handover. Therefore, the Court concluded that the applicant had not adduced evidence enabling concordant inferences to be drawn that Turkey failed to respect Kenyan sovereignty or to comply with international law in the present case. The applicant's arrest and his detention were in accordance with "a procedure prescribed by law" for the purposes of Article 5(1) of the Convention. There was, therefore, no violation of that provision.

Questions

1. Are grounds of detention in domestic law limited to those specified in Article 5(1)(a) – (f)?
2. Are powers to detain limited to specific persons or bodies, and if so, are they clearly defined?
3. Does domestic law provide effective protection against arbitrariness?
4. Are these laws sufficiently precise, accessible and foreseeable, so that an ordinary person would be able to understand both what circumstances may justify their detention and what procedures are available to challenge it?

3.2 Lawful detention after conviction by a competent court – Article 5(1)(a)

Article 5(1)(a) permits detention following conviction, only on satisfaction of certain conditions.

3.2.1 Competent court

The notion of a "competent court", relates not only to a clear legal basis but also to its composition and procedure, in particular:

- it excludes administrative bodies;
- it requires the independence and impartiality of the adjudicating body;
- it requires that the relevant court must have jurisdiction to hear the case;
- it means that courts with special jurisdiction such as military courts may qualify provided that their independence is guaranteed, they have the ability to order release, and applicants have the right to be brought before them promptly and have the right to bring proceedings challenging the lawfulness of their detention (see **Engels** discussed above); and
- It excludes the decision of a public prosecutor, a military commander, a police officer, or similar official (see, e.g., **Dacosta Silva v Spain (2006)**).

3.2.2 After conviction

The words "after conviction" mean that the detention must "result from, follow and depend or occur by virtue of the conviction" (see **B. v Austria (1990)**). This causes few problems in normal criminal proceedings. However, the significance of these words becomes apparent in cases, for example, where a person has been convicted, detained, and subsequently re-detained. Where the original detention was lawful, a subsequent re-detention, or order extending the period of detention, is lawful only where there is an unbroken causal link between the original sentence and the re-detention.

- In **Van Droogenbroeck v Belgium (1982)**, the applicant was sentenced to 2 years' imprisonment and ordered to be placed at the "government's disposal" for 10 years. Factors taken into account by the sentencing court included the fact that he was a recidivist, and manifested a persistent tendency to crime. He was subsequently re-detained on 3 separate occasions on the decision of a government Minister, following repeated offending. The Court held that there was sufficient causal connection between the original sentence and the order to re-detain.

- In **Weeks v United Kingdom (1987)**, a prisoner who had been sentenced to life imprisonment on grounds of his dangerousness to society, was released on licence. At the time of the commission of the offences, he was deemed to have a severe personality disorder. After committing a series of offences, including violent offences, his licence was revoked by a government Minister, and he was taken into custody. The Court held that at the time of revocation of the licence there were sufficient grounds for the Minister to have concluded that the applicant's continued liberty would constitute a danger to the public and to himself. Accordingly, the causal connection between the original conviction and the renewed detention had not been broken and it was therefore a detention "after" a conviction within the meaning of Article 5(1)(a) (see also **Leger v France (2006)**). By contrast, in **Stafford v UK (2002)**, the Court found that Article 5(1)(a) had not been complied with where the applicant, who had originally been convicted and sentenced to life imprisonment for murder, was recalled to prison following his release on life licence. As a result of the reliance upon the risk that the

applicant would commit non-violent offences to justify the applicant's recall to prison, the Court found that there was an insufficient causal connection with the original conviction.

- In **Eriksen v Norway (1997)**, the applicant had a long record of violent offending, caused by his mental illness. He had been convicted of a violent offence and sentenced to 120 days' imprisonment and thereafter, the prosecuting authority was authorised by the sentencing court, to use security measures for a maximum period of five years. The domestic courts consented to the extension of the period for use of security measures, on an application made prior to the expiry of the five years. The Court found that the extension was based on the offences which had grounded the applicant's initial conviction for threatening behaviour and physical assault. The Court held (at para. 78) that where a court decides to extend preventative detention imposed by way of a security measure prior to the expiry of the authorised period, such a prolongation will in principle be treated as detention of a person after conviction by a court, according to Article 5(1)(a).

A decision not to release a detained person, or to re-detain a person based on grounds which are inconsistent with the objectives of the sentencing court, would transform detention that was lawful at the outset, to an arbitrary deprivation of liberty contrary to Article 5 (see **Weeks** discussed above).

The significance of the words "after conviction" becomes apparent in a variety of other circumstances:

- In **Bozano v France (1986)**, the applicant was forcibly removed from France to Switzerland and there was a strong likelihood he would then be extradited to Italy where he been convicted and sentenced to life imprisonment in absentia. The French Government argued that his detention in the police car that effected his removal was lawful since it was "after" the applicant's conviction. The Court held that this detention was not consequent to the conviction; it was merely *subsequent* to a conviction, and was accordingly "after" conviction only in a chronological sense. Therefore it was not lawful under Article 5(1)(a).

- In **Monnell and Morris v the United Kingdom (1987)**, the applicants pursued an unmeritorious appeal against conviction as a result of which the appeal court judge ordered they should lose time spent in prison (i.e. re-serve those days). They spent further periods of 28 and 56 days in prison. The Court held that there was sufficient causal connection between the original sentence and the loss of time since the purpose of "lost time" in domestic law was an inherent part of the criminal appeal procedure following conviction. It pursued the legitimate aim of deterring unmeritorious appeals and to ensure that criminal appeals were heard within a reasonable time. There was therefore a sufficient and legitimate connection between conviction and loss of time.

- The admissibility decision in **Veermae v Finland** (2005) concerned an Estonian national convicted of a criminal offence in Finland. Pursuant to the Convention on the Transfer of Sentenced Persons and its additional protocol, the Finnish authorities planned to transfer him to back to his country of origin, Estonia, to serve out his sentence. The Court noted that the applicant had an expectation of being released on parole in Finland after serving half of his sentence. He complained that it was likely that he would spend longer in prison if transferred back to Estonia and that this would violate Article 5. The Court reiterated that the Convention should so far as possible be interpreted in harmony with other rules of international law of which it forms part – in the present case the Transfer Convention. It found that the possibility of a longer period of imprisonment in the administering State did not in itself render the deprivation of liberty arbitrary as long as the sentence to be served did not exceed the sentence imposed in the criminal proceedings. At any rate, there was a possibility of appealing to an

administrative court against the transfer decision if the sentence was likely to be longer. The Court did not exclude the possibility that a flagrantly longer de facto sentence in the administering State could give rise to an issue under Article 5, and hence engage the responsibility of the sentencing State. For this to be the case, however, substantial grounds would have to be shown to exist for believing that the time to be served in the administering State would be so flagrantly disproportionate to the time which would have had to be served in the sentencing State. Such grounds were not established in this case.

The Court may also consider to what extent the domestic trial complied with Article 6 of the Convention in determining whether any consequent deprivation of liberty is justified under Article 5(1)(a). Where the domestic trial is a "flagrant denial of justice" (i.e., "manifestly contrary to the provisions of Article 6"), the resulting detention will not come within the scope of Article 5(1)(a).

- In the case of **Stoichkov v Bulgaria (2005)**, the applicant was convicted in absentia and sentenced to prison. He complained that the detention in prison violated his rights under Article 5 as he was not sentenced after "conviction by a competent court" due to his inability to defend himself at the trial and the refusal of the domestic authorities to re-open proceedings. The Court noted that the requirement of Article 5(1)(a) that a person be lawfully detained after "conviction by a competent court" does not imply that the Court has to subject the proceedings leading to that conviction to a comprehensive scrutiny and verify whether they have fully complied with all the requirements of Article 6 of the Convention. However, the Court has also held that if a "conviction" is the result of proceedings which were a "flagrant denial of justice", i.e. were "manifestly contrary to the provisions of Article 6 or the principles embodied therein", the resulting deprivation of liberty would not be justified under Article 5(1). Citing relevant jurisprudence under Article 6 (in particular, **Einhorn v France**), the Court noted that the duty to guarantee the right of a criminal defendant to be present in the courtroom – either during the original proceedings or in a retrial – ranks as one of the essential requirements of Article 6 and is deeply entrenched in that provision. Therefore, criminal proceedings which have been held in absentia and whose re-opening has been subsequently refused, without any indication that the accused has waived his or her right to be present during the trial, may fairly be described as "manifestly contrary to the provisions of Article 6 or the principles embodied therein." There was no indication in this case that the applicant had waived his rights; hence the Court concluded that, as the trial proceedings were not in compliance with Article 6, his continued detention violated Article 5 of the Convention.

Questions

1. Does the law specify with sufficient clarity the procedure for detaining persons following a "conviction"?
2. Does domestic law ensure that detention following conviction is consequent upon conviction?
3. Are legal provisions in place to ensure the independence and impartiality of the sentencing courts?
4. Does the law make adequate provision regarding persons re-detained after an initial period of detention, in line with the above case law?

3.3 Non-compliance with a lawful order of a court, and securing fulfilment of an obligation prescribed by law – Article 5(1)(b)

Detention under this head is envisaged as a method to secure the execution of *specific obligations*: it cannot be used as a form of punishment. This provision comprises two separate parts, the first concerning court orders, and the second, legal obligations flowing from other sources.

3.3.1 Non-compliance with a lawful order of a court

The precondition to detention under the first part of Article 5(1)(b), is failure to comply with a legally enforceable court order. Detention cannot be used in anticipation of a failure to comply with a court order. Detention here is used by courts as a means of encouraging compliance with court orders. The sorts of court orders envisaged here include:

- Maintenance orders;
- A judicial order to provide a blood test;
- An order to make a declaration of assets;
- An order to undergo medical examination;
- Culpable non-payments of court-ordered fines; and
- Refusal, following a court order, to attend court or to answer questions as a witness.

The lawfulness of the court order depends on:

- The court itself being properly constituted and composed;
- The court having the power to make the order in question; and
- The order having been made according to proper procedures.

3.3.2 Securing fulfilment of an obligation prescribed by law

The second limb, namely the fulfilment of an obligation prescribed by law, permits detention of a person only to compel him to fulfil a *specific and concrete obligation* which he has until then failed to satisfy (see **Engels** discussed above, at para. 69).

Furthermore, the obligation must generally be one which is already incumbent upon the individual; detention is therefore not normally permitted in the absence of a prior breach of a legal obligation. As stated above, detention is not intended to punish; the aim of detention under this limb is to secure the fulfilment of the obligation in question.

The Court has made it very clear that it does not permit the following:

- Preventive detention e.g. of alleged terrorists (see **Lawless v Ireland (1961)**; or
- Detention in order to discharge a general duty of obedience to the law (see **Engels** above).

The purpose of the detention must genuinely be to secure the immediate fulfilment of an obligation.

- In **Nowicka v Poland (2002)**, the applicant was engaged in legal proceedings, in which there was a question concerning her mental health. She was ordered to undergo a psychiatric examination. When she failed to comply, an arrest warrant was issued. She was held in detention for eight days before being examined. Later, another court order was issued for her arrest for further medical examinations. This time she was held for 27 days prior to examination. The Court, noting that the ground for the detention was a lawful one, namely to secure the fulfilment of an obligation to submit to a psychiatric examination, held, however, that that both periods of pre-examination detention could not be reconciled with the authorities' desire to secure the immediate fulfilment of the applicant's obligation. In the circumstances, the Court concluded that the authorities failed to draw a balance between the importance of securing the immediate fulfilment of the obligation in question, and the importance of the right to liberty. There was therefore a violation of Article 5(1).

The detention must also be proportionate to the cause for which it is imposed.

- In **Vasileva v Denmark (2003)**, the applicant was a 67 year old woman who was accused by a bus driver of having travelled without a valid ticket. He attempted to serve her with a penalty fare, but the applicant refused to disclose her identity, as required by law. The police were called, and when she still refused to reveal her identity, the applicant was arrested and taken to a police station. She was held for 13 and a half hours, near the end of which she revealed her identity. The Court held that, given the minor nature of the offence which attracted a fine only, her detention for 13 and a half hours was not proportionate to the purpose of her detention. The Court paid particular attention to the fact that no efforts to establish her identity had been made during the period in question. Further, the Court noted that given the applicant's advanced age, a doctor should have been called; this might also have served to overcome the impasse in communications between the applicant and the police.

Examples of the sorts of obligations (which must be consistent with the Convention) envisaged by this provision are:

- an obligation to carry an identity card;
- an obligation to submit a tax return; and
- an obligation to do military service.

In "certain limited circumstances of a pressing nature" such as the fight against terrorism, detention may be permitted under this head where it is considered necessary to ensure the effective execution of a contemporaneous obligation.

- In **McVeigh v the United Kingdom (1982)**, the former European Commission of Human Rights considered the situation of three men detained for 45 hours at the point of entry into Great Britain from Northern Ireland, in order to "submit to further examination". Under the anti-terrorism law in force at the time, persons entering Great Britain could be questioned to ascertain whether they had been involved in terrorism. Where suspicions were roused, a person could be obliged to submit to "further examination". In this case, the applicants had been detained in order to ensure the effective execution of the obligation when it arose. The Commission found that the obligation was "specific and concrete". In finding that detention was justifiable under Article 5(1)(b), the Commission noted that the fulfilment of the obligation was a matter of immediate necessity and there were no other reasonably practicable means to secure its fulfilment. In so doing, it stated that it was necessary to balance the importance in a democratic society of securing the immediate fulfilment of the obligation against the importance of the right to liberty. The duration of the period of detention was a relevant factor in drawing such a balance.

Generally speaking, the justifiability of detention under Article 5(1)(b) can usefully be assessed in the light of the Convention as a whole; for instance where:

- it is intended to protect the rights of others (e.g. to enjoyment of their property under Article 1 of Protocol No. 1);
- it is related to specific duties foreseen by the Convention (e.g. the duty to perform military service: see Article 4);
- it gives effect to other rights (e.g. the effectiveness of the judicial system under Article 6); or
- it is a justifiable and proportionate measure intended to protect the wider community (e.g. customs and police controls at ports).

Questions

1. Do domestic laws permit detention on the basis of non-compliance with lawful orders of the court?
2. If so, do they depend on a failure to comply with lawful orders of the courts?
3. Do domestic laws permit detention in order to secure the fulfilment of an obligation prescribed by law? If so, do they depend on a failure to fulfil specific obligations?
4. Does domestic law make it clear that the purpose of such detentions is to secure the execution of the specified obligations, rather than punishment for failure to comply?

3.4 Arrest and detention of a criminal suspect – Article 5(1)(c)

Article 5(1)(c) governs the arrest and detention of persons for the purpose of enforcing the criminal law. It is a means by which criminal proceedings may be initiated. The power of arrest is a necessary element of the criminal justice system, but must be properly exercised in order to comply with Article 5.

There are three grounds for arrest under Article 5(1)(c):

- For the purpose of bringing a suspect before the competent legal authority on reasonable suspicion of having committed an offence.
- Where reasonably necessary to prevent the commission of an offence.
- To prevent a person fleeing after the commission of an offence.

Most cases that have come before the Court under Article 5(1)(c), have concerned reasonable suspicion of having committed an offence; the other two heads are rarely relied upon. They appear, in any event, to be surplus to requirements, since the wording of both these limbs presuppose the commission of a criminal offence ((i) attempt or conspiracy to commit, and (ii) having committed an offence).

Any arrest under Article 5(1)(c) must be carried out in accordance with a procedure prescribed by law and must be 'lawful.' In addition, Article 5(1)(c) must be read in conjunction with Article 5(3). Thus, all persons arrested and detained under Article 5(1)(c) are entitled to be brought promptly before a court, and are also entitled to a trial within a reasonable time, or to release pending trial. Articles 5(1)(c) and 5(3) serve not only to protect against arbitrary detention, but they are also part of the armoury of rights that protect the physical integrity of a detained person. Strictly regulated detention helps to reduce the risk to the detained person of being subjected to treatment contrary to Article 3 of the Convention (torture and inhuman and degrading treatment), deaths in custody and disappearances, contrary to Article 2, the right to life. They also serve to contribute towards an accused person's right to a fair trial. Closely regulated pre-trial detention reduces the risk that an accused will be coerced into making a confession; such confessions are in any event notoriously unreliable. Closely regulated pre-trial detention also ensures that the State authorities carry out necessary criminal investigations in respect of detained persons expeditiously.

3.4.1 Meaning and Duration of Arrest or Detention under Article 5(1)(c)

An 'arrest' for the purposes of Article 5(1)(c) is the initial act of apprehending a person on suspicion of having committed a crime, and accordingly Article 5 applies from that moment. The meaning of this term in Article 5(1)(c) is not necessarily the same as its meaning under domestic law. Since

the Convention meaning must take precedence over domestic interpretations, it is crucial for national authorities to understand the meaning of 'arrest' in the sense of Article 5(1)(c).

For the purposes of Article 5(1)(c), detention ceases to be justified on the day on which the charge against the person is determined. If a person is lawfully convicted, the subsequent detention is governed by Article 5(1)(a); if acquitted, he or she must be released.

- In **Labita v Italy (2000)** the Court considered a case where the applicant had been held in detention for twelve hours after his acquittal. The Court acknowledged that, while it is true that for the purposes of Article 5(1)(c) detention ceases to be justified on the day on which the charge is determined and that, consequently, detention after acquittal is no longer covered by that provision, some delay in carrying out a decision to release a detainee is often inevitable, although it must be kept to a minimum. The Court observed, however, that in the particular case the delay in the applicant's release was only partly attributable to the need for the relevant administrative formalities to be carried out. The additional delay was caused by the registration officer's absence. It was only on his return that it was possible to verify whether any other reasons existed for keeping the applicant in detention and to put in hand the other administrative formalities required on release. Therefore, the applicant's continued detention after his acquittal did not amount to a first step in the execution of the order for his release and therefore did not come within sub-paragraph 1 (c), or any other sub-paragraph, of Article 5. Accordingly, there had been a violation of Article 5(1) on that account.

3.4.2 Level of 'Reasonable' Suspicion

The level of suspicion required under Article 5(1)(c) is "reasonable suspicion", which must be understood in the Convention sense of the phrase. Where the level of suspicion required by the domestic law fails to satisfy the Court's test, pre-trial detention which flows from it will violate Article 5.

> "Reasonable suspicion" presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence (See **Fox, Campbell and Hartley v the United Kingdom (1990)**).

The level of suspicion necessary does not therefore mean that the investigating authorities should have obtained sufficient evidence to bring charges at the point of arrest, or even while the person is in their custody. Indeed, the arresting person does not need to be certain that an offence has in fact been committed. As the Court noted in the case of **Margaret Murray v the United Kingdom (1994)**, the object of questioning during detention following arrest is to:

> "further the criminal investigation by way of confirming or dispelling the concrete suspicion grounding the arrest".

What is reasonable will, to some extent, depend on the circumstances of each case. Accordingly, arrests in the context of the fight against terrorism fall into a special category. Reasonableness of suspicion justifying an arrest in connection with terrorist offences cannot always be judged according to the same standards as are applied in dealing with 'conventional' crime.

- In **Fox, Campbell and Hartley v United Kingdom (1990)**, arrests and detention for the questioning of terrorist suspects, under the legislation then in force, required a "genuine and honest suspicion". The respondent Government argued that, because of security concerns, it could not disclose the sensitive information which constituted the basis for the arrests. In finding a breach of Article 5(1)(c), the Court found that the domestic standard applied was

lower than that of "reasonable suspicion". It stated that Article 5(1)(c) of the Convention should not be applied in such a manner as to put disproportionate difficulties in the way of the police authorities of the Contracting States in taking effective measures to counter organised terrorism. In such circumstances, the Court noted (at paragraph 34) that States cannot be expected to disclose the confidential sources of supporting information or even facts which would be susceptible of indicating such sources or their identity. Nevertheless, some information had to be furnished by which it could be ascertained whether grounds for a reasonable suspicion did in fact exist. The information relied upon in this case (previous terrorism-related convictions, and questioning during detention related to specific terrorist acts) was inadequate to establish reasonable suspicion. There was therefore a violation of Article 5(1).

- The case of **Margaret Murray** (cited above) illustrates the relatively low threshold of 'reasonableness' required in terrorism cases, where suspects are arrested for short periods. Murray was arrested by a member of the armed forces who told her she was being arrested under "section 14". She was given no further information at the time. She was detained and held for just over two hours (the relevant legal provision only entitled detention for up to four hours) and questioned about her involvement in terrorist activities. She was asked about her contacts with her two brothers, both of whom had been recently convicted in the USA for having purchased guns for a terrorist organisation, the IRA. She was then released without charge. The applicant complained that she had not been arrested on the basis of a reasonable suspicion of the commission of any offence. The respondent Government relied on the facts that the applicant's brothers had very recently been convicted of terrorist offences in the USA, and that the applicant had travelled to the USA and had been in contact with her brothers there. It also asserted that a reliable but secret source had supplied it with information upon which to base its suspicion. The Court took into account the length of the applicant's detention as well as the maximum detention permitted. It concluded, having regard to the "special exigencies of investigating terrorist crime," that Murray had been arrested on a 'reasonable suspicion' of being involved in terrorist activity.

However, while the Court accepts that the investigation of terrorist offences presents the authorities with special problems, this does not mean that the authorities have carte blanche to arrest suspects and detain them in police custody, free from effective control by the domestic courts. Unless the State concerned has entered a derogation under Article 15, the full protection of Article 5 applies even to alleged terrorists, or others who present a danger to the State. Even where a derogation has been entered by the State, the Court has stated that it still has power to examine whether a particular measure was strictly required by the exigencies of the circumstances. See **Demir and others v Turkey (1993)** (at para. 48).

3.4.3 "Offence"

An "offence" for the purposes of Article 5(1)(c), must be one which is "concrete and specific" (see **Guzzardi v Italy (1980)** at para. 102). The Court held in **Guzzardi** that the word "offence" does not cover a policy of general crime prevention directed against a category of persons (in that case, members of the Mafia) who present a danger on account of their general propensity to crime. Any arrest under Article 5(1)(c), must "be effected for the purpose of bringing the detainee before the competent legal authority." The suspicion must therefore relate to past conduct capable of amounting to a specific criminal offence. Mere suspicion of an intention to commit an offence cannot form the basis of charges to be answered before the courts, unless acts in pursuit of the intention have amounted to criminal conspiracy or criminal attempts. An arrest on suspicion of intention, therefore, is not for the prescribed purpose and is in breach of Article 5(1)(c) (see **Lawless** cited above).

3.4.4 "Competent legal authority"

Everyone arrested under Article 5(1)(c) is entitled to be brought before a "competent legal authority". The meaning of this is equivalent to the expression "judge or other officer authorised by law to exercise judicial power" contained in Article 5(3). The relevant court must have jurisdiction to hear the case, must be independent of the parties, and must have power to make binding decisions concerning release.

Where the questioning of a suspect held in detention dispels the reasonable suspicion, the detaining authorities are obliged to release him/her. The reason for this is that reasonable suspicion under Article 5(1)(c) is the basis for detention; the moment when reasonable suspicion is dispelled, the basis of the detention, while lawful at the outset, ceases to be lawful. The fact that a detainee is released without being brought before the competent legal authorities does not necessarily invalidate the arrest or detention. Providing that a person is detained in a manner consistent in all other ways with Article 5(1)(c), and provided he or she is released in a timely fashion (see Article 5(3) below), his or her detention cannot be successfully challenged under Article 5 (see **Brogan and others v the United Kingdom (1988)**).

Questions

1. What is the legal basis of the power of arrest: is it sufficiently clear (i.e. comprehensible to the general public), precise, and limited in scope?
2. Who has the power of arrest? Are the circumstances in which these bodies may exercise it, established by law?
3. Does the law provide an adequate definition of "reasonable suspicion" capable of grounding arrests?
4. Is training and supervision given to public officials possessing the power of arrest, on how properly to form a reasonable suspicion?
5. Does the law specify that arrests on reasonable suspicion must relate to offences which are concrete and specific?
6. Do arrests and detentions allow for questioning or other investigations so as to confirm or dispel the suspicion?
7. Does the law provide for the immediate release of detained persons where reasonable suspicion is dispelled, e.g. after questioning and other investigations?

3.5 Detention of minors – Article 5(1)(d)

Although the Convention does not specify who qualifies as a minor, in the light of European standards, it appears that a minor is any person under the age of eighteen years old. Article 5(1)(d) comprises two separate limbs. The first is "lawful order for the purpose of educational supervision", the second is "detention for the purpose of bringing him before the competent legal authority."

As with the other exceptions to the right to liberty under Article 5(1), detention under Article 5(1)(d) must be attended by appropriate safeguards which are suitable to the mental, emotional and intellectual situation of a child, such as access to family members, separate and suitably staffed and equipped facilities, and the support and assistance of an appropriate adult at relevant times.

3.5.1 Lawful order for educational supervision

Such orders need not emanate from a court; they can be made by administrative authorities empowered to make such orders. However, the minor, or his/her legal representatives, must be able to take proceedings by which the lawfulness of any such detention must be decided speedily by a court; such a court must have the power to order release if the detention is not lawful. Although this provision is loosely worded, the Court requires strict guarantees that the educational purpose is served by the detention order. Remanding a child in custody may be permitted, only if the period is short and is considered necessary in order to locate and send the child to an appropriate educational facility.

- In **Bouamar v Belgium (1988)**, the applicant child suffered from a severe personality disturbance. He was repeatedly remanded in custody under a law which permitted such detention for up to 15 days pending removal to an appropriate educational institution, but it proved impossible to find such an institution immediately. During a single period of 291 days, he was remanded in custody on nine separate occasions for up to 15 days at a time, amounting to a total of 119 days. He was never in fact sent to an appropriate educational institution and was never given any educational supervision during the periods spent on remand. The Court held (at para. 50) that the "detention" referred to in Article 5(1)(d):

  > "does not preclude an interim custody measure being used as a preliminary to a regime of supervised education, without itself involving any supervised education. In such circumstances, however, the imprisonment must be speedily followed by actual application of such a regime in a setting (open or closed) designed and with sufficient resources for the purpose".

  In the circumstances, Belgium was under an obligation to put in place appropriate institutional facilities which met the demands of security and the educational objectives of the relevant law, in order to be able to satisfy the requirements of Article 5(1)(d) of the Convention.

- In **D. G. v Ireland (2002)**, the applicant had lived in local authority care from the age of two. Following release from prison when he was 17, the local authority considered that the applicant required a high degree of support in a therapeutic unit for 16-18 year olds. In subsequent legal proceedings concerning the best form of care for the applicant, the High court noted that there was no such unit, and ordered his detention in a penal institition. He was subject to three such orders and spent approximately two months in the institution. The applicant received no educational or therapeutic treatment during that period. The Court held that if the State chose a constitutional system of educational supervision implemented through court orders to deal with juvenile delinquency, it was obliged to put in place appropriate institutional facilities which met the security and educational demands of that system in order to satisfy the requirements of Article 5(1)(d). The Court rejected the notion that the applicant's detention in the penal institution could be regarded as an interim measure, followed speedily by an educational supervisory regime, as this was not supported by the facts. The first two orders were not based on any specific proposal for secure and supervised education, and the third order was based on a proposal for temporary accommodation, which subsequent events showed to be neither secure nor appropriate. The detention was therefore incompatible with Article 5(1)(d).

3.5.2 Detention for the purpose of bringing a minor before the competent legal authority

The purpose of this limb is to enable the authorities to secure a minor's removal from harmful surroundings prior to being brought before a court, not on criminal charges, but, for example, pending the preparation of a psychiatric report. This limb of Article 5(1)(d) has not yet been adjudicated on by the Court, and indeed has seldom been the subject of complaint before the Convention organs.

Questions

1. Has provision been made for proper educational institutions for minors who require special education supervision?
2. Where remand in custody prior to sending a minor to an educational institution is permitted, does the law strictly regulate the duration of such custody? And does the law require that an educational purpose is achieved during the periods spent in custody?

Additional reference may be made to the standards of the Convention on the Rights of the Child – of which all member States of the Council of Europe are signatories – in particular Articles 28 and 29 dealing with education and Articles 37 and 40 dealing with deprivation of liberty and criminal law. (See also the Beijing Rules on the administration of juvenile justice, GA Resolution 40/33 of 29/11/85.)

3.6 Detention for the prevention of spreading infectious disease, or mental illness, alcoholics and drug addicts, and vagrants – Article 5(1)(e)

Detention under this head can be ordered by a court or an administrative authority. Where detention is ordered by an administrative authority, the lawfulness of the detention must be capable of being challenged in a court which has power to order release (see Article 5(4)).

Deprivation of liberty is permitted in respect of the groups listed in Article 5(1)(e) either in order for them to be given medical treatment or because of considerations dictated by social policy, or on both medical and social grounds (see **Litwa v Poland** cited above, at para. 60).

In addition, there should be a relationship between the ground for detention and the place and conditions of detention. For example, the nature of the detention of persons suffering mental illness must be therapeutic and be designed to meet their needs; a detention that simply has as its object the containment of such persons, for example, will not comply with Article 5.

- In **Aerts v Belgium (1998)**, the applicant was arrested and detained in relation to an offence of violence. He was considered by a domestic court at the time of the offence and at the time of his appearance in court, to have been severely mentally disturbed, to the point where he was incapable of controlling his actions. Accordingly, the court ordered that the applicant should be detained provisionally in the psychiatric wing of a prison, pending a decision of the mental health board as to the most appropriate place of detention. Within two months of this order, the mental health board decided that the applicant should be transferred to a social protection centre. This recommendation was not executed for seven months, during which time the applicant remained in the prison psychiatric wing. The Court held that in order to comply with Article 5, there must be some relationship between the ground of permitted deprivation of liberty relied on, and the place and conditions of detention. It held that "detention" of a person as a mental health patient will only be "lawful" for the purposes of Article 5(1)(e) if carried out

in a hospital, clinic or other appropriate institution. It was clear from the facts of the case that the psychiatric wing of the prison concerned was not therapeutic. The Court held there was a violation of Article 5(1).

- In **Morsink v the Netherlands (2004)** the applicant was convicted and sentenced to imprisonment and, as his mental faculties were so poorly developed, the prison sentence was combined with an order for confinement in a custodial clinic (a "TBS" order). After completing the prison sentence, the TBS order took effect, however, the applicant was not transferred to a custodial clinic, but was held in an ordinary remand centre. The Court considered that a balance had to be struck between the competing interests, giving particular weight to the applicant's right to liberty. A significant delay in admission to a custodial clinic would obviously affect the prospects of a treatment's success. In the circumstances, a reasonable balance had not been struck. Whilst there was a problem of a structural lack of capacity in custodial clinics, as the authorities were not faced with an exceptional or unforeseen situation, a delay of fifteen months in admission to a custodial clinic was not acceptable. To hold otherwise would entail a serious weakening of the fundamental right to liberty to the detriment of the person concerned and thus impair the very essence of the right. Accordingly, there had been a violation of Article 5(1).

It is therefore clear that the Convention allows a deprivation of liberty not only where a person is dangerous to public safety, but also where their own interests necessitate their detention (see **Guzzardi** cited above).

Detention under this head must be kept under periodic review to ensure that it continues to be justified throughout its duration (see Article 5(4)). The basis upon which a person may be detained under Article 5(1)(e) is susceptible to change, for example, where the person has been successfully treated for drug or alcohol addiction and no longer presents a danger to him/herself. There must be an accessible, prompt and effective procedure to review detention where such a change in circumstances can be examined. Where there is evidence of a change of circumstances, such that the detained person is no longer a danger to him/herself or to others, s/he must be released immediately. A detention that was originally lawful would become unlawful if a court were to make a finding that there were no grounds justifying continued detention, and either no efforts were made to release the individual, or the process leading to release was unjustifiably long. See, for example, the case of **Brand v the Netherlands (2004)**.

3.6.1 Detention for the prevention of spreading of infectious disease

There have been very few cases before the Court under this limb.

- **Enhorn v Sweden (2005)** concerned a case in which the applicant discovered in 1994 that he was infected with the HIV virus. He had transmitted the virus to a 19-year old man with whom he first had sexual contact in 1990. On these grounds, a county medical officer issued a number of instructions to the applicant to avoid the spreading of the disease, including an obligation to keep to several appointments with the county medical officer. As the applicant failed to comply with some of these visits, the county medical officer petitioned the courts for an order that the applicant be kept in compulsory isolation. The Court found that the government did not present evidence that compulsory isolation was a last resort to prevent the spreading of the disease in circumstances where less severe measures had been considered and been found insufficient to safeguard the public interest. By extending the orders for a period of almost seven years, which resulted in the applicant's involuntary hospitalisation for almost a year and a half, the authorities were found to have failed to strike a fair balance between the need to ensure that the HIV virus did not spread and the applicant's right to liberty, and had thus violated Article 5 (1).

3.6.2 Detention of persons of unsound mind

The term "unsound mind" is not one that has been specifically defined. The Court stated, very early on, in the case of **Winterwerp v The Netherlands (1979)** (at paragraph 37), that it is a term whose meaning is continually evolving as research in psychiatry progresses, increasing flexibility in treatment is developing and society's attitude to mental illness changes. It certainly does not allow the detention of persons by reasons solely that their views or behaviour deviate from the norms prevailing in a particular society.

The Court has, however, stated in cases such as **Winterwerp** and **Varbanov v Bulgaria (2000)** (at para. 45) that three minimum conditions must be satisfied in order to detain a person on grounds of mental illness. They are:

> (i) The person must be "reliably shown" by "objective medical expertise" (for example, psychiatric evidence) to be of unsound mind (except in respect of emergency procedures);
> (ii) The individual's "mental disorder must be of a kind or degree warranting compulsory confinement"; and
> (iii) The validity of continued confinement depends upon the "persistence of such a disorder", requiring further expert psychiatric evidence.

Since deprivation of liberty is a very serious measure, it can only be justified where other less severe measures have been considered and found to be insufficient to safeguard the individual or public interest which might require the person to be detained (again see **Varbanov** at para. 46). Thus, the detention must be shown to be necessary in the circumstances.

- In **Varbanov**, a public prosecutor was investigating an allegation that the applicant had threatened to kill another person. A police officer expressed the opinion that the applicant might be suffering from a mental illness at the time. The prosecutor accordingly ordered his detention in order to undergo a psychiatric examination. The Court held that no deprivation of liberty of a person considered to be of unsound mind may be deemed in conformity with Article 5(1)(e) of the Convention if it has been ordered without first seeking the opinion of a medical expert. His detention was unlawful since no such expert opinion had been sought prior to his detention.

In **R.L. and M.-J. v France (2004)** the continued detention of one of the applicants in the psychiatric unit between 4.15 a.m. and 10.45 a.m. was explained solely by the fact that only a doctor was empowered to release him; there had therefore been no medical justification. Accordingly, there was a violation of Article 5(1).

- In the case of Kucheruk v Ukraine (2007) the Court rejected the Government's position that the applicant's detention between 22 July and 6 August 2003 was justified under paragraph 1 (e) of Article 5 and the delay with which the copy of the court's release order from 7 July 2003 reached the Hospital was due to the difficulties in communication between the Kominternovsky Court, the Hospital and the relevant police department. The Court reiterated that administrative formalities connected with release cannot justify a delay of more than several hours and in these circumstances, the applicant's continued detention in the Hospital after the court order committing him to compulsory psychiatric treatment was revoked, could not be regarded as a first step in the execution of the order for his release and therefore did not come within subparagraph 1 (e), nor did it fall within any other sub-paragraph, of Article 5.

The understanding of the term 'persons of unsound mind' is continually evolving along with developments in psychiatry and societal attitudes. However, as with all other exceptions to the right

to liberty and security, detention on grounds of unsoundness of mind must always be interpreted narrowly.

- In **H.L. v United Kingdom (2004)** the applicant, who was autistic and had a history of self-harm, lacked the capacity to consent or object to medical treatment. From 1994, after a number of years as an in-patient at a hospital Intensive Behavioural Unit (IBU), he lived with paid carers, although the hospital remained responsible for his care and treatment. In July 1997, while at a day centre, he started inflicting harm on himself. He was taken to the hospital, where he was assessed by a psychiatrist as being in need of in-patient treatment and was transferred to the IBU. A second psychiatrist decided that committal under the Mental Health Act 1983 was not necessary, as the applicant was compliant and did not resist admission, and the applicant was consequently admitted as an "informal patient". When considering whether the applicant had been deprived of his liberty the Court considered the key factor was that the health care professionals involved had exercised complete and effective control over his care and movements. It was clear that had the applicant tried to leave he would have been prevented from doing so. Thus, the concrete situation was that the applicant had been under continuous supervision and control and had not been free to leave. He had therefore been "deprived of his liberty". In the present case, the domestic legal basis for the applicant's detention was clearly the common law doctrine of necessity which, when applied in the area of mental health, accommodated the minimum conditions for lawful detention of those of unsound mind. The Court acknowledged that it was true that at the time the doctrine was still developing but it was not satisfied whether or not the applicant could reasonably have foreseen his detention on that basis. The Court was struck by the lack of any fixed procedural rules by which the detention of compliant incapacitated persons was conducted, in contrast to the extensive network of safeguards applicable to *compulsory* committal. This absence of procedural safeguards failed to protect against arbitrary deprivations of liberty on grounds of necessity and there had therefore been a violation of Article 5(1).

Clearly, those suffering from unsound mind may recover either completely or to a significant extent, thereby eliminating or reducing the danger they pose to society or themselves. Where, during subsequent legal proceedings, a medical expert states that the mental disorder warranting confinement of an individual no longer persists, the institution holding the patient must release the individual. However, the Court has stated this does not require the person to be immediately and unconditionally released into the community.

- In **Johnson v the United Kingdom (1997)**, the Court held that the responsible authority is entitled to exercise a measure of discretion in deciding whether in the light of all the relevant circumstances and the interests at stake, it would in fact be appropriate to order the immediate and absolute discharge of a person who is no longer suffering from the mental disorder which led to his confinement. That authority should be able to supervise the progress of the person once s/he is released into the community. To that end, it should be able to make his/her discharge subject to conditions. The imposition of a particular condition may in certain circumstances justify a deferral of discharge from detention, having regard to the nature of the condition and to the reasons for imposing it. Nevertheless, appropriate safeguards must be in place to ensure that any deferral of discharge is consonant with the purpose of Article 5(1) and 5(1)(e), in particular, that discharge is not unreasonably delayed.

- In **Kolanis v the United Kingdom (2005)** a domestic tribunal ruled that the applicant should be released into the community, subject to conditions, although she was still suffering from schizophrenia and continued to require treatment and medical supervision in order to control her illness. The ruling specified that she could be released only if there was continued treatment and supervision necessary to protect her health and the safety of the community. The

responsible authority refused to release her because the community did not have the capability to provide the care and support that she needed. The applicant argued that she was materially in the same position as the applicant in **Johnson** in that her release had been unjustifiably delayed. The Court held that in the absence of treatment, her detention continued to be necessary and appropriate. The Court said that where treatment necessary for conditional discharge is not available, the authorities are not required to discharge the applicant.

3.6.3 Alcoholics

For the purposes of Article 5, the term "alcoholics" is not restricted to persons who are addicted to alcohol. It also includes persons who are not medically diagnosed as "alcoholics", but whose conduct and behaviour under the influence of alcohol, pose a threat to public order or themselves (see **Litwa v Poland** cited above). However, this does not mean that the police can detain anyone on the grounds of drunkenness. They key here is the threat posed by the person's drunkenness.

3.6.4 Vagrants

The term "vagrant" was examined in **De Wilde, Ooms and Versyp v Belgium (1971)**. There the court accepted that the domestic definition was in keeping with what was envisaged by Article 5(1)(e), namely persons who have no fixed abode, no means of subsistence and no regular trade or profession.

- In **Guzzardi v Italy (1980)**, the respondent Government defended the detention of the applicant, *inter alia*, on the grounds that he was a vagrant. It claimed that, as a member of the mafia, the applicant was a vagrant in the wide sense, namely a monied vagrant, on the basis that he had no identifiable source of income. The Court stated that the word vagrant called for a narrow interpretation, and rejected the Government's claim.

3.6.5 Non-discrimination

Under Article 14 of the Convention, the obligation to protect rights without discrimination applies to all the Convention rights (see also Protocol No. 12). However, it is worth pointing out that there is a real risk that national authorities may authorise detentions not on grounds permitted by Article 5(1)(e), but based on stereotypical assumptions, e.g. that all drunks present a danger to others, or that persons suffering from AIDS present a danger to the public and must be detained. Law and practice must ensure that each individual case is examined on its merits and that the threat posed by an individual to themselves or others is one based on medical or other impartial criteria, rather than on prejudice, or fear.

Questions

1. Does domestic law provide for detention of persons for the prevention of spreading of infectious diseases, of persons of unsound mind, alcoholics, drug addicts and vagrants?
2. If so, do the terms "alcoholics" and "vagrants" possess meanings consistent with the Convention?
3. Are the criteria for detention limited to the threat of harm to themselves or others, and are they clearly provided for by law?
4. Does the law provide that the decision to detain must be made by or on the advice of appropriately qualified experts?
5. Is there a requirement for national authorities to consider measures less severe than detention, which might be sufficient to safeguard the individual or public interest in each case?

6. Is there a system in place to enable regular challenges to detention, taking account of the changing situation of the applicant? (See also below, Article 5(4)).
7. Where the detention is ordered by an administrative authority, can the lawfulness of the detention be challenged in a court? (See also below, Article 5(4)).
8. Does the law permit the release of persons once deemed of "unsound mind" to be conditionally released into the community?

3.7 Detention pending extradition or expulsion – Article 5(1)(f)

Detention under this head is only permissible in two circumstances: arrest or detention to prevent a person effecting an unauthorised entry into the country; and arrest or detention of a person against whom action is being taken with a view to deportation or extradition. It may not be imposed as a form of punishment for non-compliance with pre or post-entry regulations (unless such non-compliance amounts to an imprisonable criminal offence or civil misconduct, in which case Article 5(1)(a), (b) and (c) are likely to apply), to prevent undesirable, but non-criminal, behaviour, or as a deterrent to potential immigrants.

There is a real risk that decisions with regard to immigration detention will be made on a discriminatory basis, contrary to Article 14. Constant vigilance is required to ensure that detention will only be ordered on account of an individual's history and conduct, and not on perceptions relating to his or her race, gender, nationality, ethnic origin, religion, etc. It is also worth restating that, pursuant to Article 1, the Convention also applies to citizens of non-member States present within the jurisdiction of a member state; those 'within the jurisdiction' are entitled to the full protection of the Convention.

As with other sub-paragraphs of Article 5(1), Article 5(1)(f) requires that there must be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention. Particular consideration may therefore need to be given to the circumstances in which children, or other vulnerable people, are detained under Article 5(1)(f).

- In **Mubilanzila Mayeka and Kaniki Mitunga v Belgium (2006)** a five year old Congolese girl was detained in a transit centre on arrival at Brussels airport. The Court held that Article 5(1) had been violated because was she detained in a closed centre intended for illegal immigrants, in the same conditions as adults. The conditions were not adapted to the position of extreme vulnerability in which she found herself, as an unaccompanied foreign minor.

3.7.1 Arrest or detention to prevent a person effecting an unauthorised entry into the country.

Questions may arise as to the meaning of an "unauthorised entry".

- In **Saadi v United Kingdom (2006)** the applicant was an Iraqi national who claimed asylum on arrival at Heathrow Airport and was granted temporary admission. On reporting to the immigration authorities several days later, he was detained and transferred to a reception centre used for asylum-seekers who were not likely to abscond and who could be dealt with by a "fast track" procedure. The applicant argued that to detain a person who presented no threat to immigration control simply in order to accelerate a decision concerning their entry did not "prevent" unauthorised entry, and was therefore not compatible with Article 5(1)(f). Although the applicant had applied for asylum, had initially been granted temporary admission and had in fact been at large for 3 days, his detention

at the centre was, however, held to have been in order to prevent his effecting an "unauthorised entry" because, without formal admission clearance, he had not "lawfully" entered the country. The only requirement under Article 5(1)(f) for the detention of an individual in such circumstances, was that that detention should be imposed as a genuine part of the process to determine whether the individual should be granted immigration clearance and/or asylum, and that it should not otherwise be arbitrary. The applicant's detention at the centre was found to have been a *bona fide* application of the policy on "fast-track" immigration decisions.

3.7.2 Arrest or detention of a person against whom action is being taken with a view to deportation or extradition.

In extradition and deportation proceedings, the Court looks at all the circumstances surrounding the procedure. It has often criticised State authorities for acting in an arbitrary manner (see, for example, **Bozano v France** discussed below). In this context, *purported* compliance with legal forms and procedures is not enough. Procedures must be effective in their nature and application to comply with the Convention's objective standards and requirements. The Court will examine both the effect of any order, as well as its surrounding circumstances.

- In **Quinn v France (1995)**, the applicant's immediate release from detention related to criminal proceedings was ordered by a court. There was a delay of 11 hours while extradition proceedings were begun, before the applicant was released and immediately re-detained in respect of the extradition proceedings. The Court held the 11 hour delay to be unlawful; as it could not be regarded as lawful detention pending extradition proceedings.

- In **Bozano v France (1986)**, the French authorities had refused an extradition request. A deportation order was made but not executed until one month later, in the middle of the night, despite knowledge of the applicant's whereabouts. He was taken to the border with Switzerland; the Swiss authorities then proceeded to extradite him to Italy. A French court later declared the "deportation" was an illegal extradition. The Court concluded that the deportation was a disguised form of extradition and therefore arbitrary and unlawful under Article 5(1)(f).

In relation to the second limb of Article 5(1)(f), there is no requirement that the detention be reasonably considered 'necessary', for example, to prevent the commission of an offence or to prevent a person fleeing (see **Chahal v United Kingdom (1996)**; all that is required is that "action is being taken with a view to deportation".

National authorities may not use subterfuge in order to secure the removal of asylum seekers who have been unsuccessful in their bids to be accorded refugee status.

- In **Conka v Belgium (2002)**, the applicants were among a large number of Roma asylum seekers who had failed in their claims for refugee status. They had been served with numerous orders to leave the territory and were over-stayers. They received a letter asking them to attend the police station. The pretext for attending the police station was to enable the files concerning their applications for asylum to be completed. On arriving at the police station the applicants and other Roma families were served with orders to leave the territory, accompanied by a decision ordering their removal to Slovakia and their detention for that purpose. Accordingly, they were removed following a period of detention. The Court reiterated that all that is required under Article 5(1)(f) is that "action is being taken with a view to deportation"; it does not require a consideration of whether detention of a person against whom action is being taken with a view to deportation be reasonably considered necessary. However, it pointed out that Article 5 was intended to protect against arbitrariness. It held that acts whereby the authorities seek to

gain the trust of asylum seekers with a view to arresting and subsequently deporting them may be found to contravene the general principles stated or implicit in the Convention. It follows that, even as regards over-stayers, a conscious decision by the authorities to facilitate or improve the effectiveness of a planned operation for the expulsion of aliens by misleading them about the purpose of a notice so as to make it easier to deprive them of their liberty is not compatible with Article 5.

The case of **Gebremedhin [Gaberamadhien] v France (2007)** concerned an Eritrean national held in the "waiting area" of Charles de Gaulle airport in Paris in July 2005. On 15 July the European Court indicated to the Government (under Rule 39 of the Rules of Court), that it would be desirable in the interests of the parties and the proper conduct of the proceedings before the Court not to remove the applicant to Eritrea until 30 August 2005. Therefore, from that date, the Government could not remove the applicant to Eritrea without being in breach of their obligations under the Convention. However, there was nothing to prevent the authorities from removing him to a different country, provided that it was established that the authorities of that country would not send him on to the country referred to by the Court. Accordingly, the Court found that the applicant's detention for that purpose (as a result of the application of Rule 39), would still amount to the "lawful" detention of a person "against whom action [was] being taken with a view to deportation or extradition" within the meaning of Article 5(1)(f).

While Article 5(1)(f) is silent on the question of length of time spent in detention, the Court has ruled that deportation or extradition proceedings must be conducted with due diligence. Delays in extradition proceedings may mean that detention pending extradition will cease to be lawful. In determining whether extradition proceedings exceed a reasonable time, regard must be had to the complexity of the case, the conduct of the applicant and State authorities, and whether any arbitrariness can be shown.

- In **Kolompar v Belgium (1992)**, the Court held that there was no breach of Article 5(1)(f) where, despite an unusually long period spent in detention pending extradition (2 years and 8 months), the applicant's conduct had caused most of the delays. The applicant made numerous successive applications for stays of execution of the extradition order.

- In **Quinn v France (1995)**, a period of nearly two years' detention pending extradition was excessive. The Court noted that, at the different stages of the extradition proceedings, there were delays of sufficient length to render the total duration of those proceedings excessive.

- In **Chahal v United Kingdom (1996)**, the detention of an alleged terrorist pending deportation lasted 3 years and nearly 7 months. The applicant feared being forced to return to India, where he claimed to have been tortured. The Court noted that the case involved considerations of an extremely serious and weighty nature. It stated that the courts had acted with due diligence and there had been sufficient guarantees against arbitrariness. Accordingly the time spent in detention was not excessive.

- In **Bordovskiy v Russia (2005)**, the applicant alleged that the law on extradition (pursuant to which he was detained) was too imprecise to meet the "quality" threshhold. The Court noted, however, that at the heart of the applicant's complaint lay the substantive interest not to spend an indefinitely long period of time in pre-extradition custody. In this case, the Court considered that a period of 4 months in Russian custody was not excessively long, nor was there any other reason to believe that the Russian authorities acted without due diligence.

Questions

1. Does domestic law ensure that detention pending removal is only permissible as a means of preventing unauthorised entry, or with a view to removal?
2. Does domestic law and practice ensure that detention under Article 5(1)(f) may not be used as a form of punishment?
3. Are there procedures in place to ensure that the duration of detention pending removal is kept to a minimum?
4. Are there legal provisions in place to ensure that decisions to detain pending removal are not made on a discriminatory basis?
5. Is training given to national authorities to ensure that decisions to detain are not made on the basis of discriminatory criteria?
6. Are there procedures in place to prevent arbitrariness?

4 PROCEDURAL SAFEGUARDS

4.1 Prompt information in an understandable language of the reasons for arrest and of any charge – Article 5(2)

4.1.1 Arrest and charge

The obligation to give prompt information about the reasons for an arrest, applies to all of the grounds for detention under Article 5(1), not just detention in the context of criminal proceedings. The word "arrest" here has an autonomous meaning and "extends beyond the realm of criminal-law measures" (see, in particular, **van der Leer v the Netherlands (1990)** at para. 27) and refers to the moment when it is clear that a person is no longer at liberty. The word "charge" does refer to the criminal law, but it is only one of a number of eventualities foreseen by this section (again see **van der Leer**). Article 5(2) constitutes an elementary safeguard so that anyone detained can take steps to challenge the lawfulness of their detention as soon as possible.

- In **van der Leer**, the applicant was initially a voluntary patient in a psychiatric hospital. She was later detained compulsorily, but was not informed of this fact. She only discovered the fact of her compulsory detention by chance, 10 days after the order was made, when she was placed in isolation. The Court, stating that that the word "arrest" should be interpreted autonomously in order to protect against arbitrary deprivations of liberty, held that she was entitled to have been informed of the reasons for her compulsory detention.

4.1.2 A language which s/he understands

This phrase means not only the 'tongue', but the way in which the information is expressed. The information must be given in simple, non technical language detailing the legal and technical reasons for his/her arrest or detention, in order that the detainee can, if desired, take legal action to challenge the lawfulness of his/her detention under Article 5(4); incomprehensible legal jargon would not be sufficient (again see van der Leer).

The information provided need not give verbatim or written versions of grounds for arrest, so long as what is available is sufficient for the above purposes. With regard to interpretation or translation, it may not be necessary that information is provided in the detainee's first language, but it must ensure that the detainee has a sufficient comprehension of the reasons for detention in order to be able to challenge them. The information need not be in writing, nor need there be an explicit step of informing the detainee, so long as the information made available is effective in allowing the detainee to understand the reasons for their detention sufficiently to be able to challenge the legality of the detention.

4.1.3 Promptly

'Promptness' does not require *immediate* provision of information; rather it allows for a certain amount of flexibility to take account of individual circumstances. Where, for example, it is impossible to inform a person because s/he is putting up a struggle, it may be justifiable to wait until s/he has calmed down enough to be able to receive the information. In some instances, for example where a person is asked to show his/her identity papers and shows false papers, that fact alone may be sufficient to justify a delay in the information being provided, having regard to the criminal and intentional nature of that act (see, for example, **Dikme v Turkey (2000)**). Each case must be examined on the facts, according to its special features.

- In **Conka v Belgium (2002)**, the applicants, who had sought asylum in Belgium along with a number of other persons of Roma origin, were requested to attend the police station. Upon arrival they were served with orders for their deportation and detention and interpretation was provided. The Court held that this was consistent with Article 5(2).

- In **Saadi v United Kingdom (2006)** a delay of 76 hours in providing an asylum-seeker with the reasons for his detention at a reception centre was found to violate Article 5(2).

However, in cases concerning investigations of alleged terrorists, the Court has held that it may be sufficient that the general nature of the charge is provided initially, with greater detail being provided soon afterwards, for example, by virtue of the nature of the questioning.

- In **Fox, Campbell and Hartley v the United Kingdom (1990)**, the applicants were told that they were being arrested on suspicion of being terrorists. The Court stated that this bare information on its own would not have been sufficient for the purposes of Article 5(2). However, the Court noted that the applicants were, within 3 and 4 hours of arrest, questioned about specific terrorist offences. This was held to constitute adequate information delivered with sufficient promptness.

- In **Margaret Murray v the United Kingdom (1994)**, the police suspected that the applicant was involved in fundraising for the IRA. However the applicant was only told, upon arrest, that she was being arrested under "section 14". No further information was given at the moment of arrest. The Court held that this information alone was not sufficient for the purposes of Article 5(2). However, the Court held that it must have been apparent from the questions she was asked during police interviews held within one hour of her arrest that she had been detained on suspicion of fundraising for the IRA. This was sufficient information, given "promptly" for the purposes of Article 5(2).

However, the terrorist cases should be viewed as being situated at the far end of the spectrum. In cases involving 'ordinary' crimes, or mental illness etc, persons arrested and detained should be told either immediately, or as soon as is practicable, in clear language, of the reasons for the arrest or detention.

Questions

1. Does domestic law provide for an automatic procedure whereby information is provided in a timely fashion to persons who are detained on any of the grounds permitted by Article 5?
2. Do domestic and practice allow for interpretation where necessary?
3. Does domestic law contain specific provisions concerning the detention of terrorists? If so, are alleged terrorists nevertheless entitled to be informed of the reasons for their arrest in a timely fashion, taking account of the special threats posed by terrorism?
4. Do national authorities receive training with regard to the provision of reasons for detention?

4.2 Right to be brought promptly before a judge or other officer authorized by law and to trial or release within a reasonable time – Article 5(3)

4.2.1 The nature of the right

The wording of this right appears to suggest that the national authorities are faced with a choice between ensuring a trial within a reasonable time, or release. However, this is not the case, as can

be seen by reference to Article 6(1) which states that *everyone* is entitled to a trial within a reasonable time (i.e. whether detained or not). Instead, the purpose of the provision is to ensure that a person is not kept in detention on remand for longer than is reasonable (see, for example, **Wemhoff v Germany (1968)** at paras. 4 and 5). The key to understanding Article 5(3) is that it is part of the guarantee of physical liberty. As the Court pointed out in **Neumeister v Austria (1968)** (at para. 4), the purpose of Article 5(3) is to require the provisional release of the accused, once his/her detention ceases to be reasonable. The question of entitlement to a fair hearing is a matter for consideration under Article 6.

The national authorities are faced with two tasks under Article 5(3); first the obligation to ensure that detention at any stage of the pre-trial period is necessary in any given case, and second to ensure that the investigation is conducted with due diligence to ensure that the accused does not spend an excessive amount of time in pre-trial detention. In **Wemhoff** (at para. 17) the Court has stated that an accused person in detention is entitled to have his case given priority and conducted with particular expedition.

4.2.2 Automatic nature of the right

This provision affords those detained in respect of criminal proceedings under Article 5(1)(c) a special guarantee, namely an automatic judicial procedure to ensure that they are not being detained arbitrarily, and to ensure that the period of pre-trial detention is kept to a minimum. The object of Article 5(3) was articulated in **Duinhof and Duijf v the Netherlands (1984)**, where the Court held (at para. 36) that it was "aimed at ensuring prompt and automatic judicial control of police or administrative detention" and that the judge or judicial officer "must actually hear the detained person and take the appropriate decision".

The obligations under this sub-paragraph are to provide for a review "promptly" following initial arrest and detention, and also to provide periodic reviews of detention throughout the pre-trial period, as will be seen below. At each review, the judge or other officer authorised by law, must consider all the factors militating against releasing a person on bail pending trial. The approach of the Court has been that a person who is charged with a criminal offence must always be released unless there are relevant and sufficient reasons to justify continued detention during the pre-trial phase. The question of continued detention up to the date of trial must be kept under examination.

Article 5(3) will accordingly be breached in any circumstances where the domestic law automatically excludes the right of bail to a particular category of accused, without there being judicial consideration of the particular circumstances (see, e.g., **Ilijkov v Bulgaria (2001)**, discussed below, and **Boicenco v Moldova (2006)**).

Article 5(3) requires not only a prompt examination of the grounds for detention soon after arrest; it also requires an automatic review of those grounds at periodic intervals (see **Neumeister** at para. 4). However, the Court has not set down specific time limits as to how frequently such automatic reviews should take place. Frequently, cases under Article 5(3) also raise issues relating to the right to challenge the legality of detention, pursuant to Article 5(4).

This right does not depend upon the individual to activate it. It is an obligation for which the State is responsible. It must therefore be an automatic procedure (see **Niedbala v Poland (2000)** at para. 50). At these reviews the burden will fall on the authorities to establish that there are sufficient grounds to justify detention, otherwise the detainee must be released on bail.

4.2.3 Requirement of promptness

The Court has avoided setting maximum time limits. Indeed, it has stated that there is a degree of flexibility attached to the notion of promptness, though it is limited. In a number of case, the Court has stated that certain periods have exceeded the notion of promptness in the context of the fight against terrorism (such as **Brogan** – see below).

- In **Brogan and others v United Kingdom (1988)**, the applicants were arrested and detained in respect of terrorist offences. They were all released without charge after periods of between 4 days and 6 hours, and 6 days and 16 hours. The Court recognised that special difficulties were presented by the fight against terrorism. However, given that the overall purpose of Article 5 was to prevent arbitrary detention, even the period of four days and six hours exceeded the period envisaged by the notion 'promptly'. The Court concluded that they had not been released promptly and therefore there had been a violation of Article 5(3).

It is therefore clear that with regard to periods of detention following arrest in the context of the fight against terrorism, detention for a period of 4 days and 6 hours before being brought before a judge or released is not consistent with the notion of promptness. In other cases (not concerned with offences related to terrorism) periods of 5 days (**Koster v Netherlands (1991)** – see below) and six days (**De Jong, Baljet and van den Brink v Netherlands (1984)** – see below) have been found to violate the requirement of promptness under Article 5(3).

In many cases involving terrorism, the State concerned has declared a state of emergency under Article 15, derogating from the protection of Article 5. Where this has been the case, the Court still requires justification based on the facts to be given in respect of longer periods of detention applied in individual cases. Where respondent States have failed to show that extended periods were necessary, there may still be a violation of Article 5(3).

- For example, in **Aksoy v Turkey (1996)**, the applicant was arrested and detained in connection with alleged terrorist offences. He was detained for 14 days before being released without charge. He was tortured during this time. The Government claimed that since it had entered a derogation in respect of Article 5, there could be no violation of that Article. The Court held, however, that it had power to rule whether States have taken measures which have gone beyond the "extent strictly required by the exigencies" of the crisis. Here, while accepting there was a state of emergency in existence in south-east Turkey, and that the investigation of terrorist offences presents the authorities with special problems, the Court did not accept that it was necessary to hold a suspect for fourteen days without judicial intervention. The Court noted that this period was exceptionally long, and left the applicant vulnerable not only to arbitrary interference with his right to liberty but also to torture. Furthermore, the State failed to present any detailed reasons before the Court as to why the fight against terrorism in south-east Turkey rendered judicial intervention impracticable. The Court also held that there were insufficient safeguards available to the applicant, and that accordingly he had been held completely at the mercy of his captors. See also **Demir and others v Turkey (1993)**.

Although it is not possible to point to case law stipulating a maximum period of detention between arrest and initial appearance before a judge or other judicial officer, the practice of the Court has always been to examine the individual circumstances in each case. Where the arrest and detention of an accused takes place against a complex background (e.g. a large number of co-accused, the urgency to secure certain evidence in case it is destroyed etc), or where an accused is arrested in a rural area and must be driven a long distance to the nearest police station, the period between arrest and appearance before a judge may justifiably be longer than in the case of a person arrested

in normal circumstances. There is accordingly a degree of flexibility in deciding what amounts to being "prompt" in any case.

It is very important to reiterate that, as with all sub-paragraphs of Article 5(1), detentions under Article 5(1)(c) must be lawful, and in accordance with a procedure prescribed by law. It will be recalled that the phrases "lawfulness" and "in accordance with a procedure prescribed by law" refer back to domestic law; failure to comply with domestic law involves a violation of Article 5(1)(c). Therefore, if the domestic law makes provision for persons detained upon arrest in respect of criminal offences to be brought before a judge within a specific period, such as 24 hours, then failure to do so will be a violation of Article 5(1)(c), notwithstanding the fact that the Convention may allow for longer periods, according to the circumstances of an individual case.

As regards the domestic court's consideration of the lawfulness of detention, the Court has clarified in the case of **McKay v United Kingdom (2006)** that:

> "In order to ensure that the right guaranteed is practical and effective, not theoretical and illusory, it is not only good practice, but highly desirable in order to minimise delay, that the judicial officer who conducts the first automatic review of lawfulness and the existence of a ground for detention, also has the competence to consider release on bail. It is not however a requirement of the Convention and there is no reason in principle why the issues cannot be dealt with by two judicial officers, within the requisite time-frame".

Promptness may require judges to sit at weekends, or during the night, or on national holidays.

- In **Koster v The Netherlands (1991)**, the applicant, a soldier undertaking compulsory military service, was arrested and detained for failing to take receipt of a uniform and a weapon. He was detained on a wednesday for five days before being brought before the military court on the following monday. The reasons for the delay given by the government were that members of a military court were engaged in two-yearly major manoeuvres over the weekend. The Court held that the manoeuvres could not justify any delay in the proceedings; the manoeuvres took place at periodical intervals and were therefore forseeable and they in no way prevented the military authorities from ensuring that the military court was able to sit soon enough to comply with the requirements of the Convention, if necessary on a Saturday or Sunday. Even taking into account the demands of military life and justice the applicant's appearance before the judicial authorities did not comply with the requirement of promptness laid down in Article 5(3).

A State cannot justify delays by reference to the fact that there is a shortage of judges or courts. National authorities are required to ensure that sufficient resources are allocated in order to ensure the effective protection of Article 5.

4.2.4 "Judge or other officer authorised by law"

The phrase "other officer authorised by law" is equivalent to the "competent legal authority" in Article 5(1)(c). Thus the tribunal must be independent and impartial, and must have power to make a binding legal decision ordering release (see **Ireland v the United Kingdom** cited above).

- In **Schiesser v Switzerland (1979)**, the Court held that the procedural requirements are that the judge or "officer" is required themselves to hear the individual who comes before them – in other words the accused must be brought to court in person. The obligation on the judge or "other officer" is then to review the relevant factors relating to the need for detention, or not, and to decide according to legal criteria, whether there are reasons to justify detention. Release must be ordered if there are no such reasons.

- In **De Jong Baljet and Van den Brink v The Netherlands (1984)**, conscripts who refused on conscientious grounds to obey orders, were arrested for breach of military discipline. Their case was referred to the 'auditeur-militair'. He was competent to make recommendations about the applicants' referral for trial but had no power to order release. Furthermore, he did not have the necessary guarantees of independence, as he could also be called upon to perform the role of prosecutor, after referral of the case to a military court. There was accordingly a violation of Article 5(3).

- In the inter-state case, **Ireland v United Kingdom (1978)**, a number of persons were interned under anti-terrorist laws. Some of the detainees were brought before committees composed of a judge and two laypersons. These committees had power to recommend their release, but had no power to order their release, and so the Court found that they did not meet the requirements of Article 5(3).

In some jurisdictions, it has been the prosecutor who has made the decision concerning pre-trial detention. In the past, the Court was satisfied with this, provided that the requirements of independence and impartiality could be guaranteed, and so the prosecutor could be deemed to qualify as an "other officer authorised by law" (see, for example, **Schiesser** cited above). However, the general trend of the Court since 1990 has been to regard a prosecutor as lacking the requisite independence and impartiality. In many circumstances, the prosecutor's decision is capable of being influenced by the executive, or his/her decisions are subject to review by a senior prosecutor, or the prosecutor has the power to intervene on behalf of the prosecution authorities in a later stage of proceedings. In such circumstances, the prosecutor is therefore not sufficiently independent and/or impartial.

- In **Brincat v Italy (1992)**, the applicant was arrested and detained on suspicion of involvement in a kidnapping. The public prosecutor decided to extend the detention after a hearing at which the applicant was legally represented. The public prosecutor subsequently carried out the preliminary investigation and later declared he had no territorial jurisdiction over the case; he sent the file to the prosecutor who did have such jurisdiction. There was no dispute over the question of independence of the prosecutor from the executive. The case turned on the question of his impartiality. The Court held that the prosecutor could not be held to be independent at the preliminary stage, as he was liable to become one of the parties later. It further held that the objective appearances at the time of the decision on detention are material; if it then appears that the "officer authorised by law to exercise judicial power" may later intervene, in the subsequent proceedings, as a representative of the prosecuting authority, there is a risk that his impartiality may arouse doubts which are to be held objectively justified. The fact that the prosecutor later found that he lacked territorial jurisdiction and therefore was not entitled to conduct the prosecution was held to be immaterial. There was a violation of Article 5(3).

- In **Niedbala v Poland (2000)**, the applicant's detention was ordered by the district prosecutor. The applicant made several unsuccessful appeals, and his detention was repeatedly prolonged by the district prosecutor. The Court found that the district prosecutor was subordinate to the Prosecutor General, who in turn carried out the functions of the Ministry of Justice. In other words, the prosecutor was subject to the supervision of an authority belonging to the executive branch. Further, the Court found that the the law provided that prosecutors performed investigative and prosecutorial roles, and therefore had to be seen as a party to the proceedings in the case against the applicant. The fact that the law provided that prosecutors in addition acted as guardians of the public interest, did not by itself confer on them the status of "officer[s] authorised by law to exercise judicial power". The Court noted too, that the prosecutor had questioned the applicant before making the decision to detain him. In the circumstances, the

prosecutor lacked the independence required to be an "other officer authorised by law to exercise judicial power".

- In **Pantea v Romania (2003)**, the applicant's continued detention was ordered by a prosecutor. The Court noted that the prosecutor fulfilled several functions. In the first place the prosecutor considered whether to charge the applicant, he made the decision to open the investigations against the applicant, and decided to place him in continued custody. In the second place, he formally charged the applicant and decided on the nature of the charge. Although he did not act as the proscutor at trial, the Court noted that there was nothing in the law to prevent him from so doing. The Court further noted that in Romania, the prosecutors were subordinate to the Prosecutor General and the Minister of Justice and they therefore were not independent. It concluded that the prosecutor in this case could not be regarded as an "officer authorised by law to exercise judicial power".

The fact that a detainee can appeal to a court against a decision of a prosecutor cannot remedy the situation, unless the appeal is automatic; review by a court must not be dependent on a detainee lodging a complaint. See **Niedbala** cited above at para. 55.

Questions

1. Does domestic law provide for an automatic right to appear in person before a judge or other officer authorised by law?
2. If the right to appear in person is confined to an "other officer authorised by law", does such an officer possess the necessary guarantees of independence and impartiality?
3. Is the right to appear before a judge or "other officer authorised by law" a right that is exercisable at periodic intervals?
4. Does the judge or "other officer authorised by law" have power to order release?
5. Does the law specify a certain period within which an accused must be bought before a judge or other officer authorised by law? If so, does it comply with the notion of promptness provided for in Article 5(3)?
6. Are there special provisions which apply in respect of alleged terrorists or persons suspected of particularly serious crimes? If so, do they comply with the notion of "promptness"?
7. When the period of detention prior to being brought before a judge or "other officer authorised by law" is the subject of a legal challenge, is there a requirement that the judge etc, must examine the particular circumstances of the case to decide whether the period complied with the notion of promptness in the case before it?
8. Where a state of emergency exists and the State has entered a derogation pursuant to Article 15 of the Convention, does the law nevertheless provide prompt access to a court or "other officer authorised by law to exercise judicial power"? If not, are there compelling reasons for not so doing, and what are those reasons?

4.2.5 Grounds for refusing bail/for continued detention

Each time an accused appears before a court or "other judicial officer authorised by law", in accordance with Article 5(3), the court or judicial officer must examine closely both the reasons put forward to justify continued detention and the arguments advocating the detainee's release. The Court has held that continued detention may be justified only where there are "clear indications of a genuine public interest which, notwithstanding the presumption of innocence, outweighs the right to liberty" (see **Punzelt** at para. 73). The reasons given to justify continued detention must furthermore be *relevant and sufficient* to show that detention was not unreasonably prolonged and contrary to Article 5(3) (see **Wemhoff**). The presumption must accordingly always be in favour of

release, unless there are stong reasons for continuing detention. These reasons must continue to apply throughout the pre-trial period. Accordingly, the question of continued detention up to the date of trial must be kept under regular examination; Article 5(3) is designed to ensure that a person is provisionally released as soon as continued detention can no longer be justified (see **Neumeister**). This requires that the accused has an automatic right to be brought before the judge or other officer, on a regular basis

The Court has held that the reasonableness of detention must be assessed in each case according to its special features (see **Punzelt**). Domestic courts must base their decisions on facts and information which give rise to specific reasons justifying pre-trial detention. In **Demirel v Turkey (2003)** (at para. 58) the Court held that domestic courts may not base their decisions on stereotyped reasons (see also **Svipsta v Latvia (2006)**). In **Yagci and Sargin v Turkey (1995)** (at para. 50) and **Tomasi v France (1992)** (at para. 84) it noted further that courts must set out the reasons in their decisions, including a record of the arguments put forward by both parties, and the accused and their legal representative must be given a copy of such a decision. It is on the basis of such a decision that an accused can then make an appeal.

The Court has stated that in the initial stages, domestic courts may rely upon a reasonable suspicion that the accused has committed the offence in question – indeed such a 'reasonable suspicion' is a pre-condition (a *sine qua non*) for the validity of continued detention. However, after a certain time, this on its ownis not sufficient to justify continued detention (see **Punzelt**). It is not possible to specify the particular point at which further reasons will be necessary to justify continued detention: each case must be assessed on its merits, in order to determine the point at which the prosecution must show more than a reasonable suspicion that the accused has committed the offence in question.

The Court has always had regard to the reasons which are put forward to "justify the serious departure from the rules of respect for individual liberty and of the presumption of innocence which is involved in every detention without a conviction". See **Stogmuller v Austria (1969)** (at para. 4). In some States, the domestic law may require something more than the assertion of the seriousness of the offence and the indications of guilt from the outset. In such circumstances, the provisions of the domestic law, providing a higher level of guarantee, must be complied with; failure to do so will involve a violation of Article 5(3).

In **Boicenco v Moldova (2006)** the Court noted that the domestic courts, when ordering the applicant's detention and the prolongation thereof, have cited the relevant law, without showing the reasons why they considered to be well-founded the allegations that the applicant could obstruct the proceedings, abscond or re-offend. The reasons relied on by the domestic court were found not "relevant and sufficient". A separate violation of Article 5 § 3 was found on account of section 191 of the Code of Criminal Procedure which in advance excluded the right to release pending trial to individuals charged with intentional offences punishable with more than 10 years' imprisonment. (see as well **Becciev v Moldova (2005)** and **Sarban v Moldova (2005)**).

The grounds for refusing release which are accepted under Article 5(3) are:

- The risk of non-appearance at trial;
- The risk that the detainee will interfere with the course of justice;
- The risk that the detainee will commit further offences; and
- Where detention is necessary for the preservation of public order.

4.2.5.1 Risk of non-appearance at trial

The risk that an accused would not appear at trial cannot be based solely on the severity of the sentence risked. Where it is possible to obtain guarantees that an accused will appear, s/he must be released, subject to the relevant conditions. The following factors must be considered when assessing whether it is appropriate to continue detention on the grounds that the accused will abscond:

- the accused's character and personality ;
- the accused's assets;
- the accused's family links;
- the accused's contacts abroad;
- the severity of the possible sentence ;
- the accused's particular state of detention; and
- the lack of well-established ties in the country.

The national court must be satisfied that at least some of these factors exist, giving reason to suppose that the consequences and hazards of flight will seem to the accused to be a lesser evil than continued imprisonment. See **Stogmuller** cited above. For example, in **Ambruszkiewicz v Poland (2006)** the domestic court had ordered the applicant's detention because of a risk that the applicant might attempt to abscond. However, the Court found a violation of Article 5(1) on the basis that it was difficult to identify any evidence in support of the allegation that he might abscond.

The danger of flight decreases as the time in detention passes, due to the likelihood that the period in pre-trial detention will be deducted from the eventual sentence, should the accused be convicted. Thus, a court must take this into account each time it is required to examine the question of continued pre-trial detention. Indeed the Court has stated that when the only remaining reason for continued detention is the fear that the accused will abscond and thereby subsequently avoid appearing for trial, his release pending trial must be ordered if it is possible to obtain from him guarantees that will ensure such appearance (see **Wemhoff** at para. 15).

4.2.5.2 Risk of interference with the course of justice

In **Wemhoff**, the Court noted that there must be a well-founded risk that the accused would, if released, take action to prejudice the administration of justice. Such risks include:

- interference with witnesses;
- warning other suspects; and
- destruction of evidence.

The risk cannot be a generalised one; there must be evidence to support the allegation of the risk. Where, for example the investigation of the offences in question is very complex, there may be a greater risk of suppression or destruction of evidence, than in other less complicated cases. Furthermore, account must be taken of the fact that as the investigation progresses, the risk of interference with witnesses or other evidence reduces.

- In **Clooth v Belgium (1991)**, the applicant was detained on suspicion of arson and murder. One of the reasons for his continued detention was that he would attempt at collusion or to intimidate witnesses. The Court held that as the evidence failed to show that the accused was released only after the completion of certain specific investigative measures, the domestic court could have ordered his release earlier.

- In **Tomasi v France (1992)**, the applicant was suspected of having taken part in an attack against a centre belonging to the Foreign Legion; the attack had been carried out by a commando unit of several persons wearing balaclava helmets. The next day the Corsican National Front claimed responsibility for the attack and for 24 other attacks that took place the same night. The applicant was accused of murder and the possession of firearms. The State claimed that the threats that had been made against a co-accused made it impossible to release the applicant. The Court held, on the evidence, that there was from the outset, a genuine risk that pressure might be brought to bear on witnesses, and that, while it gradually diminished, it did not disappear.

- In **Contrada v Italy (1998)**, the applicant was a senior police officer charged with aiding and abetting the mafia. The case against him was based on the statements of several former Mafiosi who told the prosecutors that the applicant was assisting the mafia from within using his official position. The State needed corroboration of the statements from numerous witnesses. The Court held that there was a risk of the applicant tampering with the evidence because the case against him was based almost entirely on witness testimony and some of the witnesses were the applicant's friends and colleagues.

4.2.5.3 Risk of further offences

The seriousness of a charge may reasonably justify a decision to detain a suspect in an attempt to prevent attempts to commit further offences. However, the risk must be shown to be a plausible one. The past history and the personality of the accused should be taken into account. Consideration should be given as to whether any previous convictions relied upon were comparable either in nature or in the degree of seriousness to the charges made against the accused.

- In **Clooth v Belgium (1991)**, the applicant was accused of arson and of the murder of a teenage girl whose mutilated body was found in a burnt building. The applicant's previous convictions were for attempted aggravated theft for which he had been sentenced to two months in prison, and for desertion from the army, for which he had been sentenced to one month's military detention suspended. The Court held that the nature of the offences relied upon, were not comparable either in nature or in the degree of seriousness to the charges of which he was accused.

4.2.5.4 Risk to public order

The Court has consistently held that this ground may, in *exceptional circumstances*, be taken into account when assessing whether pre-trial detention of an accused is justified. The gravity of the offence in itself will not suffice: this ground may only be relied upon provided that the judge or other officer authorised by law making the decision to detain, bases the decision on facts capable of showing that the accused's release would actually disturb public order (see **Letellier** below at para. 51).

- In **Letellier v France (1991)**, the applicant was charged with being an accessory to the murder of her estranged husband. The Court found that the need for pre-trial detention was assessed by the domestic courts in a general way – namely that there was a need to protect public order for the disturbance created by the murder. The Court stated that this was insufficient, as it was not substantiated by any evidence. It accepted that some offences, by reason of their particular gravity and public reaction to them, may give rise to a social disturbance capable of justifying pre-trial detention, at least for a time. But, this must be based on facts capable of showing that the accused's release would actually disturb public order.

In addition, the detention would continue to be legitimate only if there remained a threat to public order. Continuation of pre-trial detention cannot be used as a means to anticipate a custodial sentence (again see **Letellier**).

Questions

1. Does the domestic law provide for a presumption of bail?
2. Are there prescribed grounds which justify refusal of bail? If so, are they consistent with the principles outlined above?
3. Are courts required to examine certain factors, consistent with those outlined, in order to justify continued pre-trial detention?
4. Is there a requirement relating to decisions on bail, for clear reasons based on the evidence, for refusal of bail to be given to the accused? Is provision made to ensure that stereotyped justifications are not to be relied upon to refuse bail?
5. Is the accused entitled to automatic periodic reviews of detention?
6. If so, does this review take into account changing circumstances such as the reduced risk of absconding etc?

4.2.6 What period of detention counts as pre-trial detention for the purposes of Article 5(3)?

In determining whether an accused has been held in pre-trial detention for an unreasonably long period, the Court has determined that pre-trial detention lasts until the date of judgment in the criminal proceedings deciding upon conviction or acquittal. The period between judgment and any appeal process is deemed to count as detention following conviction, falling under Article 5(1)(a). Complaints concerning the length of the appeals process will be examined by the Court according to the right to a fair hearing within a reasonable time, under Article 6(1). See **Wemhoff** cited above at para. 9.

4.2.6.1 Length of pre-trial detention

The emphasis throughout Article 5 is on the accused having the right to be released unless there are grounds for her/his detention. This means that there must also be periodic reviews of those grounds. In other words, the question of detention must be kept constantly under review.

- In **Ilijkov v Bulgaria (2001)**, the applicant was arrested and detained in relation to large-scale fraud. He was detained in pre-trial custody for a total period of almost 3 years and 4 months. The Bulgarian courts applied a domestic law presumption that detention on remand was necessary in all cases where the maximum sentence exceeded a certain threshold (ten years' imprisonment in cases until June 1995 and five years' imprisonment thereafter). The Court held that any system of mandatory detention on remand is in itself incompatible with Article 5(3) of the Convention.

In respect of each of the grounds used to justify pre-trial detention (see above), special diligence in the conduct of proceedings must be exercised by the courts to ensure that the period spent in custody does not extend beyond what is deemed reasonable. What is reasonable will differ from case to case, and cannot be assessed in the abstract (see **W. v Switzerland (1992)**). Factors to be taken into consideration when deciding to release or to continue the detention include:

- The complexity of the investigation;
- The number of co-defendants;

- Whether there are international elements;
- The nature and complexity of the legal issues; and
- The conduct of the accused.

- In **Contrada v Italy (1998)** the applicant was a senior police officer who was charged with aiding and abetting the mafia and spent a long period in pre-trial detention. He complained that he had been detained for an unreasonable period, contrary to Article 5(3) of the Convention. The Court considered that the risk of the applicant's absconding diminished during the course of the investigation. However, the dangers of his committing further offences, tampering with evidence or exerting pressure did constitute, in the particular case, relevant and sufficient grounds for his being detained for the period of 2 years, 7 months and 7 days. Moreover, the Court found that the authorities were conducting the proceedings with special diligence. The Court noted the complexity of the case that involved the investigation of the collusion of State institutions with the mafia, and required checking numerous financial and mobile phone records, government records over several years, and the statements of over 250 witnesses. The Court emphasised that time was required for detailed inquiries because the mafia was a criminal force which was able to infiltrate the state and undermine it from within. The Court further stressed that the Italian court had offered to increase the frequency of hearings when it extended the maximum period of detention, and the defence declined the offer.

- In **Chraidi v Germany (2006)** the applicant's detention on remand for a period of 5 years and 6 months was considered to be reasonable, in the exceptional circumstances of the case in the context of international terrorism. The case was extremely complex, required the hearing of 169 witnesses and involved 106 joint plaintiffs, and hearings had taken place on 281 separate days.

As to the conduct of the accused: where they invoke the rights available to them, for example, by submitting applications for release, (see Article 5(4)) no delays should be attributable to them. However, where the accused engages in deliberately obstructive behaviour, delays associated with this behaviour cannot be attributable to the State.

- In **Punzelt v Czech Republic (2000)**, the applicant was detained for a total of 8 months between the indictment and the date set for trial, since the domestic authorities had to deal with several applications by the accused for further evidence to be taken. This delay was not considered to be excessive. But after that, the court adjourned the trial to enable the prosecution to take further evidence, causing a delay of 6 months. Three months later, his conviction was quashed by the court of cassation on the grounds that the trial court had failed to consider all the relevant evidence and had applied the law incorrectly. It referred the case back to the prosecutor. Six months after that the supreme court quashed the decision to refer the case back to the prosecutor. The case was then sent back for re-trial. The second judgment was handed down 10 months after the first conviction was quashed. The Court accordingly held that the domestic courts had not displayed "special diligence".

- In **Jabłoński v Poland (2000)**, the applicant's pre-trial detention lasted 4 years, 9 months and 7 days, of which 3 years, 9 months and 27 days occurred after Poland had accepted the right of individual petition under the Convention. The Court held that the persistence of suspicion of the commission of the offence could not, by itself, justify the whole period of detention. When deciding whether a person should be released, the Court stated that the authorities are obliged to consider alternative measures to ensure appearance at trial. Here, no consideration was given to the possibility of imposing other "preventative measures" (such as bail or police supervision) expressly permissible under Polish law. The courts failed to refer to any factor indicating that there was a risk of his absconding, going into hiding, or otherwise evading

justice. No account was taken of the fact that with the passage of time and the applicant's increasing number of acts of self-aggression, keeping him in custody no longer served the purpose of bringing him to trial within a reasonable time. Prolonged detention was not necessary and the reasons were not sufficient to justify the length of detention.

Where the State authorities fail to conduct their investigations with due diligence and bring the detainee to trial within a reasonable time, there will be a violation of Article 5(3).

As to the application of the six months time limit (under Article 35(1)) for lodging applications with the European Court, the Court has clarified that where an applicant is subject to multiple, consecutive periods of pre-trial detention, they should be regarded as a whole, and accordingly the six-month period should only start to run from the end of the last period of pre-trial custody (**Solmaz v Turkey (2007)**).

Questions

1. Does domestic law ensure the speedy and efficient conduct of investigations in respect of those held in custody?
2. Does the law enable the question of continued detention to be reviewed regularly, taking account of factors such as the complexity of the investigation, the number of co-defendants, whether there are international elements, the nature and complexity of the legal issues and the conduct of the accused?
3. Are procedures in place to enable challenges to be made regarding the length of pre-trial detention?

4.2.7 Guarantees to appear for trial

The imposition of guarantees to appear for trial must always be considered as an alternative to pre-trial detention where unconditional release would otherwise be considered too risky. Indeed, Article 5(3) specifically provides that release may be conditioned by guarantees to appear at trial. Its operation must be proportionate: if a decision has been taken that conditional release is justified, then the conditions imposed must be realistically capable of being met, as well as not being so onerous as to defeat the purpose of release (i.e. the restoration of liberty). Therefore, sureties and securities must be set at a level which is achievable, whilst still acting as a deterrent to absconding. Bail conditions should be directed primarily towards appearance at trial; they should not have a punitive or compensatory purpose.

- In **Neumeister v Austria (1968)**, in imposing financial guarantees, the Austrian courts based their decisions mainly on the amount of loss resulting from the offences imputed to the accused, which he might be called upon to make good. The Court held that the purpose of the guarantees was to secure attendance at the hearing, and not provide for reparation for the loss. The amount must be assessed by reference to the accused's assets, and his relationship with those who were to provide the security.

- In **Stogmuller v Austria (1969)**, the court noted that the surrender of a passport would have been an acceptable "guarantee", to meet the concern that the applicant might flee the country.

Questions

1. Do courts have a wide discretion, founded on the presumption in favour of bail, to order conditional release, on conditions of either their own or the parties' suggestion?
2. Are courts given discretion to set appropriate conditions?
3. Is there a requirement that conditions be proportionate; i.e. to ensure that conditions imposed are realistically capable of satisfaction?
4. Is there guidance on the application of those conditions, consistent with that outlined above?
5. Is there a procedure, either automatic or occurring promptly on the application of the accused, for review of conditions in the light of changing circumstances?
6. Is there an established adversarial procedure, with proper rules of evidence, by which breaches of conditions can be proved by the prosecution or by the court of its own motion (proprio motu) and the court then order re-detention if necessary?

4.3 Entitlement to obtain a speedy decision by a court as to the lawfulness of detention – Article 5(4)

4.3.1 Right to challenge "lawfulness" of decision to detain

All persons arrested and/ or detained, for any reason, whether in relation to a suspected criminal offence, mental illness, or failure to comply with a lawful order of the court etc, have the right to initiate proceedings, in order to challenge the legality of their detention. Such proceedings should be directly available to the detainee and they must be heard by a court or tribunal which has power to order release. The procedural requirement of court review is a necessary part of institutional safeguards against arbitrary detention.

In the context of criminal proceedings, the right to challenge the legality of detention under Article 5(4) is in addition to, and separate from, the right in Article 5(3) to be brought promptly before a judge or other judicial officer. Furthermore, Article 5(4) refers to the detainee's entitlement to take proceedings, whereas hearings under Article 5(3) must be provided by the State automatically. In practice, many persons detained in respect of criminal charges will use the Article 5(3) hearings to challenge the legality of their continued detention. The requirement of access to a reviewing court does not depend on the existence of strong grounds for challenging detention; it is not therefore permissible for national authorities to require the fulfilment of conditions relating to the strength of arguments, prior to allowing Article 5(4) challenges. Furthermore, the right applies, even in circumstances where national security is at stake.

Although it is not always necessary that the procedure under Article 5 § 4 be attended by the same guarantees as those required under Article 6 § 1 of the Convention for criminal or civil litigation, it must have a judicial character and provide guarantees appropriate to the kind of deprivation of liberty in question. In particular, in the proceedings in which an appeal against a detention order is being examined, "equality of arms" between the parties, the prosecutor and the detained person must be ensured. Once a person is released, the right under Article 5(4) ceases to be applicable.

- In **Al-Nashif v Bulgaria (2002)**, the applicant was a stateless person of Palestinian origin. He was served with a deportation notice and a detention order, on the grounds that he posed a threat to national security; however, neither order stated any reasons. He was held incommunicado for 26 days, before being deported, and was not able to challenge his detention. The Court held that the fact that no domestic court was empowered to enquire into the lawfulness of the detention, that the detention order itself contained no reasons, and that

the applicant was not allowed to consult a lawyer to consider any possible legal challenge to the measures against him, amounted to a situation incompatible with Article 5(4). The Court stated that national authorities cannot do away with the effective control of the lawfulness of detention by the domestic courts merely by asserting that national security and terrorism are involved.

It is possible to succeed on a challenge based on Article 5(4), even where a challenge to Article 5(1) fails. This is because even where a person's detention is found to be lawful under Article 5(1), if the detainee is deprived of the right to challenge the lawfulness of the detention, Article 5(4) is breached.

- In the cases of **Gorshkov v Ukraine (2005)** and **Kucheruk v Ukraine (2007)** the Court found the domestic law on psychiatric medical assistance that guaranteed to every mental health patient the right to be brought before the judge automatically as insufficient on its own. Such surplus guarantees do not eliminate the need for an independent right of individual application by the patient. The Court concluded that the applicants were not entitled under the domestic law to take proceedings to test the lawfulness of their continued detention for compulsory medical treatment by a court, as required by Article 5 § 4 of the Convention.

Once released, the only domestic remedy required under Article 5 is the enforceable right to compensation for unlawful detention under Article 5(5).

4.3.2 Scope of review

The scope of the review will depend upon the nature of the detention. The Court has held (see, e.g., **Brogan v the United Kingdom (1988)**) that arrested or detained persons are entitled to a review bearing upon the procedural and substantive conditions which are essential for the "lawfulness", in the sense of the Convention, of their deprivation of liberty. This means that the competent court has to examine compliance with the procedural requirements of the domestic law as well as compliance with the requirements of Article 5 (see **Brogan** at para. 65).

4.3.3 Procedural requirements of review

Proceedings examining the lawfulness of detention under Article 5(4) must be of a 'judicial' character and provide procedural guarantees appropriate to the kind of deprivation of liberty in question (see, for example, **Megyeri v Germany** discussed above).

There are many parallels between the procedural guarantees required under Article 6 and Article 5(4) of the Convention. However, the Court has made clear that it is not always necessary that the procedure under Article 5(4) should incorporate the same guarantees as required by Article 6 of the Convention for criminal or civil litigation.

- **Reinprecht v Austria (2005)** provides a very useful summary of the principles applied by the Court under Article 5(4) in comparison to Article 6(1). In its judgment, the Court found that Article 5(4), though requiring a hearing to review the lawfulness of pre-trial detention, does not as a general rule require such a hearing to be public (as is required by Article 6). The Court noted the close link between Article 5(4) and Article 6(1) in the sphere of criminal proceedings, as evidenced by the applicability of Article 6 to some pre-trial proceedings. However, it considered that the application of Article 6 to pre-trial proceedings concerned procedural guarantees, which if not observed at the pre-trial stage, would prejudice the fairness of the proceedings taken as a whole. For example, requirements such as the adversarial nature of the proceedings and the principle of equality of arms are "fundamental guarantees of procedure"

that must apply in matters of deprivation of liberty. In **Reinprecht**, there was no indication that the non-public nature of the detention hearings at which the applicant was assisted by counsel could similarly prejudice the fairness of the proceedings as a whole. The Court also noted the different purposes of Article 5(4) (e.g., establishing reasonable suspicion) and Article 6 (which involves the "determination of a criminal charge"). It is this difference of aims which explains why Article 5(4) contains more flexible procedural requirements than Article 6, while being much more stringent as regards speediness. The Court did not exclude the possibility that a public hearing may be required in certain circumstances. However, no such circumstances were shown to exist in this case.

The most significant procedural requirements of Article 5(4) are discussed in detail below.

4.3.3.1 Competent court

The notion of a "competent court" means an independent and impartial court having jurisdiction to hear the case. Thus, the courts that hear challenges under Article 5(4) must have competence to decide the lawfulness of the detention. This does not mean that the court has a right to substitute its own decision for that of the original decision-maker. It means that it must have competence to assess the lawfulness of the detention and to order release.

A tribunal would fail to demonstrate impartiality where, for example, the person who ordered the detention was the same person who later considered its legality. Clearly, a government minister would not qualify as a competent court, since he or she does not possess the requisite independence and may also fail to demonstrate impartiality. By contrast, a court may be fully integrated into the standard judicial machinery, but fail to qualify as a competent court, if, for example, it does not have power to order the release of the detainee.

- In **X. v the United Kingdom (1981)**, the case concerned the detention of a mentally disordered person. The Mental Health Review Tribunal which reviewed his detention did not qualify as a competent court as it could only make advisory recommendations for release.

- In **Weeks v the United Kingdom (1987)**, the applicant had been sentenced to a discretionary life sentence and released on licence. He was later re-detained. The Government asserted that the court which heard the judicial review proceedings instituted by the applicant, constituted a competent court for the purposes of Article 5(4). However, the Court held that it was not a competent court, since it was not able to verify whether his detention was consistent with the objectives of the life sentence.

- In **Chahal v the United Kingdom (1996)**, the decision to detain and deport the first applicant was made on national security grounds. Neither of two sets of legal proceedings available to challenge the decision were sufficient for Article 5(4) since they were not able to review the merits of the decision to detain and deport.

- In **Von Bulow v the United Kingdom (2003)**, the applicant was sentenced in 1975 to a mandatory life sentence for murder. The trial judge recommended that the applicant serve a tariff of 20 years, to which the Lord Chief Justice agreed. In 2000, the Secretary of State wrote to the applicant stating that he had set the tariff at 23 years; since the tariff had expired, he was informed that this played no part in his continued detention. The Parole Board informed the applicant that it was going to recommend his release. The Court held that after the expiry of a tariff, the continuation of detention depended on elements of risk and dangerousness, factors that were subject to change. Therefore, Article 5(4) required that the applicant should be able *periodically* to challenge the legality of his detention in an appropriate procedure. In this case

the Parole Board did not have power to order release, and it did not hold any hearing. There was therefore a violation of Article 5(4).

4.3.3.2 Adversarial nature of proceedings

The proceedings must be adversarial in nature and must always ensure equality of arms between the parties (i.e. the prosecutor/police etc and the detained person). The Court has held that in the case of a person whose detention falls within the ambit of Article 5(1)(c), a hearing is required (see e.g., **Trzaska v Poland (2000)**). In those circumstances, the detained person must then have a right to be present and to be heard, if necessary with legal representation. Where there are complex legal issues at stake, Article 5(4) appears to require legal representation, funded, if the detainee cannot pay, by legal aid. Where the detainee is of unsound mind, the responsibility to appoint a legal representative rests with the national authorities.

- In **Winterwerp v Netherlands (1979)**, the respondent Government asserted that Article 5(4) did not require a court to hear in person, an individual whose mental condition was such that he would be incapable of presenting statements of any relevance. The Court disagreed. It held that Article 5(4) requires either that the detainee is heard in person, or through a legal representative. Mental illness could not justify impairing the right to challenge the legality of detention.

- In **Bouamar v Belgium (1988)**, the Court held that the applicant who was a minor, should have been legally represented.

- In **Megyeri v Germany (1992)**, the applicant had committed a number of violent offences for which he could not be found criminally responsible due the fact that he suffered from schizophrenic psychosis with signs of paranoia. The Court held that the applicant should have been legally represented when challenging the legality of his detention.

- In **Castravet v Moldova (2007)** the Court found that a violation of Article 5(4) could result from interferences with lawyer-client communications. In that case, the breach was a consequence of a glass partition in the lawyer-client meeting room of the detention centre, thus creating a barrier to confidentiality

As the cases of **Megyeri** and **Winterwerp** both show, special procedural safeguards are necessary in order to protect the interests of persons who, on account of their mental disabilities, are not fully capable of acting for themselves. Those committed to care as being of "unsound mind" should not have the responsibility of taking the initiative in obtaining legal representation themselves before having recourse to a court.

4.3.3.3 Detainees must have access to pertinent parts of the file held by the State authorities

In order to ensure equality of arms, counsel for the detained person must be given access to those documents in the investigation file that are essential in order effectively to challenge the lawfulness of the detention. In other words, the detainee, or their counsel, must be given copies of the material that the State authorities rely upon in seeking to continue to detain the person in question (see **Lamy v Belgium (1989)**).

- In **Sanchez-Reisse v Switzerland (1986)**, the applicant challenged his detention pending extradition. The procedure followed was that his request for release was sent to the office of the federal police, who in turn passed its opinion on to the domestic court for a judicial decision.

The applicant complained that he was not given an opportunity to see the written opinion. The Court held that the applicant should have been given an opportunity to respond to this opinion, either in writing or in person before the domestic court. The Court stated that the proceedings had therefore not been truly adversarial and therefore violated Article 5(4).

- In **Lamy v Belgium (1989)**, the applicant was arrested pursuant to a warrant on suspicion of fraud. He was not given access to the prosecution file, whereas the prosecution made submissions from the whole file. The Court held that access to those documents was essential for the applicant. It would have enabled his lawyer to address the domestic court on the matter of the co-defendant's statements. He was accordingly unable to challenge the reasons relied on to justify a remand in detention. There was therefore a violation of Article 5(4).

- In **Garcia Alva v Germany (2001)**, the applicant was denied access to the prosecution file which contained statements of a police informer. The Court held that proceedings under Article 5(4) should in principle meet the requirements of Article 6, the right to a fair hearing, *inter alia*, in criminal proceedings. In particular, the detainee should have access to the observations made by the prosecution and have a real opportunity to comment upon them. It held that while there might be a need to keep certain evidence secret during the course of the criminal investigation to prevent suspects from undermining the course of justice, this legitimate goal cannot be pursued at the expense of substantial restrictions to the rights of the defence. Information which is essential to the assessment of the lawfulness of detention should be made available in an appropriate manner to the defence lawyer.

- In **Svipsta v Latvia (2006)** the applicant's lawyer was denied access to the investigation file despite the fact that it contained a number of elements which were central to the applicant's continued detention. It had therefore been essential for the defence to be able to consult the file in order to challenge effectively the lawfulness of the applicant's pre-trial detention, which at the time had lasted for over six months.

4.3.3.4 The burden of proof

The burden of proof in proceedings challenging the legality of detention rests with the authorities.

- In **Hutchison Reid v the United Kingdom (2003)**, the applicant had been detained on mental health grounds. In his challenge concerning the lawfulness of his continued detention, he was required to satisfy the court that he was no longer suffering from a mental disorder requiring his detention in hospital for medical treatment. The Court held that it is for the authorities to prove that an individual satisfies the conditions for compulsory detention, rather than the converse. It referred to the fact that the initial deprivation of a mental patient's liberty and the continued detention could only be lawful under Article 5(1)(e) if it can "reliably be shown that he or she suffers from a mental disorder sufficiently serious to warrant detention", namely that the burden lies on the authorities in both instances The Court held that the imposition of the burden of proof on the detainee was incompatible with Article 5(4).

4.3.3.5 Speedy determination

The rationale for a speedy determination of challenges to lawfulness under Article 5(4) is that if the detention is in fact unlawful, the detainee is entitled to immediate release. The phrase "speedy determination" comprises two elements: first it refers to the period within which a detainee must be able to bring proceedings to challenge the lawfulness of his/her detention. Second, it requires that the period within which a claim must be dealt with by the domestic courts, must be as short as possible. In both cases, what amounts to "speedy" cannot be defined in the abstract. It must be

determined in the light of the circumstances of each case, by reference, for example, to the nature and complexity of the case. The detainee is entitled to a speedy determination of his request for release, even if the result is a refusal to release.

In assessing what is reasonable, time runs from the moment proceedings are begun, to the final determination, including any appeal (see **Luberti v Italy (1984)**).

- In **De Jong, Baljet and Van Den Brink v the Netherlands (1984)**, there were gaps of 7, 11 and 6 days before the applicants were brought before a military court for trial, following their detention. There were no other chances to challenge their detention. The Court held that, even having regard to the exigencies of military life, the length of time in detention prior to being brought to court, deprived the applicants of their right to bring proceedings to obtain a speedy review of the lawfulness of their detention.

- In **Sanchez-Reisse v Switzerland (1986)**, periods of 31 and 46 days in respect of challenges to detention pending extradition were held to be excessive. The issues in the case were not complex requiring detailed investigation or warranting lengthy consideration. Indeed, the only new factor which arose after an initial request preceding the challenge which took 31 days, was the applicant's state of health. It should not have necessitated 31 days.

- In **Fox, Campbell and Hartley v the United Kingdom (1990)**, the applicants were released within 44 hours of their arrest. The Court stated that they had been released promptly and there was therefore no need to examine the case under Article 5(4).

- In **Letellier v France (1991)**, the applicant was accused of being an accessory to the murder of her husband. She lodged 8 applications for release during pre-trial detention, six of which were dealt with between 8 and 20 days. The Court had reservations over the length of the second application, but bore in mind that the applicant had had the opportunity to submit further applications at any time, and had indeed done so. The second application was fairly complex and was accordingly not excessive on the facts.

- In **G.B. v Switzerland (2000)** and **M.B. v Switzerland (2000)**, the applicants were detained in September 1994. On Friday 21 October 1994, they lodged requests for release. Their attorney received them on Monday 24 October. The requests were dismissed on Tuesday 25 October. The decisions were served on the applicants on 26 and 27 October. On 31 October, the applicants appealed. The State was given 7 days to submit observations and the applicants were given a further 4 days. They were dismissed on 21 and 24 November (after total periods of 32 and 34 days). The Court held that the matters at issue were not complex. The 10 day period for filing observations was very long, considering that the Federal Attorney had been able to dismiss the case in one day, and the applicants knew their own case! Then, there were delays of 10-12 days to deliver the decision. The total period was excessive, in violation of Article 5(4).

- In **Laidin v France (2002)**, the applicant had been detained on mental health grounds. She applied to the public prosecutor challenging the lawfulness of her detention. The application was received by the prosecutor on 8 December 1997. He applied the following day for a copy of the applicant's medical certificate. The prosecutor received the medical certificate on 2 January 1998 and applied on the applicant's behalf to the competent court for her immediate release. The applicant was allowed out on a trial basis on 14 January 1998; her release was made permanent on 26 February 1998. The Court held that the period to be taken into account ran from the date on which the prosecutor received the application for release, until the date the applicant was released on a trial basis; this was a total of five weeks. The Court held that the period was excessive.

While Article 5(4) does not guarantee an appeal against a judgment as to the lawfulness of detention, any appeals that are available must also be conducted speedily.

- In **Hutchison Reid v the United Kingdom (2003)**, the applicant's application for release was refused. The applicant was able to appeal to three further levels, challenging the refusal. The total length of proceedings from original application to final appeal was three years and nearly 10 months. The Court noted that some of the delay was attributable to the applicant; however, by far the greatest delay was caused by the national authorities. It held that his application for release had not been dealt with speedily.

4.3.4 Review of lawfulness permitted at regular intervals

In cases where changes in the factual circumstances or new issues might affect the continuing legality of the detention over a period of time, there will be a right of review of lawfulness at regular intervals (see **Hutchinson Reid** cited above, at para. 65). Such cases include those where persons have been detained in psychiatric hospital for the purposes of treatment; the detention of convicted criminals on the basis of life sentences where 'life' consists of mandatory and discretionary elements (once the prisoner has entered the discretionary stage he must have access to the courts in order to challenge the exercise of the discretion to continue imprisonment); and detention of minors, most particularly on the event of their becoming of full age.

For suspects held in pre-trial detention, after the first review of the lawfulness of their detention, there is an entitlement to take proceedings at reasonable intervals.

- See, for example, **Bezicheri v Italy**, where the applicant was detained on the basis of Article 5(1)(c). The Court held that after the first appearance before a domestic court, the applicant was entitled to review at reasonable intervals. In this case, the Article 5(4) review was less than one month after the initial Article 5(3) hearing. The Government argued that it was unreasonable for the applicant to lodge a second application within such a short time after the first hearing, but the Court disagreed, stating (at para. 21) that:

  > "The nature of detention on remand calls for short intervals; there is an assumption in the Convention that detention on remand is to be of strictly limited duration because its raison d''tre is essentially related to the requirements of an investigation which is to be conducted with expedition".

Questions

1. Is there a right to institute challenges to detention before an accessible, independent, impartial and effective tribunal with authority to order release?
2. Do the tribunals allow for adversarial hearings which guarantee equality of arms?
3. Are legal provisions in place to ensure that detained persons can gain access to relevant parts of the state authorities' files?
4. Is legal assistance available to vulnerable groups such as those suffering mental illness?
5. Is there an accessible procedure to enable applicants to make challenges to their continued detention at reasonable intervals, particularly in the light of any changing circumstances?
6. Are similar procedures available on every occasion of a renewal of the detention order?
7. Are there legal procedures available that allow the subject of a deportation or extradition order to question the validity of such an order? Are the tribunals that hear such challenges independent and do they have power to order release?
8. For example, is there an automatic right of appeal against deportation, extradition or other expulsion orders?

9. Are there legal procedures that allow the applicant to challenge the duration of detention pending removal? Are the tribunals which hear such challenges, independent and do they have power to order release?
10. Is there appropriate assistance and representation for foreign nationals, taking account of linguistic and educational difficulties and cultural differences?

4.4 Right to compensation – Article 5(5))

Article 5(5) provides for an enforceable right at national level, to compensation for unlawful detention. In order to succeed in an action for compensation, the applicant must be able to demonstrate a violation of one of the other paragraphs of Article 5. In this regard, the Court can rely on a finding of a domestic court that there has been a breach of Article 5 (in a case where compensation for such breach was denied) or, if there is no such finding, it may itself examine whether there has been such a breach.

In order to comply with Article 5(5), a person must be able to bring his/her claim before a domestic court, and be entitled to receive a legally enforceable order upon a successful action. The requirements of Article 5(5) would not be met where a remedy is unenforceable, for example where it is provided by an ombudsperson, or consists of an ex gratia payment by the government. The European Commission of Human Rights has stated that compensation may be broader than mere financial compensation, but failed to indicate what that might be (see report of the Commission in **Bozano v France**). However, financial compensation is the norm. The duty to award compensation will not be discharged by an order for release, since this is a separate right provided for by Article 5(4).

Article 5(5) does not prohibit States from making the award of compensation dependent upon the ability of the person concerned to show damage resulting from the breach (see **Wassink v the Netherlands (1990)**). The status of "victim" may exist even where there is no damage, but there can be no question of "compensation" where there is no pecuniary or non-pecuniary damage to compensate. Such damage can include:

- Monetary loss;
- Pain and suffering; and
- Emotional distress

The Court has recognised, however in its determination of just satisfaction under Article 41 of the Convention "that some forms of non-pecuniary damage, including emotional distress, by their very nature cannot always be the object of concrete proof" (see **Rakevich v Russia (2003)**). In such circumstances, it is the Court's practice to make an award if it considers it reasonable to assume that the applicant has suffered prejudice requiring financial compensation.

There are no firm guidelines concerning the amount of compensation which must be awarded. However, the Commission has indicated in **X v the United Kingdom (1981)**, among others, that the amounts must reflect the seriousness of the breach.

Questions

1. Is there an enforceable right to compensation for breach of rights contained in Article 5?
2. If so, do the amounts available reflect the seriousness of the breaches?

5 STATE RESPONSIBILITY UNDER ARTICLE 5

5.1 Deprivation of Liberty by Private Actors

The question of whether the State is responsible for deprivation of liberty under Article 5 has been quite straightforward in most cases before the Court. This is because it is usually the apparatus of the State that is directly involved in deprivation of liberty through, for example, its criminal justice, immigration, or health system. In these cases, it is the 'negative obligations' of the State under Article 5 that are engaged.

However, there may be cases where it is not so clear that deprivation of liberty is imputable to the State, in particular, where private actors are directly responsible. Even if it is not possible in such cases to find the State responsible for violation of its negative obligations under Article 5, the State may be subject to positive obligations (including procedural obligations) analogous to its obligations under Article 2 and 3 of the Convention. As in the case of Articles 2 and 3, such obligations stem from the State's obligation under Article 1 of the Convention to secure the Convention rights and freedoms in its domestic law for everyone within its jurisdiction.
In the case of **Storck v Germany (2005)**, the Court outlined a number of ways in which the responsibility of the State may be engaged under Article 5. The case concerned a woman held in a private psychiatric clinic at the request of her father for 20 months and treated with strong medication. The Court found that as she never gave consent, and attempted to flee numerous times, this constituted a deprivation of liberty. The key question was whether the State was responsible under Article 5. The Court agreed with the parties that there were three aspects which could engage Germany's responsibility under the Convention for the applicant's detention in the private clinic in Bremen. Firstly, her deprivation of liberty could be imputable to the State owing to the direct involvement of public authorities in the applicant's detention. Secondly, the State could be found to have violated Article 5(1) in that its courts, in the compensation proceedings brought by the applicant, failed to interpret the provisions of civil law relating to her claim in the spirit of Article 5. Thirdly, the State could have breached its positive obligation to protect the applicant against interferences with her liberty by private persons. The Court proceeded to examine each of these aspects in turn:

- *Direct involvement of the public authorities.* It was clear that the applicant's confinement was not authorised by a court or other State entity, nor was there any system for supervision by State authorities of the lawfulness and conditions of confinement. However, the police had assisted in bringing the applicant back to the clinic after she had fled and had failed to conduct any review in response to her express objection to being returned. In such circumstances, State responsibility was directly engaged from the date on which the police became involved.

- *Failure to interpret the national law in the spirit of Article 5.* The Court observed that its role was to examine whether the effects of an interpretation of national law are compatible with the Convention. The Contracting States, notably their courts, are obliged to apply the provisions of national law in the spirit of the rights under the Convention. In this case, the domestic court of appeal rejected the applicant's compensation claim as time-barred, finding that that she had had sufficient knowledge to bring a claim when she was detained in the clinic. The Court compared this rigid application of time limits to its own practice under Article 35(1) which strives to have regard to particular circumstances that justify the interruption or suspension of the running of time for the purposes of limitation. In this case the applicant had been heavily medicated, which ought to have justified the extension of the domestic time limit. The Court also found that the court of appeal's finding that there was a contractual relationship by which the applicant had consented to her stay and treatment in the clinic was arbitrary and in violation of Article 5.

- *Compliance with the State's positive obligations*. The Court cited its previous jurisprudence to the effect that Articles 2, 3 and 8 of the Convention require the State not only to refrain from an active infringement by its representatives of the rights in question, but also to take appropriate steps to provide protection against an interference with those rights either by State agents or by private parties. It its view, the first sentence of Article 5(1) must equally be construed as laying down a positive obligation on the State to protect the liberty of its citizens. Under Article 5 the State is obliged: "to take measures providing effective protection of vulnerable persons, including reasonable steps to prevent a deprivation of liberty of which the authorities have or ought to have knowledge." In this case, no public health officer ever assessed whether the applicant's confinement was justified. Moreover, the State failed to supervise the lawfulness of her confinement for some 20 months. Although there were retrospective remedies in German law for those in the applicant's situation, the Court did not consider those to be sufficient. The Court concluded that the respondent State has breached its existing positive obligation to protect the applicant against interferences with her liberty by private persons in violation of Article 5(1), first sentence, of the Convention.

5.2 'Jurisdiction of the State' under Article 1

Each Contracting Party is responsible only for breaches of Article 5 that occur "within its jurisdiction" for the purposes of Article 5 of the Convention. However, a breach of Article 5 occurring outside the territory of a Contracting Party may be "within its jurisdiction" for the purposes of the Convention if executed by its agents.

- In the case of **Ocalan v Turkey (2005)**, Kenyan authorities handed over the applicant to Turkish agents just after he arrived in Kenya. He complained that he had been deprived of his liberty unlawfully by Turkey, without the applicable extradition procedure being followed, in violation of Article 5(1). Although the events at issue occurred outside the territory of Turkey and outside the espace juridique of the European Convention on Human Rights, the Court found that the applicant was within the "jurisdiction" of Turkey for the purpose of Article 1 of the Convention. The Court noted the following at paragraph 91:

  > "It is common ground that, directly after being handed over to the Turkish officials by the Kenyan officials, the applicant was under effective Turkish authority and therefore within the "jurisdiction" of that State for the purposes of Article 1 of the Convention, even though in this instance Turkey exercised its authority outside its territory. It is true that the applicant was physically forced to return to Turkey by Turkish officials and was under their authority and control following his arrest and return to Turkey (see, in this respect, the aforementioned decisions in the cases of *Illich Ramirez Sánchez v France and Freda v Italy*; and, by converse implication, the *Banković* and *Others v Belgium* and 16 Other Contracting States decision ((dec.) [GC], no. 52207/99, ECHR 2001-XII))."

See also the case of **Ilascu and others v Moldova and Russia (2004)**.

5.3 Derogations under Article 15

Article 15 of the Convention permits a Contracting State to derogate from its obligations under Article 5 in time of war or other public emergency threatening the life of the nation to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with its other obligations under international law.

This provision has grown in significance with regard to Article 5 in recent years with the continuation of the "war against terrorism." For example, in 2001 the United Kingdom lodged a derogation with the Secretary General of the Council of Europe concerning prevention of terrorism legislation that permitted the detention of foreign nationals who were suspected of involvement in international terrorism. A previous derogation, related to Northern Ireland, lodged after the judgment in **Brogan**, had extended the powers of arrest and detention of the UK authorities, by allowing detention after arrest for up to 48 hours and, where sanctioned by a judicial authority, for a further five days. The compliance of this derogation with Article 15 was confirmed by the Court in the case of **Brannigan and McBride** (discussed below).

In cases where the State raises the existence of a derogation, the Court generally first examines whether there has been a breach of a right under the Convention and then goes on to examine whether such derogation is applicable. There are two principal conditions to the applicability of any derogation – (i) the existence of war or other public emergency threatening the life of the nation and (ii) that derogating measures are strictly required by the exigencies of the situation.

The Court generally allows the State a wide margin of appreciation in determining the existence of a threat and on the measures necessary to address it. However, this discretion is limited in that it must be "strictly required by the exigencies of the situation." The **Brannigan** case is the most prominent case of derogation from Article 5.

- In **Brannigan and McBride v the United Kingdom (1993)** the applicants were detained under UK anti-terrorism legislation very shortly after the UK government's derogation concerning the detention of terrorist suspects under Article 15 of the Convention. They complained of a violation Article 5(3) as a result of the failure to bring them promptly before a court. The UK government acknowledged in principle that there had been a violation of Article 5 but argued that it was covered by the derogation. The Court considered that the State enjoyed a wide margin of appreciation in derogation cases, albeit accompanied by European supervision concerning necessity. In the view of the Court, there was no doubt as to the existence of a public emergency in Northern Ireland at the relevant time. The key issue was whether the measures in question were necessary. In this regard, the Court noted that judicial control of interferences by the executive with the individual's right to liberty is implied by one of the fundamental principles of a democratic society, namely the rule of law.

    - The Court went on to examine, first, whether the derogation was a genuine response to an emergency situation. It observed that the power of arrest and extended detention has been considered necessary by the government for a long period. The adoption of the view by the Government that judicial control compatible with Article 5(3) was not feasible because of the special difficulties associated with the investigation and prosecution of terrorist crime rendered derogation inevitable.

    - Second, the Court looked at whether the derogation was premature, as the government was still considering ways to comply with Article 5(3) without the derogation. The Court concluded that the validity of the derogation could not be called into question for the sole reason that the government had decided to examine whether in the future a way could be found of ensuring greater conformity with Convention obligations. Such a process of continued reflection is not only in keeping with Article 15(3) which requires permanent review of the need for emergency measures but is also implicit in the very notion of proportionality.

    - Third, the Court examined whether the absence of judicial control of extended detention was justified. The Court noted that there are difficulties in investigating and

prosecuting terrorist crime that give rise to the need for an extended period of detention which is not subject to judicial control. In light of the margin of appreciation, the Court was reluctant to substitute its view as to necessity for that of the government.

- Fourth, the Court examined the safeguards against abuse by the State. The Court was satisfied that there were sufficient safeguards against arbitrary behaviour and incommunicado detention in this case, in particular, the remedy of *habeas corpus* to test the lawfulness of the original arrest and detention and the absolute and legally enforceable right to consult a solicitor after forty-eight hours from the time of arrest.

The Court concluded that, having regard to the nature of the terrorist threat in Northern Ireland, the limited scope of the derogation and the reasons advanced in support of it, as well as the existence of basic safeguards against abuse, the government had not exceeded its margin of appreciation in considering that the derogation was strictly required by the exigencies of the situation.

See also the cases of **Lawless v Ireland (1961)**; **Ireland v the United Kingdom (1978)**; **Aksoy v Turkey (1996)** and **Elci and others v Turkey (2003)**.

5.4 Redress: Articles 41 and 46

Where the European Court finds a violation of the European Convention on Human Rights, the remedy which it provides is first and foremost declaratory: a finding of a breach supported by its detailed reasons. The Court also has a discretion under Article 41 to "afford just satisfaction to the injured party", which has been interpreted as enabling the Court to make awards of pecuniary and non-pecuniary compensation, as well as legal costs and expenses. That has almost invariably been the limit of the Court's scope, in terms of providing 'just satisfaction'. The Court's practice has therefore not been to require the state to take further steps which might, arguably, logically follow from its finding of a violation of the Convention and from its reasons for making such a finding.

Very exceptionally, in cases concerning violations of Article 5, the Court has gone further and has ordered the respondent Government to ensure the release of an unlawfully detained applicant. In two cases in 2004, the Grand Chamber, for the first time, as a result of its application of Article 41 of the Convention, ordered the respondent states to release applicants who remained in custody in circumstances that were unlawful according to both the domestic law and the European Convention on Human Rights. The requirement to release the applicants was in addition to an obligation to pay compensation.

The applicant in the first case, **Assanidze v Georgia (2004)** a former MP, remained in detention in the Ajarian autonomous province of Georgia three years after the Georgian Supreme Court had acquitted him and ordered his release in 2001. The Georgian government had taken both legal and political steps to ensure his release, but without success. The Grand Chamber found that the applicant's continuing detention was arbitrary and in violation of both Articles 5(1) and 6(1) of the European Convention. In such exceptional circumstances, and in view of the urgent need to end the continuing violations of Articles 5(1) and 6(1), the Court ordered the respondent State to "secure the applicant's release at the earliest possible date". The Court's specific reasoning for taking such an unprecedented step was that "by its very nature, the violation found in the instant case does not leave any real choice as to the measures required to remedy it".

A similar decision was made by the Grand chamber in **Ilaşcu and Others v Moldova and Russia (2004)**, in which the Court held, *inter alia*, that three applicants had been, and continued to be, unlawfully detained in the "Moldavian Republic of Transdniestria", a region of Moldova which

declared its independence in 1991 but which has not been recognised by the international community. They had been convicted by the "Supreme Court of the Moldavian Republic of Transdniestria" which had been set up by an entity which was illegal under international law. In unanimously ordering the applicants' release, the Court reasoned as follows:

> "The Court…considers that any continuation of the unlawful and arbitrary detention of the three applicants would necessarily entail a serious prolongation of the violation of Article 5 found by the Court and a breach of the respondent States' obligation under Article 46(1) of the Convention to abide by the Court's judgment.
>
> "Regard being had to the grounds on which they have been found by the Court to be in violation of the Convention…, the respondent States must take every measure to put an end to the arbitrary detention of the applicants still detained and to secure their immediate release".

Thus the Grand Chamber went further even than its judgment in **Assanidze**, in expressly spelling out that the applicants' continued detention would violate the state's obligation under Article 46 to comply with a judgment of the European Court. The states' more stringent obligation was to secure the applicants' *immediate* release, whereas in **Assanidze** the Court imposed a duty to ensure release "at the earliest possible date".

The case of **Yakisan v Turkey (2007)** concerned the applicant's continued detention pending the outcome of criminal proceedings that had been under way for almost thirteen years. The Court found that Article 5(3) had been violated because the applicant had been held in detention on remand for a period of eleven years and seven months. It also found a violation of Article 6(1) as a result of the length of the criminal proceedings against him. In addition to making an award of €12,000 in respect of non-pecuniary damage, under Article 41, the Court also stated that it considered that an appropriate way of putting an end to the violation would be to try the applicant as quickly as possible, taking into account the requirements of the proper administration of justice, or to release him pending trial as provided for by Article 5(3).

6 SELECTED EXCERPTS FROM CONVENTION JURISPRUDENCE

6.1 Deprivation of liberty

Guzzardi v Italy (1980)

92. ...In proclaiming the "right to liberty", paragraph 1 of Article 5 is contemplating the physical liberty of the person; its (*the court's*) aim is to ensure that no one should be dispossessed of this liberty in an arbitrary fashion. In order to determine whether someone has been "deprived of his liberty" within the meaning of Article 5, the starting point must be his concrete situation and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question.
93. The difference between deprivation of and restriction upon liberty is nonetheless merely one of degree or intensity, and not one of nature or substance. Although the process of classification into one or other of these categories sometimes proves to be no easy task in that some borderline cases are a matter of pure opinion, the court cannot avoid making the selection upon which the applicability or inapplicability of Article 5 depends.

Engel and others v The Netherlands (1976)

59. In order to determine whether someone has been "deprived of his liberty" within the meaning of Article 5, the starting point must be his concrete situation. Military service, as encountered in the Contracting States, does not on its own in any way constitute a deprivation of liberty under the Convention, since it is expressly sanctioned in Article 4(3)(b). In addition, rather wide limitations upon the freedom of movement of the members of the armed forces are entailed by reason of the specific demands of military service so that the normal restrictions accompanying it do not come within the ambit of Article 5 either. Each State is competent to organise its own system of military discipline and enjoys in the matter a certain margin of appreciation. The bounds that Article 5 requires the State not to exceed are not identical for servicemen and civilians. A disciplinary penalty or measure which on analysis would unquestionably be deemed a deprivation of liberty were it to be applied to a civilian may not possess this characteristic when imposed upon a serviceman. Nevertheless, such penalty or measure does not escape the terms of Article 5 when it takes the form of restrictions that clearly deviate from the normal conditions of life within the armed forces of the Contracting States. In order to establish whether this is so, account should be taken of a whole range of factors such as the nature, duration, effects and manner of execution of the penalty or measure in question.

Ashingdane v United Kingdom (1985)

44. The issue of principle raised by this submission is whether and, if so, to what extent the expression "lawful detention of a person of unsound mind" can be construed as including a reference not simply to actual deprivation of liberty of mental health patients but also to matters relating to execution of the detention, such as the place, environment and conditions of detention.

Certainly, the "lawfulness" of any detention is required in respect of both the ordering and the execution of the measure depriving the individual of his liberty. Such "lawfulness" presupposes conformity with domestic law in the first place and also, as confirmed by Article 18 conformity with the purposes of the restrictions permitted by Article 5(1). More generally, it follows from the very aim of Article 5(1) that no detention that is arbitrary can ever be regarded as "lawful". The court would further accept that there must be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention. In principle, the

"detention" of a person as a mental health patient will only be "lawful" for the purposes of sub-paragraph (e) of paragraph 1 if effected in a hospital, clinic or other appropriate institution authorised for that purpose. However, subject to the foregoing, Article 5(1)(e) is not in principle concerned with suitable treatment or conditions.
....

47. The differences between the regimes at Broadmoor and Oakwood are set out above. Whilst these differences were of vital concern for Mr. Ashingdane and for the quality of his life in detention, they were not such as to change the character of his deprivation of liberty as a mental patient. Both Broadmoor and Oakwood were psychiatric hospitals where, ... qualified staff displayed a constant preoccupation with the applicant's treatment and health. Consequently, although the regime at Oakwood was more liberal and, in view of the improvement in his mental state, more conducive to his ultimate recovery, the place and conditions of the applicant's detention did not cease to be those capable of accompanying "the lawful detention of a person of unsound mind". It cannot therefore be said that, contrary to Article 17, the applicant's right to liberty and security of person was limited to a greater extent than that provided for under Article 5(1)(e).

Amuur v France (1996)

42. In proclaiming the right to liberty, paragraph 1 of Article 5 contemplates the physical liberty of the person; its aim is to ensure that no one should be dispossessed of this liberty in an arbitrary fashion. On the other hand, it is not in principle concerned with mere restrictions on the liberty of movement; such restrictions are governed by Article 2 of Protocol No. 4. In order to determine whether someone has been "deprived of his liberty" within the meaning of Article 5, the starting-point must be his concrete situation, and account must be taken of a whole range of criteria such as the type, duration, effects and manner of implementation of the measure in question. The difference between deprivation of and restriction upon liberty is merely one of degree or intensity, and not one of nature or substance.

6.2 Exceptions: The permissible grounds for deprivation of liberty

6.2.1 The nature of the exceptions

Quinn v France (1995)

42. The court reiterates that the list of exceptions to the right to liberty secured in Article 5(1) is an exhaustive one and only a narrow interpretation of those exceptions is consistent with the aim and purpose of that provision, namely to ensure that no one is arbitrarily deprived of his or her liberty. The court acknowledges that some delay in executing a decision ordering the release of a detainee is understandable. It notes, however, that in the instant case the applicant remained in detention for eleven hours after the Indictment Division's decision directing that he be released "forthwith", without that decision being notified to him or any move being made to commence its execution.

Mr Quinn's continued detention on 4 August 1989 was clearly not covered by sub-paragraph (c) of paragraph 1 of Article 5 and did not fall within the scope of any other of the sub-paragraphs of that provision.

43. There has accordingly been a breach of Article 5(1) in this respect.

Eriksen v Norway (1997)

76. The court reiterates that Article 5(1) of the Convention contains a list of permissible grounds of deprivation of liberty which is exhaustive. However, the applicability of one ground does not necessarily preclude that of another; a detention may, depending on the circumstances, be justified under more than one sub-paragraph.

6.2.2 "In accordance with a procedure prescribed by law" and "lawful"

Bizzotto v Greece (1996)

31. The court reiterates that in order to comply with Article 5(1), the detention in issue must take place "in accordance with a procedure prescribed by law" and be "lawful". The Convention here refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules of national law, but it requires in addition that any deprivation of liberty should be in keeping with the aim of Article 5, namely to protect the individual from arbitrariness.

Scott v Spain (1996)

56. The Convention here essentially refers back to national law and states the obligation to conform to the substantive and procedural rules thereof; but it requires in addition that any deprivation of liberty should be consistent with the purpose of Article 5, namely to protect individuals from arbitrariness.

57. It is in the first place for the national authorities, notably the courts, to interpret and apply domestic law. However, since under Article 5(1) failure to comply with domestic law entails a breach of the Convention, it follows that the court can and should exercise a certain power to review whether this law has been complied with.

Amuur v France (1996)

50. ... In laying down that any deprivation of liberty must be effected "in accordance with a procedure prescribed by law", Article 5(1) primarily requires any arrest or detention to have a legal basis in domestic law. However, these words do not merely refer back to domestic law; like the expressions "in accordance with the law" and "prescribed by law" in the second paragraphs of Articles 8 to 11, they also relate to the quality of the law, requiring it to be compatible with the rule of law, a concept inherent in all the Articles of the Convention. In order to ascertain whether a deprivation of liberty has complied with the principle of compatibility with domestic law, it therefore falls to the court to assess not only the legislation in force in the field under consideration, but also the quality of the other legal rules applicable to the persons concerned. Quality in this sense implies that where a national law authorises deprivation of liberty – especially in respect of a foreign asylum-seeker – it must be sufficiently accessible and precise, in order to avoid all risk of arbitrariness. These characteristics are of fundamental importance with regard to asylum-seekers at airports, particularly in view of the need to reconcile the protection of fundamental rights with the requirements of States' immigration policies.

53. The court emphasises that from 9 to 29 March 1992 the applicants were in the situation of asylum-seekers whose application had not yet been considered. In that connection, neither the Decree of 27 May 1982 nor the unpublished circular of 26 June 1990 (the only text at the material time which specifically dealt with the practice of holding aliens in the transit zone) constituted a "law" of sufficient "quality" within the meaning of the court's case-law; there must be adequate legal protection in domestic law against arbitrary interferences by public authorities with the rights

safeguarded by the Convention. In any event, the Decree of 27 May 1982 did not concern holding aliens in the international zone. The above-mentioned circular consisted, by its very nature, of instructions given by the Minister of the Interior to Prefects and Chief Constables concerning aliens refused leave to enter at the frontiers. It was intended to provide guidelines for immigration control at ports and airports. Moreover, the brief section it devoted to holding in the international zone and aliens' rights contains no guarantees comparable to those introduced by the Law of 6 July 1992. At the material time none of these texts allowed the ordinary courts to review the conditions under which aliens were held or, if necessary, to impose a limit on the administrative authorities as regards the length of time for which they were held. They did not provide for legal, humanitarian and social assistance, nor did they lay down procedures and time-limits for access to such assistance so that asylum-seekers like the applicants could take the necessary steps.

Kepenerov v Bulgaria (2003)

35. In the **Varbanov** case the court made the following findings relevant to the present case (see paragraphs 43-53 of that judgment):

> "[T]he Public Health Act, as in force [until February 1997], did not contain any provision empowering prosecutors to commit a person to compulsory confinement in a psychiatric clinic for the purpose of effecting a psychiatric examination.
> Moreover, the applicable law, as in force at the relevant time and even after its amendment in 1997, does not provide for the seeking of a medical opinion as a pre-condition to ordering detention with a view to compulsory psychiatric examination and thus falls short of the required standard of protection against arbitrariness.
> The court thus finds a violation of Article 5(1) of the Convention on account of the fact that the applicant's deprivation of liberty was not justified under subparagraph (e) of this provision and had no basis in domestic law which, moreover, does not provide the required protection against arbitrariness as it does not require the seeking of a medical opinion."

36. The court sees no relevant difference in the present case. The applicant was detained between 22 February and 22 March 1996 by decision of a prosecutor who did not have power to order his detention and did not seek a prior medical assessment of the need for the applicant's confinement. There was no possibility to obtain an independent review of its lawfulness. Furthermore, in this particular case the prosecutor's order and instructions even failed to specify the length of the applicant's confinement.

37. Accordingly, the court finds that the applicant's detention had no basis in domestic law, which, moreover, did not provide the required protection against arbitrariness.

38. There has therefore been a violation of Article 5(1) of the Convention.

Menesheva v Russia (2006)

87. Firstly, the Court observes that no documents pertaining specifically to the applicant's initial arrest and her overnight stay at the police station could subsequently be found.... It follows that for some 20 hours after the applicant's arrest there existed no records as to who the applicant was and what was the reason for and expected duration of her detention. Even assuming that the police intended to press charges for the administrative offence, this did not absolve them from complying with such basic formalities before locking her up. That fact in itself must be considered a most serious failing, as it has been the Court's traditional view that the unacknowledged detention of an individual is a complete negation of the fundamentally important guarantees contained in Article 5 of the Convention and discloses a most grave violation of that provision. The absence of a record

of such matters as the date, time and location of detention, the name of the detainee, the reasons for the detention and the name of the person effecting it must be seen as incompatible with the requirement of lawfulness and with the very purpose of Article 5 of the Convention ....

6.2.3 Lawful detention after conviction by a competent court – Article 5(1)(a)

Van Droogenbroeck v Belgium (1982)

35. The court has to determine whether those periods of detention occurred "after conviction" by the Ghent court of Appeal. Having regard to the French text, the word "conviction", for the purposes of Article 5(1)(a), has to be understood as signifying both a "finding of guilt" after "it has been established in accordance with the law that there has been an offence", and the imposition of a penalty or other measure involving deprivation of liberty. These conditions are satisfied in the instant case. The word "after" does not simply mean that the "detention" must follow the "conviction" in point of time: in addition, the "detention" must result from, "follow and depend upon" or occur "by virtue of" the "conviction"

Eriksen v Norway (1997)

78. There can be no doubt that if a court decides to extend preventive detention imposed by way of a security measure prior to the expiry of the authorised period (he had been sentenced to a period of 120 days' imprisonment, out of a possible maximum of 5 years) such a prolongation in principle falls within Article 5(1)(a) as "detention of a person after conviction by a competent court". Admittedly, with the passage of time, the link between the initial conviction and a prolongation may become less strong and may eventually be broken, where the prolongation no longer has any connection with the objectives of the initial decision or was based on an assessment that was unreasonable in terms of those objectives.

Bozano v France (1986)

53. ... The issue before it is not the sentence of life imprisonment Mr. Bozano is serving in Italy after his "conviction by [the] competent court" within the meaning of sub-paragraph (a), but the deprivation of liberty he suffered in France during the night of 26 to 27 October 1979. The impugned forcible removal was effected "after" the aforementioned conviction only in a chronological sense. In the context of Article 5(1)(a), however, the preposition "after" denotes a causal link in addition to a succession of events in time; it serves to designate detention "consequent upon" and not merely "subsequent to" the criminal court's decision. This was not so in the instant case, since it was not incumbent on the French authorities themselves to execute the judgment delivered by the Genoa Assize court of Appeal on 22 May 1975.

Nor was it for the French authorities to ensure that that judgment was executed, since the Indictment Division of the Limoges court of Appeal had, by its negative ruling of 15 May 1979, caused the Italian extradition request to be refused. The disputed deprivation of liberty was, consequently, not undergone as part of "action ... with a view to extradition"; rather, it was the means chosen for giving effect to the ministerial order of 17 September 1979, the final stage of "action ... with a view to deportation...". Sub-paragraph (f) therefore applies only in respect of the latter words.

6.2.4 Non Compliance with a lawful order of a court and securing fulfilment of an obligation prescribed by law – Article 5(1)(b)

6.2.4.1 Securing fulfilment of an obligation prescribed by law.

Engel and others v The Netherlands (1976)

69. ... The words "secure the fulfilment of any obligation prescribed by law" concern only cases where the law permits the detention of a person to compel him to fulfil a specific and concrete obligation which he has until then failed to satisfy. A wide interpretation would entail consequences incompatible with the notion of the rule of law from which the whole Convention draws its inspiration. It would justify, for example, administrative internment meant to compel a citizen to discharge, in relation to any point whatever, his general duty of obedience to the law. However, it is clear from the case-law of the European court that the reckoning of a detention on remand (Untersuchungshaft) as part of a later sentence cannot eliminate a violation of paragraph 3 of Article 5, but may have repercussions only under Article 50 on the basis that it limited the loss occasioned.

Nowicka v Poland (2002)

62. ... The court firstly notes that it appeared to be common ground that the applicant's detention fell under Article 5(1)(b) of the Convention and that it was "lawful". Having regard to the fact that the applicant's detention was carried out pursuant to a court order to secure the fulfilment of her obligation to submit to a psychiatric examination, the court sees no reason to hold otherwise.
63. With respect to the applicant's pre-examination detention, the court notes that on the first occasion she had been detained for eight days before she was given an appointment with psychiatrists on 2 November 1994. Her examination was completed on the same day. The applicant's second examination, between 19 April and 26 May 1995, was preceded by twenty-seven days of detention. The court considers that both periods of pre-examination detention cannot be reconciled with the authorities' desire to secure the immediate fulfilment of the applicant's obligation. Moreover, the "purely technical reasons" relied on by the Government in the context of the length of detention preceding the first examination cannot justify holding the applicant in custody for eight days before submitting her to a brief examination. Taking into account the duration of detention, the court is of the view that the authorities failed to draw a balance between the importance of securing the immediate fulfilment of the obligation in question, and the importance of the right to liberty.

6.2.5 Arrest and detention of criminal suspects – Article 5(1)(c)

6.2.5.1 Level of suspicion

Fox, Campbell and Hartley v the United Kingdom (1990)

32. The "reasonableness" of the suspicion on which an arrest must be based forms an essential part of the safeguard against arbitrary arrest and detention which is laid down in Article 5(1)(c). ... having a "reasonable suspicion" presupposes the existence of facts or information which would satisfy an objective observer that the person concerned may have committed the offence. What may be regarded as "reasonable" will, however, depend upon all the circumstances. The "reasonableness" of the suspicion justifying such arrests cannot always be judged according to the same standards as are applied in dealing with conventional crime. Nevertheless, the exigencies of dealing with terrorist crime cannot justify stretching the notion of "reasonableness" to the point where the essence of the safeguard secured by Article 5(1)(c) is impaired.

34. ...Article 5(1)(c) of the Convention should not be applied in such a manner as to put disproportionate difficulties in the way of the police authorities of the Contracting States in taking effective measures to counter organised terrorism. It follows that the Contracting States cannot be asked to establish the reasonableness of the suspicion grounding the arrest of a suspected terrorist by disclosing the confidential sources of supporting information or even facts which would be susceptible of indicating such sources or their identity. Nevertheless the court must be enabled to ascertain whether the essence of the safeguard afforded by Article 5(1)(c) has been secured. Consequently the respondent Government have to furnish at least some facts or information capable of satisfying the court that the arrested person was reasonably suspected of having committed the alleged offence. This is all the more necessary where, as in the present case, the domestic law does not require reasonable suspicion, but sets a lower threshold by merely requiring honest suspicion.

Demir and others v Turkey (1998)

41. Admittedly, the court has already accepted on a number of occasions that the investigation of terrorist offences undoubtedly presents the authorities with special problems. This does not mean, however, that the authorities have carte blanche under Article 5 to arrest suspects and detain them in police custody, free from effective control by the domestic courts and, in the final instance, by the Convention's supervisory institutions, whenever they consider that there has been a terrorist offence.

Margaret Murray v United Kingdom (1994)

55. The object of questioning during detention under sub-paragraph (c) of Article 5(1) is to further the criminal investigation by way of confirming or dispelling the concrete suspicion grounding the arrest. Thus, facts which raise a suspicion need not be of the same level as those necessary to justify a conviction or even the bringing of a charge, which comes at the next stage of the process of criminal investigation.

56. The length of the deprivation of liberty at risk may also be material to the level of suspicion required.

57. With particular regard to the "reasonableness" of the suspicion, the principles stated in the ***Fox, Campbell and Hartley*** judgment are to be applied in the present case, although as pointed out in that judgment, the existence or not of a reasonable suspicion in a concrete instance depends ultimately on the particular facts.

58. ...The use of confidential information is essential in combating terrorist violence and the threat that organised terrorism poses to the lives of citizens and to democratic society as a whole. This does not mean, however, that the investigating authorities have carte blanche under Article 5 to arrest suspects for questioning, free from effective control by the domestic courts or by the Convention supervisory institutions, whenever they choose to assert that terrorism is involved.

6.2.5.2 Offence

Guzzardi v Italy (1980)

102. ... At first sight, a more likely hypothesis is that the measure complained of was taken because it was "reasonably considered necessary to prevent [Mr. Guzzardi's] committing an offence" or, at the outside, "fleeing after having done so". However, in that case as well a question would arise as to the measure's "lawfulness" since, solely on the basis of the 1956 and 1965 Acts,

an order for compulsory residence as such, leaving aside the manner of its implementation, does not constitute deprivation of liberty. It would also be necessary to consider whether the requirements of paragraph 3 of Article 5 had been observed. In any event, the phrase under examination is not adapted to a policy of general prevention directed against an individual or a category of individuals who, like mafiosi, present a danger on account of their continuing propensity to crime; it does no more than afford the Contracting States a means of preventing a concrete and specific offence. This can be seen both from the use of the singular ("an offence", "celle-ci" in the French text) and from the object of Article, namely to ensure that no one should be dispossessed of his liberty in an arbitrary fashion.

6.2.6 Detention of minors – Article 5(1)(d)

Nielsen v Denmark (1988)

58. According to its wording, Article 5 applies to "everyone". The protection afforded by this provision clearly also covers minors, as is confirmed by, *inter alia*, sub-paragraph (d) of paragraph 1. This point has not been in dispute before the court.

6.2.6.1 Lawful order for educational supervision

Bouamar v Belgium (1988)

50. ... The confinement of a juvenile in a remand prison does not necessarily contravene sub-paragraph (d), even if it is not in itself such as to provide for the person's "educational supervision". As is apparent from the words "for the purpose of" ("pour"), the "detention" referred to in the text is a means of ensuring that the person concerned is placed under "educational supervision", but the placement does not necessarily have to be an immediate one. Just as Article 5(1) recognises – in sub-paragraphs (c) and (a) – the distinction between pre-trial detention and detention after conviction, so sub-paragraph (d) does not preclude an interim custody measure being used as a preliminary to a regime of supervised education, without itself involving any supervised education. In such circumstances, however, the imprisonment must be speedily followed by actual application of such a regime in a setting (open or closed) designed and with sufficient resources for the purpose.

52. The detention of a young man in a remand prison in conditions of virtual isolation and without the assistance of staff with educational training cannot be regarded as furthering any educational aim.

D.G. v Ireland (2002)

79. The court notes that the detention orders impugned in the present case were made against the background of enduring and considerable efforts by various authorities to ensure the best possible care and upbringing for the applicant. Nevertheless, the court's case-law, outlined above, provides that if the Irish State chose a constitutional system of educational supervision implemented through court orders to deal with juvenile delinquency, it was obliged to put in place appropriate institutional facilities which met the security and educational demands of that system in order to satisfy the requirements of Article 5(1)(d).

80. It is also accepted that, in the context of the detention of minors, the words "educational supervision" must not be equated rigidly with notions of classroom teaching: in the context of a young person in local authority care, educational supervision must embrace many aspects of the exercise, by the local authority, of parental rights for the benefit and protection of the person.

6.2.7 Detention for the prevention of spreading infectious diseases, or mental illness, alcoholics and drug addicts and vagrants – Article 5(1)(e)

Litwa v Poland (2000)

60. The court observes that the word "alcoholics", in its common usage, denotes persons who are addicted to alcohol. On the other hand, in Article 5(1) of the Convention, this term is found in a context that includes a reference to several other categories of individuals, that is, persons spreading infectious diseases, persons of unsound mind, drug addicts and vagrants. There is a link between all those persons in that they may be deprived of their liberty either in order to be given medical treatment or because of considerations dictated by social policy, or on both medical and social grounds. It is therefore legitimate to conclude from this context that a predominant reason why the Convention allows the persons mentioned in paragraph 1 (e) of Article 5 to be deprived of their liberty is not only that they are dangerous for public safety but also that their own interests may necessitate their detention.

6.2.7.1 Detention of persons of unsound mind

Winterwerp v The Netherlands (1979)

37. The Convention does not state what is to be understood by the words "persons of unsound mind". This term is not one that can be given a definitive interpretation: as was pointed out by the Commission, the Government and the applicant, it is a term whose meaning is continually evolving as research in psychiatry progresses, an increasing flexibility in treatment is developing and society's attitude to mental illness changes, in particular so that a greater understanding of the problems of mental patients is becoming more wide-spread.

In any event, sub-paragraph (e) of Article 5(1) obviously cannot be taken as permitting the detention of a person simply because his views or behaviour deviate from the norms prevailing in a particular society. To hold otherwise would not be reconcilable with the text of Article 5(1) which sets out an exhaustive list of exceptions calling for a narrow interpretation. Neither would it be in conformity with the object and purpose of Article 5(1) namely to ensure that no one should be dispossessed of his liberty in an arbitrary fashion. Moreover, it would disregard the importance of the right to liberty in a democratic society.

39. The Commission likewise stresses that there must be no element of arbitrariness; the conclusion it draws is that no one may be confined as "a person of unsound mind" in the absence of medical evidence establishing that his mental state is such as to justify his compulsory hospitalisation. The applicant and the Government both express similar opinions. The court fully agrees with this line of reasoning. In the court's opinion, except in emergency cases, the individual concerned should not be deprived of his liberty unless he has been reliably shown to be of "unsound mind". The very nature of what has to be established before the competent national authority – that is, a true mental disorder – calls for objective medical expertise. Further, the mental disorder must be of a kind or degree warranting compulsory confinement. What is more, the validity of continued confinement depends upon the persistence of such a disorder

Varbanov v Bulgaria (2000)

45. The court recalls its established case-law according to which an individual cannot be considered to be of "unsound mind" and deprived of his liberty unless the following three minimum conditions are satisfied: firstly, he must reliably be shown to be of unsound mind;

secondly, the mental disorder must be of a kind or degree warranting compulsory confinement; thirdly, the validity of continued confinement depends upon the persistence of such a disorder.

46. The court further reiterates that a necessary element of the "lawfulness" of the detention within the meaning of Article 5(1)(e) is the absence of arbitrariness. The detention of an individual is such a serious measure that it is only justified where other, less severe measures, have been considered and found to be insufficient to safeguard the individual or public interest which might require that the person concerned be detained. The deprivation of liberty must be shown to have been necessary in the circumstances

Johnson v United Kingdom (1997)

61. ... In [the court's] view, it does not automatically follow from a finding by an expert authority that the mental disorder which justified a patient's compulsory confinement no longer persists, that the latter must be immediately and unconditionally released into the community. Such a rigid approach to the interpretation of that condition would place an unacceptable degree of constraint on the responsible authority's exercise of judgment to determine in particular cases and on the basis of all the relevant circumstances whether the interests of the patient and the community into which he is to be released would in fact be best served by this course of action. It must also be observed that in the field of mental illness the assessment as to whether the disappearance of the symptoms of the illness is confirmation of complete recovery is not an exact science. Whether or not recovery from an episode of mental illness which justified a patient's confinement is complete and definitive or merely apparent cannot in all cases be measured with absolute certainty. It is the behaviour of the patient in the period spent outside the confines of the psychiatric institution which will be conclusive of this.

62. It is to be recalled in this respect that the court in its ***Luberti*** judgment accepted that the termination of the confinement of an individual who has previously been found by a court to be of unsound mind and to present a danger to society is a matter that concerns, as well as that individual, the community in which he will live if released. Having regard to the pressing nature of the interests at stake, and in particular the very serious nature of the offence committed by Mr Luberti when mentally ill, it was accepted in that case that the responsible authority was entitled to proceed with caution and needed some time to consider whether to terminate his confinement, even if the medical evidence pointed to his recovery.

Aerts v Belgium (1998)

46. The court reiterates that in order to comply with Article 5(1), the detention in issue must take place "in accordance with a procedure prescribed by law" and be "lawful". The Convention here refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules of national law, but it requires in addition that any deprivation of liberty should be in keeping with the aim of Article 5, namely to protect the individual from arbitrariness.

Furthermore, there must be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention. In principle, the "detention" of a person as a mental health patient will only be "lawful" for the purposes of sub-paragraph (e) of paragraph 1 if effected in a hospital, clinic or other appropriate institution.

Litwa v Poland (2000)

60. The court observes that the word "alcoholics", in its common usage, denotes persons who are addicted to alcohol. On the other hand, in Article 5(1) of the Convention this term is found in a

context that includes a reference to several other categories of individuals, that is, persons spreading infectious diseases, persons of unsound mind, drug addicts and vagrants. There is a link between all those persons in that they may be deprived of their liberty either in order to be given medical treatment or because of considerations dictated by social policy, or on both medical and social grounds. It is therefore legitimate to conclude from this context that a predominant reason why the Convention allows the persons mentioned in paragraph 1(e) of Article 5 to be deprived of their liberty is not only that they are dangerous for public safety but also that their own interests may necessitate their detention.

61. This *ratio legis* indicates how the term "alcoholics" should be understood in the light of the object and purpose of Article 5(1)(e) of the Convention. It indicates that the object and purpose of this provision cannot be interpreted as only allowing the detention of "alcoholics" in the limited sense of persons in a clinical state of "alcoholism". The court considers that, under Article 5(1)(e) of the Convention, persons who are not medically diagnosed as "alcoholics", but whose conduct and behaviour under the influence of alcohol pose a threat to public order or themselves, can be taken into custody for the protection of the public or their own interests, such as their health or personal safety.

62. That does not mean that Article 5(1)(e) of the Convention can be interpreted as permitting the detention of an individual merely because of his alcohol intake. However, the court considers that in the text of Article 5, there is nothing to suggest that this provision prevents that measure from being applied by the State to an individual abusing alcohol, in order to limit the harm caused by alcohol to himself and the public, or to prevent dangerous behaviour after drinking. On this point, the court observes that there can be no doubt that the harmful use of alcohol poses a danger to society and that a person who is in a state of intoxication may pose a danger to himself and others, regardless of whether or not he is addicted to alcohol.

6.2.7.2 Vagrants

De Wilde, Ooms and Versyp v Belgium (1971)

68. The Convention does not contain a definition of the term "vagrant". The definition of Article 347 of the Belgian Criminal Code reads: "vagrants are persons who have no fixed abode, no means of subsistence and no regular trade or profession". Where these three conditions are fulfilled, they may lead the competent authorities to order that the persons concerned be placed at the disposal of the Government as vagrants. The definition quoted does not appear to be in any way irreconcilable with the usual meaning of the term "vagrant", and the court considers that a person who is a vagrant under the terms of Article 347 in principle falls within the exception provided for in Article 5(1)(e) of the Convention.

6.2.8 Detention pending extradition or expulsion – Article 5(1)(f)

Quinn v France (1995)

42. The court acknowledges that some delay in executing a decision ordering the release of a detainee is understandable. It notes, however, that in the instant case the applicant remained in detention for eleven hours after the Indictment Division's decision directing that he be released "forthwith", without that decision being notified to him or any move being made to commence its execution. Mr Quinn's continued detention on 4 August 1989 was clearly not covered by sub-paragraph (c) of paragraph 1 of Article 5 and did not fall within the scope of any other of the sub-paragraphs of that provision.

Chahal v the United Kingdom (1996)

112. Article 5(1)(f) does not demand that the detention of a person against whom action is being taken with a view to deportation be reasonably considered necessary, for example to prevent his committing an offence or fleeing; in this respect Article 5(1)(f) provides a different level of protection from Article 5(1)(c). Indeed, all that is required under this provision is that "action is being taken with a view to deportation". It is therefore immaterial, for the purposes of Article 5(1)(f), whether the underlying decision to expel can be justified under national or Convention law.

113. The court recalls, however, that any deprivation of liberty under Article 5(1)(f) will be justified only for as long as deportation proceedings are in progress. If such proceedings are not prosecuted with due diligence, the detention will cease to be permissible under Article 5(1)(f).

Amuur v France (1996)

41. The court notes in the first place that in the fourth paragraph of the Preamble to its Constitution of 27 October 1946 (incorporated into that of 4 October 1958), France enunciated the right to asylum in "the territories of the Republic" for "everyone persecuted on account of his action in the cause of freedom". France is also party to the 1951 Geneva Convention Relating to the Status of Refugees, Article 1 of which defines the term "refugee" as "any person who [has a] well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion". The court also notes that many member States of the Council of Europe have been confronted for a number of years now with an increasing flow of asylum-seekers. It is aware of the difficulties involved in the reception of asylum-seekers at most large European airports and in the processing of their applications. Contracting States have the undeniable sovereign right to control aliens' entry into and residence in their territory. The court emphasises, however, that this right must be exercised in accordance with the provisions of the Convention, including Article 5.
...

43. Holding aliens in the international zone does indeed involve a restriction upon liberty, but one which is not in every respect comparable to that which obtains in centres for the detention of aliens pending deportation. Such confinement, accompanied by suitable safeguards for the persons concerned, is acceptable only in order to enable States to prevent unlawful immigration while complying with their international obligations, particularly under the 1951 Geneva Convention Relating to the Status of Refugees and the European Convention on Human Rights. States' legitimate concern to foil the increasingly frequent attempts to circumvent immigration restrictions must not deprive asylum-seekers of the protection afforded by these conventions. Such holding should not be prolonged excessively, otherwise there would be a risk of it turning a mere restriction on liberty – inevitable with a view to organising the practical details of the alien's repatriation or, where he has requested asylum, while his application for leave to enter the territory for that purpose is considered – into a deprivation of liberty. In that connection, account should be taken of the fact that the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled from their own country. Although by the force of circumstances the decision to order holding must necessarily be taken by the administrative or police authorities, its prolongation requires speedy review by the courts, the traditional guardians of personal liberties. Above all, such confinement must not deprive the asylum-seeker of the right to gain effective access to the procedure for determining refugee status.
...

48. The mere fact that it is possible for asylum-seekers to leave voluntarily the country where they wish to take refuge cannot exclude a restriction on liberty, the right to leave any country, including

one's own, being guaranteed, moreover, by Protocol No. 4 to the Convention (P4). Furthermore, this possibility becomes theoretical if no other country offering protection comparable to the protection they expect to find in the country where they are seeking asylum is inclined or prepared to take them in. Sending the applicants back to Syria only became possible, apart from the practical problems of the journey, following negotiations between the French and Syrian authorities. The assurances of the latter were dependent on the vagaries of diplomatic relations, in view of the fact that Syria was not bound by the Geneva Convention relating to the Status of Refugees.

6.3 Procedural safeguards

6.3.1 Arrest and charge

van der Leer v the Netherlands (1990)

27. The court is not unmindful of the criminal-law connotation of the words used in Article 5(2). However, it agrees with the Commission that they should be interpreted "autonomously", in particular in accordance with the aim and purpose of Article 5, which are to protect everyone from arbitrary deprivations of liberty. Thus the "arrest" referred to in paragraph 2 of Article 5 extends beyond the realm of criminal-law measures. Similarly, in using the words "any charge" ("toute accusation") in this provision, the intention of the drafters was not to lay down a condition for its applicability, but to indicate an eventuality of which it takes account.

6.3.2 Prompt information in an understandable language on reasons for arrest (Article 5(2))

Fox, Campbell and Hartley v The United Kingdom (1990)

40. Paragraph 2 of Article 5 contains the elementary safeguard that any person arrested should know why he is being deprived of his liberty. This provision is an integral part of the scheme of protection afforded by Article 5(art. 5): by virtue of paragraph 2 any person arrested must be told, in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest, so as to be able, if he sees fit, to apply to a court to challenge its lawfulness in accordance with paragraph 4.

Conka v Belgium (2002)

50. As to the merits, the court reiterates that paragraph 2 of Article 5 contains the elementary safeguard that any person arrested should know why he is being deprived of his liberty. This provision is an integral part of the scheme of protection afforded by Article 5: by virtue of paragraph 2 any person arrested must be told, in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest, so as to be able, if he sees fit, to apply to a court to challenge its lawfulness in accordance with paragraph 4... Whilst this information must be conveyed "promptly" (in French: "*dans le plus court délai*"), it need not be related in its entirety by the arresting officer at the very moment of the arrest. Whether the content and promptness of the information conveyed were sufficient is to be assessed in each case according to its special features.

Fox, Campbell and Hartley v The United Kingdom (1990)

40. ... Whilst this information must be conveyed "promptly" (in French: "dans le plus court délai"), it need not be related in its entirety by the arresting officer at the very moment of the arrest.

Whether the content and promptness of the information conveyed were sufficient is to be assessed in each case according to its special features.

6.3.3 Right to be brought promptly before a judge or other officer authorised by law and to trial or release within a reasonable time (Article 5(3))

6.3.3.1 Nature of the Right

Duinhoff and Duijf v The Netherlands (1984)

36. The applicants were referred for trial before the military court five days and three days respectively after their arrest. In the applicants' submission, the military court did not possess the necessary independence of a judicial authority for the purposes of Article 5(3). The court need not decide this point in the present context since, in any event, the fact that the detained person has access to a judicial authority is not sufficient to constitute compliance with the opening part of Article 5(3). This text is aimed at ensuring prompt and automatic judicial control of police or administrative detention ordered in accordance with the provisions of paragraph 1 (c). The language of paragraph 3 ("shall be brought promptly before"), read in the light of its object and purpose, makes evident its inherent "procedural requirement": the "judge" or judicial "officer" must actually hear the detained person and take the appropriate decision. ...

Wemhoff v Germany (1968)

4. The court considers that it is of the greatest importance that the scope of this provision should be clearly established. As the word "reasonable" applies to the time within which a person is entitled to trial, a purely grammatical interpretation would leave the judicial authorities with a choice between two obligations, that of conducting the proceedings until judgment within a reasonable time or that of releasing the accused pending trial, if necessary against certain guarantees.

5. The court is quite certain that such an interpretation would not conform to the intention of the High Contracting Parties. It is inconceivable that they should have intended to permit their judicial authorities, at the price of release of the accused, to protract proceedings beyond a reasonable time. This would, moreover, be flatly contrary to the provision in Article 6 (1) ....

Neumeister v Austria (1968)

4. The court is of the opinion that this provision cannot be understood as giving the judicial authorities a choice between either bringing the accused to trial within a reasonable time or granting him provisional release even subject to guarantees. The reasonableness of the time spent by an accused person in detention up to the beginning of the trial must be assessed in relation to the very fact of his detention. Until conviction, he must be presumed innocent, and the purpose of the provision under consideration is essentially to require his provisional release once his continuing detention ceases to be reasonable. This is, moreover, the intention behind the Austrian legislation (Section 190 (1) of the Code of Criminal Procedure).

5. The court is likewise of the opinion that, in determining in a given case whether or not the detention of an accused person exceeds a reasonable limit, it is for the national judicial authorities to seek all the facts arguing for or against the existence of a genuine requirement of public interest justifying a departure from the rule of respect for individual liberty. It is essentially on the basis of the reasons given in the decisions on the applications for release pending trial, and of the true facts

mentioned by the Applicant in his appeals, that the court is called upon to decide whether or not there has been a violation of the Convention.

6.3.3.2 Automatic nature of the right

Duinhoff and Duijf v The Netherlands (1984)

36. The applicants were referred for trial before the military court five days and three days respectively after their arrest. In the applicants' submission, the military court did not possess the necessary independence of a judicial authority for the purposes of Article 5(3). The court need not decide this point in the present context since, in any event, the fact that the detained person has access to a judicial authority is not sufficient to constitute compliance with the opening part of Article 5(3). This text is aimed at ensuring prompt and automatic judicial control of police or administrative detention ordered in accordance with the provisions of paragraph 1(c). The language of paragraph 3 ("shall be brought promptly before"), read in the light of its object and purpose, makes evident its inherent "procedural requirement". The "judge" or judicial "officer" must actually hear the detained person and take the appropriate decision.

Accordingly, the referral of the applicants for trial did not in itself assure them the guarantees provided for under Article 5(3).

6.3.3.3 Promptly

Brogan and others v the United Kingdom (1988)

58. The fact that a detained person is not charged or brought before a court does not in itself amount to a violation of the first part of Article 5(3). No violation of Article 5(3) can arise if the arrested person is released "promptly" before any judicial control of his detention would have been feasible. If the arrested person is not released promptly, he is entitled to a prompt appearance before a judge or judicial officer. The assessment of "promptness" has to be made in the light of the object and purpose of Article 5. The court has regard to the importance of this Article in the Convention system: it enshrines a fundamental human right, namely the protection of the individual against arbitrary interference by the State with his right to liberty. Judicial control of interference by the executive with the individual's right to liberty is an essential feature of the guarantee embodied in Article 5(3), which is intended to minimise the risk of arbitrariness. Judicial control is implied by the rule of law, "one of the fundamental principles of a democratic society ..., which is expressly referred to in the Preamble to the Convention" and "from which the whole Convention draws its inspiration.

59. The obligation expressed in English by the word "promptly" and in French by the word "aussitôt" is clearly distinguishable from the less strict requirement in the second part of paragraph 3 ("reasonable time"/"délai raisonnable") and even from that in paragraph 4 of Article 5 ("speedily"/"à bref délai"). The term "promptly" also occurs in the English text of paragraph 2, where the French text uses the words "dans le plus court délai". The use in the French text of the word "aussitôt", with its constraining connotation of immediacy, confirms that the degree of flexibility attaching to the notion of "promptness" is limited, even if the attendant circumstances can never be ignored for the purposes of the assessment under paragraph 3. Whereas promptness is to be assessed in each case according to its special features, the significance to be attached to those features can never be taken to the point of impairing the very essence of the right guaranteed by Article 5 para 3, that is to the point of effectively negating the State's obligation to ensure a prompt release or a prompt appearance before a judicial authority.
...

61. The investigation of terrorist offences undoubtedly presents the authorities with special problems, partial reference to which has already been made under Article 5(1). The court accepts that, subject to the existence of adequate safeguards, the context of terrorism in Northern Ireland has the effect of prolonging the period during which the authorities may, without violating Article 5 para 3, keep a person suspected of serious terrorist offences in custody before bringing him before a judge or other judicial officer. The difficulties, alluded to by the Government, of judicial control over decisions to arrest and detain suspected terrorists may affect the manner of implementation of Article 5 para 3, for example in calling for appropriate procedural precautions in view of the nature of the suspected offences. However, they cannot justify, under Article 5 para 3, dispensing altogether with "prompt" judicial control.

Aksoy v Turkey (1996)

76. The court would stress the importance of Article 5 in the Convention system: it enshrines a fundamental human right, namely the protection of the individual against arbitrary interference by the State with his or her right to liberty. Judicial control of interferences by the executive with the individual's right to liberty is an essential feature of the guarantee embodied in Article 5(3), which is intended to minimise the risk of arbitrariness and to ensure the rule of law. Furthermore, prompt judicial intervention may lead to the detection and prevention of serious ill-treatment, which, as stated above, is prohibited by the Convention in absolute and non-derogable terms.

77. In the ***Brannigan and McBride*** judgment, the court held that the United Kingdom Government had not exceeded their margin of appreciation by derogating from their obligations under Article 5 of the Convention to the extent that individuals suspected of terrorist offences were allowed to be held for up to seven days without judicial control. In the instant case, the applicant was detained for at least fourteen days without being brought before a judge or other officer. The Government have sought to justify this measure by reference to the particular demands of police investigations in a geographically vast area faced with a terrorist organisation receiving outside support.

78. Although the court is of the view – which it has expressed on several occasions in the past that the investigation of terrorist offences undoubtedly presents the authorities with special problems, it cannot accept that it is necessary to hold a suspect for fourteen days without judicial intervention. This period is exceptionally long, and left the applicant vulnerable not only to arbitrary interference with his right to liberty but also to torture. Moreover, the Government has not adduced any detailed reasons before the court as to why the fight against terrorism in south-east Turkey rendered judicial intervention impracticable.

83. ... The court considers that in this case insufficient safeguards were available to the applicant, who was detained over a long period of time. In particular, the denial of
access to a lawyer, doctor, relative or friend and the absence of any realistic possibility of being brought before a court to test the legality of the detention meant that he was left completely at the mercy of those holding him.

McKay v United Kingdom (2006)

48. The Court recalls that the applicant was arrested on 6 January 2001, at 10 p.m. on suspicion of having carried out a robbery of a petrol station. He was charged at 12.37 p.m. the next day. On 8 January 2001, at 10 a.m., the applicant made his first appearance in the magistrates' court which remanded him in custody. It is not in dispute that the magistrate had the competence to examine the lawfulness of the arrest and detention and whether there were reasonable grounds for suspicion and moreover that he had the power to order release if those requirements were not

complied with. That without more provided satisfactory guarantees against abuse of power by the authorities and ensured compliance with the first limb of Article 5 § 3 as being prompt, automatic and taking place before a duly empowered judicial officer.

49. The question of release pending trial was a distinct and separate matter which logically only became relevant after the establishment of the existence of a lawful basis and a Convention ground for detention. It was, in the applicant's case, dealt with some 24 hours later, on 9 January 2001, by the High Court which ordered his release. No element of possible abuse or arbitrariness arises from the fact that it was another tribunal or judge that did so nor from the fact that the examination was dependent on his application. The applicant's lawyer lodged such an application without any hindrance or difficulty; it is not apparent, nor falls to be decided in this case, that the system in operation would prevent the weak or vulnerable from making use of this possibility.

50. While it is true that the police had no objection to bail and that if the magistrate had had the power to release on bail, the applicant would have been released one day earlier, the Court nonetheless considers that the procedure in this case was conducted with due expedition, leading to his release some three days after his arrest.

51. There has, accordingly, been no violation of Article 5 § 3 of the Convention.

6.3.3.4 Judge or other officer authorised by law

Ireland v The United Kingdom (1977)

199. As for paragraph 3 taken together with paragraph 1(c), the court finds that the impugned measures were not effected for the purpose of bringing the persons concerned "promptly" before "the competent legal authority", namely "a judge or other officer authorised by law to exercise judicial power". Persons originally detained under, for example, Regulation 11(2) were, in fact, sometimes brought before the ordinary courts, but paragraphs 1(c) and 3 of Article 5 of the Convention are not satisfied by an appearance "before the competent legal authority" in some cases since such appearance is obligatory in every single case governed by those paragraphs. For its part, the advisory committee before which were brought – on the occasions when they so consented – individuals interned under Regulation 12 (1) did not have power to order their release and accordingly did not constitute a "competent legal authority".

Schiesser v Switzerland (1979)

27. In providing that an arrested person shall be brought promptly before a "judge" or "other officer", Article 5(3) leaves the Contracting States a choice between two categories of authorities. It is implicit in such a choice that these categories are not identical. However, the Convention mentions them in the same phrase and presupposes that these authorities fulfil similar functions; it thus clearly recognises the existence of a certain analogy between "judge" and "officer". Besides, were this not so, there would scarcely be any explanation for the inclusion of the adjective "other".

28. ... The exercise of "judicial power" is not necessarily confined to adjudicating on legal disputes. In many Contracting States, officers (magistrates) and even judges exercise such power without adjudicating, for example members of the prosecuting authorities and investigating judges. A literal analysis thus suggests that Article 5(3) includes officials in public prosecutors' departments as well as judges sitting in court (les magistrats du parquet comme ceux du siége).
...

31. The first of such conditions (*of guarantees for persons arrested*) is independence of the executive and of the parties. This does not mean that the "officer" may not be to some extent subordinate to other judges or officers provided that they themselves enjoy similar independence. In addition, under Article 5(3), there is both a procedural and a substantive requirement. The procedural requirement places the "officer" under the obligation of hearing himself the individual brought before him, the substantive requirement imposes on him the obligations of reviewing the circumstances militating for or against detention, of deciding, by reference to legal criteria, whether there are reasons to justify detention and of ordering release if there are no such reasons. In verifying whether these various conditions are satisfied, the court does not have to deal with questions that do not arise in the instant case, for example whether an officer is fitted, by reason of his training or experience, to exercise judicial power.

Brincat v Italy (1992)

20. ... A judicial officer who is competent to decide on detention may also carry out other duties, but there is a risk that his impartiality may arouse legitimate doubt on the part of those subject to his decisions if he is entitled to intervene in the subsequent proceedings as a representative of the prosecuting authority.

21. ... Only the objective appearances at the time of the decision on detention are material: if it then appears that the "officer authorised by law to exercise judicial power" may later intervene, in the subsequent proceedings, as a representative of the prosecuting authority, there is a risk that his impartiality may arouse doubts which are to be held objectively justified.

6.3.3.5 What period of detention counts as pre-trial detention for the purposes of Article 5(3)?

Wemhoff v Germany (1968)

9. It remains to ascertain whether the end of the period of detention with which Article 5(3) is concerned is the day on which a conviction becomes final or simply that on which the charge is determined, even if only by a court of first instance. The court finds for the latter interpretation.

One consideration has appeared to it as decisive, namely that a person convicted at first instance, whether or not he has been detained up to this moment, is in the position provided for by Article 5(1)(a) which authorises deprivation of liberty "after conviction". This last phrase cannot be interpreted as being restricted to the case of a final conviction, for this would exclude the arrest at the hearing of convicted persons who appeared for trial while still at liberty, whatever remedies are still open to them. Now, such a practice is frequently followed in many Contracting States and it cannot be believed that they intended to renounce it. It cannot be overlooked moreover that the guilt of a person who is detained during the appeal or review proceedings, has been established in the course of a trial conducted in accordance with the requirements of Article 6 (art. 6). It is immaterial, in this respect, whether detention after conviction took place on the basis of the judgment or – as in the Federal Republic of Germany – by reason of a special decision confirming the order of detention on remand. A person who has cause to complain of the continuation of his detention after conviction because of delay in determining his appeal, cannot avail himself of Article 5(3) but could possibly allege a disregard of the "reasonable time" provided for by Article 6 (1).
...

6.3.3.6 Length of pre-trial detention

Chraidi v Germany (2006)

37. The Court notes at the outset that the present case relates to large-scale offences committed in the context of international terrorism. States combating this form of terrorism may be faced with extraordinary difficulties. The Court, whose role it is to examine measures taken in this regard by Contracting States as to their conformity with the Convention, is not oblivious of these difficulties. It sees no reason to depart from the general approach it has adopted in previous cases of a similar nature (see Klass and Others v Germany, judgment of 6 September 1978, Series A no. 28, pp. 23 and 27-28, § 48-49 and 59; Brogan and Others v the United Kingdom, judgment of 29 November 1988, Series A no. 145-B, pp. 27-28, § 48; Murray v the United Kingdom, judgment of 28 October 1994, Series A no. 300-A, pp. 23-24, § 47; Pantano v Italy, no. 60851/00, § 70, 6 November 2003; and Van der Tang v Spain, judgment of 13 July 1995, Series A no. 321, p. 21, § 75). However, in the context of the issues arising in the present case the Court considers that the specific nature of these offences and, in particular, the difficulties intrinsic to the investigation of offences committed by criminal associations acting on a global scale call for special consideration. It will bear this context in mind when assessing the reasonableness of the length of the applicant's continued detention, in particular the grounds for his detention and the conduct of the proceedings in the light of the complexity of the case.

6.3.3.7 Grounds for refusing bail/for continued detention

Ilijkov v Bulgaria (2001)

79. As to the grounds for the continued detention, the domestic courts applied law and practice under which there was a presumption that detention on remand was necessary in cases where the sentence faced went beyond a certain threshold of severity (ten years' imprisonment according to the law as in force until June 1995 and five years' imprisonment thereafter).

80. The severity of the sentence faced is a relevant element in the assessment of the risk of absconding or re-offending. The court accepts that in view of the seriousness of the accusation against the applicant, the authorities could justifiably consider that such an initial risk was established.

81. However, the court has repeatedly held that the gravity of the charges cannot by itself serve to justify long periods of detention. That is particularly true in the present case where under the applicable domestic law and practice the characterisation in law of the facts and thus the sentence faced by the applicant was determined by the prosecution authorities without judicial control on the question whether or not the evidence supported reasonable suspicion that the accused had committed an offence attracting a sentence of the relevant length.

82. The only other ground for the applicant's lengthy detention was the domestic courts' finding that there were no exceptional circumstances warranting release.

83. However, that finding was not based on an analysis of all pertinent facts. The authorities regarded the applicant's arguments that he had never been convicted, that he had a family and a stable way of life, and that after the passage of time any possible danger of collusion and absconding had receded, as irrelevant. They did so because by virtue of Article 152 of the Code of Criminal Procedure and the Supreme court's practice the presumption under that provision was only rebuttable in very exceptional circumstances where even a hypothetical possibility of absconding, re-offending or collusion was excluded due to serious illness or other exceptional

factors. It was moreover incumbent on the detained person to prove the existence of such exceptional circumstances, failing which he was bound to remain in detention on remand throughout the proceedings).

84. The court reiterates that continued detention can be justified in a given case only if there are specific indications of a genuine requirement of public interest which, notwithstanding the presumption of innocence, outweighs the rule of respect for individual liberty. Any system of mandatory detention on remand is per se incompatible with Article 5(3) of the Convention

Yagci and Sargin v Turkey (1995)

50. It falls in the first place to the national judicial authorities to ensure that, in a given case, the detention of an accused person pending trial does not exceed a reasonable time. To this end they must examine all the facts arguing for or against the existence of a genuine requirement of public interest justifying, with due regard to the principle of presumption of innocence, a departure from the rule of respect for individual liberty and set them out in their decisions on the applications for release. It is essentially on the basis of the reasons given in these decisions and of the true facts mentioned by the applicant in his appeals, that the court is called upon to decide whether or not there has been a violation of Article 5(3) of the Convention.

Demirel v Turkey (2003)

58. En l'occurrence, il ressort des éléments du dossier que la cour de s˚reté de l'Etat a ordonné le maintien en détention de la requérante en utilisant presque toujours des formules identiques, telles que « compte tenu de la nature du crime reproché et de l'état des preuves », pour ne pas dire stéréotypées, et, à sept reprises, sans en indiquer de motifs. La persistance de raisons plausibles de soupçonner la personne arrêtée d'avoir commis une infraction est une condition *sine qua non* de la régularité du maintien en détention. Par ailleurs, au bout d'un certain temps, elle ne suffit plus. La Cour doit dans ce cas établir si les autres motifs adoptés par les autorités judiciaires continuent à légitimer la privation de liberté. Quand ceux-ci se révèlent « pertinents » et « suffisants », elle cherche de surcroît si les autorités nationales compétentes ont apporté une « diligence particuliére » à la poursuite de la procedure.

59. La Cour ne partage pas non plus les arguments soulevés par le Gouvernement concernant les dangers de fuite, l'absence de domicile fixe, la destruction des preuves, les actes terroristes auxquels la requérante avait prétendument participé ainsi que le nombre de personnes arrêtées. D'ailleurs, de tels arguments ne peuvent s'apprécier uniquement sur la base de la gravité de la peine encourue. Ils doivent s'analyser en fonction d'un ensemble d'éléments supplémentaires pertinents propres soit à confirmer l'existence, soit à le faire apparaître à ce point réduit qu'il ne peut justifier une détention provisoire. La Cour considère que pareils dangers invoqués par le Gouvernement n'ont semblent-ils pas été pris en considération par les autorités judiciaires internes.

[Risk of non-appearance]

Stogmuller v Austria (1969)

15. ... One must note, in this respect, that the danger of an accused absconding does not result just because it is possible or easy for him to cross the frontier (in any event, it would have been sufficient for the purpose to ask Stögmüller to surrender his passport): there must be a whole set of circumstances, particularly, the heavy sentence to be expected or the accused's particular state

of detention, or the lack of well-established ties in the country, which give reason to suppose that the consequences and hazards of flight will seem to him to be a lesser evil than continued imprisonment. But the behaviour of Stögmüller shows clearly that such was not his situation. It is in any case decisive in this connection to note that the Vienna court of Appeal found, in its decision of 10 November 1961, that there was no danger of his absconding. It is true that Stögmüller provisional release was granted afterwards only subject to security but provision of security had already been offered by him as early as 6 December 1961. In these circumstances, the court considers that, at any rate from that date, there was no danger of absconding sufficient to justify the keeping of Stögmüller in detention.

Tomasi v France (1992)

98. ... In addition, the court points out that the danger of absconding cannot be gauged solely on the basis of the severity of the sentence risked; it must be assessed with reference to a number of other relevant factors which may either confirm the existence of a danger of absconding or make it appear so slight that it cannot justify detention pending trial. In this case, the decisions of the judicial investigating authorities contained scarcely any reason capable of explaining why, notwithstanding the arguments advanced by the applicant in his applications for release, they considered the risk of his absconding to be decisive and why they did not seek to counter it by, for instance, requiring the lodging of a security and placing him under court supervision.

[Risk of interference with the course of justice]

Clooth v Belgium (1991)

43. The court acknowledges that it was a very complicated case necessitating difficult inquiries. By his conduct, Mr Clooth considerably impeded and indeed delayed them. The authorities' belief that he should consequently be kept in detention in order to prevent him from disrupting the inquiry even more is easy to understand, at least at the outset. In the long term, however, the requirements of the investigation do not suffice to justify the detention of a suspect: in the normal course of events the risks alleged diminish with the passing of time as the inquiries are effected, statements taken and verifications carried out.

Tomasi v France (1992)

92. Several judicial decisions adopted in this case were based on the risk of pressure being brought to bear on the witnesses – the Poitiers indictments division even referred to a "campaign of intimidation" – and that of collusion between the co-accused; they did not, however, give any details concerning such risks.

93. According to the Government, the threats against [the co-accused] had made it impossible to consider releasing Mr Tomasi. Mr Tomasi would have been able to increase the effectiveness of the pressure brought to bear on [the co-accused], who had been at the origin of the prosecution and who had tried to commit suicide.

....

95. In the court's opinion, there was, from the outset, a genuine risk that pressure might be brought to bear on the witnesses. It gradually diminished, without however disappearing completely.

[Risk of further offences]

Clooth v Belgium (1991)

40. The court considers that the seriousness of a charge may lead the judicial authorities to place and leave a suspect in detention on remand in order to prevent any attempts to commit further offences. It is however necessary, among other conditions, that the danger be a plausible one and the measure appropriate, in the light of the circumstances of the case and in particular the past history and the personality of the person concerned. In the present case, the offences which had given rise to the applicant's previous convictions were not comparable, either in nature or in the degree of seriousness, to the charges preferred against him in the contested proceedings. In addition, the same expert report of 21 June 1985 which described Mr Clooth as dangerous mentioned the need for him to be taken into psychiatric care. Such conclusions, submitted more than nine months after the beginning of the detention, ought to have persuaded the competent courts not to extend it without an accompanying therapeutic measure.

The ground based on the risk of repetition did not therefore in itself justify the continuation of the detention after 21 June 1985.

[Risk to public order]

Letellier v France (1991)

51. The court accepts that, by reason of their particular gravity and public reaction to them, certain offences may give rise to a social disturbance capable of justifying pre-trial detention, at least for a time. In exceptional circumstances this factor may therefore be taken into account for the purposes of the Convention, in any event in so far as domestic law recognises – as in Article 144 of the Code of Criminal Procedure – the notion of disturbance to public order caused by an offence. However, this ground can be regarded as relevant and sufficient only provided that it is based on facts capable of showing that the accused's release would actually disturb public order. In addition detention will continue to be legitimate only if public order remains actually threatened; its continuation cannot be used to anticipate a custodial sentence.

In this case, these conditions were not satisfied. The indictments divisions assessed the need to continue the deprivation of liberty from a purely abstract point of view, taking into consideration only the gravity of the offence. This was despite the fact that the applicant had stressed in her memorials of 16 January 1986 and of 3 March and 10 April 1987 that the mother and sister of the victim had not submitted any observations when she filed her applications for release, whereas they had energetically contested those filed by Mr Moysan; the French courts did not dispute this.

6.3.3.8 Guarantees to appear for trial

Stogmuller v Austria (1969)

15. ... One must note, in this respect, that the danger of an accused absconding does not result just because it is possible or easy for him to cross the frontier (in any event, it would have been sufficient for the purpose to ask Stˆgm ¸ller to surrender his passport): ...

Neumeister v Austria (1968)

14. When the principle of release conditioned by guarantees seemed acceptable, it was still exclusively in relation to the amount of loss that the amount of security required was fixed successively at 2,000,000, 1,750,000 and 1,250,000 schillings, finally to be reduced on 3 June 1964 to the sum of one million schillings which Neumeister was able to provide only on 16

September. This concern to fix the amount of the guarantee to be furnished by a detained person solely in relation to the amount of the loss imputed to him does not seem to be in conformity with Article 5(3) of the Convention. The guarantee provided for by that Article is designed to ensure not the reparation of loss but rather the presence of the accused at the hearing. Its amount must therefore be assessed principally by reference to him, his assets and his relationship with the persons who are to provide the security, in other words to the degree of confidence that is possible that the prospect of loss of the security or of action against the guarantors in case of his non-appearance at the trial will act as a sufficient deterrent to dispel any wish on his part to abscond.

6.3.4 Entitlement to take court proceedings to decide speedily on the lawfulness and continuation of detention – (Article 5(4)

6.3.4.1 Right to challenge "lawfulness" of decision to detain

Al-Nashif v Bulgaria (2002)

94. In accordance with the relevant law and practice, the decision whether a deportation and detention order should invoke national security – with the automatic consequence of excluding any judicial review of lawfulness – is fully within the discretion of the Ministry of the Interior. No court is empowered to enquire into the lawfulness of the detention. The detention order itself, as in the present case, states no reasons. Moreover, Mr Al-Nashif was detained practically incommunicado and was not allowed to meet a lawyer to discuss any possible legal challenge to the measures against him.

95. That is a situation incompatible with Article 5(4) of the Convention and its underlying rationale, the protection of individuals against arbitrariness. National authorities cannot do away with effective control of lawfulness of detention by the domestic courts whenever they choose to assert that national security and terrorism are involved.

6.3.4.2 Scope of the review

Brogan and others v The United Kingdom (1988)

65. According to the court's established case-law, the notion of "lawfulness" under paragraph 4 has the same meaning as in paragraph 1 and whether an "arrest" or "detention" can be regarded as "lawful" has to be determined in the light not only of domestic law, but also of the text of the Convention, the general principles embodied therein and the aim of the restrictions permitted by Article 5 para 1 (arrested or detained persons are entitled to a review bearing upon the procedural and substantive conditions which are essential for the "lawfulness", in the sense of the Convention, of their deprivation of liberty). This means that, in the instant case, the applicants should have had available to them a remedy allowing the competent court to examine not only compliance with the procedural requirements set out in section 12 of the 1984 Act but also the reasonableness of the suspicion grounding the arrest and the legitimacy of the purpose pursued by the arrest and the ensuing detention.
...

Weeks v the United Kingdom (1987)

59. Article 5 para 4 does not guarantee a right to judicial control of such scope as to empower the "court", on all aspects of the case, including questions of expediency, to substitute its own discretion for that of the decision-making authority. The review should, however, be wide enough to bear on those conditions which, according to the Convention, are essential for the lawful

detention of a person subject to the special kind of deprivation of liberty ordered against Mr. Weeks.

X. v the United Kingdom (1981)

57. Although X had access to a court which ruled that his detention was "lawful" in terms of English law, this cannot of itself be decisive as to whether there was a sufficient review of "lawfulness" for the purposes of Article 5 para 4. In paragraph 1(e) of Article 5 as interpreted by the court, the Convention itself makes the "lawfulness" of the kind of deprivation of liberty undergone by X subject to certain requirements over and above conformity with domestic law. Article 5 must be read as a whole and there is no reason to suppose that in relation to one and the same deprivation of liberty the significance of "lawfulness" differs from paragraph 1 (e) to paragraph 4."

6.3.4.3 Procedural requirements of review

[Competent court]

X. v the United Kingdom (1981)

53. It is not within the province of the court to inquire into what would be the best or most appropriate system of judicial review in this sphere, for the Contracting States are free to choose different methods of performing their obligations. Thus, in Article 5(4) the word "court" is not necessarily to be understood as signifying a court of law of the classic kind, integrated within the standard judicial machinery of the country. This term, as employed in several Articles of the Convention including Article 5(4), serves to denote "bodies which exhibit not only common fundamental features, of which the most important is independence of the executive and of the parties to the case, but also the guarantees" – "appropriate to the kind of deprivation of liberty in question" – "of [a] judicial procedure", the forms of which may vary from one domain to another.

Von Bulow v the United Kingdom (2003)

24. In this case, the applicant's tariff under his mandatory life sentence expired in 1998. While the Parole Board reviewed the applicant's case in 2001, it did not have any power to order his release and could only make recommendations to the Secretary of State. Nor did any oral hearing take place, with the opportunity to examine or cross-examine witnesses relevant to any allegations that the applicant remained a risk to the public. The Government did not dispute that that the lawfulness of the applicant's continued detention was not reviewed by a body with the power to order release or with a procedure containing the necessary judicial safeguards as required by Article 5(4) of the Convention.

[Adversarial nature of the hearing]

Winterwerp v The Netherlands (1979)

60. ... The judicial proceedings referred to in Article 5(4) need not, it is true, always be attended by the same guarantees as those required under Article 6 (1) for civil or criminal litigation. Nonetheless, it is essential that the person concerned should have access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation, failing which he will not have been afforded "the fundamental guarantees of procedure applied in matters of deprivation of liberty". Mental illness may entail restricting or modifying the manner of exercise of such a right, but it cannot justify impairing the very essence of the right. Indeed, special procedural safeguards may prove called for in order to protect the

interests of persons who, on account of their mental disabilities, are not fully capable of acting for themselves.

Megyeri v Germany (1992)

23. Where a person is confined in a psychiatric institution on the ground of the commission of acts which constituted criminal offences but for which he could not be held responsible on account of mental illness, he should – unless there are special circumstances – receive legal assistance in subsequent proceedings relating to the continuation, suspension or termination of his detention. The importance of what is at stake for him – personal liberty – taken together with the very nature of his affliction – diminished mental capacity – compel this conclusion.

Hussain v the United Kingdom (1996)

59. ... In matters of such crucial importance as the deprivation of liberty and where questions arise which involve, for example, an assessment of the applicant's character or mental state, it has held that it may be essential to the fairness of the proceedings that the applicant be present at an oral hearing.

60. ... In a situation such as that of the applicant, where a substantial term of imprisonment may be at stake and where characteristics pertaining to his personality and level of maturity are of importance in deciding on his dangerousness, Article 5 para 4 requires an oral hearing in the context of an adversarial procedure involving legal representation and the possibility of calling and questioning witnesses.

[Detainee must have access to pertinent parts of the file held by the State authorities]

Sanchez-Reisse v Switzerland (1986)

51. In the court's opinion, Article 5(4) required in the present case that Mr. Sanchez-Reisse be provided, in some way or another, with the benefit of an adversarial procedure. Giving him the possibility of submitting written comments on the office's opinion would have constituted an appropriate means, but there is nothing to show that he was offered such a possibility. Admittedly, he had already indicated in his request the circumstance swhich, in his view, justified his release, but this of itself did not provide the "equality of arms" that is indispensable: the opinion could subsequently have referred to new points of fact or of law giving rise, on the detainee's part, to reactions or criticisms or even to questions of which the Federal Court should have been able to take notice before rendering its decision.

The applicant's reply did not, however, necessarily have to be in writing: the result required by Article 5(4) could also have been attained if he had appeared in person before the Federal court. The possibility for a detainee "to be heard either in person or, where necessary, through some form of representation" features in certain instances among the "fundamental guarantees of procedure applied in matters of deprivation of liberty". Despite the difference in wording between paragraph 3 (right to be brought before a judge or other officer) and paragraph 4 (right to take proceedings) of Article 5, the court's previous decisions relating to these two paragraphs have hitherto tended to acknowledge the need for a hearing before the judicial authority. These decisions concerned, however, only matters falling within the ambit of sub-paragraphs (c) and (e) in fine of paragraph 1. And, in fact, "the forms of the procedure required by the Convention need not ... necessarily be identical in each of the cases where the intervention of a court is required"

In the present case, the Federal court was led to take into consideration the applicant's worsening state of health, a factor which might have militated in favour of his appearing in person, but it had

at its disposal the medical certificates appended to the third request for provisional release from custody. There is no reason to believe that the applicant's presence could have convinced the Federal court that he had to be released. Nevertheless, it remains the case that Mr. Sanchez-Reisse did not receive the benefit of a procedure that was really adversarial.

Lamy v Belgium (1989)

29. Like the Commission, the court notes that during the first thirty days of custody the applicant's counsel was, in accordance with the law as judicially interpreted, unable to inspect anything in the file, and in particular the reports made by the investigating judge and the Verviers police. This applied especially on the occasion of the applicant's first appearance before the chambre du conseil, which had to rule on the confirmation of the arrest warrant. The applicant's counsel did not have the opportunity of effectively challenging the statements or views which the prosecution based on these documents.

Access to these documents was essential for the applicant at this crucial stage in the proceedings, when the court had to decide whether to remand him in custody or to release him. Such access would, in particular, have enabled counsel for Mr Lamy to address the court on the matter of the co-defendants' statements and attitude. In the court's view, it was therefore essential to inspect the documents in question in order to challenge the lawfulness of the arrest warrant effectively.

The appraisal of the need for a remand in custody and the subsequent assessment of guilt are too closely linked for access to documents to be refused in the former case when the law requires it in the latter case

Garcia Alva v Germany (2001)

39. A court examining an appeal against detention must provide guarantees of a judicial procedure. The proceedings must be adversarial and must always ensure "equality of arms" between the parties, the prosecutor and the detained person. Equality of arms is not ensured if counsel is denied access to those documents in the investigation file which are essential in order effectively to challenge the lawfulness of his client's detention. In the case of a person whose detention falls within the ambit of Article 5(1)(c), a hearing is required.

These requirements are derived from the right to an adversarial trial as laid down in Article 6 of the Convention, which means, in a criminal case, that both the prosecution and the defence must be given the opportunity to have knowledge of and comment on the observations filed and the evidence adduced by the other party. According to the court's case law, it follows from the wording of Article 6 – and particularly from the autonomous meaning to be given to the notion of "criminal charge" – that this provision has some application to pre-trial proceedings. It thus follows that, in view of the dramatic impact of deprivation of liberty on the fundamental rights of the person concerned, proceedings conducted under Article 5(4) of the Convention should in principle also meet, to the largest extent possible under the circumstances of an on-going investigation, the basic requirements of a fair trial, such as the right to an adversarial procedure. While national law may satisfy this requirement in various ways, whatever method is chosen should ensure that the other party is aware that observations have been filed and will have a real opportunity to comment thereon.

40. In the present case, the applicant was, upon his arrest, informed in general terms of the grounds for suspicion and of the evidence against him, as well as of the grounds for his detention. Upon counsel's request, copies of the applicant's statements to the police authorities and the detention judge, of the record of the search of the applicant's premises, as well as of the arrest

warrant against him were made available to the defence, but at that stage, the Public Prosecutor's Office dismissed counsel's request for consultation of the investigation files, and in particular of the depositions made by Mr K., on the ground that consultation of these documents would endanger the purpose of the investigations.
...

41. The contents of the investigation file, and in particular the statements of Mr K. thus appear to have played a key role in the District Court's decision to prolong the applicant's detention on remand. However, while the Public Prosecutor and the District Court were familiar with them, their precise content had not at that stage been brought to the applicant's or his counsel's knowledge. As a consequence, neither of them had an opportunity adequately to challenge the findings referred to by the Public Prosecutor and the District Court, notably by questioning the reliability or conclusiveness of the statements made by Mr K., who had a previous conviction and was the subject of another set of investigations for drug-trafficking. It is true that, as the Government points out, the arrest warrant gave some details about the facts grounding the suspicion against the applicant. However the information provided in this way was only an account of the facts as construed by the District Court on the basis of all the information made available to it by the Public Prosecutor's Office. In the court's opinion, it is hardly possible for an accused to challenge the reliability of such an account properly without being made aware of the evidence on which it is based. This requires that the accused be given a sufficient opportunity to take cognisance of statements and other pieces of evidence underlying them, such as the results of the police and other investigations, irrespective of whether the accused is able to provide any indication as to the relevance for his defence of the pieces of evidence which he seeks to be given access to.

[Burden of proof]

Hutchison Reid v The United Kingdom (2003)

69. The court would observe that there is no direct Convention case-law governing the onus of proof in Article 5(4) proceedings, though the imposition of a strong burden of proof on applicants held in detention on remand to show that there was no risk of absconding has previously been taken into account in finding procedures for review of that detention incompatible with the Article 5(4).

70. That it is however for the authorities to prove that an individual satisfies the conditions for compulsory detention, rather than the converse, may be regarded as implicit in the case law. In examining complaints under Article 5(1), the court has adopted the approach that both the initial deprivation of a mental patient's liberty and the continued detention could only be lawful under Article 5(1)(e) if it can "reliably be shown that he or she suffers from a mental disorder sufficiently serious to warrant detention", namely that the burden lies on the authorities in both cases ...
...

71. The court finds therefore that insofar as the burden of proof was placed on the applicant in his appeal to establish that his continued detention did not satisfy the conditions of lawfulness it was not compatible with Article 5(4) of the Convention.

77. While it is true that Article 5(4) guarantees no right, as such, to an appeal against decisions ordering or extending detention, it follows from the aim and purpose of this provision that its requirements must be respected by appeal courts if an appeal lies against a decision. The applicant's applications challenging the Sheriff's decision were not, in the domestic sense, full appeals on fact and law but involved judicial review, principally, of lawfulness and propriety of

procedure. As the appellate instances were nonetheless involved in ruling on issues concerning the lawfulness of his continued detention and this could have potentially led to his release, the court sees no reason why they should not be taken into account as part of the proceedings. The fact that the Scottish system provides a four-tier system of review cannot serve to justify the applicant's being deprived of his rights under Article 5(4) of the Convention. It is for the State to organise its judicial system in such a way as to enable its courts to comply with the requirements of that provision.

6.3.4.4 Review of lawfulness permitted at regular intervals

Bezicheri v Italy (1989)

21. The Government do not consider it "reasonable" that the applicant lodged his second application as early as 6 July 1983, barely a month after the dismissal of the first. In their view, the very nature of detention on remand, combined with the review that the judge concerned must conduct of his own motion, justifies a longer interval than for other forms of deprivation of liberty, for example the committal of mentally handicapped persons. In the court's opinion, the nature of detention on remand calls for short intervals; there is an assumption in the Convention that detention on remand is to be of strictly limited duration, because its raison d''tre is essentially related to the requirements of an investigation which is to be conducted with expedition. In the present case an interval of one month is not unreasonable. ...

6.3.5 Right to compensation – Article 5(5)

Wassink v The Netherlands (1990)

38. In the court's view, paragraph 5 of Article is complied with where it is possible to apply for compensation in respect of a deprivation of liberty effected in conditions contrary to paragraphs 1, 2, 3 or 4. It does not prohibit the Contracting States from making the award of compensation dependent upon the ability of the person concerned to show damage resulting from the breach. In the context of Article 5(5), as for that of Article 25, the status of "victim" may exist even where there is no damage, but there can be no question of "compensation" where there is no pecuniary or non-pecuniary damage to compensate.

6.3.6 Redress – Article 41

Assanidze v Georgia (2004)

202. As regards the measures which the Georgian State must take (see paragraph 198 above), subject to supervision by the Committee of Ministers, in order to put an end to the violation that has been found, the Court reiterates that its judgments are essentially declaratory in nature and that, in general, it is primarily for the State concerned to choose the means to be used in its domestic legal order in order to discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment (see, among other authorities, *Scozzari and Giunta*, cited above, § 249; *Brumărescu v Romania* (just satisfaction) [GC], no. 28342/95, § 20, ECHR 2001-I; *Akdivar and Others v Turkey* (Article 50), judgment of 1 April 1998, *Reports* 1998-II, pp. 723-24, § 47; and *Marckx v Belgium*, judgment of 13 June 1979, Series A no. 31, p. 25, § 58). This discretion as to the manner of execution of a judgment reflects the freedom of choice attached to the primary obligation of the Contracting States under the Convention to secure the rights and freedoms guaranteed (Article 1) (see, *mutatis mutandis, Papamichalopoulos and Others v Greece* (Article 50), judgment of 31 October 1995, Series A no. 330-B, pp. 58-59, § 34).

However, by its very nature, the violation found in the instant case does not leave any real choice as to the measures required to remedy it.

203. In these conditions, having regard to the particular circumstances of the case and the urgent need to put an end to the violation of Article 5 § 1 and Article 6 § 1 of the Convention (see paragraphs 176 and 184 above), the Court considers that the respondent State must secure the applicant's release at the earliest possible date.

Ilascu and others v Moldova and Russia (2004)

490. The Court further considers that any continuation of the unlawful and arbitrary detention of the three applicants would necessarily entail a serious prolongation of the violation of Article 5 found by the Court and a breach of the respondent States' obligation under Article 46 § 1 of the Convention to abide by the Court's judgment.

Regard being had to the grounds on which they have been found by the Court to be in violation of the Convention (see paragraphs 352 and 393 above), the respondent States must take every measure to put an end to the arbitrary detention of the applicants still detained and to secure their immediate release.

Yakisan v Turkey (2007))

1. De plus, la Cour note que, selon les informations fournies par les parties, l'affaire est encore pendante devant les juridictions internes après près de treize ans et que le requérant est toujours maintenu en détention (voir paragraphes 18, 28 et 39 ci-dessus). En l'occurrence, si tel est toujours le cas, la Cour estime qu'une manière appropriée de mettre un terme à la violation constatée serait de terminer le procès le plus rapidement possible, en prenant en considération les exigences d'une bonne administration de la justice, ou de libérer le requérant pendant la procédure, tel que prévu par l'article 5 § 3 de la Convention.

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