THE AIRE CENTRE
Advice on Individual Rights in Europe

Right to Liberty and Security

The jurisprudence of the
European Court of Human Rights

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Preface

The right to liberty contained in Article 5 of the European Convention on Human Rights provides a fundamental protection against the arbitrary exercise of state power. It includes both substantive and procedural protections which aim to ensure that no individual is deprived of their liberty except in certain, limited conditions and where specific procedural protections are in place. This publication sets out the key principles developed by the European Court of Human Rights when interpreting and applying the provisions of Article 5 and contains summaries of some of the most pertinent case law on this topic.

The right to liberty is relevant to a diverse and ever-developing range of contexts. One example of this is the exemption within Article 5 which permits the detention of asylum seekers or other immigrants with a view to their deportation or extradition or prior to the State's authorisation of their entry. Given the significant rise in the numbers of migrants and refugees coming into Europe, the introduction of stricter border controls by member states of the European Union and the increasing number of applications for asylum made in Western Balkans countries, this is one of a number of contexts in which an understanding of Article 5 is becoming ever more relevant.

What exactly constitutes a 'deprivation of liberty' will depend on the specific facts and context of a particular case. An understanding of the case law surrounding Article 5 is therefore essential for anyone seeking to understand when exactly the right to liberty applies in practice. A review of the jurisprudence on Article 5 also provides greater clarity on the scope of the exemptions to Article 5. Understanding when exactly the exemptions apply is essential for ensuring compliance with Article 5, given how often the Court has emphasised that these exemptions are exhaustive and that no deprivation of liberty will be permitted unless it fits within one of these grounds.

Perhaps the most topical example of the importance of understanding the scope of Article 5, is the relevance of Article 5 to the global response to the Covid-19 pandemic. Most European States have adopted some form of quarantine, lockdown and/or social distancing measures to prevent the spread of the virus. Such measures typically involve restricting liberty of movement (protected by Article 2 Protocol 4) and, depending on the severity of the measures, may also constitute an interference with Article 5. The distinction between restriction of movement and deprivation of liberty is one of degree and intensity and the pandemic has brought to the forefront the question of

where the line between these two rights should be drawn. There are significant practical consequences which result from the decision; not all States have ratified Protocol 4, and the conditions under which restrictions of movement may be permitted are wider than the narrowly interpreted permitted limitations under Article 5. Whilst detention for the prevention of the spread of infectious diseases is authorised under Article 5 §1 (e), current case law stipulates that this is only where it is a measure of last resort.

The pandemic is likely to lead to the further development of the case law on Article 5 §1 (e) in so far as it relates to preventing the spread of infectious disease, as well as raising wider questions regarding the use of Article 15 by Member States to derogate from the ECHR in times of emergency. Understanding the principles already established by the Court to distinguish between a deprivation of liberty and a restriction on movement will be necessary to understand how Article 5 rights can and should be protected in such extraordinary times; this publication summarises the case law on this vital question, as well as on Article 5 §1 (e).

The publication contains three parts. First, an introductory overview of the key principles of Article 5. Second, summaries of relevant cases from the European Court of Human Rights. Third, short summaries of relevant cases involving countries from the Western Balkans.

We hope this resource will provide greater clarity on the requirements of Article 5 and that the case summaries will serve as practical examples of how such requirements should be implemented in practice. The publication has been produced as part of the Rule of Law Platform, a wider project which exists to provide comprehensive insight into the rule of law and protection of individual rights in the Western Balkans. By producing resources such as this, we aim to increase the knowledge and capacity of the judiciary in the Western Balkans to ensure the proper implementation of international standards at domestic level. It is our hope that this publication acts as point of reference for members of the judiciary, and also for government officials, police officials and practicing lawyers seeking guidance on the contexts in which a deprivation of liberty may arise, the ways in which a deprivation of liberty may be justified and the procedural protections that are required.

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(1) INTRODUCTION

The right to liberty and security is of the highest importance in a democratic society.[1] The basic principle that nobody should be arbitrarily deprived of their liberty is fundamental. However, what this means in practice is not universally understood and can be contentious. This Guide aims to provide an overview of the principles and the case law of the European Court of Human Rights (the Court) relating to:

- deprivations of liberty,
- restrictions on liberty,
- restrictions on freedom of movement,
- interferences with security of the person, and
- their associated procedural rights.

These topics will be examined primarily in the context of scenarios which typically occur in the Western Balkans.

The right to liberty is particularly relevant for those detained in relation to criminal proceedings, those detained under mental health legislation and those in immigration detention. The text of Article 5[2] forms the basis of the regulation of deprivations of liberty under the Convention:

Article 5

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*

1 *Medvedyev and Others v. France*, Grand Chamber judgment of 29 March 2010, no. 3394/03, §76

2 All references to Articles and Protocols are to the European Convention on Human Rights (the Convention), unless otherwise stated.

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.*

Article 5 opens with a clear statement of the presumption of liberty which underpins the rest of the Article. It is important to remember that the list of authorised deprivations of liberty set out in Article 5 § 1 (a) is wholly exhaustive.[3] The presumption of liberty must be respected.

While Article 5 enshrines the right to both liberty and security of person, in practice the concept of security of person has no real independent existence in the context of this Article.[4] Physical safety and security are protected by the

3 *Frroku v. Albania*, judgment of 18 September 2018, no. 47403/15, §52 (included as a summary in this publication)

4 *Bozano v. France*, judgment of 18 December 1986, no. 9990/82, §54 (included as a summary in this

prohibition of torture and inhumane or degrading treatment under Article 3 or by the right to respect for private life under Article 8 depending on whether or not the treatment reaches the minimum level of severity required to engage Article 3.[5]

What constitutes a deprivation of liberty?

Article 5 only applies in cases where there is a deprivation of liberty. Neither its substantive provisions nor procedural safeguards apply if there has been some lesser infringement of liberty or a restriction on freedom of movement. Consequently, understanding this concept is crucial to understanding the right to liberty and security and the protection provided by Article 5. Deprivation of liberty is a concept which has an autonomous definition under the Convention irrespective of how a situation is characterised in national law.[6] The Court undertakes an autonomous assessment of the circumstances in each individual case. Deprivation of liberty is not defined by the legal context in which it occurs nor is it confined to detention following arrest or conviction but can take numerous forms. For example, the question of applicability of Article 5 has arisen in relation to the placement of individuals in a social care home;[7] crowd control measures adopted by the police on public order grounds;[8] or confinement in transit zones.[9]

The right to liberty contemplates the physical liberty of the person, not merely restrictions on the freedom of movement. A deprivation of liberty is distinct from

publication)

5 For the Court's analysis on the impact of detention on the ill-treatment of individuals see amongst many other authorities, *Salman v. Turkey*, Grand Chamber judgment of 27 June 2000, no. 21986/93, § 100, *El-Masri v. the former Yugoslav Republic of Macedonia*, Grand Chamber judgment of 13 December 2012, no. 39630/09, § 152 (included as a summary in this publication), *Bouyid v. Belgium*, Grand Chamber judgment of 28 September 2015, no. 23380/09, § 83 etc.

6 *Creangă v. Romania*, Grand Chamber judgment of 23 February 2012, no. 29226/03, §91 (included as a summary in this publication)

7 *Hadžimejlić and Others v Bosnia and Herzegovina*, judgment of 3 November 2015, nos. 3427/13, 74569/13 and 7157/14

8 *Austin and Others v. the United Kingdom*, Grand Chamber judgment of 15 March 2012, nos. 39692/09, 40713/09 and 41008/09 (included as a summary in this publication)

9 *Amuur v. France*, judgment of 25 June 1996, no. 19776/92, *Ilias and Ahmed v. Hungary*, Grand Chamber judgment of 21 November 2019, no. 47287/15, §248 (included as a summary in this publication), *Z.A. and Others v. Russia*, Grand Chamber judgment of 21 November 2019, nos. 61411/15, 61420/15, 61427/15 and 3028/16, §248 (included as a summary in this publication)

a restriction on freedom of movement which is governed by Article 2 of Protocol No. 4.[10] The distinction is made based on an evaluation of the degree or intensity, not the nature or substance, of the measure in the applicant's particular case.[11] Relevant factors in this assessment include the duration, type and effects of a measure. The context in which measures are taken is important as there are common situations in modern society where the public may be expected to endure restrictions on freedom of movement or liberty or even deprivations of liberty for a wider public purpose.[12] Measures adopted in many countries in response to the Covid 19 pandemic may eventually be found by the Court to have included the whole range of restrictions and even deprivations of liberty.

There is both an objective and a subjective element to deprivations of liberty. As a general test, objectively a person must have been confined in a particular restricted space for a not negligible amount of time and subjectively the person must not have consented or not be able to consent to the confinement.[13] However, this general test does not always work and the Court has noted that in some borderline cases the distinction between a restriction on liberty of movement and a deprivation of liberty is a matter of pure opinion.[14] In addition, the language used by the Court is not always consistent. One jurisprudential development is the use of the term "restriction of liberty", a concept which does not amount to a deprivation of liberty.[15] The French translation of "restriction of liberty" has varied from "restriction à la liberté" to "atteinte à la liberté" within the same judgment.[16]

Recently there has been a development in the Court's case law on the definition of a deprivation of liberty in the context of asylum seekers being

10 See *De Tommaso v. Italy*, judgment of 23 February 2017, no. 43395/09, §§ 74-90 (included as a summary in this publication)

11 *Guzzardi v Italy*, judgment of 6 November 1980, no. 7367/76, §92 (included as a summary in this publication)

12 *Austin and Others v. the United Kingdom*, Grand Chamber judgment of 15 March 2012, nos. 39692/09, 40713/09 and 41008/09, §59 (included as a summary in this publication)

13 *Stanev v. Bulgaria*, Grand Chamber judgment of 17 January 2012, no. 36760/06, §117 (included as a summary in this publication)

14 *Z.A. and Others v. Russia*, Grand Chamber judgment of 21 November 2019, nos. 61411/15, 61420/15, 61427/15 and 3028/16, §133 (included as a summary in this publication)

15 *Amuur v. France*, judgment of 25 June 1996, no. 19776/92, §43

16 *Amuur v. France*, judgment of 25 June 1996, no. 19776/92, §§43+48 (comparison of the English and French judgments)

held in international transit zones which demonstrates the complexities of the distinction between restrictions on freedom of movement and deprivations of liberty. The Court differentiated between asylum seekers held in transit zones located on land borders and those located in airports. It held that in the former there was no deprivation of liberty since it was possible for the applicants to return to a third intermediary country where there was no direct threat to their lives or health.[17]

Thus, in order to engage Article 5 the existence of a deprivation of liberty, or a de facto deprivation of liberty,[18] is essential, regardless of the purpose of the detention in question. The extent of the interference with an individual's liberty must be determined before consideration is given to the potential justification for the interference under Article 5 § 1 (a)-(f).

(2) ARTICLE 5 AND OTHER RELEVANT INTERNATIONAL AND EU LAW

The right to liberty and security is not exclusively regulated by the Convention. A number of other international instruments may be relevant when considering whether or not a deprivation of liberty is justified. The Convention cannot be considered in a vacuum and must be interpreted within the general principles of international law.[19] This principle of interpretation is an extension of what is set out in Article 53:

> *"Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party."*

The Convention requires that all measures carried out by Contracting Parties that affect an individual's protected rights must be "in accordance with the law". In some circumstances, this will be European Union (EU) or international law. In determining whether Contracting Parties' obligations under the Convention are

17 *Ilias and Ahmed v. Hungary*, Grand Chamber judgment of 21 November 2019, no. 47287/15, §248 (included as a summary in this publication)

18 *Ilias and Ahmed v. Hungary*, Grand Chamber judgment of 21 November 2019, no. 47287/15, §230 (included as a summary in this publication)

19 *Hassan v. the United Kingdom*, Grand Chamber judgment of 16 September 2014, no. 29750/09, §77

engaged in any particular case, these international law obligations are materially relevant when the States are themselves bound by that corpus of law.

Further, pursuant to Article 53, the provisions of the Convention cannot be applied in a manner that would limit the scope of the protection of human rights and fundamental freedoms under EU or international law. There is a range of international law instruments, to which many Western Balkan states are party, which may be relevant when considering an alleged deprivation of liberty under Article 5. Some notable examples include:

- European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment 1987
- The Geneva Conventions 1949, and their Additional Protocols I and II 1977
- UN Convention on the Rights of the Child 1989
- UN Convention on the Rights of Persons with Disabilities 2006[20]

In relation to EU law, the EU asylum acquis is relevant when determining whether a deprivation of liberty was lawful for the purposes of Article 5 § 1. Specifically, Directive 2008/115/EC ("the Returns Directive" which regulates detention pending removal), Directive 2013/32/EU ("the Asylum Procedures Directive") and Directive 2013/33/EU ("the Reception Conditions Directive") should be taken into account in relation to deprivations of liberty concerning asylum seekers in EU Member States.

Therefore, the principles discussed in this Guide were informed by and will continue to be informed by the wider international regulation of the right to liberty as it evolves.

(3) LAWFULNESS OF DETENTION

Article 5 § 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

Article 5 § 1 imposes two key procedural safeguards that apply to all authorised deprivations of liberty. Firstly, a deprivation of liberty must be in

20 The above listed international instruments have been ratified by all Western Balkan states.

accordance with a procedure prescribed by law. Secondly, the detention, arrest or order itself must be lawful. Any interference with the right to liberty must be in accordance with the law both substantively and procedurally and must be in keeping with the purpose of Article 5, to protect the individual from arbitrariness.[21]

The notion underlying lawfulness 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.[22] Consequently, the unacknowledged detention of an individual, whereby there is no record of important details of the detention or the detainee, is a complete negation of the fundamentally important guarantees contained in Article 5.[23] The lawfulness requirement is analysed in more detail below.

(i) Compliance with national law

For detention to be "in accordance with a procedure prescribed by law" it must first and foremost be in compliance with national law,[24] but also with other applicable legal standards, including EU and international law as noted above.[25] Moreover, national law must in itself be in conformity with the Convention, including the general principles expressed or implied therein.[26] These principles include the rule of law, legal certainty and protection against arbitrariness. Where restrictive measures falling within Article 5 are adopted in response to an emergency – such as the Covid 19 pandemic – they are still subject to the requirement that they should be authorised and implemented by a process which complies with the applicable national legal norms and with properly enacted laws or where appropriate regulations.

21 *El-Masri v. the Former Yugoslav Republic of Macedonia*, Grand Chamber judgment of 13 December 2012, no. 39630/09, §230 (included as a summary in this publication)

22 *M.S. v. Croatia (No. 2)*, judgment of 19 February 2015, no. 75450/12, §140

23 *El-Masri v. the Former Yugoslav Republic of Macedonia*, Grand Chamber judgment of 13 December 2012, no. 39630/09, §233 (included as a summary in this publication)

24 *Mooren v. Germany*, Grand Chamber judgment of 9 July 2009, no. 11364/03, § 72 (included as a summary in this publication)

25 *Mitrović v. Serbia*, judgment of 21 March 2017, no. 52142/12, §40, see above section 2

26 *Bigović v. Montenegro*, judgment of 5 March 2019, no. 48343/16, §§181-182 (included as a summary in this publication), *Šaranović v Montenegro*, judgment of 19 March 2019, no. 31775/16, §69

(ii) Legal certainty

In order to satisfy the principle of legal certainty, it is essential that the conditions for deprivation of liberty under national law are clearly defined and that the law is foreseeable in its application. The law needs to be sufficiently precise to allow an individual, if need be with advice, to foresee to a degree that is reasonable in the circumstances the consequences which a given action may entail.[27]

Consequently, the Court does not confine itself to simply determining that there is a legal provision in place authorising the detention, but it carries out an assessment of the quality of this provision. The factors considered in this quality assessment are often referred to as "safeguards against arbitrariness".[28] Safeguards against arbitrariness will include clear legal provisions for ordering and extending detention, setting time limits for it, and providing an effective remedy by which an individual can contest the "lawfulness" and "length" of continuing detention.[29]

Where there is a court order, there must still be adequate safeguards against arbitrariness that ensure its terms are clearly defined and foreseeable. However, detention is in principle lawful if it is based on a court order. Flaws in a detention order do not necessarily render the underlying period of detention unlawful. Detention on the basis of an order later found unlawful by a superior court may still be valid under domestic law.[30] Similarly, detention may remain in accordance with a "procedure prescribed by law" even though domestic courts have admitted there had been flaws in the detention proceedings but held the detention nevertheless to be lawful.[31] Unless they constitute a gross and obvious irregularity, defects in a detention order may be remedied by the domestic appeal courts in the course of judicial review proceedings.[32]

27 *Dragin v. Croatia*, judgment of 24 July 2014, no. 75068/12, §90

28 *Grori v. Albania*, judgment of 7 July 2009, no. 25336/04, §§ 151-162 (included as a summary in this publication)

29 *J.N. v the United Kingdom*, judgment of 19 May 2016, no. 37289/12, §77

30 *Bozano v. France*, judgment of 18 December 1986, no. 9990/82, §55 (included as a summary in this publication), *Mooren v. Germany*, Grand Chamber judgment of 9 July 2009, no. 11364/03, §74 (included as a summary in this publication)

31 *Erkalo v. the Netherlands*, judgment of 2 September 1998, no. 23807/94, §55

32 *Mooren v. Germany*, Grand Chamber judgment of 9 July 2009, no. 11364/03, §75 (included as a summary in this publication)

(iii) No arbitrariness

It is a fundamental principle that no detention which is arbitrary can be compatible with Article 5 § 1 and the notion of "arbitrariness" in Article 5 § 1 extends beyond lack of conformity with national law, so that a deprivation of liberty may be lawful in terms of domestic law but still arbitrary and thus contrary to the Convention.[33] The concept of arbitrariness varies to a certain extent depending on the type of detention involved.[34] The Court has summarised some of the key principles for identifying what types of conduct constitute "arbitrariness" in the context of immigration detention.[35] Following on from these principles, detention will be considered arbitrary where:

- There is an element of bad faith or deception[36]
- Either the order to detain or the execution do not genuinely conform with the purpose of the permitted restriction[37]
- There is no relationship between the ground of permitted deprivation of liberty and the place and conditions of detention[38]
- In relation to Article 5 § 1 (b), (d) and (e), detention was not necessary to achieve the stated aim[39]

It is important to note that detention under Article 5 § 1 (a) and (f) does not have to be necessary in order not to be deemed arbitrary. There merely has to be a genuine connection between the detention and the ground invoked. Such a connection should be evidenced in the reasons for a decision to detain.

33 *Creangă v. Romania*, Grand Chamber judgment of 23 February 2012, no. 29226/03, § 84 (included as a summary in this publication), *Sebalj v. Croatia*, judgment of 28 June 2011, no. 4429/09, §188

34 *Mooren v. Germany*, Grand Chamber judgment of 9 July 2009, no. 11364/03, §77 (included as a summary in this publication)

35 *Saadi v. the United Kingdom*, Grand Chamber judgment of 29 January 2008, no. 13229/03, §§68-74

36 *M.S. v. Croatia (No. 2)*, judgment of 19 February 2015, no. 75450/12, §§142+160

37 *Lazoroski v. the Former Yugoslav Republic of Macedonia*, judgment of 8 October 2009, no. 4922/04, §§43-49

38 *Hadžic and Suljić v. Bosnia and Herzegovina*, judgment of 7 June 2011, nos. 39446/06 and 33849/08, §41

39 *Hadžimejlić and Others v. Bosnia and Herzegovina*, judgment of 3 November 2015, nos. 3427/13, 74569/13 and 7157/14, §§52-59

(iv) Reasons

An absence or lack of reasoning is one of the elements taken into account by the Court when assessing the lawfulness of detention.[40] Reasons are required both for the initial decision to detain and for the decision to extend a period of detention. In the absence of any grounds given in decisions authorising detention, detention may be incompatible with Article 5 § 1.[41] Similarly, a decision which is laconic making no reference to any legal provision which would permit detention will fail to provide sufficient protection from arbitrariness.[42] However, exceptionally, the Court has considered an applicant's detention to be in conformity with the domestic legislation despite the lack of reasons in the detention order where the national courts were satisfied that there had been some grounds for the applicant's detention on remand.[43]

National judicial authorities must examine all the facts when arguing for or against the existence of a genuine requirement of public interest justifying, with due regard to the presumption of innocence, a departure from the rule of respect for individual liberty, and must set them out in their decisions dismissing applications for release. It is not the Court's task to establish such facts and take the place of the national authorities. It is essentially on the basis of the reasons given in the domestic court's decisions and of the true facts mentioned by the individual in appeals that the Court is called upon to decide whether or not there has been a violation.[44]

(v) Procedural flaws

Not all procedural flaws in the detention process will render the detention unlawful for the purposes of Article 5 § 1.[45] In relation to delays, the Court has recognised that some delays in carrying out a decision to release a detainee are understandable but that national authorities must endeavour to keep those delays to a minimum.[46] The administrative system must function so as

40 *S., V. and A. v. Denmark*, Grand Chamber judgment of 22 October 2018, nos. 35553/12, 36678/12 and 36711/12, §92 (included as a summary in this publication)

41 *Stašaitis v. Lithuania*, judgment of 21 March 2002, no. 47679/99, §67

42 *Khudoyorov v. Russia*, judgment of 8 November 2005, no. 6847/02, §157

43 *Minjat v. Switzerland*, judgment of 28 October 2003, no. 38223/97, §43 (included as a summary in this publication)

44 *Ramkovski v. the Former Yugoslav Republic of Macedonia*, judgment of 8 February 2018, no. 33566/11, §53

45 *Oravec v. Croatia*, judgment of 11 July 2017, no. 51249/11, §§49-61.

46 *Giulia Manzoni v. Italy*, judgment of 1 July 1997, no. 19218/91, §25

to serve the principles of Article 5 and not the other way around. In particular, administrative formalities connected with release cannot justify a delay of more than a few hours.[47] However, clerical errors in the arrest warrant or detention order that are later corrected by a judicial order are not sufficient so as to constitute a violation of Article 5 § 1.[48]

As such, there are a range of factors to be considered when assessing the lawfulness of all deprivations of liberty. In addition, there are a number of specific requirements that must be met relating to each authorised deprivation of liberty in Article 5 § 1 (a)-(f).

(4) AUTHORISED DEPRIVATIONS OF LIBERTY

To be compliant with Article 5, the detention of a person must fall within one of the exceptions listed in paragraph 1. As noted above, the list of exceptions to the presumption of liberty set out in Article 5 § 1 is wholly exhaustive.[49] That is not to say that the exceptions are exclusive of each other. Detention may fall within more than one category.[50] Each of the six exceptions is analysed below.

(i) Detention after conviction

Article 5 § 1

... 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*

In order to understand how this provision operates in practice, it is important to define both "conviction" and "competent court". For the purposes of Article

47 *Quinn v. France*, judgment of 22 March 1995, no. 18580/91, §§39-43 (included as a summary in this publication)

48 *Douiyeb v. the Netherlands*, Grand Chamber judgment of 4 August 1999, no. 31464/96, §52

49 *Frroku v. Albania*, judgment of 18 September 2018, no. 47403/15, §52 (included as a summary in this publication), see also *Rooman v. Belgium*, Grand Chamber judgment of 31 January 2019, no. 18052/11, § 190, and the references therein (included as a summary in this publication)

50 *Louled Massoud v. Malta*, judgment of 27 July 2010, no. 24340/08 (included as a summary in this publication)

5 § 1 (a), a conviction requires both a finding of guilt and the imposition of a penalty or other measure involving the deprivation of liberty.[51] Matters of appropriate sentencing fall in principle outside the scope of the Convention. It is not the role of the Court to decide whether the period of detention imposed for a particular offence is appropriate.

The term "court" does not necessarily have to be a court of law of the classic kind integrated within the standard judicial machinery of the country. In the context of Article 5, it denotes bodies which exhibit not only common fundamental features, of which the most important is independence of the executive and of the other parties to the case, but also the guarantees of a judicial procedure.[52] A Parole Board, an independent executive public body that carries out risk assessments on prisoners to determine whether they can be safely released into the community, has been considered a court for the purpose of Article 5 § 1 (a).

Under Article 5 § 1 (a), the relevant time period starts from the day a charge is determined, even if only by a court of first instance and even if there is the possibility of an appeal.[53] Prior to the charge being determined, detention would fall under Article 5 § 1 (c). Detention must follow a conviction, not only in time but in justification. There must be a sufficient causal link between the conviction and the deprivation of liberty at issue.[54] It is possible that over time the causal link becomes weaker and a detention that was lawful at the outset becomes arbitrary and therefore unlawful for the purposes of Article 5 § 1.

Preventive detention beyond a prison sentence can also constitute an individual's detention "after conviction by a competent court" and consequently fall to be considered under Article 5 § 1 (a). Preventive detention is not fixed with regard to an offender's personal guilt, but with regard to the danger he presents to the public.[55] This is not detention as part of a penalty but is another

51 *James, Wells and Lee v. the United Kingdom*, judgment of 18 September 2012, nos. 25119/09, 57715/09 and 57877/09, §189

52 *Weeks v. the United Kingdom*, judgment of 2 March 1987, no. 9787/82, §61

53 *Grubić v. Croatia*, judgment of 30 October 2012, no. 5384/11, §34 (included as a summary in this publication)

54 *Del Río Prado v. Spain*, Grand Chamber judgment of 21 October 2013, no. 42750/09, §124 (included as a summary in this publication)

55 *M v. Germany*, judgment of 17 December 2019, no. 19359/04, §96

"measure involving deprivation of liberty".[56] However, a decision not to release a detainee may become inconsistent with the objectives of the sentencing court's detention order if the person concerned continued to be detained on the grounds of a risk that he or she would reoffend where that person is deprived of the necessary means, such as therapy, to demonstrate that he or she is no longer dangerous.[57]

It should be noted that Article 5 § 1 (a) also applies where individuals are detained in psychiatric facilities after conviction.[58] However, it does not apply to such cases following acquittal.[59] Therefore, "conviction by a competent court" has a wider definition than is initially apparent from the wording of the provision. Article 5 § 1 (a) covers not only prison sentences following criminal convictions but also preventive detention beyond a prison sentence and detention in psychiatric facilities following a criminal conviction.

(ii) Detention for non-compliance with a court order/legal obligation

Article 5 § 1

... No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

b) *the lawful arrest or detention of a person for noncompliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law*

Article 5 § 1 (b) can be split into two limbs; non-compliance with a court order and fulfilment of an obligation prescribed by law. Under the first limb, it is presumed: 1) that there is a court order; and 2) that the individual arrested or detained had an opportunity to comply with that court order and has failed to do so.[60] An individual cannot be accountable for not complying with an order if he or she was never informed of it. In addition, there must be a proportionality assessment to ensure a fair balance is struck between the importance of securing

56 *Ruslan Yakovenko v. Russia*, judgment of 4 June 2015, no. 5425/11, §51

57 *Klinkenbuss v. Germany*, judgment of 25 February 2016, no. 53157/11, §47

58 *Klinkenbuss v. Germany*, judgment of 25 February 2016, no. 53157/11, §49

59 *Luberti v. Italy*, judgment of 23 February 1984, no. 9019/80, §25

60 *Beiere v. Latvia*, judgment of 29 November 2011, no. 30954/05, §49

compliance with a lawful court order and the importance of the right to liberty. In this assessment, the Court will take into account the purpose of the order; the feasibility of compliance with the order; and the duration of the detention.[61]

Examples of orders to which the first limb of Article 5 § 1 (b) has been applied include:

- Failure to pay a court fine[62]
- Breach of bail conditions[63]
- Refusal to undergo a medical examination[64]
- Failure to observe a residence restriction[65]

The second limb of Article 5 § 1 (b) allows for detention only to "secure the fulfilment" of any obligation prescribed by law. As soon as that obligation has been fulfilled, the basis for detention under this provision ceases to exist.[66]

The obligation must be of a specific and concrete character.[67] For criminal law, an obligation can only be specific and concrete if the place and time of the imminent commission of the offence and potential victims have been sufficiently specified. If the obligation is to refrain from doing something, it is necessary that the individual has been made aware of the specific act which he or she must refrain from committing, and that the individual has shown himself or herself not to be willing to so refrain.[68]

An arrest is only acceptable under the Convention if the "obligation prescribed by law" cannot be fulfilled by milder means.[69] A proportionality assessment is required

61 *Gatt v. Malta*, judgment of 27 July 2010, no. 28221/08, §50

62 *Velinov v. the Former Yugoslav Republic of Macedonia*, judgment of 19 September 2013, no. 16880/08 (included as a summary in this publication)

63 *Gatt v. Malta*, judgment of 27 July 2010, no. 28221/08

64 *X v. Germany*, judgment of 10 December 1975, no. 6659/74 (mental health), *X v. Austria*, judgment of 13 December 1979, no. 8278/78 (blood test)

65 *Freda v Italy*, judgment of 7 October 1980, no. 8916 /80

66 *S., V, and A. v. Denmark*, Grand Chamber judgment of 22 October 2018, nos. 35553/12, 36678/12 and 36711/12, §81 (included as a summary in this publication)

67 *Ciulla v. Italy*, judgment of 22 February 1989, no. 11152/84, §36

68 *Ostendorf v. Germany*, judgment of 7 March 2013, no. 15598/08, §94 (included as a summary in this publication)

69 *Khodorkovskiy v. Russia*, judgment of 31 May 2011, no. 5829/04, §136, and *Enhorn v. Sweden*, judgment of 25 January 2005, no. 56529/00 (included as a summary in this publication)

once again. Proportionality requires a balance to be struck between the importance in a democratic society of securing the immediate fulfilment of the obligation in question and the importance of the right to liberty.[70] In this proportionality assessment the Court will consider the object and purpose of the legislation, the characteristics of the individual being detained and the length of detention.[71]

Examples of obligations to which the second limb of Article 5 § 1 (b) has been applied include:

- To submit to a security check when entering a country[72]
- To undergo a psychiatric examination[73]
- To appear for questioning at a police station[74]
- To stay in a designated locality[75]

(iii) Detention on remand or to prevent the commission of an offence

Article 5 § 1

... No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

c) *(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*

There are three alternative bases for arrest or detention under Article 5 § 1 (c). The first basis, "on reasonable suspicion of having committed an offence", is only relevant in the context of criminal proceedings.[76]

70 *Saadi v. the United Kingdom*, Grand Chamber judgment of 29 January 2008, no. 13229/03, §70

71 *S., V, and A. v. Denmark*, Grand Chamber judgment of 22 October 2018, nos. 35553/12, 36678/12 and 36711/12, §75 (included as a summary in this publication)

72 *McVeigh and Others v. the United Kingdom*, judgment of 18 March 1981, nos. 8022/77, 8025/77 and 8027/77

73 *Nowicka v. Poland*, judgment of 3 December 2002, no. 30218/96

74 *Iliya Stefanov v. Bulgaria*, judgment of 22 May 2008, no. 65755/01

75 *Ciulla v Italy*, judgment of 22 February 1989, no. 11182/84

76 *Ječius v. Lithuania*, judgment of 31 July 2000, no. 34578/97, §50

The second basis of the provision "when it is reasonably considered necessary to prevent his committing an offence" does not permit a policy of general prevention – rather, it gives States a way of preventing a specific offence, as regards the place and time of its commission and its victims. Authorities must demonstrate that the individual would in all likelihood have been involved in the concrete and specific offence, had its commission not been prevented by detention.[77] This second aspect provides a distinct ground for detention – different to "a reasonable suspicion of his having committed an offence" - and thus applies to preventive detention outside of criminal proceedings.[78] The third and final basis is detention to prevent a person fleeing after having committed an offence. However, there are no judgments of substance in relation to this ground.

It should be noted that under all three bases, "offence" has an autonomous meaning under the Convention, identical to "criminal offence" under Article 6, the right to a fair trial. The classification of the offence under national law is one factor to be taken into account. The nature of the proceedings and severity of the potential penalty will also be considered.[79]

Article 5 § 1 (c) does not presuppose that the police have sufficient evidence to bring charges at the time of arrest or while the individual is in custody.[80] The object of questioning during detention under 5 § 1 (c) is to further the criminal investigation by way of confirming or dispelling the concrete suspicion grounding the arrest. The "purpose" requirement must be applied flexibly so as not to prolong detention.

Detention must be a proportionate measure to achieve the stated aim. Authorities should demonstrate the detention is necessary in relation to one of the three bases. Measures less severe than detention have to be considered and found insufficient.[81] The offence in question must be a serious offence, entailing physical danger or significant material damage and detention should cease as soon as the risk has passed.[82]

77 *S., V, and A. v. Denmark*, Grand Chamber judgment of 22 October 2018, nos. 35553/12, 36678/12 and 36711/12, §§89+91 (included as a summary in this publication)

78 *S., V, and A. v. Denmark*, Grand Chamber judgment of 22 October 2018, nos. 35553/12, 36678/12 and 36711/12, §§114-116 (concerning detention to prevent spectator violence) (included as a summary in this publication)

79 *Benham v. the United Kingdom*, judgment of 10 June 1996, no. 19380/92, §56

80 *Petkov and Profirov v. Bulgaria*, judgment of 24 June 2014, nos. 50027/08 and 50781/09, §52

81 *Ladent v. Poland*, judgment of 18 March 2008, no. 11036/03, §55

82 *S., V, and A. v. Denmark*, Grand Chamber judgment of 22 October 2018, nos. 35553/12, 36678/12 and

With regard to proportionality, it should be noted that the presumption of liberty set out in Article 5 § 1 means that where an individual's detention on remand is being considered, there should be a presumption of bail. There is a clear link between the presumption of bail and the presumption of innocence.[83] An individual should not be assumed to be guilty and should not be detained solely on this basis.

The "reasonableness" of the suspicion on which an arrest must be based forms an essential part of the safeguard laid down in Article 5 § 1 (c). The Court will require evidence of facts or information which would satisfy an objective observer that the individual may have committed an offence,[84] and will look at all the circumstances. The threshold for assessing a suspicion need not be the same as that needed to justify a conviction or the bringing of a charge, which comes at a later stage of the process of criminal investigation.[85]

In practice cases before the Court most commonly relate to the first of the three limbs, detention "on reasonable suspicion of having committed an offence". It is common in these Article 5 § 1 (c) cases for there also to be complaints relating to Article 5 § 3 and the right to be brought promptly before a judge.

(iv) Detention of a minor

Article 5 § 1

... No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

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*

This provision permits minors to be deprived of their liberty in circumstances where adults would not be so deprived. The UN Convention on the Rights of the Child is an international treaty of particular relevance with regard to the detention

36711/12, §161 (included as a summary in this publication)

83 See *Matijašević v. Serbia*, judgment of 19 September 2006, no. 23037/04

84 *Ilgar Mamadov v. Azerbaijan*, judgment of 22 May 2014, no. 15172/13, §88

85 *Lazoroski v. the Former Yugoslav Republic of Macedonia*, judgment of 8 October 2009, no. 4922/04, §48

of minors and which should be taken into account when interpreting Article 5 § 1 (d). Article 3 of the UN Convention provides an additional safeguard against the arbitrary detention of minors under Article 5 § 1 (d) (or any other provision which authorises such detention). It states that the best interests of the child shall be a primary consideration in all actions concerning children. Consequently, a child should only be detained when it is in their best interests. A minor is anyone under the age of 18.[86] Article 5 § 1 (d) contains examples of circumstances in which minors might be detained. This is not an exhaustive list.[87]

The first limb of Article 5 § 1 (d) permits deprivation of a minor's liberty in his or her interests, irrespective of whether he or she is suspected of having committed a crime or is simply a child at risk.[88] "Educational supervision" is not simply teaching at school, but includes many aspects of the exercise by an authority of parental rights for the benefit and protection of the person concerned.[89]

A child placed under educational supervision must, however, benefit from schooling even if in temporary detention in order to avoid gaps in their education.[90] Behaviour correction is not classed as educational supervision and is not permitted under Article 5 § 1 (d).[91] In terms of what a State must provide in respect of the content of the education, a margin of appreciation will be afforded.[92] This means that the Court will defer to national authorities to a greater degree as it considers this to be a subject on which they are best placed to decide. An interim custody measure may be used as a preliminary to a regime of educational supervision, but the imprisonment must be speedily followed by actual application of such a regime.[93]

86 *Koniarska v. the United Kingdom*, decision of 12 October 2000, no. 33670/96

87 *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, judgment of 12 October 2006, no. 13178/03, §100

88 *D.L. v. Bulgaria*, judgment of 19 May 2016, no. 7472/14, §71

89 *Ichin and Others v. Ukraine*, judgment of 21 December 2010, nos.28189/04 and 28192/04, §39, see e.g. *D.G. v. Ireland*, judgment of 16 May 2002, no. 39474/98, §80 (voluntary educational facilities in a penal detention centre constituted a breach of Article 5 § 1 (d)), *Koniarska v. the United Kingdom*, decision of 12 October 2000, no. 33670/96 (no breach of Article 5 in relation to a specialist centre for seriously disturbed young people that took a multidisciplinary approach)

90 *Blokhin v. Russia*, Grand Chamber judgment of 23 March 2016, no. 47152/06, §170 (included as a summary in this publication)

91 *Blokhin v. Russia*, Grand Chamber judgment of 23 March 2016, no. 47152/06, §171 (included as a summary in this publication)

92 *D.L. v. Bulgaria*, judgment of 19 May 2016, no. 7472/14, §77

93 *Bouamar v. Belgium*, judgment of 29 February 1988, no. 9106/80, §50 (included as a summary in this publication)

Placing a minor in a closed institution must also be proportionate to the aim of "educational supervision" so must be a measure of last resort, taking into account the best interests of the child, intended to prevent serious risks for the child's development.[94]

In respect of bringing a minor before a competent legal authority, Article 5 § 1 (d) covers the situation of detention of a minor before civil or administrative proceedings (criminal proceedings to be covered by Article 5 § 1 (c)).

(v) Detention for medical or social reasons

Article 5 § 1

... No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

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*

Article 5 § 1 (e) refers to persons who may be deprived of their liberty to be given medical treatment or due to social policy considerations, or on both grounds. Such individuals may be a danger to public safety, but it may be that their own interests necessitate detention.[95] The text of the provision identifies three categories of person.

The first category of persons referred to in Article 5 § 1 (e) is those who may be need to be held in quarantine to prevent the spread of infectious diseases. The criteria to be applied to detention under these circumstances are:[96]

- whether the spreading of the infectious disease is dangerous to public health or safety; and
- whether the detention of a person being held in quarantine is the last resort in order to prevent the spreading of the disease, because less

94 *D.L. v. Bulgaria*, judgment of 19 May 2016, no. 7472/14, §74

95 *Enhorn v. Sweden*, judgment of 25 January 2005, no. 56529/00, §43 (included as a summary in this publication)

96 *Enhorn v. Sweden*, judgment of 25 January 2005, no. 56529/00, §44 (included as a summary in this publication)

severe measures have been considered and found insufficient to safeguard the public interest.

Given the evolving nature of both medicine and social attitudes, there is no precise definition of the second category of persons to which Article 5 § 1 (e) refers, those of unsound mind. It is not, however, sufficient that an individual's views or behaviour deviate from established norms.[97] A mental disorder must be so serious as to necessitate treatment in an institution appropriate for mental health patients.[98] It is not a requirement that the individual suffers from a condition which would be such as to exclude or diminish his or her criminal responsibility under domestic criminal law when committing the offence. In order for confinement to be necessary, an individual must either need therapy, medication or other clinical treatment to cure or alleviate his condition or need control and supervision to prevent harm to himself, or to others.[99]

In deciding whether an individual should be detained as a "person of unsound mind" the Court gives certain deference to national authorities. It will not substitute the decisions of States on how to apply Convention rights to concrete factual circumstances. The Court's task is to review under the Convention the decisions of those authorities. However, in order to defer to the judgment of domestic authorities, the Court must be satisfied they have assessed and scrutinised the pertinent issues thoroughly so the detained persons enjoy effective procedural safeguards against arbitrary detention in practice.[100]

Three minimum conditions must be satisfied for an individual to be deprived of liberty for being of "unsound mind":[101]

- the individual must be reliably shown, by objective medical expertise, to be of unsound mind (unless emergency detention is required);
- the individual's mental disorder must be of a kind to warrant compulsory confinement; and
- the mental disorder, verified by objective medical evidence, must persist throughout the period of detention.

97 *Rakevich v Russia*, judgment of 28 October 2003, no. 58973/00, §26

98 *Ilnseher v. Germany*, Grand Chamber judgment of 4 December 2018, nos. 10211/12 and 27505/14, §129

99 *Ilnseher v. Germany*, Grand Chamber judgment of 4 December 2018, nos. 10211/12 and 27505/14, §133

100 *MS v. Croatia (No. 2)*, judgment of 19 February 2015, no. 75450/12, §§145-146

101 *MS v. Croatia (No. 2)*, judgment of 19 February 2015, no. 75450/12, §143

The opinion of a medical expert is vital.[102] The report must be sufficiently recent to enable the competent authorities to assess the clinical condition of the person concerned at the time when the lawfulness of the detention is examined.[103] Where an individual refuses to consent to appear for an examination, an assessment by a medical expert at least of the case file must be sought, otherwise it cannot be maintained that the person has been shown to be of unsound mind.[104]

The relevant time at which an individual must be established as being of unsound mind is the date of the adoption of the measure depriving the individual of liberty.[105] The place of detention for persons of unsound mind must be a hospital, clinic or other appropriate institution authorised for detention of such individuals.[106] As part of their detention, suitable therapy must be given to the individual who is deprived, aimed at curing or alleviating their mental health condition.[107]

While the guarantees required in civil or criminal litigation by Article 6 § 1 are not all necessary, an individual being detained under Article 5 § 1 (e) must have access to a court and the opportunity to be heard, either in person or through representation. Thus, an individual confined in a psychiatric institution should, unless there are special circumstances, receive legal assistance in the proceedings relating to the continuation, suspension or termination of his or her confinement.[108]

In respect of the detention of the third category of individuals mentioned, those with alcoholism or drug addiction, Article 5 § 1 (e) is not limited to persons in a clinical state of alcoholism. Those whose conduct under the influence of alcohol poses a threat to themselves or others can be taken into custody for the protection of their own interests or others.[109] However, in the absence of such a threat and in the interests of protecting against arbitrary detention, consideration must be given to alternatives to deprivations of liberty.[110]

102 *Ruiz Rivera v. Switzerland*, judgment of 18 February 2014, no. 8300/06, §59

103 *Kadusic v. Switzerland*, judgment of 9 January 2018, no. 43977/13, §44

104 *Constancia v. the Netherlands*, decision of 3 March 2015, no. 73560/12, §26

105 *Ilnseher v. Germany*, Grand Chamber judgment of 4 December 2018, nos. 10211/12 and 27505/14, §134

106 *Hadzic and Suljic v. Bosnia and Herzegovina*, judgment of 7 June 2011, nos. 39446/06 and 33849/08, §40

107 *Rooman v. Belgium*, Grand Chamber judgment of 31 January 2019, no. 18052/11, §208 (included as a summary in this publication)

108 *MS v. Croatia (No. 2)*, judgment of 19 February 2015, no. 75450/12, §§152-153

109 *Hilda Hafsteinsdottir v. Iceland*, judgment of 8 June 2004, no. 40905/98, §42

110 *Witold Litwa v. Poland*, judgment of 4 April 2000, no. 26629/95, §79 (included as a summary in this

(vi) Immigration detention

Article 5 § 1

... No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

f) *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*

Article 5 § 1 (f) has two limbs. Firstly, it permits the detention of an asylum seeker or other immigrant prior to the State's grant of authorisation to enter. Secondly, it permits the detention of those held with a view to deportation or extradition. The principle that detention must be compatible with the overall purpose of Article 5, to safeguard the right to liberty and ensure no one is dispossessed of his or her liberty in an arbitrary fashion, applies equally to both limbs.[111] Freedom from arbitrariness under both limbs of Article 5 § 1 (f) means:[112]

- the detention must be carried out in good faith
- the detention must be closely connected to the purpose of preventing unauthorised entry of the person to the country or in view of the deportation or extradition proceedings;
- the place and conditions of detention should be appropriate (bearing in mind that the measure is applicable not to those who have committed criminal offences but to aliens who, often fearing for their lives, have fled their own country);
- the length of detention should not exceed what is reasonably required for the purpose of the detention.

Article 5 § 1 (f) permits the State to control the liberty of aliens within the context of immigration. It does not demand that the detention be reasonably considered necessary, for example to prevent the individual from committing an offence or fleeing.[113] It offers a different level of protection from Article 5 §

publication)

111 *Saadi v. the United Kingdom*, Grand Chamber judgment of 29 January 2008, no. 13229/03, §66

112 *Saadi v. the United Kingdom*, Grand Chamber judgment of 29 January 2008, no. 13229/03, §§73-74

113 *Al Husin v. Bosnia and Herzegovina (No.2)*, judgment of 25 June 2019, no. 10112/16, §97

1 (c). However, any deprivation of liberty under the second limb will only be justified for as long as deportation or extradition proceedings are in progress.[114] If such proceedings are not carried out with due diligence, the detention will cease to be permissible.[115] In addition, the specific circumstances of each individual must be taken into consideration, and any particular vulnerability such as health or age should also be considered.[116]

The question as to when the first limb of Article 5 § 1 (f) ceases to apply, because the individual has been granted formal authorisation to enter or stay, is largely dependent on national law.[117]

Under the second limb of Article 5 § 1 (f), domestic authorities have an obligation to consider whether removal is a realistic prospect and whether detention with a view to removal is from the outset, or continues to be, justified.[118] The wording of the provision sets out that action must be taken "with a view to deportation or extradition". Since there is no requirement that the detention is necessary, it is immaterial whether the underlying decision to expel can be justified under national or Convention law.[119]

Detention with a view to expulsion should not be punitive. It should be accompanied by appropriate safeguards.[120] In its assessment of whether domestic law provides sufficient procedural safeguards against arbitrariness, the Court may take into account the existence or absence of time-limits for detention as well as the availability of a judicial remedy. However, Article 5 § 1 (f) does not require States to establish a maximum period of detention pending deportation or automatic judicial review of immigration detention.[121] However, for EU countries a maximum period of six months is set out in the Returns Directive.[122]

114 *Louled Massoud v. Malta*, judgment of 27 July 2010, no. 24340/08, §§ 63-74 (included as a summary in this publication)

115 *Al Hamdani v. Bosnia and Herzegovina*, judgment of 7 February 2012, no. 31098/10, §57 (included as a summary in this publication)

116 *Thimothawes v. Belgium*, judgment of 4 April 2017, no. 39061/11, §73

117 *Suso Musa v. Malta*, judgment of 23 July 2013, no. 42337/12, §97 (included as a summary in this publication)

118 *Al Husin v. Bosnia and Herzegovina (No.2)*, judgment of 25 June 2019, no. 10112/16, §98

119 *Chahal v. the United Kingdom*, Grand Chamber judgment of 15 November 1996, no. 22414/93, §112

120 *Azimov v. Russia*, judgment of 18 April 2013, no. 67474/11, §172

121 *J.N. v. the United Kingdom*, judgment of 19 May 2015, no. 37289/12, §§83-86

122 Article 15(5) Directive 2008/115/EC

Interim measures following an indication by the Court that it would be desirable not to return an individual to a particular country, although they prevent deportation, do not render the detention unlawful as long as expulsion proceedings are still pending and being pursued with due diligence and the duration of detention is not unreasonable.[123]

In cases involving children, the deprivation of liberty must be necessary to fulfil the aim pursued, namely to secure the family's removal. The presence in a detention centre of a child accompanying parents will comply with Article 5 § 1 (f) only where national authorities can establish that this measure of last resort has been taken after actual verification that no other measure involving a lesser restriction could be put in place.[124]

The Convention contains no provisions concerning the circumstances in which extradition may be granted, or the procedure to be followed before extradition may be granted. Subject to it being the result of cooperation between the States concerned, and provided that the legal basis for the order for the fugitive's arrest is an arrest warrant issued by the authorities of the fugitive's State of origin, even an atypical extradition cannot as such be regarded as contrary to the Convention.[125]

Most cases under Article 5 § 1 (f) arise in relation to deportations as opposed to extraditions. The most controversial cases are those concerning the treatment of asylum seekers.[126] It is important to remember that although there is no requirement for detention under Article 5 § 1 (f) to be necessary, there are still a number of safeguards against arbitrariness that must be in place to ensure compliance with the Convention.

123 *Yoh-Ekale Mwanje v. Belgium*, judgment of 20 December 2011, no. 10486/10, §120

124 *A.B. and Others v. France*, judgment of 12 July 2016, no. 11593/12, §§120 + 123

125 *Öcalan v. Turkey*, Grand Chamber judgment of 12 May 2005, no. 46221/99, §86

126 See e.g. *Ilias and Ahmed v. Hungary*, Grand Chamber judgment of 21 November 2019, no. 47287/15, §248 (included as a summary in this publication)

(5) GUARANTEES FOR PERSONS DEPRIVED OF LIBERTY

Article 5 contains various guarantees for those who have been deprived of their liberty under one of the exceptions set out in Article 5 § 1 (a)-(f). Not all of the guarantees are relevant to every exception. These guarantees apply in addition to the general requirement discussed above that all deprivations of liberty are lawful both procedurally and substantively.

(i) Information on the reasons for arrest

Article 5 § 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.

The words used in Article 5 § 2 have an autonomous meaning and should be interpreted in accordance with the aim of Article 5, which is to protect everyone from arbitrary deprivations of liberty. "Arrest" extends beyond criminal law measures. In addition, there are no grounds for excluding from the scope of Article 5 § 2 persons who have been detained rather than arrested.[127] Consequently, the guarantees of Article 5 § 2 apply in relation to deprivations of liberty authorised under Article 5 § 1 (a)-(f).

Article 5 § 2 contains the elementary safeguard that any person arrested must know why he is being deprived of his liberty. Any person arrested must be told in simple non-technical language the essential factual and legal grounds for the arrest so that the individual can know whether it is appropriate to apply to a court to challenge its lawfulness.[128]

In terms of reasons, these must be provided either to the individual or to his representative. Importantly, where the person is incapable of receiving the information, the relevant details must be given to those persons who represent his interests such as a lawyer or guardian.[129] The reasons for the arrest may

127 *Van der Leer v. the Netherlands*, judgment of 21 February 1990, no. 11509/85, §§27-28

128 *Velinov v. the Former Yugoslav Republic of Macedonia*, judgment of 19 September 2013, no. 16880/08, §63 (included as a summary in this publication)

129 *Z.H. v. Hungary*, judgment of 8 November 2012, no. 28973/11, §§42-43

be provided or become apparent in the course of post-arrest interrogations or questioning.[130] They need not constitute a complete list of charges held against the arrested individual.[131]

In addition, the individual must be made aware of the reasons for his or her arrest in a language he or she understands. Requests for translation should be formulated with meticulousness and precision by the authorities.[132]

Therefore, Article 5 § 2 protects against arbitrary detention by enshrining in law the basic requirement to communicate with the detained individual the reasons for their detention.

(ii) Right to be brought promptly before a judge

Article 5 § 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...

Article 5 § 3 and Article 5 § 4 are discrete provisions which expressly guarantee judicial review. The opening part of Article 5 § 3 is aimed at ensuring prompt and automatic judicial control of police or administrative detention ordered in accordance with the provisions of Article 5 § 1 (c). Article 5 § 3 does not provide for any exceptions to this requirement, not even where there has been prior judicial involvement.[133]

Judicial control of detention must be automatic and cannot be made to depend on an application by the detained person.[134] A person subjected to ill-treatment may well be incapable of lodging an application asking for a judge to review the detention, and the same might also be true of other vulnerable categories of arrested person, such as the mentally frail or those ignorant of the language of the judicial officer.

130 *Fox, Campbell and Hartley v. the United Kingdom*, judgment of 30 August 1990, nos. 12244/86, 12245/86 and 12383/86, §41

131 *Bordovskiy v. Russia*, judgment of 8 February 2005, no. 49491/99, §56

132 *Shamayev and Others v. Georgia and Russia*, judgment of 12 April 2005, no. 36378/02, §425

133 *Bergmann v. Estonia*, judgment of 29 May 2008, no. 38241/04, §45

134 *McKay v. the United Kingdom*, Grand Chamber judgment of 3 October 2006, no. 543/03, §34

In relation to the requirement of promptness, release at a time before prompt judicial control in the context of preventive detention should be a matter of hours rather than days.[135] The risk of ill-treatment is at its greatest in the early stages of detention. Judicial control provides an effective safeguard against this and against the abuse of powers on the part of law enforcement officers.[136] Periods in excess of four days have been found, prima facie, to be too long.[137] Shorter periods can also breach the promptness requirement if there is no special reason for not bringing the arrested individual before the judge sooner.[138]

The expression "judge or other officer authorised by law to exercise judicial power" bears the same meaning as "competent legal authority" under Article 5 § 1 (c).[139] The definition includes officials in public prosecutors' departments as well as judges sitting in court. However, where the judicial officer who orders the detention is entitled to intervene in the subsequent criminal proceedings as a representative of the prosecuting authority, his impartiality can be "open to doubt".[140]

In respect of independence, it is important for officers to be seen to be independent and impartial, as well as in fact being so. If it appears that an officer may later intervene in subsequent criminal proceedings on behalf of the prosecutor, his independence and impartiality may be doubted.[141] Thus, in reality, the judicial officer will have to be a court officer or a judge.

In relation to the hearing itself, there are procedural and substantive requirements. Procedurally, the officer has an obligation to hear the individual brought before him in person, before taking decisions. It is important that the individual themselves is brought before the judge and not just their case. While a lawyer's presence at the hearing has not been held necessary, exclusion of a lawyer may adversely affect the individual's ability to present

135 *S., V, and A. v. Denmark*, Grand Chamber judgment of 22 October 2018, nos. 35553/12, 36678/12 and 36711/12, §§133-134 (included as a summary in this publication)

136 *Ladent v. Poland*, judgment of 18 March 2008, no. 11036/03, §72

137 *Oral and Atabay v. Turkey*, judgment of 23 June 2009, no. 39686/02, §43

138 *Gutsanovi v. Bulgaria*, judgment of 15 October 2013, no. 34529/10, §§154-159

139 *Schiesser v. Switzerland*, judgment of 4 December 1979, no. 7710/76, §29

140 *Huber v. Switzerland*, judgment of 23 October 1990, no. 12794/87, §43

141 *Nikolova v. Bulgaria*, Grand Chamber judgment of 25 March 1999, no. 31195/96, §49 (included as a summary in this publication)

his case.[142] Substantively, the officer must review the circumstances for and against detention and decide whether there are reasons to justify detention, by reference to legal criteria.[143] If there are no reasons to justify detention, the officer must have the power to make a binding order for the individual's release.[144]

As highlighted above, it is crucial that the first element of Article 5 § 3, to be brought promptly before a judge, applies to all incidents of detention on remand or detention to prevent the commission of an offence without exception.

(iii) Right to a trial within a reasonable time or to be released pending trial

Article 5 § 3

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

Until conviction, an individual must be presumed innocent. This is why it is important that authorities either bring an individual to trial within a reasonable time or release him or her pending trial. A person charged with an offence in line with Article 5 § 1 (c) must always be released pending trial unless the State can show that there are "relevant and sufficient" reasons to justify detention and continuing the detention.[145]

When determining the length of detention pending trial under Article 5 § 3, the relevant period to consider begins on the day the individual is taken into custody and ends on the day on which the charge is determined by a court of first instance.[146] The question of whether the period of time is reasonable depends on the facts of each case, and a global evaluation of the accumulated

142 *Lebedev v. Russia*, judgment of 25 October 2007, no. 4493/04, §§83-91

143 *Aquilina v. Malta*, Grand Chamber judgment of 29 April 1999, no. 25642/94, §47

144 *Assenov and Others v. Bulgaria*, judgment of 28 October 1998, no. 24760/94, §146

145 *Osmanović v. Croatia*, judgment of 6 November 2012, no. 67604/10, §32

146 *Bigović v. Montenegro*, judgment of 19 March 2019, no. 48343/16, §199 (included as a summary in this publication)

periods of detention will be undertaken.[147] Continued detention will be justified only if there are specific indications of a genuine requirement of public interest, notwithstanding the presumption of innocence and the importance of the respect for individual liberty.[148] Justification is required for any period of detention, no matter how short, and must be convincingly demonstrated.[149] An evaluation of the necessity of the detention needs to be carried out at each review. Where a case is not ready for trial, detention cannot be extended without the authorities demonstrating that the extension is necessary. It is not sufficient that the initial detention on remand was considered necessary.

The guarantee provided for by Article 5 § 3 is designed to ensure the appearance of the accused at the hearing. When deciding whether an individual should be released or detained, authorities are obliged to consider alternative measures of ensuring the individual's appearance at trial.[150] The amount of any bail must be assessed principally by reference to the accused and their assets.[151] Thus, the authorities must take as much care in fixing appropriate bail as in deciding whether or not the individual's continued detention is indispensable.

Arguments for and against release of an individual should not be general and abstract. They must contain references to the specific facts of the case and to the individual's personal circumstances.[152] Four reasons have been found in the case law to justify the refusal of bail:[153]

1. the risk that the accused will fail to appear for trial;
2. the risk that the accused, if released, would take action to prejudice the administration of justice;
3. the risk that the accused would commit further offences; and
4. the risk that the accused would cause public disorder.

147 *Bigović v. Montenegro*, judgment of 19 March 2019, no. 48343/16, §200 (included as a summary in this publication)

148 *Grujović v. Serbia*, judgment of 21 July 2015, no. 25381/12, §45

149 *Idalov v. Russia*, Grand Chamber judgment of 22 May 2012, no. 5826/03, §140

150 *Nenad Kovačević v. Croatia*, judgment of 24 November 2015, no. 38415/13, §60

151 *Margaretić v. Croatia*, judgment of 5 June 2014, no. 16115/13, §92

152 *Bigović v. Montenegro*, judgment of 19 March 2019, no. 48343/16, §205 (included as a summary in this publication)

153 *Buzadji v. the Republic of Moldova*, Grand Chamber judgment of 5 July 2016, no. 23755/07, §88

Where these risks are asserted as reasons for refusing bail, authorities must provide clear, specific and substantiated reasons.[154] The detained individual does not have to justify their release. Rather, the authorities must justify ordering or prolonging detention. Automatic refusal of bail, by virtue of the law, without judicial control, will be incompatible with Article 5 § 3.[155] Inadequate reasoning for extending detention is an important issue in the Western Balkans.[156]

With regard in particular to the danger of an individual absconding, the Court has held that it cannot be gauged solely on the basis of the severity of the sentence risked.[157] 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. The risk of absconding has to be assessed in the light of factors relating to the person's character, morals, home, occupation, assets, family ties and all kinds of links with the country in which he is being prosecuted.[158] The expectation of a heavy sentence and the weight of evidence may be relevant but are not as such decisive, and the possibility of obtaining guarantees may have to be used to offset any risk.[159] Previous absconding is one factor to be taken into account but must still be considered alongside other factors.[160]

The risk of absconding necessarily decreases as the time spent in detention passes by, because the likelihood that the period spent in custody will be deducted from the prison sentence which the detainee may expect if convicted is likely to make the prospect of prison less daunting, reducing the temptation to flee.[161] Reference to a person's prior criminal record cannot suffice to justify refusal of release. Courts must compare the nature and degree of seriousness of previous convictions with the charges in the case before them.[162]

154 *Merabishvili v. Georgia*, Grand Chamber judgment of 28 November 2017, no. 72508/13, §222

155 *Piruzyan v. Armenia*, judgment of 26 June 2012, no. 33376/07, §105

156 *Orban v Croatia*, judgment of 19 December 2013, no. 56111/12, §62, *Bigović v Montenegro*, judgment of 19 March 2019, no. 48343/16, §213 (included as a summary in this publication), *Ramkovski v. the Former Yugoslav Republic of Macedonia*, judgment of 8 February 2018, no. 33566/11, §67

157 *Panchenko v. Russia*, judgment of 8 February 2005, no. 45100/98, §106

158 *Becciev v. Moldova*, judgment of 4 October 2010, no. 9190/03, §58

159 *Nenad Kovacević v. Croatia*, judgment of 24 November 2015, no. 38415/13, §59

160 *Bulatović v. Montenegro*, judgment of 22 July 2014, no. 67320/10, §142

161 *Bulatović v. Montenegro*, judgment of 22 July 2014, no. 67320/10, §142

162 *Miladinov and Others v. the Former Yugoslav Republic of Macedonia*, judgment of 24 April 2014, nos. 46398/09, 50570/09 and 50576/09, §56

With regard to the risk that the accused, if released, may take action to prejudice the administration of justice, there must be clear evidence that the accused will hinder the investigation for this justification to be accepted. The risk of pressure being brought to bear on witnesses can be accepted at the initial stages of the proceedings.[163] 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 these risks diminish with the passing of time, as inquiries are effected, statements taken and verifications carried out.[164]

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 that the danger be a plausible one and the measure appropriate, in light of the circumstances of the case and in particular the past history and the personality of the person concerned.[165]

In exceptional circumstances, considerations of social disturbance can be relied upon in justifying pre-trial detention. However, this will only be regarded as relevant and sufficient if it is based on facts capable of showing that the individual'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.[166]

In respect of the pre-trial detention of minors, this must only be used as a measure of last resort. Minors should be kept apart from adults.[167]

Therefore, the guarantees of Article 5 § 3 reinforce the presumption of liberty and the corresponding presumption of bail discussed in section 4 (i).

163 *Jarzyński v. Poland*, judgment of 4 October 2005, no. 15479/02, §43

164 *Clooth v. Belgium*, judgment of 12 December 1991, no. 12718/87, §42

165 *Clooth v. Belgium*, judgment of 12 December 1991, no. 12718/87, §40

166 *Perica Oreb v. Croatia*, judgment of 31 March 2013, no. 20824/09, §117

167 *Nart v. Turkey*, judgment of 6 May 2008, no. 20817/04, §31

(iv) Right to have the lawfulness of detention speedily examined by a court

Article 5 § 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.

Article 5 § 4 is the *habeas corpus* provision of the Convention. It provides detained persons the right to actively seek judicial review of their detention, irrespective of the reason for their detention under Article 5 § 1 (a)-(f).[168] *Habeas corpus* means that the person (*corpus*) and not just the file must appear before the judge. This way they are able to see if the detainee is fit and well. Article 5 § 4 secures for persons arrested or detained the right to have the lawfulness of their detention decided "speedily" by a court and have their release ordered if detention is not lawful. The arrested or detained person is entitled to a review of the lawfulness of detention in light not only of domestic law but also of the Convention. The fact that there has been no breach of Article 5 § 1 does not mean the Court will not carry out a review of compliance with Article 5 § 4. The provisions are separate.[169]

A remedy must be made available during a person's detention to allow that person to obtain speedy judicial review of the lawfulness of the detention, capable of leading, where appropriate, to his or her release. The existence of the remedy required by Article 5 § 4 must be sufficiently certain, not only in theory but in practice, failing which it will lack the accessibility and effectiveness required for the purposes of that provision.[170] The accessibility of a remedy implies, *inter alia*, that the circumstances voluntarily created by the authorities must be such as to afford applicants a realistic possibility of using the remedy.[171]

The court to which the detained has access must be a body of judicial character, with procedural guarantees, independent both of the executive and

168 *Čović v Bosnia and Herzegovina*, judgment of 3 October 2017, no. 61287/12, §29 (included as a summary in this publication)

169 *Douiyeb v. the Netherlands*, Grand Chamber judgment of 4 August 1999, no. 31464/96, §57

170 *Čović v Bosnia and Herzegovina*, judgment of 3 October 2017, no. 61287/12, §29

171 *Jović v. Croatia*, judgment of 13 October 2015, no. 45593/13, §30

of the parties to the case.[172] The court must provide guarantees appropriate to the kind of deprivation of liberty in question. In the case of an individual whose detention falls within the ambit of Article 5 § 1 (c), a hearing is required.[173]

Procedural guarantees must be respected. Proceedings should be adversarial and ensure equality of arms between the prosecutor and the detained persons.[174] In remand cases, the detainees must be given an opportunity to challenge the basis of allegations against them.[175] This may require the hearing of witness testimony. In addition, individuals should have access to legal assistance.[176]

The competent court has to examine not only compliance with the procedural requirements set out in domestic law but also the objective reasonableness of the suspicion grounding the arrest and the legitimacy of the purpose pursued by the arrest and the ensuing detention.[177] In terms of substantive guarantees, Article 5 § 4 does not impose an obligation on a judge examining an appeal against detention to address every argument contained in the appellant's submissions. However, its guarantees would be deprived of their substance if the judge, relying on domestic law, could treat as irrelevant or disregard concrete facts invoked by the detainee and capable of putting into doubt the existence of the conditions that are essential for the lawfulness of the deprivation of liberty.[178]

The question of whether the right to a speedy decision has been respected will be determined in light of the circumstances of each case.[179] Factors to take into account are:[180]

- the complexity of the proceedings;
- the conduct of both the authorities and the individual;

172 *Stephens v. Malta (No. 1)*, judgment of 21 April 2009, no. 11956/07, §95

173 *Miladinov and Others v. the Former Yugoslav Republic of Macedonia*, judgment of 24 April 2014, nos. 46398/09, 50570/09 and 50576/09, §63

174 *Miladinov and Others v. the Former Yugoslav Republic of Macedonia*, judgment of 24 April 2014, nos. 46398/09, 50570/09 and 50576/09, §64

175 *Turcan and Turcan v. Moldova*, judgment of 23 October 2007, no. 39835/05, §§67-70

176 *Černák v. Slovakia*, judgment of 17 December 2013, no. 36997/08, §78

177 *Sebalj v. Croatia*, judgment of 28 June 2011, no. 4429/09, §224

178 *Sebalj v. Croatia*, judgment of 28 June 2011, no. 4429/09, §229

179 *Delijorgji v. Albania*, judgment of 28 April 2015, no. 6858/11, §87

180 *Mooren v. Germany*, Grand Chamber judgment of 9 July 2009, no. 11364/03, §106 (included as a summary in this publication)

- what is at stake for the latter; and
- the specificities of the domestic procedure.

The starting point of the relevant period is the moment when the application for release is made/proceedings are instituted. It comes to an end when the final determination of the legality of the individual's detention is made.[181] The requirement of speediness is less stringent in proceedings before a court of appeal.[182] If there are proceedings over more than one level of jurisdiction, an overall assessment is made.[183] However, in all cases, the State must ensure proceedings are conducted as quickly as possible.[184]

If the length of time before a decision is taken is prima facie incompatible with the notion of speediness, the Court will look to the State to explain the reason for the delay or to put forward exceptional grounds to justify the lapse of time in question.[185] Excessive workloads and vacation periods cannot justify inactivity on the part of judicial authorities.[186]

Importantly, Article 5 § 4 allows an individual to challenge the lawfulness of their detention and is a distinct provision from Article 5 § 3. It is not a requirement that such a procedure is conducted in every case, as under Article 5 § 3. However, the individual does have the right to initiate these proceedings in every case.

(v) Right to compensation for unlawful detention

Article 5 § 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.

181 *Sanchez-Reisse v. Switzerland*, judgment of 21 October 1986, no. 9862/82, §54

182 *Abdulkhakov v. Russia*, judgment of 2 October 2012, no. 14743/11, §198

183 *Hutchison-Reid v. the United Kingdom*, judgment of 20 February 2003, no. 50272/99, §78

184 *Khlaifia and Others v. Italy*, Grand Chamber judgment of 15 December 2016, no. 16483/12, §131 (included as a summary in this publication)

185 *Musial v. Poland*, Grand Chamber judgment of 25 March 1999, no. 24557/94, §44 (included as a summary in this publication)

186 *E v. Norway*, judgment of 29 August 1980, no. 11701/85, §66

The right to compensation set forth in Article 5 § 5 presupposes that a violation of one of the other paragraphs has been established, either by a domestic authority or by the Court.[187] This right is directly enforceable before domestic courts.[188] The right to compensation relates primarily to financial compensation. It does not confer a right to secure the detained person's release, which is covered by Article 5 § 4. Compensation must be made available by the State both in theory and in practice. Article 5 § 5 encompasses a right not only to claim for pecuniary damage but also for distress, anxiety and frustration.[189]

As to the redress which is appropriate and sufficient to remedy a breach of a Convention right at national level, the Court has generally considered this to be dependent on all the circumstances of the case, having regard, in particular, to the nature of the Convention violation at stake.[190] Article 5 § 5 does not entitle the individual to a particular amount of compensation. The mere fact that the amount awarded by national authorities is lower than the award the Court would have made does not per se entail a violation.[191] However, negligible compensation or compensation wholly disproportionate to the seriousness of the violation will not comply.[192] Further, an award cannot be considerably lower than that awarded by the Court in similar cases.[193]

Thus, as well as setting out guarantees to prevent unlawful deprivations of liberty, Article 5 provides for a remedy in the event that these guarantees are not respected.

187 *N.C. v. Italy*, Grand Chamber judgment of 18 December 2002, no. 24952/94, §49

188 *Storck v. Germany*, judgment of 16 June 2005, no. 61603/00, §122

189 *Sahakyan v. Armenia*, judgment of 10 November 2015, no. 66256/11, §29

190 *Selami and Others v. the Former Yugoslav Republic of Macedonia*, judgment of 1 March 2018, no. 78241/13, §96

191 *Mehmet Hasan Altan v. Turkey*, judgment of 20 March 2018, no. 13237/17, §176

192 *Vasilevsky and Bogdanov v. Russia*, judgment of 10 July 2018, nos. 52241/14 and 74222/14, §22

193 *Ganea v. Moldova*, judgment of 17 May 2011, no. 2474/06, §30

(6) DEROGATIONS IN TIME OF NATIONAL EMERGENCY THREATENING THE LIFE OF THE NATION

Article 15 states:

Article 15

1. *In time of war or other public emergency threatening the life of the nation any High Contracting Party may take measures derogating from its obligations under this Convention 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.*
2. *No derogation from Article 2, except in respect of deaths resulting from lawful acts of war, or from Articles 3, 4 (paragraph 1) and 7 shall be made under this provision.*
3. *Any High Contracting Party availing itself of this right of derogation shall keep the Secretary General of the Council of Europe fully informed of the measures which it has taken and the reasons therefor. It shall also inform the Secretary General of the Council of Europe when such measures have ceased to operate and the provisions of the Convention are again being fully executed.*

If States consider that the permitted justifications inherent in Article 5 § 1 (a)-(f) are insufficient, or that the exigencies of the situation mean that they cannot observe all the procedural safeguards that would otherwise be required to comply the Convention, they have the possibility to derogate under Article 15 in an emergency situation. They must inform the Secretary General of the Council of Europe of the reasons for the derogation and the measures being taken. All derogations that had been made – until 2020 – concerned responding to terrorism. Most of the cases on Article 15 that have come before the Court have concerned Article 5 but the mechanism is not restricted to that article. It should be noted here that Articles 2, 3, 4(1) and 7 are non-derogable.

In its case law the Court has noted that it is for Governments, as guardians of their citizens, to assess the threat on the basis of the facts known to them. However if the acts or omissions that have occurred would have constituted violations of the Convention – absent the derogation – then the Court has the power to rule on whether the States have gone beyond what was actually

required by the crisis.[194] The Court has also looked at the compatibility of the timing of the *removal* of the impugned restrictions if the severity of the crisis has passed.[195]

(7) CONCLUSION

Freedom from arbitrary deprivations of liberty forms the basis of Article 5. The exhaustive list of authorised deprivations of liberty in Article 5 § 1 (a)-(f) reinforces the presumption of liberty. Moreover, the protection of those who are detained under one of the permitted exceptions is strengthened by the corpus of substantive rights which are intended to minimise the risks of arbitrariness, by ensuring the act of deprivation of liberty is amenable to independent judicial scrutiny and by securing the accountability of the authorities for that act.[196] In this sense, there is no ambiguity. The most problematic aspect of the right to liberty and security can be determining whether there has been a deprivation of liberty or a restriction of freedom of movement. It is crucial that all practitioners and members of the judiciary stay up to date with any jurisprudential developments in this regard in order to ensure compliance with the Convention.

The narrative above has highlighted some of the key issues in relation to the right to liberty and security. What follows in the second section of this publication is a selection of summaries of key cases before the Court, to illustrate and expand on the points discussed in the narrative. Also included in this publication is a list of all judgments handed down in respect of countries in the region on Article 5, with short summaries.

194 *A and Others v United Kingdom*, judgment of 19 February 2009, no. 3455/05, §173

195 *Marshall v United Kingdom*, judgment of 10 July 2001, no. 41571/98

196 *El-Masri v. the Former Yugoslav Republic of Macedonia*, Grand Chamber judgment of 13 December 2012, no. 39630/09, §231 (included as a summary in this publication)

Case Summaries

Part of the applicant's detention was not justified under Article 5 § 1 as no deportation proceedings were pending and general prevention is not a permitted ground – violation of Article 5

JUDGMENT IN THE CASE OF AL HAMDANI v. BOSNIA AND HERZEGOVINA

(Application no. 31098/10)
7 February 2012

1. Principal Facts

The applicant, Mr Fadhil Al Hamdani, was an Iraqi national born in 1960. He travelled to Bosnia and Herzegovina to pursue his studies in 1979. In 1987 he married a citizen of Bosnia and Herzegovina and they had five children together.

During the 1992-95 war in Bosnia and Herzegovina (BiH), the applicant joined a local unit within the ARBH (Army of the Republic of Bosnia and Herzegovina) called *El Mujahedin*. The unit was made up of foreign "mujahedin", a term used to refer to foreigners mainly from the Arab world who came to BiH during the war in support of Bosnian Muslims. On 14 December 1995 the ARBH disbanded *El Mujahedin* and ordered its foreign members to leave the country by 10 January 1996.

The applicant acquired BiH citizenship on three occasions: on 23 March 1992, 12 January 1995 (under the name of Awad Fadhil) and again on 20 February 1995. He visited Iraq twice after the 1992-95 war, in 2003 and 2004. On 30 August 2006 the authorities established that the applicant's BiH citizenship had been acquired by means of fraudulent conduct, false information and concealment of the fact that he already possessed BiH citizenship when he lodged the second application and that he had used documents issued in two different names, and quashed the decisions of 23 March 1992 and 20 February 1995. Proceedings in relation to these decisions were still pending before the Constitutional Court of BiH ("the Constitutional Court") at the time the case was heard by the European Court of Human Rights.

On 23 June 2009 the Aliens Service established that the applicant was a threat to national security and detained him in Istočno Sarajevo Immigration Centre. The applicant's appeals were dismissed. The initial detention period

was extended on a monthly basis until April 2011 when the applicant was released.

A request made by the applicant for a temporary residence permit on 6 June 2007 was refused by the Aliens Service, a decision which was upheld on appeal. Proceedings relating to this issue were also still pending at the time the case was heard by the European Court of Human Rights.

On 17 February 2010 the applicant claimed asylum. He maintained that Iraqi citizens who had joined the foreign mujahedin during the war in Bosnia and Herzegovina were treated in Iraq as suspected terrorists and subjected to ill-treatment. On 23 February 2010 the Asylum Service interviewed the applicant in the presence of his lawyer and a UNHCR representative. Regard was had to reports by the US Department of State, the UNHCR, the IOM and the UK Border Agency on Iraq. On 4 March 2010 the Asylum Service refused the asylum claim and granted him a period for voluntary departure of fifteen days. Eventually, the State Court upheld the Asylum Service decision and the Constitutional Court dismissed the applicant's subsequent appeal.

On 8 November 2010 the Aliens Service issued a deportation order accompanied with an entry ban for a period of five years. It stated, however, that removal directions would not be issued for as long as the Court's Rule 39 interim measure (granted on 10 October 2010) remained in force. An appeal before the Constitutional Court was still pending at the time of the European Court of Human Rights' judgment.

On 5 April 2011 the State Court ordered the applicant's immediate release from the immigration centre, quashing the last extension order of 21 March 2011 as unlawful.

2. Decision of the Court

The applicant alleged, in particular, that his deportation would expose him to a risk of treatment contrary to Article 3 and that his detention amounted to a breach of Article 5 § 1.

Article 3

The Court noted the fact that the applicant visited Iraq twice, at a time of upsurge of violence in that country, without any consequences. The Court also

noted that the applicant did not adduce any evidence capable of proving that there were substantial grounds for believing that, if deported, he would be exposed to a real risk of being subjected to treatment contrary to Article 3. The applicant's asylum claim had been considered in detail, before being rejected, and its assessment had been adequate and sufficiently supported by domestic materials as well as by materials originating from other reliable and objective sources. Having regard to the above consideration, the Court concluded that the applicant's complaint under Article 3 was manifestly ill-founded and it was therefore rejected.

Article 5 § 1

The Court re-iterated that sub-paragraphs (a) to (f) of Article 5 § 1 contain an exhaustive list of permissible grounds on which persons may be deprived of their liberty and no deprivation of liberty will be lawful unless it falls within one of those grounds. Sub-paragraph (f) permits the State to control the liberty of aliens in an immigration context. It does not demand that the detention be reasonably considered necessary, and in this respect it provides a different level of protection from sub-paragraph (c) of Article 5 § 1. All that is required under this provision is that deportation proceedings be in progress and pursued with due diligence. The deprivation of liberty must also be "lawful" and in keeping with the purpose of protecting the individual from arbitrariness.

The Government argued that the applicant was lawfully detained as a person against whom action was being taken with a view to deportation. However, the Court noted that deportation proceedings against the applicant were instituted on 8 November 2010 whereas the applicant was detained on 23 June 2009. Since detention under Article 5 § 1 (f) is justified only for as long as deportation proceedings are pending, the first period of the applicant's detention was clearly not justified under Article 5 § 1 (f).

The Government further emphasised that the applicant posed a threat to national security and that the domestic authorities therefore had no other option but to detain him. However, sub-paragraphs (a) to (f) of Article 5 § 1 amount to an exhaustive list of exceptions and only a narrow interpretation of these exceptions is compatible with the aims of Article 5: detention on security grounds only is accordingly not permitted.

The Court also examined the case under subparagraph (c) and reiterated that it does not permit a policy of general prevention. Detention to prevent a person

from committing an offence must be "effected for the purpose of bringing him before the competent legal authority" and thus only deprivation of liberty in connection with criminal proceedings is permitted. Since the Government had not mentioned any concrete and specific offence which the applicant had to be prevented from committing, his detention was not covered by sub-paragraph (c), and there was a violation of Article 5 § 1 with regard to the period from 23 June 2009 to 8 November 2010.

In relation to the subsequent period, the Court noted that a deportation order was issued on 8 November 2010. It further noted that since 4 October 2010 the Government had refrained from deporting the applicant in compliance with the request made by the Court under Rule 39. Whilst States are obliged to comply with interim measures made pursuant to Rule 39, the implementation of an interim measure does not in itself have any bearing on whether the deprivation of liberty to which that individual may be subject complies with Article 5 § 1 – the domestic authorities must still act in strict compliance with domestic law. Here the Court noted that it had been established by the domestic authorities that the applicant constituted a threat to national security, and his detention was accordingly authorised and was indeed mandatory pursuant to the Aliens Act 2008.

Having regard to the above, the Court concluded that the deportation proceedings, although temporarily suspended pursuant to the request made by the Court, had nevertheless been in progress and were in strict compliance with domestic law. Since there was no indication that the authorities had acted in bad faith, that the applicant had been detained in unsuitable conditions or that his detention had been arbitrary for any other reason, there had been no violation of Article 5 § 1 in respect of the applicant's detention from 8 November 2010 until 7 April 2011.

Article 41

The Court awarded €2,000 to the applicant in respect of non-pecuniary damage and dismissed the rest of the claim for just satisfaction.

Containment within police cordon during violent demonstration did not amount to deprivation of liberty

GRAND CHAMBER JUDGMENT IN THE CASE OF AUSTIN AND OTHERS v. THE UNITED KINGDOM

(Application no. 39692/09)
15 March 2012

1. Principal Facts

The four applicants in this case were Lois Austin, a British national born in 1969; George Black, a Greek and Australian national born in 1949; Bronwyn Lowenthal a British and Australian national born in 1972; and, Peter O'Shea, a British national born in 1963.

The police became aware that on 1 May 2001 activists from environmentalist, anarchist and left-wing protest groups intended to stage various protests based on locations from the Monopoly board game. The organisers of the "May Day Monopoly" protest did not make any contact with the police or attempt to seek authorisation for the demonstrations. By 2 p.m. on that day there were over 1,500 people in Oxford Circus in central London and more were steadily joining them. The police, fearing public disorder, took the decision at approximately 2 p.m. to contain the crowd and cordon off Oxford Circus. Controlled dispersal of the crowd was attempted throughout the afternoon but proved impossible as some members of the crowds both within and outside the cordon were very violent, breaking up paving slabs and throwing debris at the police. The dispersal was completed at around 9.30 p.m.

Ms Austin, a member of the Socialist Party and a frequent participant in demonstrations, attended the protest on 1 May 2001 and was caught up in the Oxford Circus cordon. Mr Black wanted to go to a bookshop on Oxford Street but, diverted by a police officer on account of the approaching demonstrators, met a wall of riot police and was forced into Oxford Circus where he remained until 9.20 p.m. Similarly, Ms Lowenthal and Mr O'Shea had no connection with the demonstration. Both on their lunch-break, they were held within the cordon until 9.35 p.m. and 8 p.m., respectively.

In April 2002 Ms Austin brought proceedings against the Commissioner of Police of the Metropolis, claiming damages for false imprisonment and for a

breach of her rights under Article 5 of the European Convention of Human Rights. In March 2005 her claims were dismissed. Her subsequent appeals were then also dismissed both by the Court of Appeal and finally in January 2009 by the House of Lords. The House of Lords concluded that Ms Austin had not been deprived of her liberty and that Article 5 of the Convention did not therefore apply.

2. Decision of the Court

The applicants complained that they were deprived of their liberty without justification, in breach of Article 5 § 1.

Article 5

The Court observed that this was the first time it was called on to consider the application of the Convention in respect of the "kettling" or containment of a group of people carried out by the police on public order grounds. Consequently, it first had to assess whether the applicants had been deprived of their liberty, within the meaning of Article 5 § 1.

The Court referred to a number of general principles established in its case law. First, the Convention was a "living instrument", which had to be interpreted in the light of present day conditions. Even by 2001, advances in communications technology had made it possible to mobilise protesters rapidly and covertly on a hitherto unknown scale. Secondly, the Convention had to be interpreted harmoniously, as a whole. It had to be taken into account that various Articles of the Convention placed a duty on the police to protect individuals from violence and physical injury. Thirdly, the context in which the measure in question had taken place was relevant. Members of the public were often required to endure temporary restrictions on freedom of movement in certain contexts, such as travel by public transport or on the motorway, or attendance at a football match.

The Court did not consider that such commonly occurring restrictions could properly be described as "deprivations of liberty" within the meaning of Article 5 § 1, so long as they were rendered unavoidable as a result of circumstances beyond the control of the authorities, were necessary to avert a real risk of serious injury or damage, and were kept to the minimum required for that purpose. The Court further emphasised that, within the Convention system, it was for the domestic courts to establish the facts and the Court would generally follow the findings of facts reached by the domestic courts.

In this case, the Court based itself on the facts established by the High Court, following a three week trial and the consideration of substantial evidence. It was established that the police had expected a hard core of between 500 and 1000 violent demonstrators to gather at Oxford Circus at around 4 p.m. The police had also anticipated a real risk of serious injury, even death, and damage to property if the crowds were not effectively controlled. Given that, about two hours earlier, over 1,500 people had already gathered there, the police had decided to impose an absolute cordon.

There had been space within the cordon for people to walk about and there had been no crushing. However, the conditions had been uncomfortable with no shelter, food, water or toilet facilities. Although the police had tried, continuously throughout the afternoon, to start releasing people, their attempts were repeatedly suspended because of the violent and uncooperative behaviour of a significant minority both within and outside the cordon. As a result, the police had only managed, at about 9.30 p.m., to complete the full dispersal of the people contained. In the circumstances, an absolute cordon had been the least intrusive and most effective means available to the police to protect the public, both within and outside the cordon, from violence. Consequently, it did not amount to a "deprivation of liberty". Indeed, the applicants had not contended that, when it was first imposed, those within the cordon had been immediately deprived of their liberty.

Furthermore, the Court was unable to identify a moment when the containment could be considered to have changed from what had been, at most, a restriction on freedom of movement, to a deprivation of liberty. Indeed, five minutes after the cordon was imposed, the police had been planning to start a controlled dispersal. Shortly afterwards, and fairly frequently thereafter, the police had made further attempts to start dispersing people and had kept the situation under permanent close review. As the same dangerous conditions at the origin of the absolute cordon had continued to exist throughout the afternoon and early evening, the Court found that the people within the cordon had not been deprived of their liberty within the meaning of Article 5 § 1. Notwithstanding the above finding, the Court emphasised the fundamental importance of freedom of expression and assembly in all democratic societies and underlined that national authorities should not use measures of crowd control to stifle or discourage protest, but rather only when necessary to prevent serious injury or damage.

Since Article 5 did not apply, the Court held that there had been no violation of that provision.

Inadequate detention conditions, excessive detention periods without an order extending the detention and insufficient reasoning regarding the grounds for detention constituted violations of Article 3, Article 5 § 1 and Article 5 § 3

JUDGMENT IN THE CASE OF BIGOVIĆ v. MONTENEGRO

(Application no. 48343/16)
19 March 2019

1. Principal facts

The applicant, Mr Ljubo Bigović, was a Montenegrin national born in 1976 who at the time of this judgment was serving a prison sentence of 30 years for the aggravated murder of a high-ranking police investigator and other related offences.

The applicant was initially arrested on 16 February 2006 and placed in detention for fear of absconding and taking into account the gravity of the alleged criminal offences. His detention was repeatedly extended during the criminal proceedings on the grounds that the reasons for detention persisted and that the applicant's release would seriously breach public order and peace. The applicant was convicted by the High Court in 2012 and this decision was upheld on appeal by the Supreme Court in 2015.

During his detention the applicant was diagnosed with ulcerative colitis, several ophthalmologic issues which required eye surgery, knee-related injuries and an anxious-depressive psychopathology. For these and other health illnesses the applicant was examined, treated by prison doctors and external specialists and provided with surgery and medication.

Although the applicant applied several times to be released from detention, on various grounds, he was always unsuccessful. In 2015 he lodged a constitutional appeal complaining of inadequate detention conditions, in particular the medical care received, that his detention was unlawful given that it was not regularly reviewed and also that his detention was lengthy and insufficiently reasoned. The Constitutional Court dismissed the applicant's appeal.

2. Decision of the Court

The applicant complained of a violation of Article 3 on account of poor detention conditions and inadequate medical care. The applicant also alleged

that, under Article 5, his detention was unlawful for not being regularly reviewed, that insufficient reasoning was given when extending his detention and that his application for release was not decided in good time.

Article 3

In relation to the claim relating to detention conditions, the Court reaffirmed that prisoners are to be detained in conditions that respect human dignity and must not be subject to distress or hardship beyond the unavoidable level of suffering inherent in detention. The Court then noted reports confirming that the remand prison in which the applicant was held had an alarming level of overcrowding, that inmates were only allowed time to walk below the daily statutory minimum, were confined to their cells for 23 hours a day and that the cells contained a semi-partitioned sanitary facility. Although the conditions in which the applicant was held later improved, the Court concluded that between February 2006 and August 2009 the applicant remained in detention conditions contrary to Article 3.

The Court then considered the applicant's claims of inadequate medical care, and reiterated that States must protect the health and general well-being of persons deprived of their liberty, including by providing medical assistance and adequate food. Although accepting that medical assistance in prison hospitals may be of lower quality than that which is offered to the general public, States must ensure that detainees are provided with sufficient medical supervision for a timely diagnosis and treatment.

The applicant was medically assisted both in prison and in other medical facilities across Montenegro, and the State provided more medication than it was obliged to cover and took a number of other measures aimed at remedying the applicant's knee-related problems. Although the remand prison was not able to provide for the diet recommended to the applicant, the High Court had allowed for the applicant's family to provide him with adequate food once a week, therefore taking measures to overcome the situation.

The Court further noted there was no indication that a psychiatric examination was urgent or necessary to treat a severe or life-threatening mental disorder, nor that its absence caused further suffering to the applicant.

The Court acknowledged the need for medical confidentiality but also weighed the fact that taking the applicant to a medical facility outside of prison was a security risk. Viewing the facts as whole, the presence of prison guards at

the applicant's medical examinations did not attain a sufficient level of severity to violate Article 3.

The Court thus concluded that there had been no violation of Article 3 in relation to medical care.

Article 5 § 1 (c)

The applicant complained that his detention had been unlawful due to a lack of regular examination of the grounds. The Court reaffirmed that the conditions for the deprivation of liberty must be clearly defined in domestic law, and the application of the law must be foreseeable in order to ensure legal certainty.

Domestic law in the present case provided for the courts to examine whether the grounds for detention persisted every 30 days before the indictment, and subsequently every two months. Given that the courts were not obliged to specify the exact duration of the detention, in the applicant's case it was particularly important to comply with these statutory time-limits in order to ensure foreseeability. It was clear that these time-limits were exceeded on several occasions in relation to the applicant.

There had hence been a violation of Article 5 § 1 with regards to the periods of detention exceeding two months without a new order extending the applicant's detention, and confirming that its grounds persisted.

Article 5 § 3

The applicant maintained that the entire period of his deprivation of liberty was unlawful and the decisions extending his detention had been insufficiently reasoned. The Court reiterated here that detention must be justified in each individual case, with a genuine requirement of public interest outweighing the principle of respect for individual liberty. For detention to be legitimately extended it is required that a reasonable suspicion that the detainee has committed a criminal offence persists and, in addition, relevant and sufficient reasons for the detention must be provided. Where relevant and sufficient grounds are established, domestic authorities must apply special diligence when considering the facts and the applicant's circumstances.

In the present case the only reason why the applicant was held in pre-trial detention for over five years was for a risk of absconding, generally applied

to him and to all other defendants. From there on, the courts considered that the applicant's release would breach public order and peace but still failed to identify specified reasons why detention remained necessary. The Court noted that the severity of the offence cannot by itself justify a long period of detention on remand, nor can the justification based on a risk of absconding rely solely on the severity of a possible sentence. The domestic courts failed to consider the applicant's personal circumstances for the purposes of assessing his risk of absconding, such as his character and morals, home, occupation, assets, family ties and other links to the country in which he was being prosecuted. No assessment of proportionality was carried out in view of the applicant's state of health and lapse of time, and the authorities did not consider any alternative measures.

The Court thus considered that the grounds for the applicant's extended detention were not sufficient to justify his continued deprivation of liberty, amounting to a violation of Article 5 § 3. The Court did not find it necessary to examine whether the proceedings were conducted with due diligence.

Article 5 § 4

This complaint was declared inadmissible as, at the relevant time, the applicant's detention was decided by a competent court.

Article 41

The Court awarded the applicant €7,500 in respect of non-pecuniary damage.

Not providing adequate medical care or educational supervision to a minor in a temporary detention centre violated Article 3 and Article 5, whilst questioning and proceedings violated Article 6

GRAND CHAMBER JUDGMENT IN THE CASE OF BLOKHIN v. RUSSIA

(Application no. 47152/06)
23 March 2016

1. Principal Facts

The applicant, Ivan Blokhin, was a Russian national born in 1992 and living in Novosibirsk (Russia). The applicant suffered from attention-deficit hyperactive disorder (ADHD) and enuresis. He was diagnosed in December 2004 and January 2005 after being examined by two specialists who prescribed him medication and regular consultation by a neurologist and psychiatrist.

On 3 January 2005, the applicant, who was 12 years old at the time, was arrested and taken to a police station. He was not told the reasons for his arrest, and alleged that he was put in a cell that had no windows and with the lights turned off. He stated that he spent an hour in the dark, after which he was questioned by a police officer. The officer told him that S. (the applicant's 9 year old neighbour) had accused him of extortion. According to the applicant, the police officer told him to confess, saying that if he did so he would be released, but if he refused he would be placed in custody. The applicant signed a confession statement. After the applicant's guardian, his grandfather, was contacted and came to the police station, he retracted his confession.

Relying on the applicant's confession along with the statements of the 9 year old neighbour and his mother, the prosecuting authorities found that his actions contained elements of the criminal offence of extortion. However, since he had not reached that age of criminal responsibility the authorities refused to open criminal proceedings. On 21 February 2005, a district court ordered his placement for 30 days in a temporary detention centre for juveniles to prevent him from committing further acts of delinquency; he was placed in the detention centre on the same day. After an appeal by the applicant's grandfather, stating that the detention was unlawful and incompatible with his grandson's health and that he had been intimidated and questioned in the absence of his guardian, the regional court quashed the detention order in March 2005. In

May 2006 the same court, after re-examining the matter, held that the original detention order was lawful.

After being released from the detention centre on 23 March 2005, the applicant was taken to a hospital where he received treatment for enuresis and ADHD until 21 April 2005. According to the applicant he did not receive appropriate medical care during his time in the detention centre. He claimed access to the toilets was limited and that he had to endure bladder pain and humiliation, given he suffered from enuresis. He also claimed that he and the other juveniles detained at the centre spent the whole day in a large empty room which had no furniture. They were only allowed to go into the yard twice during the applicant's 30 day stay, and they were given lessons only twice a week for about three hours, where about 20 children all of different ages were taught together in one class.

2. Decision of the Court

Relying on Article 3, the applicant complained that the conditions in the temporary detention centre had been inhuman and that he did not receive adequate medical care. He also complained that his detention had been in breach of Article 5 (right to liberty and security). Lastly he claimed that the proceedings relating to his placement in the temporary detention centre had been unfair and violated Article 6 (right to a fair trial).

On 14 November 2013 a Chamber of the Court delivered a judgment in which it found a violation of Article 3, 5, and 6. The case was referred to the Grand Chamber under Article 43 at the Government's request.

Article 3

The Court reiterated that in order for treatment to come under the scope of Article 3, it must reach a minimum level of severity. Article 3 imposed an obligation on the State to protect the physical well-being of persons who are deprived of their liberty, by providing them, among other things, with the required medical care. However, assessing if the medical care is adequate is one of the most difficult elements to determine. As a result the authorities must ensure that a comprehensive record is kept concerning the detainee's state of health and their treatment while in detention. The State must ensure that the medical treatment provided within prison facilities is at a level comparable to that which the State provides to the public.

When dealing with children, the health of juveniles deprived of their liberty should be safeguarded according to recognised medical standards applicable to juveniles in the wider community. The authorities should always be guided by the child's best interests and the child should be guaranteed proper care and protection. This includes a medical assessment of the child's state of health to determine if he/she should be placed in a juvenile detention centre.

In the present case the Court noted in particular the applicant's young age and his state of health as circumstances relevant in the assessment of whether the minimum level of severity had been attained. The documents submitted by the Government as to the standards of the detention centre were all dated after the time when the applicant was placed there, and reports or certificates submitted were of little evidentiary value as they lacked reference to original documentation held by the detention centre. The applicant's grandfather had submitted medical certificates at the detention hearing to show that the applicant suffered from ADHD, to ensure that the authorities would be aware of his condition. The Court found this evidence sufficient to establish that the authorities knew about the applicant's medical condition upon his admission to the temporary detention centre. Furthermore, the fact that he had to be hospitalised after his release for almost three weeks, provided an indication that he did not receive the necessary treatment for his condition while at the centre.

The Court found that the Government had failed to show that the applicant received medical treatment required for his condition, and found a violation of Article 3. Having made this finding, the Court held it unnecessary to examine the remainder of the applicant's complaints under this provision.

Article 5

The Court confirmed that the detention of the applicant for thirty days at the temporary detention centre amounted to a deprivation of liberty within the meaning of Article 5(1). The Court found that the applicant's detention did not come within the scope of Article 5(1)(a), (b), (c), (e) or (f), but examined whether or not the applicant's placement in the temporary detention centre was in accordance with Article 5(1)(d). Detention for education supervision, in the case of minors, must take place in an appropriate facility with the resources to meet the necessary educational objectives and security requirements. This does not mean that the placement in such a facility must be immediate – interim placements are allowed in facilities which do not provide this, however, the interim custody period must be quickly followed by the transfer to a centre that provides education supervision.

In the present case, the applicant was placed in the detention centre for the purpose of correcting his behaviour and not as a temporary hold before being transferred to a different centre. The Court found, contrary to the Government's claims, that the applicant's placement in the temporary detention centre could not be compared to a placement in a closed educational institution. As discussed above, placement in a temporary detention centre should be a short term solution, and the Court failed to see how any meaningful educational supervision, to change a minor's behaviour, could be provided during a maximum period of thirty days. The Court did not dispute that there was some schooling at the centre, however, the centre was characterised by a disciplinary regime rather than the schooling provided. Furthermore, none of the domestic courts stated that the applicant's placement was for educational purposes, instead they all referred to "behaviour correction", or to prevent him from committing further delinquent acts, neither of which is a valid ground covered by Article 5(1)(d).

The Court found that the applicant's placement in the temporary detention centre did not fall under Article 5(1)(d), and therefore violated Article 5(1).

Article 6

With regard to juvenile defendants, the Court held that criminal proceedings should be organised to respect the principle of the best interests of the child, that the child charged with an offence should be dealt with in a way that takes into account his age and level of maturity, and that steps should be taken to promote his ability to understand and participate in the proceedings. Although not absolute, the right under Article 6(3)(c) provides for everyone charged with a criminal offence to be effectively defended by a lawyer. The Court noted that the particular vulnerability of an accused at the initial stages of police questioning can only be properly balanced by the assistance of a lawyer. For a fair trial, Article 6(1) requires that access to a lawyer be provided as soon as a suspect is first questioned by police, unless there is a compelling reason otherwise. The Court stressed in particular the fundamental importance of providing access to a lawyer where the person in custody is a minor given their particular vulnerability.

Article 6(3)(d) enshrines the principle that before an accused can be convicted, all evidence against him must usually be presented in his presence at a public hearing. An accused should be given adequate and proper opportunity to challenge and question witnesses against him.

In the present case the applicant had a diagnoses of ADHD and was only twelve years old when the police questioned him at the station. He was also below the age of criminal responsibility set by the Criminal Code for the crime of extortion, which he was accused of. He was in need of special treatment and protection by the authorities and at a minimum he should have been guaranteed the same legal rights and safeguards as those provided to adults. The Court noted that there was no indication that the applicant was told that he had the right to call his grandfather, a teacher, or lawyer or any other person of confidence during the period he was held at the police station to come to assist him during questioning. Furthermore, no steps were taken to ensure that he was provided with legal assistance during questioning. The fact that domestic law did not provide for legal assistance to a minor under the age of criminal responsibility when interviewed by police was not a valid reason for failing to comply with that obligation. The Court found that the absence of legal assistance during the applicant's questioning by the police affected his defence rights and undermined the fairness of the proceedings as a whole, and constituted a violation of Article 6(1) and (3)(c).

The Court noted that the District Court was provided with the results of the pre-investigation inquiry, which included the witness statements made by the alleged victim and his mother. Neither S. nor his mother were called to the hearing to give evidence and to provide the applicant with an opportunity to cross examine them, despite the fact that their statements were of decisive importance to the pre-investigation inquiry's conclusion that the applicant committed the act. Based on these facts the Court concluded that the applicant was not afforded a fair trial and found a violation of Article 6(1) and (3)(d).

Article 41

The Court awarded the applicant €7,500 with respect to non-pecuniary damage, and €1,910 in respect of costs and expenses.

The repeated detention of a minor in a remand prison violated Article 5 § 1 (d), and the inability to challenge this detention violated Article 5 § 4

JUDGMENT IN THE CASE OF BOUAMAR v. BELGIUM

(Application no. 9106/80)
29 February 1988

1. Principal Facts

The applicant, Mr Naïm Bouamar, was a Moroccan national who was born in Morocco on 20 November 1963 and moved to Belgium in 1972. He was described as an adolescent with a disturbed personality, owed mainly to family problems. From June 1977 to May 1978 he was placed in various juvenile homes as a preventive welfare measure under the Belgian Children's and Young Persons' Welfare Act 1965. In May 1978, the applicant was suspected of certain offences and was brought before the Liège Juvenile Court, following which a number of court orders were issued against him.

On nine occasions in 1980 the applicant was ordered to be placed in a remand prison under the 1965 Act – between 18 January and 4 November 1980, he was detained intermittently for 119 out of 291 days. The provision of the 1965 Act under which the applicant was detained stated that a juvenile could, "if it is materially impossible to find an individual or an institution able to accept him immediately", be provisionally detained in a remand prison for a period not exceeding fifteen days. While not in detention the applicant was initially placed in youth reformatories and later in the care of various family members under the supervision of the Youth Welfare Officer.

Each of the placement orders recorded that it was materially impossible to find an individual or an institution able to accept the applicant immediately, except that the first order did not use the word "materially". The second, third, fourth, fifth, sixth and eighth orders referred to an institution "appropriate to the juvenile's behaviour", while the seventh and the ninth used only the adjective "appropriate". The Juvenile Court's principal justifications for the repeated orders were that the applicant had persisted in his delinquent behaviour and that his personality and behaviour meant that it was necessary to send him to an institution in which he would be closely supervised. These were coupled with the fact that no state institution had agreed to take the applicant.

Before each of the orders was made placing the applicant in the remand prison, the applicant was heard by the court, except on one occasion when he declined to be heard. However, the applicant's lawyers were not called upon to assist or represent him on any of these occasions.

On 3 November 1980, the Juvenile Court varied the last order dated 21 October 1980 and ordered the provisional release of the applicant to his family under the supervision of a Youth Welfare Officer. Thereafter, the applicant was not placed in a remand prison. The applicant's behaviour had improved following his placement during the autumn of 1980 in a more conducive environment, at the instigation of one of his lawyers. On 8 August 1981, the Juvenile Court relinquished jurisdiction in favour of the ordinary court but the case was not brought to trial.

Between 22 January and 7 July 1980, the applicant appealed six of the Juvenile Court's orders. These appeals were all deemed by the Court of Appeal, and in two cases also by the Court of Cassation, to be inadmissible because they had become devoid of purpose. It was noted that in each case a subsequent order had terminated the order being challenged. The courts deemed the detention to be compliant with the European Convention on Human Rights since it was ordered in the general context of the educational supervision of the juvenile in the exceptional case where it was materially impossible to find an individual or organisation able to accept them immediately.

2. Decision of the Court

The applicant alleged that his detention in the remand prison did not meet the requirements of Article 5 § 1. In addition, he complained that he was unable to take any proceedings to challenge the lawfulness of his detention as provided for in Article 5 § 4. Separately he claimed under Article 13 that he did not have access to an effective remedy in respect of the alleged breach of his right to liberty. Finally, he argued that, contrary to Article 14, he had been the victim of discrimination during the detention proceedings by virtue of his status as a minor.

Article 5 § 1

The Court considered all nine placement orders in its judgment. It held that Article 5 § 1 (d) (detention of a minor for the purpose of educational supervision) was the appropriate sub-paragraph under which to analyse the

applicant's detention. The Court found that the main issue to be considered in this regard was lawfulness. Specifically, it was necessary to determine whether the detention in the remand prison was in conformity with both the substantive and procedural rules of national law and the purpose of Article 5, to protect individuals from arbitrariness.

In this regard, the Court commented on the "liberal spirit" of the Belgian system and the 1965 Act which removed minors from the ambit of criminal law and provided an exhaustive list of the circumstances under which a minor could be detained. It found that the applicant's detention complied with the 1965 Act and thus the relevant national law.

The Court went on to consider whether the detention was in keeping with the purpose of the restrictions permissible under Article 5 § 1 (d). It highlighted that placement under educational supervision for the purposes of this provision does not have to be immediate. An interim custody measure being used as a preliminary to a regime of supervised education, which itself does not involve supervised education, is permissible. However, such imprisonment must be speedily followed by actual application of such a regime. In the instant case, the Court decided that the detention of a young man in a remand prison for such a long period in conditions of virtual isolation and without the assistance of staff with educational training could not be regarded as furthering any educational aim. Thus, the applicant's detention was in breach of Article 5 § 1 (d).

Article 5 § 4

The Court stressed that the finding of a breach of Article 5 § 1 did not dispense it from examining the complaint under Article 5 § 4 since the two provisions are distinct. The Government asserted that a review of the lawfulness of the applicant's detention was incorporated into the decision to deprive him of his liberty since it was carried out by a judicial body, the Juvenile Court. However, the Court highlighted that its case law stated that the intervention of a single body of this kind will only satisfy Article 5 § 4 when the procedure has a judicial character and gives the individual concerned guarantees appropriate to the kind of deprivation of liberty in question.

When evaluating whether the applicant enjoyed such guarantees before the Juvenile Court, the Court placed significant weight on the fact that although he was heard before the court, he did not benefit from the assistance of his lawyer. As such, it held that the necessary safeguards were not in place.

Next, the Court considered whether the right to appeal the orders satisfied the requirements of Article 5 § 4. It decided that the lapses of time between the appeal application and the decision meant that the appeal process did not meet the speediness requirement of Article 5 § 4. Moreover, there was no real examination of the lawfulness of the applicant's detention since all the appeals were inadmissible due to being deemed devoid of purpose. For these reasons, the Court found there to have been a breach of Article 5 § 4.

Article 13

The Court found there was no reason to examine a separate complaint under Article 13 since its requirements in terms of providing an effective remedy are less strict than those of Article 5 § 4.

Article 14 (together with Article 5 § 4)

The Court held that the difference in treatment between adults and children held in custody pending trial was reasonably and objectively justified and thus did not amount to discrimination. It stemmed from the protective, as opposed to punitive, nature of the procedure applicable to minors in Belgium.

Article 50 (now Article 41)

The Court held that the question of the application of Article 50 was not yet ready for decision and therefore reserved the matter.

The applicant's forcible transfer to Switzerland from France amounted to a disguised form of extradition and not a measure taken with a view to deportation, resulting in a breach of Article 5 § 1 (f)

JUDGMENT IN THE CASE OF BOZANO v. FRANCE

(Application no. 9990/82)
18 December 1986

1. Principal Facts

The applicant, Mr Lorenzo Bozano, was an Italian national born in 1945. He was arrested by the Italian police on 9 May 1971, released on 12 May 1971, and arrested again on 20 May 1971 on a charge of having abducted and murdered thirteen-year-old Swiss girl Milena Sutter. He was also charged with indecency and indecent assault with violence against four women.

On 15 June 1973, the Genoa Assize Court sentenced him to two years and fifteen days' imprisonment for offences relating to one of the four women and he was acquitted of the other crimes with which he was charged due to a lack of evidence. However, on 22 May 1975 the Genoa Assize Court of Appeal, giving judgment in absentia, sentenced the applicant to life imprisonment for the crimes relating to Milena Sutter and to four years' imprisonment for the other crimes. On 25 March 1976, the Court of Cassation dismissed the applicant's appeal on points of law against this judgment and on 1 April 1976 the Italian police circulated an international arrest warrant.

During this time, the applicant had taken refuge in France, assuming a false identity. On 26 January 1979, the French gendarmerie arrested him in the course of a routine check in the département of Creuse and on the same day he was taken into custody at Limoges Prison pending extradition proceedings. On 31 January 1979, Italy officially applied to France for his extradition under a bilateral treaty. However, on 15 May 1979 the Indictment Division of the Limoges Court of Appeal ruled against extradition since the Italian procedure for trial in absentia was incompatible with French public policy. This negative ruling was final and binding on the French Government, which accordingly declined to extradite the applicant.

The applicant nonetheless remained in prison at Limoges because he had been charged in France with fraud, forgery and falsification of administrative

documents and use thereof. On 24 August 1979, the investigating judge found that it was no longer necessary to keep the applicant in prison in order to ascertain the truth, but on account of his "special administrative position" he had to be placed under judicial supervision. The judge therefore ordered his release on bail of 15,000 French francs (FF) and subject to certain conditions.[197] The public prosecutor's appeal was unsuccessful and the applicant was released on 19 September 1979. On 26 October 1979, the investigating judge issued a discharge order in respect of the fraud charge, an order terminating judicial supervision and an order committing the applicant for trial at Limoges Criminal Court on charges of forging and falsifying administrative documents and using falsified documents.

On the evening of 26 October 1979, three plain-clothes policemen, at least one of whom was armed, stopped the applicant as he was returning home and ordered him to follow them. When he protested, they seized him and forced him to get into an unmarked car. He was handcuffed and driven to Limoges police headquarters where he was served with a deportation order. The order stated that his presence was likely to jeopardise public order and ordered him to leave French territory.

The applicant refused to sign a police report saying that he complied with this decision of his own free will and demanded to be brought before the Appeals Board. He was told that this was not possible and was taken immediately to Switzerland (and not to the Spanish border which was the closest frontier). He travelled to the Swiss border in an unmarked BMW, sitting, still handcuffed, between two police officers.

Once they had reached the French customs post at the border, a Swiss police officer emerged and put other handcuffs on the applicant, and then sat with the applicant in the back seat of an unmarked Opel. The applicant was taken to a police station in Geneva.

The applicant, who had no identity papers, was told that Italy had requested his extradition and was provisionally taken into custody. As early as 14 September and 24 October 1979 Interpol Rome had telexed several States, including Switzerland, to inform them that Mr Bozano would shortly be deported from France. The applicant was extradited to Italy on 18 June 1980 after the Swiss Federal Court rejected his objection on 13 June 1980. At the time

197 Equivalent to £21,000 at the relevant time.

of the European Court's judgment, the applicant was serving his sentence in an Italian prison without having been subject to a retrial.

The applicant's lawyer had recourse to two remedies in France after his deportation. Firstly, on 11 December 1979 he made an urgent application to the Paris tribunal de grande instance arguing that the events of 26-27 October 1979 constituted a flagrantly unlawful act. The presiding judge made an order stating that there were no grounds for hearing the case. Secondly, on 26 December 1979 the applicant's lawyer applied to the Limoges Administrative Court to have the deportation order set aside. On 22 December 1981 the court ruled that the Minister of the Interior had committed a "manifest error of judgment" and the administrative authorities an "abuse of powers" and quashed the deportation order.

The applicant was never summoned to appear in court in relation to the charges of forgery and falsifying documents and uttering false identity documents. The prosecuting authorities considered that the nature of the offences did not justify continuing the proceedings once the applicant had been deported.

2. Decision of the Court

The applicant complained that his "abduction" and "forcible removal" to Switzerland had deprived him of his personal liberty and his freedom of movement, contrary to Article 5 § 1 and Article 2 of Protocol 4. He also claimed that he had been the victim of an abuse of powers, contrary to Article 18.

Article 5 § 1

The Court began by stressing that the only period of detention it was examining was the applicant's deprivation of liberty on the night of 26 to 27 October 1979 in France and that it was examining this detention under Article 5 § 1 (f). The applicant's life sentence in Italy was not relevant for the complaint, instead the main issue to be determined was whether the disputed detention was "lawful", meaning in conformity with national law and with the purpose of Article 5 – to protect the individual from arbitrariness.

The Court first rejected the applicant's assertion that the police action on 26 to 27 October 1979 was automatically deprived of any legal basis when the deportation order was retroactively quashed. However, it acknowledged that

while state agents who conduct themselves unlawfully in good faith might not violate the Convention, in the present case, the issuing of the deportation order was found to amount to an abuse of powers. The French authorities could not therefore claim to have been acting in good faith.

Secondly, the Court dealt with the applicant's complaint that the executive was not generally empowered to implement its own decisions by force. It noted that several points of French law had been disputed in this regard and that even if the arguments put forward were not entirely conclusive, they provided sufficient material for the Court to have the "gravest doubts" about whether domestic legal requirements were satisfied. The Court went on to highlight that lawfulness implied an absence of arbitrariness. Consequently, the Court attached significant weight to the circumstances in which the applicant was forcibly conveyed to the Swiss border.

Viewing the circumstances of the case as a whole, the Court concluded that the applicant's deprivation of liberty was neither lawful within the meaning of Article 5 § 1 (f), nor compatible with the right to security of person. It held that this amounted to a disguised form of extradition designed to circumvent the negative ruling on 15 May 1979 and not to detention in the ordinary course of an action taken with a view to deportation. Therefore, the Court found there had been a breach of Article 5 § 1.

Article 18 together with Article 5 § 1

Since the Court had already noted that the deportation procedure was abused for objects and purposes other than its normal ones, it did not deem it necessary to examine the same issue under Article 18.

Article 2 of Protocol 4

The Court found that its conclusions in relation to Article 5 § 1 meant that it was unnecessary to determine whether Article 2 of Protocol 4 and the right to freedom of movement were applicable.

Article 50 (now Article 41)

The Court reserved the question of the application of Article 50 due to the possibility of an agreement between the respondent State and the applicant.

The Constitutional Court's failure to reach a decision regarding the applicant's detention constituted a violation of Article 5 § 4 of the Convention

JUDGMENT IN THE CASE OF ČOVIĆ v. BOSNIA AND HERZEGOVINA

(Application no. 61287/12)
3 October 2017

1. Principal Facts

The applicant, Mr Fadil Čović, was a citizen of Bosnia and Herzegovina and born in 1953. On 22 November 2011 he was arrested and detained on suspicion of having committed war crimes during the 1992-95 war. On two separate occasions, 23 November 2011 and 22 December 2011, the State Court of Bosnia and Herzegovina reviewed and extended his detention based on the risk of him obstructing the course of justice by exerting pressure on witnesses and co-accused or by destroying evidence. Both decisions were upheld by the Appeals Chamber of the State Court.

Thereafter, the applicant's detention was regularly examined and extended every two months by the State Court. In addition to those automatic reviews, the applicant repeatedly challenged his detention before the Appeals Chamber of the State Court.

On 23 February 2012 the applicant lodged a constitutional appeal, alleging in particular that his detention had been arbitrary and excessive, and that it had not been based on relevant and sufficient reasons. This was rejected on 13 July 2012 by the Constitutional Court of Bosnia and Herzegovina as the formation of eight judges could not reach a majority on any of the proposals.

On 1 November 2012, the State Court held that the grounds for the applicant's continued detention had ceased to apply and released the applicant. The State Court also imposed preventative measures on the applicant, including a prohibition on leaving his place of residence without the prior approval of the State Court, the duty to report once a week to the police, a prohibition on associating with other co-accused and on associating or having contact with witnesses. The applicant's passport was seized. These preventive measures were reviewed and extended every two months. On 16 December 2015 they were revoked.

According to the information available to the European Court of Human Rights at the time of the judgment, the criminal proceedings against the applicant were still ongoing.

2. Decision of the Court

The applicant complained that the proceedings for review of the lawfulness of his detention before the Constitutional Court had not complied with the requirements of Article 5 § 4 of the Convention. The applicant further complained that his pre-trial detention had been arbitrary and excessively long breaching Articles 5 §§ 1 and 3 of the Convention.

Article 5 § 4

The Court observed that the applicant was able to lodge an appeal with the Appeals Chamber of the State Court against each decision of that court extending his detention and that the domestic courts also periodically and automatically reviewed his detention and gave reasons for their decisions.

However, when considering the proceedings before the Constitutional Court, it was observed that although it had taken a formal decision on the applicant's appeal, it had effectively declined to decide on its admissibility and/or merits. The impugned decision contained reasons both for and against the finding of a violation and the only reason why the applicant's appeal was dismissed was that court's failure to reach a majority. Therefore, the Court found that the issue of the constitutionality of the applicant's detention had been allowed to remain unaddressed. The Court considered that the situation had left the applicant without any final determination of his case and, accordingly, restricted the very essence of his right of access to a court.

By dismissing the applicant's appeal simply because it was unable to reach a majority on any of the proposals under consideration, the Constitutional Court had failed to satisfy the requirement that the circumstances voluntarily created by the authorities must be such as to afford applicants a realistic possibility of using the remedy and therefore fell short of its obligation under Article 5 § 4.

Article 5 §§ 1 and 3

Having regard to the finding relating to Article 5 § 4 of the Convention, the Court considered that it was not necessary to examine whether there had also

been a violation of Article 5 §§ 1 and 3 of the Convention, as it was satisfied that the complaints under Article 5 §§ 1 and 3 of the Convention would be examined at the domestic level, in view of the existing domestic legal framework and the subsidiary role of the Convention mechanism.

Article 41

The Court awarded €1,500 to the applicant in respect of non-pecuniary damages, and €61.35 to the applicant in respect of costs and expenses.

The deprivation of a police officer's liberty in connection with an investigation into corruption was not prescribed by law and constituted a violation of Article 5

GRAND CHAMBER JUDGMENT IN THE CASE OF CREANGĂ v. ROMANIA

(Application no. 29226/03)
23 February 2012

1. Principal facts

The applicant, Mr Sorin Creangă, was a Romanian national born in 1956. He had been a police officer in the criminal investigation department of the Bucharest police since 1995.

On 16 July 2003 the applicant reported to the National Anti-Corruption Prosecution Service headquarters ("the NAP") after being informed by his hierarchical superior that he was required to go there for questioning. 25 of his colleagues were also called there for the same reasons. According to the applicant, he entered the NAP premises at 9 a.m. and made an initial written statement regarding thefts of petroleum from pipelines on the outskirts of Bucharest. He remained in a room guarded by armed gendarmes and was not permitted to leave. Moreover, it had not been possible for him to contact his family or his lawyer. He had not been informed until around 1.15 to 1.30 a.m. on 17 July 2003 that a warrant for his pre-trial detention of a period of three days, from 16 to 18 July 2003, had been issued.

According to the Government, at around 12 noon on 16 July 2003 a criminal investigation was opened and the applicant had waited voluntarily in the NAP premises in order to clarify his legal situation. He had been neither supervised nor guarded at any time; the gendarmes present had merely been there to maintain order. At 10 p.m. the prosecutor charged several police officers, including the applicant, with accepting bribes, aiding and abetting aggravated theft and criminal conspiracy. The applicant was then placed in temporary pre-trial detention. During the night he was transferred to Rahova Prison.

By a judgment delivered in private on 18 July 2003, the Military Court of Appeal, sitting as a single judge, granted a request by the prosecutor and extended by twentyseven days the pre-trial detention of the applicant and his

thirteen co-accused. On the same day, a warrant for pre-trial detention identical to that of 16 July 2003 was issued in respect of the applicant.

On 21 July 2003 the Supreme Court of Justice upheld an appeal contesting the lawfulness of the constitution of the court that had delivered the judgment and ordered the applicant's release. The applicant was released the same day. On 25 July 2003 this judgment was quashed by the Supreme Court of Justice, following an application by the Procurator General of Romania on the grounds that the Supreme Court had committed serious errors of law in its interpretation of the domestic legislation. The applicant was again placed in pre-trial detention on the same day.

By an interlocutory judgment of 29 June 2004, upheld on 2 July 2004 by the Military Court of Appeal, the territorial Military Court ordered that the applicant be released and replaced his pre-trial detention by an order prohibiting him from leaving the country. By a judgment of 22 July 2010 the Bucharest Court of Appeal sentenced the applicant to three years' imprisonment, suspended, for taking bribes and harbouring a criminal.

2. Decision of the Court

Relying on Article 5 § 1, the applicant complained that his deprivation of liberty from 9 a.m. to 10 p.m. on 16 July 2003, and his placement in pre-trial detention on 25 July 2003 had been unlawful. In a Chamber judgment of 15 June 2010 the Court held that there had been a violation of Article 5 § 1 on account of the applicant's deprivation of liberty from 10 a.m. to 10 p.m. on 16 July 2003 and his placement in detention on 25 July 2003. The Chamber further held that there had been no violation of Article 5 § 1 in regard to the applicant's detention from 16 to 18 July 2003. The case was referred to the Grand Chamber at the Government's request under Article 43.

Article 5 § 1

Deprivation of liberty from 9 a.m. to 10 p.m. on 16 July 2003

It was not disputed that the applicant had been officially summoned to appear before the NAP and that he had entered the premises of the prosecution service at 9 a.m. to make a statement for the purpose of a criminal investigation. The applicant had not been brought there under duress, but from that moment on he had been under the control of the authorities. Consequently, the onus

was on the Government to provide a plausible and satisfactory explanation as to what happened at the premises of the NAP after that time.

The Court noted that the applicant was not only summoned but also received a verbal order from his hierarchical superior to report to the NAP, an order which it would have been extremely difficult for him not to comply with as police officers were bound by military discipline. The proceedings against the applicant clearly formed part of a large-scale criminal investigation and hence they needed to be examined in that light. In particular, the need to carry out the various criminal investigation procedures concerning the applicant and his colleagues on the same day, indicated that the applicant was indeed obliged to comply. This was also confirmed by witness evidence he had produced. On its part, the Government had not been able to demonstrate that the applicant had left or that he could have left the NAP premises of his own free will after his initial statement. In view of these considerations, the Court considered that the applicant did indeed remain in the prosecution service premises and was deprived of his liberty, at least from 12 noon to 10 p.m.

The Court then moved on to examine whether the applicant was deprived of his liberty "in accordance with a procedure prescribed by law" within the meaning of Article 5 § 1. It noted firstly that the applicant was summoned to appear at the NAP to make a statement in the context of a criminal investigation without having been given any additional information as to the purpose of that statement, the capacity in which he was being summoned or the subject matter of the case. At 12 noon, he was informed by the prosecutor that criminal proceedings had been formed against him. The Court acknowledged the complexity of the proceedings instituted in the instant case, which required a unified strategy to be implemented by a single prosecutor carrying out a series of measures on the same day, in a large-scale case involving a significant number of people regarding corruption. Nonetheless, this could not justify recourse to arbitrariness and areas of lawlessness in places where people were deprived of their liberty. In the present case, although the prosecutor had, at least from 12 noon, sufficiently strong suspicions to justify the applicant's deprivation of liberty for the purpose of the investigation and Romanian law provided for such measures – placement in police custody or pre-trial detention – he only decided at a very late stage to place the applicant in pre-trial detention, towards 10 p.m. Accordingly, the Court considered that the applicant's deprivation of liberty on 16 July 2003, at least from 12 noon to 10 p.m., had no basis in domestic law and that there had therefore been a violation of Article 5 § 1.

Pre-trial detention from 10 p.m. on 16 July 2003 to 10 p.m. on 18 July 2003

The Court agreed with the Chamber's considerations with regard to the applicant's placement in pre-trial detention at 10 p.m. on 16 July 2003, namely that the suspicions against him had been based on a set of concrete facts and evidence produced in the case file and communicated to him, suggesting that he could have committed the offences at issue. Also, the risk of influencing witnesses due to his position as a police officer had been a relevant and sufficient reason to justify his placement in pre-trial detention at the outset of the investigation under Article 5 § 1 (c). There was thus no violation of that Article.

Placement in pre-trial detention on 25 July 2003

The Court also agreed with the Chamber's holding that the method used by the authorities to correct a possible error in the interpretation of domestic law – an application by the Procurator General to have the final judgment of 21 July 2003 that ordered the applicant's release quashed – had been neither accessible nor foreseeable for the latter. The remedy in question had not been directly open to the parties, since only the Procurator General, who was the hierarchical superior of the prosecutor that had ordered the applicant's placement in detention and had requested the courts to extend that measure, could make use of it. The prosecutor had failed to present his arguments on this matter during the ordinary proceedings. Further, the provision of the Code of Criminal Procedure by which an application to have a final decision quashed for being "contrary to the law", was too vague to render foreseeable an intervention in the proceedings through an extraordinary remedy of this kind. In view of these considerations, the Court agreed with the Chamber's conclusions that the applicant's deprivation of liberty on 25 July 2003 had not been prescribed by law, falling short of the requirements of Article 5 § 1. There had thus been a violation of that provision.

Article 41

The applicant was awarded €8,000 in respect of non-pecuniary damage and €500 for costs and expenses.

The applicant's detention, including periods after judgments against him had been quashed, did not comply with Article 5 § 3

JUDGMENT IN THE CASE OF ĐERMANOVIC v. SERBIA

(Application no. 48497/06)
23 February 2010

1. Principal facts

The applicant, Dušan Đermanović, was a Serbian national born in 1966.

In March 2003 a criminal investigation was opened against him on suspicion of abuse of power and forging official documents. About two months later, the District Court ordered the applicant's detention on remand on the grounds that there was a risk of flight. After the applicant's appeal against the order had been dismissed, he was eventually detained in February 2004. The applicant claimed that he had gone to the police station of his own accord, but the Government disagreed. His subsequent request to be released on bail was dismissed, and in November 2004 the District Court sentenced him to four and a half years' imprisonment.

In June 2005 the Supreme Court quashed the judgment and remitted the case, ordering at the same time the applicant's continued detention. Several requests by the applicant to be released on bail were dismissed. A second judgment by the District Court in May 2006, which reduced the applicant's prison sentence, was quashed by the Supreme Court. In June 2007 the District Court sentenced him to four years' imprisonment. The applicant was released, but was ordered not to leave his habitual place of residence and to report to the court each month.

During his detention, the applicant suffered from severe health problems including Hepatitis C, diagnosed towards the end of 2006. He complained that his health had deteriorated to a large extent owing to the duration of his detention and requested to be released on account of inadequate medical care. A few weeks after the diagnosis, the applicant went on a hunger strike. When transferred to a prison hospital because of a deterioration of his liver condition as a result of the hunger strike, he refused to be examined. The applicant was released from detention on 7 June 2007, and after he started undergoing appropriate anti-viral treatment, his infection went into remission.

2. Decision of the Court

Relying in particular on Articles 3 (prohibition of inhuman or degrading treatment) and 5 § 3 (right to liberty and security), the applicant complained that the medical treatment afforded to him during his detention had been inadequate and that the length of his pre-trial detention had been excessive.

Article 3

The Court recalled that in the light of Article 3 of the Convention, the State must ensure that a person is detained under conditions which are compatible with respect for human dignity, that the manner and method of the execution of the measure do not subject the individual to distress or hardship exceeding the unavoidable level of suffering inherent in detention, and that, given the practical demands of imprisonment, the person's health and well-being are adequately secured with the provision of the requisite medical assistance and treatment.

In exceptional cases, where the state of a detainee's health is wholly incompatible with detention, Article 3 may require his or her release under certain conditions. However, Article 3 cannot be construed as laying down a general obligation to release detainees on health grounds. Instead it imposes an obligation on the State to protect the physical well-being of persons deprived of their liberty. The Court accepted that the medical assistance available in prison hospitals might not always be at the same level as that offered by the best medical institutions for the general public, however the State must ensure that the health and well-being of detainees are adequately secured.

In the present case the Court noted that there was no evidence the authorities had failed to ensure prompt discovery of the applicant's infection with Hepatitis C. In fact, the applicant had discovered his infection through voluntary counselling offered to him in detention. In the absence of any obvious earlier symptoms, the State could therefore not be reproached for failing to diagnose his illness in a timelier manner.

During the seven months between his diagnosis and his release from detention the applicant had not started medication-based treatment for his infection. However, he had undergone a liver biopsy, numerous blood tests and examinations by specialised doctors. It was regrettable that two months had elapsed before the applicant's first examination by an infectious diseases specialist, however, the applicant had himself substantially delayed the

identification of the damage to his liver by going on a hunger strike and refusing to be examined in hospital. In doing so, he had showed little concern for his state of health and could therefore not hold the authorities responsible for the deterioration of his medical condition during detention.

The Court therefore concluded that there had been no violation of Article 3.

Article 5 § 3

It falls in the first place to the national judicial authorities to ensure that, in a given case, the pre-trial detention of an accused person does not exceed a reasonable length of 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 the presumption of innocence, a departure from the rule of respect for individual liberty, and set them out in their decisions dismissing the applications for release. It is essentially on the basis of the reasons given in these decisions and of the established facts mentioned by applicants in their appeals that the Court is called upon to decide whether or not there has been a violation of Article 5 § 3 of the Convention.

The persistence of a reasonable suspicion that the person arrested has committed an offence is a condition *sine qua non* for the lawfulness of the continued detention, but after a certain lapse of time it no longer suffices. In such cases the Court must establish whether the other grounds given by the judicial authorities continue to justify the deprivation of liberty. Where such grounds are "relevant" and "sufficient", the Court must also ascertain whether the competent national authorities displayed "special diligence" in the conduct of the proceedings. The burden of proof in these matters should not be reversed by making it incumbent on the detained person to demonstrate the existence of reasons warranting release.

The Court noted that the period of pre-trial detention to be taken into consideration in the present case, including the two terms after the judgments against the applicant had been quashed, amounted to two years and two months. His detention had been regularly extended by the authorities, every time on the grounds that there was a risk of absconding, as the applicant had been unavailable to the authorities at the outset of the investigation. The Court considered that this might have been an acceptable justification for the initial placement in custody. The domestic courts had not verified, however, whether this ground remained valid at the advanced stage of the proceedings.

Furthermore, the authorities had failed to consider alternative means of ensuring the applicant's presence at the trial, such as the seizure of his travel documents. Moreover, his applications for release were rejected even after he had been detained for a period equivalent to three-quarters of the prison sentence imposed on him by both – ultimately quashed – judgments and despite his aggravated health condition.

The Court therefore held that the grounds on which the applicant's pre-trial detention had been extended could not be regarded as sufficient, in violation of Article 5 § 3.

Article 41

The Court awarded the applicant €1,500 in non-pecuniary damage.

Delays in evidence examination, a lengthy period without development in proceedings, and disregard for considering other preventative measures were irreconcilable with the requisite of "special diligence" violating Article 5 § 3

JUDGMENT IN THE CASE OF DERVISHI v. CROATIA

(Application no. 67341/10)
25 September 2012

1. Principal facts

The applicant was born in 1966. In April 2008, he was sentenced by Rijeka Municipal Court to one year and ten months' imprisonment on charges of extortion, however he was not sent to serve the sentence. Another set of criminal proceedings was also pending against the applicant on charges of making usurious contract and obstruction of justice.

The applicant was arrested in May 2008 on suspicion of trafficking heroin. The investigating judge ordered his detention for risk of tampering with evidence. The applicant appealed, arguing that there were no indications that he might suborn witnesses. The Rijeka County Court remitted the case and the investigating judge ordered the applicant's further detention for risk of tampering with evidence, noting that the case file did not show that the defendant might reoffend.

The investigating judge further extended the applicant's detention for the same reason. Witnesses were heard on 22 July 2008 and the applicant subsequently lodged a request for release. A three-judge panel of the Rijeka County Court dismissed the appeal on 25 September 2008 citing the applicant's tendency to break the law and the serious crimes. The investigating judge extended the applicant's detention additional times for the same reasons. The Rijeka State Attorney's Office indicted the applicant on 2 April 2009, on charges of conspiracy to supply heroin from the Czech Republic to Italy. The applicant's detention was extended further, and he appealed against the decision with no success.

On 5 June 2009 the applicant requested to be sent to serve his prison term for extortion on the basis of the judgment of 29 April 2008, however he could not start serving this prison sentence as long as his pre-trial detention concerning the heroin trafficking charges continued. The pre-trial detention was continually extended for risk of reoffending and the gravity of charges.

On 23 February 2011, the applicant's lawyer informed the court that the applicant had been released from detention by the Rijeka County Court owing to a death in his family. On 27 February 2011 the applicant returned and was again placed in detention. He then asked to be released based on significant delays in obtaining evidence from the Italian authorities, and requested that the detention be replaced with some other measure, noting that he had voluntarily returned to detention. That request was refused. The applicant lodged a constitutional complaint, arguing inter alia that he had been detained for three years and that for one year and five months there had been no progress in the proceedings. The Constitutional Court dismissed the complaint as ill-founded. His detention was extended again on similar grounds and he remained in pre-trial detention until 1 February 2012, when the maximum period of the pre-trial detention expired.

2. Decision of the Court

Relying on Article 5 § 3, the applicant complained that the reasons put forward by the courts for extending his pre-trial detention had not been relevant and sufficient to justify his continued detention and that the length of his detention had been excessive.

Article 5 § 3

The Court first noted that the period of the applicant's pre-trial detention amounted to three years and six months, from his arrest on 14 May 2008 to his release on 1 February 2012, less the time during which he was released due to a death in his family. The Court reiterated that the issue of whether a period of detention is reasonable cannot be assessed *in abstracto*, and whether it is reasonable for an accused to remain in detention must be assessed in each case according to its particular features.

It falls to the national judicial authorities to ensure that in a given case the pre-trial detention of an accused person does not exceed a reasonable time. The persistence of reasonable suspicion that the person has committed an offence is a condition sine qua non for the validity of the continued detention, but, after a certain lapse of time, it no longer suffices. Other grounds are needed to continue to justify the deprivation of liberty. Where such grounds are "relevant" and "sufficient", the Court also considers whether the competent national authorities displayed "special diligence" in the conduct of the proceedings.

The Court noted that in the present case the applicant was detained on three different grounds: (1) risk of tampering with evidence, (2) risk of reoffending and (3) gravity of charges. These grounds were not, however, taken cumulatively during the entire period of his pre-trial detention. It noted that when the investigation was opened in respect of the applicant on charges of trafficking heroin, the investigating judge ordered the applicant's detention on the ground of the risk of his tampering with evidence but did not order his detention on the ground of the risk of reoffending and the gravity of the charges. On the same ground the investigating judge extended the applicant's detention twice. However, when the evidence with which it was feared that the applicant might tamper had been obtained by the investigating judge, the applicant's detention was extended on grounds of the risk of reoffending and the gravity of the charges.

The Court further noted that the applicant's detention was extended twelve times on the grounds of (1) the risk of his reoffending and (2) the gravity of the charges. Regarding the former, the Court stated that when relying on this ground it is necessary to establish that the danger was a plausible one and the measure appropriate in the light of the circumstances of the case. Regarding the latter, this reason cannot by itself serve to justify long periods of detention.

When examining the grounds, the Court considered at the outset that the one-year period in which only six witnesses were heard could not be considered to satisfy the domestic authorities' obligation to conduct the proceedings with due diligence, particularly where the applicant had already been detained for almost one year during the investigation. Furthermore, the Court noted that after all the witnesses had given their evidence the trial court adjourned a total of eleven hearings because the Italian authorities had failed to submit the requested evidence and two hearings were adjourned on account of other professional and private obligations of the members of the trial panel.

The Court further noted that at no stage of the proceedings was any consideration given to the possibility of imposing alternative, less severe preventive measures on the applicant, such as bail or police supervision. Until his conviction, the accused must have been presumed innocent, and the purpose of Article 5 § 3 is essentially to require him to be released provisionally once his continuing detention ceases to be reasonable. The applicant asked several times for his detention to be replaced by any preventive measure considered appropriate by the domestic authorities, and the domestic authorities never gave any consideration to these requests even though he had voluntarily returned to detention after temporary release.

Based on this background, the Court considered that the period of delays in the examination of evidence, which could possibly be tolerated if seen as isolated, accumulated with a very long period without any progress or new development in the proceedings, and the fact that the domestic authorities never gave any consideration to replacing the applicant's detention with other preventive measures, could not been seen as other than irreconcilable with the requisite of "special diligence" in such cases. Thus, Article 5 § 3 was violated.

Article 41

The Court awarded the applicant €3,600 for non-pecuniary damage and €2,000 for costs and expenses.

National law did not define with sufficient clarity the content of the preventative measures which could be imposed on an individual in violation of the right to freedom of movement in Article 2 of Protocol 4

GRAND CHAMBER JUDGMENT IN THE CASE OF DE TOMMASO v. ITALY

(Application no. 43395/09)
23 February 2017

1. Principal Facts

The applicant was an Italian national born in 1963.

Under Italian law (Act. No. 1423/1956), certain preventative measures could be imposed against "persons presenting a danger for security and public morality". Such persons included those who "may be regarded as habitual offenders", as "living habitually, even in part, on the proceeds of crime" and as "posing a threat to health, security or public order". The Italian Constitutional Court had on several occasions clarified the criteria to be used for assessing whether preventative measures were necessary. It had held that mere suspicions did not suffice, but rather that factual evidence indicating a real and not merely theoretical danger must be established.

On 11 April 2008, the Bari District Court placed the applicant under special supervision for two years. This was based on the applicant's previous convictions for drug trafficking, absconding and unlawful possession of weapons, which showed that he associated with criminals and was a dangerous individual. The preventative measure imposed various obligations, such as (1) to report once a week to the police authority, (2) not to change his place of residence (3) to lead an honest and law-abiding life and not give cause for suspicion (4) not to return home later than 10 p.m. or to leave home before 6 a.m. (5) not to go to bars, nightclubs or attend public meetings, and (6) not to use mobile phones or radio communication devices.

On 28 January 2009, the Court of Appeal quashed the preventative measure, as it did not consider that the requirement of a "current" danger to society had been established; the applicant's most recent illegal activities relating to drugs related back to five years before the preventative measure had been imposed. It also held that the District Court had omitted to assess the impact of the

rehabilitation purpose of the sentence on the applicant's personality. Despite the favourable outcome of the applicant's proceedings, he was still placed under special supervision for 221 days due to the Bari Court of Appeal's failure to comply with the statutory 30 day time-limit for giving its decision.

2. Decision of the Court

The applicant alleged, in particular, that the preventive measures to which he had been subjected for a period of two years were in breach of Articles 5, 6 and 13 of the Convention and of Article 2 of Protocol No. 4.

Article 5

The government disputed the applicability of Article 5 on the grounds that the preventative measures did not amount to a deprivation of liberty within the meaning of Article 5.

The Court referred to its past case law on the meaning of "deprivation of liberty". It reiterated that the factors to take into account include the type, duration, effects and manner of implementation of the measure concerned and that the difference between deprivation and restriction of liberty is one of degree or intensity, and not one of nature or substance. Applying this to the case at hand, the Court did not accept that the requirement not to leave the house at night amounted to house arrest and hence to deprivation of liberty. Some of the key factors leading to this decision included that there were no restrictions on the applicant's freedom to leave home during the day, he was able to have a social life, to maintain relations with the outside world and to make social contacts.

The Court referred to analogous cases, concerning compulsory residence orders and requirements not to leave the house at night which it had held not to amount to a deprivation of liberty, but rather to restrictions of liberty of movement, and found that there was no reason to change its approach in this case. Further, the Court found that, unlike in cases where the Court had found a deprivation of liberty, in this case the applicant was not forced to live within a restricted area, and there was nothing to indicate that the applicant had ever applied to the authorities for permission to travel away from his place of residence. This could be contrasted to the case of *Guzzardi v Italy*[198] where the

198 See *Guzzardi v. Italy*, judgment of 6 November 1980, no. 7367/76 (included as a summary in this publication)

Court had concluded that the applicant had been "deprived of his liberty" as he had been forced to live on an island within an area of 2.5 sq. km, under almost permanent supervision and where it had been almost completely impossible for him to make social contacts. The Court therefore proceeded to examine the applicant's claim in this case under Article 2 of Protocol No. 4.

Article 2 of Protocol No. 4

The Court reiterated that Article 2 of Protocol No. 4 guarantees to any person a right to liberty of movement within a given territory and the right to leave that territory, which implies the right to travel to a country of the person's choice to which he or she may be admitted. The Court considered the restrictions imposed on the applicant to be measures restricting the right to liberty of movement for the purposes of Article 2 of Protocol No. 4. It therefore proceeded to consider whether they were in accordance with law, pursued one of the legitimate aims referred to in the third paragraph of Article 2 of Protocol No. 4 and struck a fair balance between the public interest and the individual's rights.

The Court reiterated its settled case-law, according to which the expression "in accordance with law" not only requires that the impugned measure have a basis in domestic law, but also refers to the quality of the law in question, requiring it to be accessible to the persons concerned and foreseeable as to its effects. Thus, a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable citizens to regulate their conduct; the person must be able – if need be with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. However, such consequences need not be foreseeable with absolute certainty; many laws, in order to avoid excessive rigidity, are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and applications are questions of practice. The level of precision required of domestic legislation depends to a considerable degree on its content and the field it is designed to cover and the number and status of those to whom it is addressed. Furthermore, the Court reiterated that a law conferring a discretion on a public authority must indicate the scope of that discretion, although not necessarily the detailed procedures and conditions to be observed.

Applying these principles to the present case, the Court firstly noted that the preventative measures in issue had a legal basis in domestic law, namely Act. No. 1423/1956, as interpreted in the light of the Constitutional Court's judgments. The Court noted that accessibility and foreseeability of the effects

of the Act were especially important in a case such as the present one, where the legislation had a very significant impact on the applicant and his right to liberty of movement. The Court acknowledged that the Italian Constitutional Court had on several occasions clarified the criteria to be used for assessing whether preventative measures are necessary. However, the imposition of such measures remained linked to a prospective analysis by the domestic courts as neither the Act nor the Constitutional Court had clearly identified the "factual evidence" or the specific types of behaviour which must be taken into consideration in order to assess the danger to society posed by the individual. Hence, the Act did not contain sufficiently detailed provisions as to what types of behaviour were to be regarded as posing a danger to society. Noting that the District Court had based its decision on the existence of "active" criminal tendencies on the part of the applicant, without attributing any specific behaviour or criminal activity to him, the Court also considered that the Act did not indicate with sufficient clarity the scope or manner of exercise of the very wide discretion conferred on the domestic courts.

As regards the measures provided for in the Act that were applied to the applicant, the Court observed the vague and indeterminate phrasing of some of them, such as the obligation to "lead an honest and law-abiding life" and to "not give cause for suspicion". Despite an interpretive aid provided by the Constitutional Court, it was not possible for the applicant to ascertain their precise content. His case had preceded Constitutional Court's guidance, and in any case, any interpretation on that criterion would not have solved the problem of lack of foreseeability, since the legislative Act allowed the District Court to also impose any measures it deemed necessary – without specifying their content – in view of the requirements of protecting society.

The Court therefore considered that the relevant part of the Act did not define with sufficient clarity the content of the preventative measures which could be imposed even in the light of the Constitutional Court's case law. The interference with the applicant's liberty of movement could hence not be said to have been based on legal provisions complying with the Convention requirements of lawfulness, and there had been a violation of Article 2 of Protocol No. 4.

Article 6

The Court also noted that there had been a violation of Article 6(1) on account of the applicant's hearings having not been held in public. With regard to the

alleged unfairness of the proceedings, however, the procedural safeguards, as evidenced by the Court of Appeal's judgment, had as a whole guaranteed the applicant a fair hearing.

Article 13

Having regard to the applicant's ability to appeal to the Court of Appeal, which subsequently quashed the special supervision, the Court considered that the applicant had an effective remedy under Italian law affording him the opportunity to raise his complaints of Convention violations.

Article 41

The applicant was awarded €5,000 in respect of non-pecuniary damages and €11,525 in respect of costs and expenses, including for those incurred before the domestic courts.

The detention of three Belgian nationals as "vagrants" without a remedy to challenge the lawfulness of the detention decision violated Article 5 § 4

JUDGMENT IN THE CASE OF DE WILDE, OOMS AND VERSYP v. BELGIUM

(Application nos. 2832/66, 2835/66 and 2899/66)
18 June 1971

1. Principal Facts

This case concerned three separate applicants whose applications were joined together due to the similarity of their circumstances. They were Jacques De Wilde, Franz Ooms and Edgard Versyp, all Belgian nationals who were detained under Belgian law as "vagrants".

Factors common to the three cases

Vagrants were defined in Belgian law as persons who had no fixed abode, no means of subsistence and no regular trade or profession. In Belgium every person picked up as a vagrant had to be arrested and brought before the police court which was composed of one judge (a magistrate). The arrested person had to be brought before the police court within twenty-four hours, although the individual could request a three-day adjournment to prepare his defence.

At the hearing, the magistrate had to determine the identity, age, physical and mental state and manner of life of the individual before concluding that they were a vagrant. This hearing was public, and the individual was given the opportunity to reply. Whilst magistrates formed part of the judiciary their decisions were considered administrative acts and not therefore subject to challenge or appeal, unless they were ultra vires.

There were two types of vagrant in Belgian law at the time. First, those able-bodied persons, who instead of working for their livelihood, exploited charity as professional beggars and those who through idleness, drunkenness or immorality lived in a state of vagrancy. Second, there were those who were found begging but to whom none of the circumstances mentioned above applied. The first type of vagrants could be detained in a vagrancy centre for a minimum of two and a maximum of seven years. The second type could be detained in an assistance home for a maximum of one year. The distinction between these

reformatory institutions was purely theoretical; the main difference being detention in a vagrancy centre was entered on an individual's criminal record.

Able-bodied persons detained in vagrancy centres or assistance homes were required to work while in the institution. They were entitled to a daily wage for this work which went towards State administrative expenses and release savings.

De Wilde

On 18 April 1966 Mr De Wilde reported to the police station at Charleroi and declared that he was homeless and would have no money until his next pension instalment on 6 May 1966. On 19 April 1966, the police court, after deciding that he met the requirements of a vagrant, ordered that the applicant be detained in a vagrancy centre for two years.

While detained, Mr De Wilde wrote to the Ministry of Justice to request his release several times. He expressed his surprise at not having been released after he received his next pension payment and complained about being forced to work for very low remuneration. In response, the Ministry informed him that his release before the prescribed period expired could be considered, provided his conduct at work was satisfactory and adequate arrangements for rehabilitation had been made.

The applicant was detained in various different institutions, including two disciplinary prisons after refusing to work in June 1966 and stealing from a dwelling house in August 1966. He was released from detention on 16 November 1966 after almost seven months, three months of which were spent serving the prison sentence.

Ooms

Mr Ooms reported to the deputy superintendent of police at Namur on 21 December 1965 and asked to be treated as a vagrant unless one of the social services could find him employment where he could be provided with board and lodging while waiting for regular work. On the same day the police court, after deciding that he met the requirements of a vagrant, ordered that the applicant be detained in an assistance home.

While detained, Mr Ooms petitioned the Ministry of Justice and the Prime Minister for his release several times. First, he argued that he was suffering from

tuberculosis, but the doctor did not support this assertion. Later, he argued that he had been unable to earn money to make up his release savings since he had been ill throughout his detention, but his mother was willing to take care of him. The Ministry deemed his requests to be premature and noted that the applicant had received several criminal convictions, this being his fourth detention for vagrancy and his conduct had not been exemplary, with low earnings.

Mr Ooms was released ex officio on 21 December 1966, exactly one year after he had been put at the disposal of the Government.

Versyp

On 3 November 1965 Mr Versyp appeared before the deputy superintendent of police in Brussels carrying a letter from the Social Rehabilitation Office requesting the he be given a night's shelter. He stated that he had no fixed abode, work or resources and begged to be sent to a welfare settlement. After spending the night in the municipal lock-up, the applicant was deemed a vagrant and ordered to be detained in a vagrancy centre for two years.

After being detained for three months, the applicant wrote to the Ministry of Justice and requested that he be transferred to the solitary confinement division. He stated that living with other vagrants shattered his morale and that he had neglected his work as he had to receive hospital treatment twice. The director granted his request on account of him being unable to adapt to communal living following nine criminal convictions and being detained four times for vagrancy. A few months later, the applicant wrote to the Ministry of Justice requesting the opportunity to rehabilitate himself in society with the help of the Brussels' Social Service. However, this request was rejected by the Ministry who said his case would be examined when the amount of his release savings showed that he was capable of doing a suitable job.

Mr Versyp was released on 10 August 1967, by virtue of a ministerial decision, after one year and nine months of detention.

2. Decision of the Court

Mr De Wilde complained of violations of Articles 3 and 4 with regards to his treatment during detention. Mr Ooms invoked Article 6 with regards to not being granted legal aid and Articles 3 and 9 with regards to his treatment while in detention. Mr Versyp alleged that the decision to detain him and the

conditions of his detention breached Articles 4, 5 and 6. The Court also found that questions on the merits arose under Articles 5, 3 and 13. The analysis of Article 5 became the focus of the judgment.

The Government's preliminary observation

The Government argued that since the applicants had reported voluntarily to the police, their detention in a vagrancy centre or an assistance home was the result of an express or implicit request on their part, and such voluntary reporting could not result in a deprivation of liberty within the meaning of Article 5. However, the Court found that the wishes of the applicants could not remove or disguise the mandatory, as opposed to contractual, character of the decisions complained of. It was stressed that the right to liberty is too important for a person to lose the benefit of the protection of the Convention for the single reason that he gives himself up to be taken into detention.

Article 5 § 1

The Court began by accepting the definition of "vagrant" as set out in Belgian law and consequently that a person who met this definition fell within Article 5 § 1 (e). Since the applicants had the character of "vagrants", they could be detained provided that this detention was ordered by the competent authorities and was in accordance with the procedure prescribed by Belgian law. In this respect, although all three applicants were detained for different periods and in different institutions, the Court found no irregularities of arbitrariness in the placing of the applicants at the disposal of the Government and no reason to find the resulting detention incompatible with Article 5 § 1 (e).

Article 5 § 3

Article 5 § 3 is solely concerned with detention on reasonable suspicion of having committed an offence. Since simple vagrancy did not constitute an offence in Belgian law, the Court found Article 5 § 3 was not applicable in the present case.

Article 5 § 4

The Court began by highlighting that the absence of a breach of Article 5 § 1 did not preclude it from examining whether there had been a violation of Article 5 § 4. Everyone deprived of their liberty, lawfully or not, is entitled to supervision of lawfulness by a court.

Next, the Court considered whether the conditions in which the applicants appeared before the magistrates satisfied their right to take proceedings before a court to question the lawfulness of their detention. In this regard, the first question to be answered was whether Article 5 § 4 required two authorities to deal with cases, one to order the detention and one with the attributes of a court to examine its lawfulness, or whether one authority which has the attributes of a court ordering the detention was sufficient. It reached the conclusion that a single authority could satisfy the requirements of Article 5 § 4, provided that the procedure followed had a judicial character and gave to the individual concerned guarantees appropriate to the kind of deprivation of liberty in question.

In the present cases, the Court determined that from an organisational point of view the magistrate was a court since it was independent of the executive and of the parties of the case. However, since the deprivation complained of resembled that imposed by a criminal court, it was necessary to examine whether the procedure applicable provided guarantees equivalent to those existing in criminal matters across member States. The Court found that the magistrates did not ensure such guarantees since individuals liable under the Belgian Criminal Code to sentences shorter than those imposed on vagrants had the benefit of the extensive guarantees provided under the Code of Criminal Procedure. Thus, there was a breach of Article 5 § 4.

The applicants also alleged a violation of Article 5 § 4 in respect of the refusal of their requests for release. The Court held that they could have appealed to the Conseil d'État and that this would have been effective if the Minister of Justice had violated Belgian law or the Convention in refusing their requests. The applicants' requests related to the Minister's discretionary power to grant release before the statutory period or the term fixed by the discretionary power conferred upon him which fell outside the application of Article 5 § 4. Therefore, the Court found no violation of Article 5 § 4 in this regard.

Other complaints

In relation to the applicants' complaints under Articles 3, 4, 6, 7, 8 and 13 the Court either found there was no violation or considered it was unnecessary to examine the complaints.

The applicants' right to apply for just satisfaction was reserved.

The postponement of the applicant's date of release from imprisonment following a change in case-law after her conviction amounted to violations of Articles 5 and 7

GRAND CHAMBER JUDGMENT IN THE CASE OF DEL RÍO PRADA v. SPAIN

(Application no. 42750/09)
21 October 2013

1. Principal Facts

The applicant was a Spanish national, Ms Inés del Río Prada. In the course of eight different sets of proceedings, she was sentenced to imprisonment for over 3,000 years for terrorist-related offences committed between 1982 and 1987. The applicant was held in pre-trial detention in July 1987 and began to serve her sentence after her first conviction in February 1989.

In 2000, the *Audiencia Nacional* (a domestic court with jurisdiction in terrorist cases) decided that the legal and chronological links between the offences made it possible to group them together, therefore fixing the maximum term to be served by the applicant as a combined prison sentence of thirty years. Taking into consideration the remission that the applicant was entitled to for work carried out in detention, the prison authorities submitted a proposal to the *Audiencia Nacional* for the applicant to be released on 2 July 2008.

The *Audiencia Nacional* rejected the proposal, and requested the prison authorities to re-submit a date for the applicant's release taking into consideration a new precedent adopted by the Supreme Court in 2006. According to this judgment, any adjustments and remissions were to be applied successively to each of the sentences imposed, instead of being applied to the maximum term of imprisonment of thirty years (known as the "Parot doctrine"). Conforming to this doctrine, the applicant's time in prison would be increased by almost nine years.

The applicant appealed this decision, on the grounds that the application of the Parot doctrine would breach the principle of non-retroactive application of criminal law provisions that are less favourable to the accused. Her appeal was rejected on the basis that the issue at stake was not the limits of the prison sentences but rather how the reductions of sentences were applied. The Constitutional Court declared a further appeal by the applicant inadmissible.

2. Decision of the Court

The applicant complained that her continued detention had been unlawful under Article 5 § 1, and that the retroactive application of the new approach adopted by the Supreme Court after her conviction had breached Article 7. On 10 July 2012, a Chamber of the Court found that there had been a violation of Article 7 and that the applicant's detention, since 3 July 2008, had been unlawful and in violation of Article 5 § 1. Following a request from the Government, the case was referred to the Grand Chamber under Article 43.

Article 7

The Court affirmed that Article 7 enshrines the principle "nullum crimen, nulla poena sine lege", an essential element of the rule of law that provides effective safeguards against arbitrary prosecution, conviction and punishment. No derogation from this principle is permissible even in time of war or emergency. Article 7 encompasses the prohibition of retrospective application of criminal law to the disadvantage of the accused and the principle that offences and the relevant penalties must be clearly defined by a legal provision that was in force at the time when the accused committed the offences.

The Court noted that if, after the final sentence of an accused, the legislature, administrative authorities or courts impose measures that result in a change of scope of the penalty imposed by the trial court, such measures will fall within the scope of prohibition of retroactive application of penalties under Article 7 § 1 *in fine*.

However, the Court further acknowledged the difference between measures that constitute a "penalty" for the purposes of Article 7 and measures that concern the "execution" or "enforcement" of a penalty. Changes made to the manner of execution of a sentence will not fall within the scope of Article 7 § 1 *in fine*. To distinguish the latter from a measure that affects the scope of the penalty, the Court must examine what the intrinsic nature of the penalty was at the time it was imposed and take into consideration the domestic law taken as a whole, including previous case-law.

The Court considered that, at the time when the applicant committed the relevant offences, the domestic law and case-law were sufficiently clear to enable the applicant to reasonably expect that the penalty imposed on her was a maximum of thirty years' imprisonment, and that any remissions would be

deducted from that maximum penalty. The introduction of the "Parot doctrine" resulted in the redefinition of the scope of the penalty imposed, as the maximum term of thirty years' imprisonment became a sentence to which no remissions for work done in detention would effectively be applied. As such, the measure introduced by the Supreme Court fell within the scope of Article 7 § 1 *in fine*.

The Court also found that at the time of the applicant's conviction and of the decision to combine her sentences and set a maximum of thirty years' imprisonment, the applicant could not have reasonably foreseen that the Supreme Court would depart from previous case-law. Such departure resulted in a change of scope of the penalty imposed, to the applicant's disadvantage, and the Court found a violation of Article 7.

Article 5

The applicant alleged that her detention had breached the requirements of "lawfulness" and of "a procedure prescribed by law" imposed by Article 5.

The Court reiterated that Article 5 § 1 contains an exhaustive list of permissible grounds for deprivation of liberty. For the purposes of subparagraph (a), under which a person may be lawfully detained after a conviction by a competent court, "conviction" signifies both a finding of guilt and the imposition of a penalty involving deprivation of liberty. The Court also noted that the word "after" means that there must be a causal connection between the detention and the conviction, namely that the detention must result from the conviction.

In order for detention to be lawful and in accordance with a procedure prescribed by law, Article 5 imposes an obligation on States to conform with substantive and procedural rules of national law. It also demands quality of the law, requiring national law that authorises the deprivation of liberty to be sufficiently accessible, precise and foreseeable in its application.

The question under dispute in the present case was whether the applicant's continued detention after 2 July 2008, the date initially proposed by the prison authorities for her release, was lawful within the meaning of Article 5 and thus sufficiently foreseeable in its application. In line with the Court's considerations under Article 7, the Court found that when the applicant was convicted, when she worked in detention and when she was notified of the decision to combine the sentences and set a maximum of thirty years' imprisonment, the applicant could not have reasonably foreseen that the manner in which the remissions of

sentences were applied would change as a result of new case-law, including in its application to her own case.

As the applicant effectively served a longer term of imprisonment than she would have under the legislation in force at the time of her conviction, the Court concluded that her detention as of 3 July 2008 was unlawful and in violation of Article 5 § 1.

Article 46

The Court noted that, further to the finding of a violation, the respondent State is under a legal obligation to pay the sums awarded by way of just satisfaction and to take any individual and/or general measures in the domestic legal framework to end the violation. In principle, the State is free to choose the means by which it will abide by the final judgment, although the Court may assist in identifying appropriate measures. In the present case, the Court considered that due to the nature of the violation there was only one possible measure capable of urgently ending the violation, and thus considered it incumbent on the respondent State to release the applicant at the earliest possible date.

Article 41

The Court awarded the applicant €30,000 in respect of non-pecuniary damage and €1,500 in respect of costs and expenses.

The unacknowledged detention and extraordinary rendition of the applicant violated the Convention

GRAND CHAMBER JUDGMENT IN THE CASE OF EL-MASRI v. THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA

(Application No. 39630/09)
13 December 2012

1. Principal Facts

The applicant, Khaled El-Masri, was a German national born in 1963. In December 2003, he travelled to Skopje by bus to go on holiday. At the Serbian-Macedonian border, a suspicion arose as to the applicant's newly issued German passport. As a result, his personal belongings were searched and he was questioned about his possible ties to several Islamic organisations. After an approximately seven-hour interrogation, he was driven to his hotel accompanied by armed men in civilian attire. Upon arrival at the hotel, the applicant was detained incommunicado, and repeatedly interrogated in English, a language in which he was not proficient. He was informed that he would be returned to Germany if he signed a confession as a member of Al-Qaeda. His requests to contact the German embassy were refused. At one point, when he stated that he intended to leave, he was threatened with being shot. After ten days of detention, the applicant was transferred to Skopje airport, handcuffed and blindfolded.

At the airport he was severely beaten by disguised men. He was then shackled and chained to the walls of an aeroplane. His passport was affixed with a Macedonian exit stamp. The applicant was flown to Afghanistan via Iraq and held at a detention centre for high-risk terrorists. According to his submissions, he was kept for over four months in a small, dirty, dark concrete cell where he was repeatedly interrogated and beaten, kicked and threatened. His repeated requests to meet with a representative of the German Government were ignored.

In May 2004, the applicant was again blindfolded and handcuffed, instructed to change in to the clothes he had worn at the time he entered Skopje, and placed on another aircraft. The applicant was flown to Albania, without being told where he was. When he was finally released and told where he was, an Albanian exit stamp was affixed in his passport. The applicant was then flown

to Frankfurt, Germany. Upon his arrival, he was 18 kilograms lighter, unkempt, and diagnosed with Post-Traumatic Stress Disorder, likely caused by his torture and ill treatment.

2. Decision of the Court

The applicant contended that the Former Yugoslav Republic of Macedonia had been responsible for the ill treatment he had been subjected to in contravention of Articles 3, 5, 8, 10 and 13 of the Convention.

The Government denied any responsibility for the applicant's ill treatment and challenged the credibility of the expert reports as to his mental health.

Article 3

As to the facts of the case, the Court noted that the applicant's account had been very detailed, specific and consistent throughout the whole period following his return to Germany. His account was furthermore supported by a large amount of indirect evidence obtained during the international inquiries and an investigation by the German authorities. Finally, a statement by the former Macedonian Minister of the Interior submitted to the Court was confirmation of the facts established in the course of the other investigations and of the applicant's consistent and coherent description of events. In view of that evidence, the Court found the applicant's allegations, including the fact he had been handed over to the CIA, sufficiently convincing and established beyond reasonable doubt.

At the outset the Court recalled that freedom from torture was one of the most fundamental of rights. Thus it was imperative for States to effectively investigate all allegations of treatment which contravened Article 3. Without effective investigations which were capable of identifying the perpetrators of such acts, the rights and freedoms of Article 3 would be ineffective in practice, and allow State actors to breach the Article 3 rights of persons in their control with impunity. Therefore, investigations must be prompt, thorough and independent of the executive.

The applicant had brought a criminal complaint in October 2008 to the public prosecutor regarding the complicity of State agents in his rendition and ill treatment. His claims were supported by corroborating evidence, such as credible media reports and other foreign investigations. The public prosecutor

did no more than contact the Ministry of Interior and was therefore not justified in dismissing the applicant's complaint due to lack of evidence. The government conceded that the investigation in to the complaint had not been effective. In order to combat impunity for States involved in serious human rights abuses, the Court held that the applicant had been deprived of being given an adequate account of what happened to him, and why.

In addition, the treatment of the applicant could not be justified on the grounds of national security, or the combatting of terrorism. The Court reiterated that the prohibition of torture was an absolute right. Therefore, authorities had to take reasonable steps to avoid the risk of ill treatment that the State knew, or ought to have known, about. Although, whilst the applicant was held in the hotel in Skopje, he was not subjected to physical force, the Court noted that Article 3 does not refer exclusively to physical pain. The prolonged confinement of the applicant was such that would cause him emotional and psychological distress. The applicant was deliberately placed in a situation of perpetual anxiety because the authorities wished to extract a confession from him. Thus the Court held that the conditions at the hotel were severe enough to breach Article 3.

The ill treatment that the applicant underwent at Skopje airport was also held to be the responsibility of the Government. The actions of foreign officials which were undertaken with the knowledge or acquiescence of the authorities were imputable to the respondent State. The severity of the ill treatment could not be justified either, as the security officials clearly outnumbered the applicant, and he posed no risk to them. The Court also pointed out that forcible undressing conducted by the police serves to debase to such an extent that it should not be done arbitrarily.

It was further noted that the transfer of the applicant to the CIA was not done as part of a legitimate request for extradition. The Macedonian authorities knew the destination of the aeroplane that the applicant was forced on to. The Court expressed concerns as to the treatment meted out to suspected terrorists by US authorities, particularly in such high profile detention centres as Guantanamo Bay. Since this information was already in the public domain at the time that the applicant was handed over to the US authorities, the Court believed that the Macedonian authorities knew or ought to have known of the risk of torture and ill treatment. Thus, the Court found the Macedonian authorities in breach of Article 3.

Article 5

The Court noted the fundamental importance of the guarantees contained in Article 5 for securing the right of individuals in a democracy to be free from arbitrary detention at the hands of the authorities. It was for that reason that the Court had repeatedly stressed in its case-law that any deprivation of liberty must not only have been effected in conformity with the substantive and procedural rules of national law but must equally be in keeping with the very purpose of Article 5, namely to protect the individual from arbitrariness.

Although the investigation of terrorist offences undoubtedly presented special problems, that did not mean 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 by the Convention's supervisory institutions. In addition, the unacknowledged detention of an individual is a complete negation of the guarantees in Article 5. Having assumed control over an individual, the authorities have a duty to account for his or her whereabouts. For this reason, Article 5 must be seen as requiring the authorities to take effective measures to safeguard against the risk of disappearance and to conduct a prompt effective investigation into an arguable claim that a person has been taken into custody and has not been seen since.

In relation to the circumstance of the case, the Court found that the Macedonian Government was responsible for violating the applicant's rights under Article 5 during the entire period of his captivity. There had been no court order for his detention, as required under national law, and no custody records of his confinement in the hotel, a detention place outside any judicial framework. He had been deprived of any possibility of being brought before a court to test the lawfulness of his detention, having been left entirely at the mercy of the officials holding him. Furthermore, by handing the applicant over to the US authorities, it should have been clear to the Macedonian authorities that he faced a real risk of a flagrant violation of his rights under Article 5. Finally, having regard to its finding that there had been no effective investigation into his complaints of ill-treatment, the Court held that, for the same reasons, there had been no meaningful investigation into his allegations of arbitrary detention, in further violation of Article 5.

Article 8

The Court held that the applicant's rights to family and private life, Article 8,

had been breached, as they had been interfered with in such a way as to be 'not in accordance with law.'

Article 13

The Court further held that there had been a breach of the applicant's right to an effective remedy under Article 13. The applicant had been denied effective and practical remedies due to the lack of an effective investigation. There was no evidence that the decision to hand the applicant to the CIA had undergone any form of review. Therefore, in conjunction with Articles 3, 5 and 8 the Court found a breach of Article 13.

Article 41

The Court held that the Former Yugoslav Republic of Macedonia was to pay the applicant €60,000 for non-pecuniary damage.

Compulsory isolation of HIV infected person violated the right to liberty in Article 5

JUDGMENT IN THE CASE OF ENHORN v. SWEDEN

(Application no. 56529/00)
25 January 2005

1. Principal facts

The applicant was a Swedish national, Eie Enhorn, born in 1947. In 1994 it was discovered that he was infected with the HIV virus and that he had transmitted the virus to a 19-year-old man with whom he first had sexual contact in 1990. In light of this, a county medical officer issued instructions to the applicant pursuant to the 1988 Infectious Diseases Act (the "1998 Act"), which were aimed at preventing him from spreading the HIV infection. He was required to inform any potential sexual partners about his infection, to wear a condom and to abstain from consuming an amount of alcohol which could impair his judgment and cause him to put others at risk. He was also required to inform medical staff and his dentist about his infection before he underwent procedures such as physical examinations, vaccinations or blood tests and was obliged to visit his consulting physician and attend medical appointments fixed by the county medical officer.

Between September 1994 and November 1994, the applicant attended four appointments with the county medical officer and received two home visits. However, on five occasions, he failed to appear as summoned. The county medical officer therefore applied to the County Administrative Court for a court order that the applicant be kept in compulsory isolation in a hospital for up to three months. In a judgment of 16 February 1995, the County Administrative Court found that the applicant had failed to comply with the measures prescribed by the county medical officer, and ordered that he should be kept in compulsory isolation for up to three months pursuant to section 38 of the 1988 Act. Whilst isolated, the applicant was entitled to go outdoors at least once a day, but only if he was accompanied by hospital staff members.

Thereafter, orders to prolong his deprivation of liberty were continuously issued every six months until 12 December 2001. Since the applicant absconded several times, his actual deprivation of liberty lasted from 16 March 1995 until 25 April 1995, 11 June 1995 until 27 September 1995, 28 May 1996 until

6 November 1996, 16 November 1996 until 26 February 1997, and 26 February 1999 until 12 June 1999 – almost one and a half years altogether.

On 12 December 2001 an application to further extend the order was turned down by the County Administrative Court, which referred to the fact that the applicant's whereabouts were unknown and that therefore no information was available regarding his behaviour, state of health and so on. It appeared at the time of the judgment of the European Court that since 2002 the applicant's whereabouts had been known, but that the competent county medical officer made the assessment that there were no grounds for the applicant's further involuntary placement in isolation.

2. Decision of the Court

The applicant complained that the compulsory isolation orders and his involuntary placement in hospital had been in breach of Article 5 § 1 of the Convention.

Article 5 § 1

Being satisfied that the applicant's detention had a basis in Swedish law, the Court proceeded to examine whether the deprivation of the applicant's liberty amounted to "the lawful detention of a person in order to prevent the spreading of infectious diseases" within the meaning of Article 5 § 1 (e) of the Convention.

The Court emphasised that it does not suffice for a deprivation of liberty to be in accordance with national law, it must also comply with the general principle of legal certainty, meaning that the conditions for detention must be clearly defined and the relevant national law must be sufficiently accessible and precise to be foreseeable.

The Court stated that it had "only to a very limited extent" decided on cases where a person has been detained "for the prevention of the spreading of infectious diseases". It therefore drew comparisons from the case law on the other grounds for deprivation under Article 5 § 1 (e) (namely: persons of unsound mind, alcoholics or drug addicts or vagrants). The Court found that there was a link between 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. The Court stated therefore

that it was legitimate to conclude from this context that a predominant reason why the Convention allows the persons mentioned in Article 5 § 1 (e) to be deprived of their liberty was not only that they were a danger to public safety but also that their own interests may have necessitated their detention.

In light of this, the Court also found that there must be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention. For example, the detention of a person as a mental health patient will only be lawful for the purposes of sub-paragraph (e) if effected in a hospital, clinic or another appropriate institution.

The Court found that the essential criteria when assessing the "lawfulness" of the detention of a person "for the prevention of the spreading of infectious diseases" were whether the spreading of the infectious disease was dangerous for public health or safety, and whether detention of the person infected was the last resort in order to prevent the spreading of the disease, inasmuch as less severe measures had been considered and found to be insufficient to safeguard the public interest. When those criteria were no longer fulfilled, the basis for the deprivation of liberty ceased to exist. It did not suffice therefore if a deprivation of liberty in this context was lawful, it also needed to be necessary.

In the case under review, it was undisputed that the first criterion was fulfilled, in that the HIV virus was dangerous for public health and safety. With respect to the second criterion, the Court noted that the Government had not provided any examples of less severe measures which might have been considered for the applicant in the period from 16 February 1995 until 12 December 2001, but had turned out to be insufficient to safeguard the public interest.

Among other things, despite his being at large for most of the period from 16 February 1995 until 12 December 2001, there was no evidence or indication that during that period the applicant had transmitted the HIV virus to anybody, or that he had sexual intercourse without first informing his partner about his HIV infection, or that he did not use a condom, or that he had any sexual relationship at all for that matter. He had visited physicians twice during the period he absconded from 1997 to 1999, and on both occasions he informed them about his HIV infection. He therefore appeared to have acted in compliance with many of the instructions issued to him by the county medical officer in 1994.

In those circumstances, the Court found that the compulsory isolation

of the applicant was not a last resort in order to prevent him from spreading the HIV virus after less severe measures had been considered and found to be insufficient to safeguard the public interest. Moreover, by extending over a period of almost seven years the order for the applicant's compulsory isolation, with the result that he had been placed involuntarily in a hospital for almost one and a half years in total, the authorities had 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. There had accordingly been a violation of Article 5 § 1 of the Convention.

Article 41

The Court awarded the applicant €12,000 for non-pecuniary damage and €2,083 for costs and expenses.

Parliament's authorisation of two out of three sets of criminal proceedings against the applicant, a Member of Parliament, was sufficient to ensure the detention was lawful

JUDGMENT IN THE CASE OF FRROKU v. ALBANIA

(Application no. 47403/15)
18 September 2018

1. Principal facts

The applicant was born in 1972. A Member of Parliament at the time, in 2015 he had three sets of criminal proceedings brought against him.

The charges included in particular false statements, premeditated murder and laundering the proceeds from a criminal offence. The Parliament authorised his arrest and detention in the context of the first and second set of proceedings and he was placed under house arrest from 26 March 2015. Because the police were not in a position to enforce the house arrest, on 2 April 2015, Parliament authorised his placement in detention in connection with the second and third set of proceedings, which had in the meantime been joined.

In subsequent judicial proceedings, the Supreme Court validated the lawfulness of his detention, finding that there was a risk of flight and tampering with the collection of evidence. In the Supreme Court's view, all three conditions for detention had been cumulatively fulfilled in the applicant's case: firstly, that there was a reasonable suspicion, based on evidence, that the accused had committed a crime; secondly, that the facts attributed to the accused constituted a criminal offence which had not become time-barred, as provided for by the criminal law; and thirdly, that the accused was criminally responsible for the alleged criminal offence.

The applicant appealed to the Constitutional Court about his detention, alleging in particular that Parliament had not authorised his arrest in relation to the charges in the third set of criminal proceedings. However, his appeal was rejected in July 2015. The Constitutional Court found that the Supreme Court had authorised his detention in response to all the criminal charges against him, including the charges in the third set of proceedings. Mr Frroku made further challenges to his detention in 2015 and 2016, which were rejected.

2. Decision of the Court

Relying on Article 5 § 1, the applicant complained that he had been placed in detention in the third set of criminal proceedings against him without authorisation from Parliament.

Article 5 § 1

The Court reiterated that Article 5 § 1 contains an exhaustive list of permissible grounds for the deprivation of liberty. No deprivation of liberty will be lawful unless it falls within one of the grounds set out in sub-paragraphs (a) to (f) of Article 5 § 1. The Court further reiterated that the authorities must also conform to the requirements imposed by domestic law in proceedings concerning detention.

The Court was of the view that the central issue in this case was whether the applicant's detention in relation to the third set of criminal proceedings was "lawful" within the meaning of Article 5 § 1, including whether it was effected "in accordance with a procedure prescribed by law". The Court reiterated that the Convention refers essentially to national law, but it also requires that any measure depriving the individual of his liberty be compatible with the purpose of Article 5, namely to protect the individual from arbitrariness.

In the case, the Court observed that the applicant was deprived of his liberty as of 26 March 2015 and that he was thereafter in detention in relation to the first and second sets of proceedings. The General Prosecutor's Office initiated the criminal proceedings against the applicant in relation to the third set of proceedings only on 1 April 2015, and on the same day decided to join that set of proceedings to the second set of proceedings against the applicant. Parliament's decision to grant authorisation to detain the applicant was taken on the basis of that request. The Court accepted that Parliament may not have been informed that it was called on to decide also in relation to the third set of criminal proceedings, in addition to the second set of criminal proceedings.

However, the Court observed that although Parliament did not in fact give authorisation for the applicant's detention in relation to the third set of proceedings, the deprivation of his liberty was nonetheless lawful in the framework of the first and second criminal proceedings. Thus, although the authorities failed to specifically request Parliament's authorisation for arrest in relation to the third set of proceedings, that failure did not render the

applicant's detention unlawful. The entire period of detention was "lawful detention" on the basis of the first and second sets of criminal proceedings, in relation to which the Parliament had given its authorisation, and there was no violation of Article 5 § 1.

Lack of legal basis for detention in relation to the validation of a sentence imposed on the applicant in Italy

JUDGMENT IN THE CASE OF GRORI v. ALBANIA

(Application no. 25336/04)
7 July 2009

1. Principal facts

The applicant, Arben Grori, was an Albanian national born in 1971. At the time of the judgment of the European Court of Human Rights, he was detained in a high security prison in Albania serving a 15-year prison sentence for international narcotics trafficking and a life sentence for murder and illegal possession of firearms, the latter offences having been committed on Italian territory.

The applicant was initially detained in Albania on 30 April 2001 on the basis of an arrest warrant issued in Italy on 16 February 2001 in relation to his alleged involvement in drug trafficking. On that same day, Interpol Rome asked the Albanian authorities to initiate criminal proceedings against the applicant for crimes committed on Italian territory. In July 2002 the Albanian Prosecutor General charged the applicant with international narcotics trafficking and in December 2003 the Albanian courts found him guilty as charged and sentenced him, in June 2006, to 15 years in prison.

In addition, on 2 February 2001, the Italian authorities sentenced the applicant in absentia to life imprisonment for murder and to five years for illegal possession of firearms. However, they could not request the enforcement of that sentence in Albania, as at the time neither country was party to any international agreement on the matter.

While in detention pending the criminal proceedings in Albania for drug-trafficking carried out in Italy, the applicant was on 15 May 2002 served with an Albanian judicial decision ordering his detention pending the proceedings for the validation of the sentence imposed on him in Italy for murder and illegal possession of firearms.

The applicant complained before the Albanian courts that no request for the validation of the sentence, handed down in absentia in Italy, had been

addressed by the Italian authorities to the Albanian Minister of Justice. He also claimed that there had been no relevant international agreement in force between the countries at the relevant time for such a validation to take effect, and that he had not given his consent for the validation as required by the then Code of Criminal Procedure. The domestic courts found against him, concluding that according to international criminal law rules, cooperation between countries could occur even in the absence of bilateral treaties, on the basis of good will, generally recognised norms and the principle of reciprocity.

Between September 2003 and February 2004, the applicant asked for an appropriate medical examination in view of the deterioration in his health. In August 2004 he was diagnosed with multiple sclerosis, the doctors reporting that his disease could cause him shock, organ damage, permanent disability or death. In 2005, he brought several sets of criminal proceedings against the prosecution and the Head of Tirana Prison Hospital complaining of negligence in the provision of medical care as it had been delayed and he was being treated mainly with drugs prescribed to cure rheumatism.

On 10 January 2008 the European Court ordered the Albanian Government as an interim measure under Rule 39 to transfer him immediately to a civilian hospital for examination and appropriate medical treatment. On 28 January 2008, the Government transferred him to Tirana University Hospital Centre where he underwent a specialised medical examination. From 17 June 2008, the applicant received appropriate medical treatment for his disease.

2. Decision of the Court

The applicant complained mainly of having received inadequate medical treatment in prison and about the unlawfulness of his detention for the validation and enforcement in Albania of the life sentence imposed by the Italian courts in his absence. Here he relied on Articles 3 and 5 § 1. He also complained that his transfer to a civilian hospital in January 2008, as indicated by the Court under Rule 39 of its Rules of Court, had been delayed, in breach of Article 34.

Article 3

The Court noted with concern that between April 2005 and 28 January 2008 the applicant had been left for long periods of time without adequate medical treatment, despite suffering from a serious disease. In particular, the last

medical report on his state of health had confirmed that the progression of the disease over the years had been due to the lack of medical care. The Government had not supplied any justification about why it had refused to provide him with the medical treatment prescribed by the civilian doctors, especially given that it had been provided free of charge to persons in public hospitals at the time; the Government had likewise failed to explain how treatment with vitamins and anti-depressants could be considered adequate in the circumstances. Neither had the Government provided a plausible explanation for the deterioration of the applicant's health in prison. The Court concluded that all the above had created such a strong feeling of insecurity in the applicant that, combined with his physical suffering, it had amounted to degrading treatment, in violation of Article 3.

Article 5 § 1

The applicant was initially detained on 30 April 2001 on a criminal charge relating to his alleged involvement in drug trafficking. However, the present case concerned the applicant's detention as of 15 May 2002 in respect of the proceedings concerning the validation and enforcement of the Italian court's judgment. The end date was 29 December 2003, when the applicant was convicted of drug trafficking in the first set of proceedings. Following that date, there was a legal basis for his detention under Article 5 § 1 (a).

The Court also treated the applicant's detention as of 15 May 2002 as falling within the ambit of Article 5 § 1 (a). In relation to proceedings concerning the recognition of the validity and enforcement of sentences issued by a foreign court, the presumption was that detention of an individual is "lawful detention … after conviction by a competent court".

The Court reiterated that the list of exceptions in Article 5 § 1 is an exhaustive one and only a narrow interpretation is consistent with the aim that no one is arbitrarily deprived of his or her liberty. The detention has to meet the standard of "lawfulness", which requires that all law be sufficiently precise to allow the person – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. The authorities must also conform to the requirements imposed by domestic law.

When the Supreme and Constitutional courts considered the applicant's detention, they confined themselves to considering that the relevant provision

of the Code of Criminal Procedure was inadequate and that a legal basis could be provided by the generally recognised norms of international law in accordance with the principle of good will and reciprocity. They referred to two treaties, namely the European Convention on the International Validity of Criminal Judgments and the Convention on the Transfer of Sentenced Persons and the Additional Protocol thereto.

However, the European Convention on the International Validity of Criminal Judgments was not in force in respect of either country at the material time. Neither the Supreme Court nor the Constitutional Court suggested that either Convention was in force in respect of Albania.

In fact, the Supreme Court's search for a legal basis for the applicant's detention led it to import into domestic law provisions of international law instruments which had not yet entered into force with respect to Albania. Thus, the legal basis ultimately found by the Supreme Court could scarcely be said to have met the requirements for "lawfulness" as regards the applicant's detention and the conversion of his sentence imposed by the Italian courts. The Court concluded therefore that, between 15 May 2002 and 29 December 2003, the applicant had not been detained in accordance with a procedure prescribed by law, and that there had therefore been a violation of Article 5 § 1.

Article 34

The Court noted that despite having become aware at the latest on the morning of 11 January 2008 of its order to transfer the applicant into a hospital, the Government had effectuated his transfer only on 28 January 2008. Accordingly, the Court's order had not been complied with for 17 days and there had been no objective obstacles preventing the authorities to do so. There had therefore been a violation of Article 34.

Article 41

The Court awarded the applicant €8,000 in respect of non-pecuniary damage and €7,000 for costs and expenses.

The maximum permissible period of detention was clarified by the case law of the Supreme Court, which was accessible and sufficiently foreseeable – no violation of Article 5 § 1

JUDGMENT IN THE CASE OF GRUBIĆ v. CROATIA

(Application no. 5384/11)
30 October 2012

1. Principal facts

The applicant was a Croatian national born in 1972. In 2006, he was arrested on suspicion of having committed armed robberies. The investigating judge of the Zagreb County Court opened an investigation on suspicion that the applicant and six others had committed additional armed robberies, aggravated murders, and attempted aggravated murders. During the investigation, the applicant was detained pursuant to the Code of Criminal Procedure on the basis of his risk of reoffending and the gravity of the charges.

Following an indictment against the applicant and the six other individuals in May 2007, the applicant's pre-trial detention was extended, and he remained in detention throughout the trial. On 17 April 2009, a panel of the Zagreb County Court extended the maximum statutory limit of the applicant's detention under the Code of Criminal Procedure for a further six months. This decision was taken on the basis of national legislation providing that the maximum duration of a pre-trial detention could be extended in cases of corruption and organised crime.

On 21 April 2009, the Zagreb County Court found the applicant guilty of armed robbery and aggravated murder, and he was sentenced to 30 years' imprisonment. On 21 September 2009, he appealed to the Supreme Court. A panel of the Zagreb County Court extended the applicant's detention for a further nine months, again basing their decision on the Code of Criminal Procedure. On 18 November 2009, the applicant appealed against this decision, claiming that he had not been given the opportunity to be heard when his detention had been extended and that the decision to extend his detention was insufficiently reasoned.

On 25 November 2009, the Supreme Court dismissed the applicant's appeal, stating that he could be detained under the relevant provisions. On 16 December

2009, the Supreme Court dismissed the applicant's appeal against the first instance judgment as ill-founded. On 24 June 2010, the applicant lodged a further appeal with the Supreme Court against its judgment of December 2009.

Under the Code of Criminal Procedure, the Zagreb County Court extended the applicant's detention for a further three months in August 2010. The applicant appealed against the decision, arguing that his detention after 16 March 2010 was unlawful because the Code of Criminal Procedure stipulated that the detention should have lasted for a maximum of three months – until 16 March 2010 – following a judgment against which an appeal was allowed. On 25 August 2010, the Supreme Court dismissed the appeal on the basis of a different provision within the Code of Criminal Procedure. The applicant lodged a constitutional complaint with the Constitutional Court against the Supreme Court's decision.

In September 2010, the Supreme Court dismissed the applicant's appeal against the December 2009 judgment, making his conviction final. The Constitutional Court endorsed the arguments of the Supreme Court and dismissed the constitutional complaint against the Supreme Court's decision of August 2010. In October 2010, the applicant lodged a constitutional complaint with the Constitutional Court against the Supreme Court's judgment in September 2010, and the proceedings were still pending at the time of the European Court of Human Rights' judgment.

2. Decision of the Court

Relying on Article 5 § 1, the applicant alleged that the maximum permissible period for which he could be detained pending his appeal against his conviction had expired on 16 March 2010 and that his subsequent detention had therefore been unlawful.

Article 5 § 1

The Court observed that the applicant was detained after conviction by a competent court. The ground for the detention about which he was complaining was his conviction and thus the case fell to be examined under Article 5 § 1 (a).

The Court reiterated that any deprivation of liberty must be lawful, and that the concept of lawfulness included an obligation to conform to the substantive and procedural rules of national law. Deprivation of liberty is thus required to

have a legal basis in domestic law but is also required to adhere to the purpose of protecting individuals from arbitrariness in relation to the quality of the law – it must be sufficiently accessible, precise, and foreseeable in its application.

The Code of Criminal Procedure prescribed the maximum permissible duration of detention before a conviction became final. The Court accepted that the wording of the relevant provisions created some doubt regarding the manner of calculating the maximum permissible period where an appeal judgment was adopted. As the applicant suggested, the provision could be understood to suggest that the maximum duration of detention after an appeal judgment could not exceed three months.

Nonetheless, the lack of clarity regarding the maximum period of detention was resolved by the detailed guidelines adopted at a meeting of the Criminal Division of the Supreme Court on 23 March 2006. These guidelines were published by the Supreme Court and the same approach was confirmed in the Supreme Court's practice. Given that the applicant was legally represented throughout the criminal proceedings, it was expected of a lawyer that he or she would be aware of such relevant case law. Therefore, the Court concluded that the practice of the Supreme Court clarifying the manner of the application of the Code of Criminal Procedure was accessible and made the application sufficiently foreseeable. Moreover, the decisions the applicant was contesting were all taken after the guidelines in question were adopted. The Court found nothing indicating that the Supreme Court's interpretation of domestic law was arbitrary, and there had been no violation of Article 5 § 1.

The applicant also complained under Article 5 of the length of the pre-trial detention, and the lack of information being relayed to him and his counsel regarding a panel session of the Zagreb County Court. Likewise, he complained under Article 13 that he had had no effective remedy for his complaints, and that he had not been heard in person by the Supreme Court when it had dismissed his appeal against conviction. The Court considered that this part of the application did not disclose any appearance of a violation and found it inadmissible as manifestly ill-founded.

The applicant's compulsory residence on a small section of a remote Italian island constituted a deprivation of liberty and violated Article 5 § 1

JUDGMENT IN THE CASE OF GUZZARDI v. ITALY

(Application no. 7367/76)
6 November 1980

1. Principal Facts

The applicant, Mr Michele Guzzardi, was an Italian national who was arrested on 8 February 1973, placed in detention on remand and then charged with conspiracy and being an accomplice to the abduction of a businessman. He was initially acquitted on 13 November 1976 by the Milan Regional Court for lack of sufficient evidence but was later convicted on 19 December 1979 by the Milan Court of Appeal. He was sentenced to eighteen years' imprisonment and a fine.

According to Article 272 of the Italian Criminal Code Procedure, the applicant's detention on remand could not exceed two years. Thus, on 8 February 1975 he was removed from Milan gaol and taken to the island of Asinara. This transfer followed a report on 23 December 1974 sent by the Milan Chief of Police to the Milan State prosecutor recommending that the applicant be subjected to the measure of "special supervision" provided for under Italian law. The report made reference to indications that the applicant did not work in the building trade as he claimed but was in fact involved in illegal activities and belonged to a band of Mafiosi. The report described the applicant as "one of the most dangerous individuals".

On 30 January 1975, the Milan Regional Court directed that the applicant be placed under special supervision for three years. As part of this special supervision, the applicant was obliged to reside "in the district (commune) of the island of Asinara". He also had to meet various conditions including: reporting to the supervisory authorities twice a day and whenever called upon to do so; not returning to his residence later than 10pm; not going out before 7am; and informing the supervisory authorities in advance of any long-distance phone call made or received and of the name and number of the person he wished to phone.

The whole island of Asinara covers an area of 50 sq. km but the area reserved for individuals in compulsory residence only covered 2.5 sq. km.

Those in compulsory residence could apply for permission for a supervised visit to Sardinia or the Italian mainland if they had good reasons. There was also the option to visit Porto Torres to buy provisions after authorisation and under supervision. However, the frequency and actual possibility of such visits were disputed.

The applicant appealed to the Milan Court of Appeal (First Chamber) arguing that the decision to place him under special supervision was invalid and unjustified. However, this appeal did not have a suspensive effect and the applicant was obliged to reside on Asinara for its duration. The appeal was dismissed on 12 March 1975. The Appeal Court found that Asinara was a suitable location for compulsory residence. It emphasised that the purpose of the measure was to separate the applicant from his social environment in order to make contacting his previous associates more difficult and that this requirement took precedence over other requirements such as the absence of regular employment or suitable accommodation for a family. The applicant appealed to the Court of Cassation on 3 April 1975, but it was dismissed as being devoid of foundation on 6 October 1975.

The Second Chamber of the Court of Appeal gave its decision on 20 January 1976. It affirmed that the demands of the protection of society justified the special form of isolation undergone by the extremely dangerous individuals who were sent to Asinara. However, it decided that these demands did not require that these individuals were separated from their families or deprived of regular employment. Following this decision, on 21 July 1976 the Milan Regional Court directed that the applicant be sent to the district of Force on the Italian mainland. The reasoning given was that his co-accused was also serving a compulsory residence measure on Asinara and the applicant's continued presence may have had negative repercussions on the security of the island and the ensuing criminal proceedings. The applicant then had to remain in Force until 8 February 1978, when the three-year period initially fixed by the Milan Regional Court for the special supervision expired.

2. Decision of the Court

The applicant complained that the actions of the Italian authorities in compelling him to reside in such a small area of land where he was unable to work, keep his family permanently with him, practise the Catholic religion or ensure his son's education constituted a violation of Articles 3, 8, 9 and Article 2 of Protocol 1. Additional observations were requested on Articles 5

and 6, provisions which the applicant later relied on in addition to his previous complaints. The complaint under Article 5 became the focus of the judgment.

Article 5

The Court began by reiterating the well-established principle that Article 5 is not concerned with mere restrictions on liberty of movement. These restrictions are governed by Article 2 of Protocol 4, which has not been ratified by Italy. In order to determine whether someone has been deprived of their liberty for the purpose of Article 5, a range of factors such as the type, duration, effects and manner of implementation of the measure in the individual's concrete situation need to be considered.

In the applicant's case, the Court accepted that "special supervision" under Italian law did not in itself fall within the scope of Article 5. However, it is possible that the manner of implementation of a measure can lead to the finding of a deprivation of liberty and in this case, it was only the manner of implementation of the special supervision which fell to be considered.

The Court placed more emphasis on the range of factors that were restricting the applicant's liberty and less on the fact that the area that the applicant was confined to exceeded the dimensions of a cell and contained no physical barriers to exit. Amongst other factors, the Court noted that the area of confinement was a tiny section of an island that was difficult to access and was predominantly taken up by a prison. It also commented on the lack of opportunities for social contact. It was held that while taken singly each of the factors mentioned would not amount to a deprivation of liberty, cumulatively and in combination they raised issues under Article 5. Consequently, the Court found there had been a deprivation of liberty.

Next, the Court considered whether the situation fell under one of the authorised deprivations of liberty set out in Article 5 § 1 (a)-(f). Firstly, the Court rejected the Government's argument that the applicant could be classed as a "vagrant" for the purposes of Article 5 § 1 (c). It held that during proceedings the Italian authorities did not depict the applicant as a vagrant but instead focused on his criminal record, his illegal activities and his links with the mafia. Moreover, the Court did not consider the applicant's way of life to be in line with the ordinary meaning of the word "vagrant". Importantly, it was emphasised that Article 5 §1 (c) permits the detention of persons of unsound mind, alcoholics, drug addicts and vagrants not only because they are occasionally

deemed dangerous for public safety but also because their own interests may necessitate their detention. Consequently, the Court could not accept that the fact that Article 5 § 1 (c) authorises the detention of vagrants, would mean that the aforementioned reasoning could be applied to any individual who was regarded as dangerous.

The Court then went on to consider the possibility of the applicant's detention being justified under the other paragraphs of Article 5 § 1 which were not pleaded by the Government. It ruled out detention "after conviction by a competent court" (Article 5 § 1 (a)) since the compulsory residence was not punishment for a specific offence but a preventive measure taken on the strength of indications of a propensity to crime. The Court also rejected the possibility of a justification under Article 5 § 1 (b) since a warning issued by Chief of Police did not constitute "an order of a court".

Furthermore, Article 5 § 1 (c) was not deemed to be applicable since the decisions of the Regional Court had no connection in law with the criminal investigation relating to abduction, the offence the applicant was reasonably suspected of having committed. The special supervision legislation could be applied irrespective of whether a charge had been brought against an individual. In addition, since Article 5 § 1 (c) and the ability to detain an individual where it is reasonably considered necessary to prevent them committing an offence does not authorise a policy of general prevention directed against a particular category of individuals such as the mafia, the applicant's detention could not be justified under this provision.

Therefore, the Court concluded that there was no justification under Article 5 § 1 (a)-(f) for the applicant's detention and there had been a breach of Article 5 § 1.

Articles 3, 6, 8 and 9

The Court dealt briefly with the applicant's remaining complaints. It held that his living conditions did not reach the adequate level of severity to fall within the scope of Article 3. The Court found that there was no evidence for an infringement of Article 6 § 1.

Since the applicant's wife and son were able to live with him for fourteen of the sixteen months he spent on the island and the reason they had to leave was because they had not applied for the renewal of their residence permits, the

Court found there to be no conduct that could be attributed to the Italian state in violation of Article 8. Finally, the Court found no evidence to substantiate the applicant's claim that his right to manifest his religion had been infringed upon.

Article 50 (now Article 41)

The Court awarded the applicant under Article 50 a sum of one million Lire.[199]

199 Equivalent to £557.23 at the time.

The placement of an elderly person in a nursing home on account of serious neglect did not amount to a deprivation of liberty under Article 5

JUDGMENT IN THE CASE OF H.M. v. SWITZERLAND

(Application no. 39187/98)
26 February 2002

1. Principal Facts

The applicant, Mrs H.M, was a Swiss national born in 1912. She was a pensioner who until late 1996 lived with her son, He.M. She started receiving assistance from the Lyss Association for Home Visits to the Sick and Housebound (the Association), that provided care and treatment to her leg sores in 1987. In 1996, the Association complained to the Lyss Guardianship Office that it was facing serious difficulties in assisting the applicant, describing that its programme was being disrupted, that He.M. would not open the door on time, the house was untidy, the rooms were not heated and the applicant's room was chaotic. The Association set a number of conditions that needed to be fulfilled in order to continue the programme, however in the absence of improvement it stopped visiting the applicant in February 1996.

In December 1996, the Lyss Guardianship Commission made a request to the District Government Office to place the applicant in a nursing home. After visiting the applicant, the District Government Office made such an order. It was granted on account of the serious neglect suffered by the applicant, her need to receive treatment to her leg sores and cataract, and the intolerable conditions and lack of heating in her house.

The applicant and He.M. appealed this decision, which the Appeals Commission dismissed after hearing the applicant. It concluded that the applicant was unable to tend to her most basic dietary and hygiene needs and had been neglected. The Appeals Commission also found that the applicant suffered from a mental disability which justified her placement in a nursing home, even if the degree of neglect was not sufficiently serious.

In 1997, the Federal Court dismissed a further appeal submitted by the applicant and He.M., reiterating that other measures had been attempted but the placement of the applicant in a nursing home was ultimately considered the only means of preventing neglect. In 1998, the District Government Office

lifted the applicant's placement order after she agreed to reside in the nursing home of her own free will.

2. Decision of the Court

The applicant complained that her deprivation of liberty was unlawful, on the grounds that Article 5 § 1 (e) does not cite neglect as a ground for detention.

Article 5

The Court first examined whether the applicant's placement in a nursing home was considered a deprivation of liberty for the purposes of Article 5. This assessment took as its starting point the specific situation of the individual and considered a number of factors, including the type, duration, effects and manner of implementation of the deprivation of liberty. The Court pointed out that there is no substantive distinction between the deprivation of liberty and the restriction of liberty of movement, the difference being only one of degree and intensity.

In the present case, the Court noted that the applicant had been given the possibility of staying at home and being cared for by the Association, however her living conditions deteriorated to such an extent that the authorities considered it necessary to place her in a nursing home. The applicant was not placed in a secure ward and had freedom of movement and could communicate with the outside world. Moreover, the domestic courts had found that the applicant would have been hardly aware of the effects of staying at the nursing home, and the applicant stated before the Appeals Commission that she had no reason to be unhappy at the nursing home and later even agreed to stay there. The placement of the applicant in a nursing home was ordered in her own interests, to provide for the requisite medical care and standards of hygiene.

In light of the abovementioned circumstances of the case, the Court concluded that the placement of the applicant in a nursing home was a responsible measure taken by the domestic authorities that did not amount to a deprivation of liberty within the meaning of Article 5 § 1. The Court hence found there had been no violation of Article 5.

Asylum seekers in transit zone between Serbia and Hungary were not deprived of their liberty within the meaning of Article 5 but their removal to Serbia constituted a breach of Article 3

GRAND CHAMBER JUDGMENT IN THE CASE OF ILIAS AND AHMED v. HUNGARY

(Application no. 47287/15)
21 November 2019

1. Principal Facts

The two applicants were Bangladeshi nationals, Mr Ilias Ilias and Mr Ali Ahmed. The applicants were born in 1983 and 1980 respectively.

On 15 September 2015 the applicants arrived in Hungary from Serbia. At unspecified times, each applicant on their own, travelled through different countries before meeting each other in Greece, leaving together for North Macedonia, Serbia and Hungary.

Upon their arrival to Hungary, they entered the Röszke transit zone, situated in Hungarian territory at the border between Hungary and Serbia. The transit zone was a compound with mobile containers and a narrow open-air area surrounded by approximately four-meter high fencing with barbed wire on the top and guarded by police officers and armed security guards. The ten mobile containers were furnished with three to five beds and an electric heater. There was a separate container for sanitary purposes and a bigger container used as a common room.

According to the applicants, they had no access to social or medical assistance while in the zone, nor any access to television or the Internet, landline telephone or any recreational facilities. The Government however alleged that medical care was available for two hours daily from doctors of the Hungarian Defence Force. According to the Council of Europe's Committee for the Prevention of Torture ("the CPT"), the beds in the zone were fitted with clean mattresses, pillows and bedding, the containers had good access to natural light and artificial lighting and the sanitary facilities were satisfactory and health care was provided. Individuals in the transit zone could spend time outdoors on a narrow strip of land in front of the containers serving as dormitories and could receive visits, such as by their lawyer, with the authorities' permission.

On the same day of the applicants' arrival in Hungary, 15 September 2015, they each submitted requests for asylum. They were interviewed with the assistance of an interpreter. The first applicant's interview lasted two hours and the second applicant's twenty-two minutes. The first applicant was provided with a two-page information leaflet in Urdu (not their mother tongue) on asylum procedure. According to the notes taken by the Hungarian authorities, Hungary was the first country where both applicants had applied for asylum. During the interview, both applicants were invited to explain why they had not requested protection in Serbia. The first applicant was given a three-day period to rebut the presumption that Serbia was a "safe third country" and the second applicant was asked to explain why he thought that he could not have obtained protection in Serbia as an immediate obligation. Both asylum requests were rejected on the same day as being inadmissible and the applicants' expulsion was ordered.

The applicants, with the help of lawyers of the Hungarian Helsinki Committee, challenged the decisions before the Szeged Administrative and Labour Court. On 21 September 2015, this court annulled the asylum authority's decisions and remitted the case to it for fresh consideration.

In the renewed procedure before the asylum authority the applicants' submitted a written opinion by a psychiatrist, who diagnosed both applicants with PTSD and the second applicant also with an episode of depression. The psychiatrist did not mention any need for medical or psychological treatment. However, she was of the opinion that the applicants' mental state was liable to deteriorate due to the confinement.

On 30 September 2015, the asylum authority rejected the applications for asylum. The applicants sought judicial review by the Szeged Administrative and Labour Court.

However, on 5 October 2015, the Szeged Administrative and Labour Court upheld the asylum authority's decisions. The final decisions were served on the applicants on 8 October 2015. They were written in Hungarian but explained to them in Urdu. During the afternoon of the same day the applicants were escorted by police officers out of the transit zone and then entered Serbia, despite having expressed their wish to appeal and remain in Hungary.

2. Decision of the Court

The applicants alleged that their expulsion to Serbia had exposed them to a real risk of treatment contrary to Article 3 of the Convention. They also complained that they had been confined to the transit zone in violation of Article 5. On 14 March 2017, the Chamber held that there had been violations of Article 5 § 1 and 5 § 4, as well as Article 13 in conjunction with Article 3 in relation to the conditions of detention, and of Article 3 in respect of the applicants' expulsion to Serbia. At the Government's request under Article 43, the case was referred to the Grand Chamber.

Article 3

The applicants' removal to Serbia

The Court observed that removal to a third country must be preceded by thorough examination of the question whether the receiving third country's asylum procedure affords sufficient guarantees to avoid an asylum-seeker being removed, directly or indirectly, to his country of origin without a proper evaluation of the risks he faces from the standpoint of Article 3. While it is for the persons seeking asylum to rely on and to substantiate their individual circumstances that the national authorities cannot be aware of, those authorities must carry out of their own motion an up-to-date assessment of the accessibility and functioning of the receiving country's asylum system and the safeguards it affords.

Firstly, the Court looked at whether the Hungarian authorities took into account the available general information about Serbia and its asylum system in an adequate manner and of their own initiative. The Hungarian authorities merely relied on a list of "safe third countries" established by Government decree no. 191/2015. While the Court noted that the Convention does not prevent Contracting States from establishing lists of countries which are presumed safe for asylum seekers, any such presumption, if it has been relied upon in decisions concerning an individual asylum seeker, must be sufficiently supported at the outset by an analysis of the relevant conditions in that country and, in particular, of its asylum system. The Court was not satisfied that the respondent Government mentioned any facts demonstrating that the decision-making process leading to the adoption of the presumption in 2015, when the decree was adopted, involved a thorough assessment of the risk of lack of effective access to asylum proceedings in Serbia.

Secondly, the Court looked at whether the applicants were given sufficient opportunity to demonstrate that Serbia was not a safe third country in their particular case. The Court observed that while the applicants were able to make detailed submissions in the domestic proceedings and were legally represented, the Court was not convinced that this meant that the national authorities had given sufficient attention to the risks of denial of access to an effective asylum procedure in Serbia. Furthermore, in the Court's view the asylum authority and the national court had made only passing references to the UNHCR report and other relevant information. There was an insufficient basis for the Government's decision to establish a general presumption concerning Serbia as a safe third country. The expulsion decisions disregarded the authoritative findings of the UNHCR as to a real risk of denial of access to an effective asylum procedure in Serbia and summary removal from Serbia to North Macedonia and then to Greece, and the Hungarian authorities exacerbated the risks facing the applicants by inducing them to enter Serbia illegally instead of negotiating an orderly return. The Court therefore found that Hungary had failed to discharge its procedural obligation under Article 3 of the Convention to assess the risks of treatment contrary to that provision before removing the applicants from Hungary.

The conditions in the Röszke border transit zone

While at the transit zone, the applicants were fully dependent on the Hungarian authorities for their most basic human needs and as such it was the authorities' responsibility not to subject them to such conditions as would constitute inhuman and degrading treatment contrary to Article 3.

In terms of the applicants' vulnerability, the Court endorsed the Chamber's view that while it is true that asylum-seekers may be considered vulnerable because of everything they might have been through during their migration, there is no indication that the applicants in the present case were more vulnerable than any other adult asylum-seekers confined to the Röszke transit zone. As a result, the Court held that there had been no violation of Article 3 with regard to the conditions in the Röszke border transit zone.

Article 5

In looking at Article 5, the Court considered relevant principles set out in previous jurisprudence such as whether the applicants, while waiting for the processing of their asylum claims, benefitted from procedural rights and

safeguards against excessive waiting periods and whether there the was a domestic legal regulation limiting the length of stay in the transit zone.

The Court observed that while the Hungarian authorities were working in conditions of a mass influx of asylum-seekers, the applicants' asylum claims, and their judicial appeals were examined within three weeks and two days. The applicants' situation was not influenced by any inaction of the Hungarian authorities and no action was imputable to them other than what was strictly necessary to verify whether the applicants' wish to enter Hungary to seek asylum there could be granted. The applicants had not been deported or returned but had crossed into Hungary from Serbia of their own free will.

Next, the Court looked at the nature and degree of the actual restrictions imposed on or experienced by the applicants. Individuals staying at the Röszke transit zone were not permitted to leave in the direction of the remaining territory of Hungary which was unsurprising, having regard to the purpose of the transit zone as a waiting area while the authorities decided whether to formally admit asylum-seekers to Hungary. The Court found that, overall, the size of the area and the manner in which it was controlled were such that the applicants' freedom of movement was restricted to a very significant degree, in a manner similar to the characteristics of certain types of light-regime detention facilities. However, the conditions imposed did not limit their liberty unnecessarily or to an extent or in a manner unconnected to the examination to their asylum claims.

The remaining question was whether the applicants could leave the transit zone in a direction other than the territory of Hungary. In this regard, the Court observed, in the first place, that during the relevant period many persons in the applicants' situation returned from the Röszke transit zone to Serbia. The Court also found it significant to contrast this case to, for example, persons confined to an airport transit zone, in that those placed in a land border transit did not need to board an airplane in order to return to the country from which they came. In practical terms, therefore, the possibility for them to leave the Röszke land border transit zone was not only theoretical but realistic and it was practically possible for the applicants to walk to the border and cross into Serbia, a country bound by the Geneva Convention relating to the Status of Refugees.

The Court noted that it was of further relevance that what the applicants feared in case of return to Serbia, as explained in their submissions, was

not a direct threat to their life or health but deficiencies in the functioning of Serbia's asylum system. According to the Court, such fears alone would stretch the concept of deprivation of liberty beyond its meaning intended by the Convention.

In the Court's view, where – as in the present case – the sum of all other relevant factors did not point to a situation of de facto deprivation of liberty and it was possible for the asylum seekers, without a direct threat for their life or health, known by or brought to the attention of the authorities at the relevant time, to return to the third intermediary country they had come from, Article 5 could not be seen as applicable to their situation in a land border transit zone where they awaited the examination of their asylum claims, on the ground that the authorities had not complied with their separate procedural duties under Article 3. The Court therefore found that, having regard to all the circumstances of the present case, the applicants were not deprived of their liberty within the meaning of Article 5.

Article 41

The Court awarded €5,000 to each applicant in respect of non-pecuniary damages, and €18,000 jointly to the two applicants in respect of all costs and expenses.

The detention of irregular migrants to Tunisia who landed on the Italian coast in September 2011 violated Article 5

GRAND CHAMBER JUDGMENT IN THE CASE OF KHLAIFIA AND OTHERS v. ITALY

(Application no. 16483/12)
15 December 2016

1. Principal facts

The applicants, Saber Ben Mohamed Ben Ali Khlaifia, Fakhreddine Ben Brahim Ben Mustapha Tabal and Mohamed Ben Habib Ben Jaber Sfar, were Tunisian nationals born in 1983, 1987 and 1988 respectively.

On 16 and 17 September 2011 they left Tunisia on makeshift boats heading to the Italian coast. Their boats were intercepted by the Italian authorities, which escorted them to the island of Lampedusa. They were subsequently transferred to an Early Reception and Aid Centre ("CSPA") on the island, where the authorities proceeded with their identification. The applicants alleged that the Centre was overcrowded with unacceptable sanitation, inadequate space to sleep and that they had no contact with the outside due to constant police surveillance.

Following an uprising by detainees on 20 September, the CSPA suffered fire damage and was partially destroyed. The applicants were transferred to a sports park for the night, where they managed to evade detection by the law enforcement agencies and reached the village of Lampedusa. They then joined in a protest demonstration with almost 1,800 other migrants. After being stopped by the police, the applicants were first taken back to the reception centre and then to Lampedusa Airport, from where they were flown to Palermo on 22 September 2011. The applicants were then placed on two ships moored in that city's harbour, where they stayed for a few days. The first applicant was placed on the *Vincent*, with some 190 other people, while the second and third applicants were put on board the *Audace*, with about 150 others.

The applicants were finally expelled to Tunisia on 27 and 29 September 2011. Before their departure they were interviewed by the Tunisian Consul, who, according to the applicants, merely recorded their civil status data.

The applicants also asserted that at no time during their stay in Italy had they been issued with any document. Annexed to their observations, the Government, however, produced three refusal-of-entry orders dated 27 and 29 September 2011 that had been issued in respect of the applicants. Those orders, which were virtually identical, were each accompanied by a record of notification with the same handwritten indication "[the person] refused to sign or to receive a copy." On their arrival at Tunis airport, the applicants were released.

2. Decision of the Court

On 1 September 2015, a Chamber of the Court found that there had been a violation of Article 5(1), (2) and (4) of the Convention, that there had been no violation of Article 3 in respect of the conditions of detention on board the ships but that there had been a violation of Article 3 in respect of the conditions of detention in the CSPA. It also held that there had been a violation of Article 4 of Protocol No. 4 and of Article 13 taken in conjunction with Article 3, and Article 4 of Protocol No. 4. On the Government's request, the case was referred to the Grand Chamber under Article 43.

The applicants alleged that their confinement firstly at a reception centre for irregular migrants and subsequently on two ships was in breach of the Convention. They also argued that they had been subjected to a collective expulsion and that, under Italian law, they had had no effective remedy by which to complain of the violation of their fundamental rights.

Article 5(1)

Contrary to the Government's argument, the Court held that the bilateral agreement between Italy and Tunisia of April 2011 could not be considered as constituting a legal basis for the applicants' detention at the CSPA, considering that the agreement had not been made public and had thus been inaccessible to the applicants, who accordingly could not have foreseen the consequences of its application. In addition, the applicants had been unable to enjoy the fundamental safeguards of *habeas corpus* such as the requirement that any restriction of personal liberty must be based on a reasoned decision of a judicial authority, and that any provisional measures taken by a police authority must be validated by the judicial authority. In the present case, there had been no judicial or administrative authority validating the applicants' detention.

In view of the above, the Court found that the applicants' deprivation of liberty could not be regarded as "lawful" within the meaning of Article 5(1) as it did not satisfy the general principle of legal certainty and was not compatible with the aim of protecting the individual against arbitrariness. Accordingly, there was a violation of Article 5(1) of the Convention.

Article 5(2)

The Court observed that having found, under Article 5(1), that the applicants' detention had no clear and accessible legal basis in Italian law, the authorities could not have informed the applicants of the legal reasons for their deprivation of liberty or thus have provided them with sufficient information to enable them to challenge the grounds for the measure before a court. Accordingly, it found that there had been a violation of Article 5(2).

Article 5(4)

Having regard to its finding under Article 5(2) that the legal reasons for the applicants' detention in the CSPA and on the ships had not been notified to them, the Court concluded that their right to appeal against their detention was deprived of all effective substance. There had thus been a violation of Article 5(4).

Article 3

With respect to the conditions in the CSPA, the Court acknowledged that this centre was not suited to stays of several days and the Italian authorities had an obligation to transfer them to suitable places. Considering, however, that the centre had been gutted by fire only two or three days after the applicants' arrival, it could not be presumed that the Italian authorities had been inactive or negligent. Furthermore, the applicants did not claim that they had been deliberately ill-treated by the authorities in the centre, that the food or water had been insufficient or that the climate at the time had affected them negatively when they had had to sleep outside. Nor could they be seen as falling within any of the categories of vulnerable persons. Hence the treatment they complained of did not exceed the level of severity required for it to fall within Article 3.

As regards the conditions on the two ships, the Court dismissed the applicants' allegations of ill-treatment as being based merely on their own testimony, with no objective reports certifying any signs or after-effects of the

alleged ill-treatment or any third-party testimony confirming their version of the facts. Hence, there was no violation of Article 3.

Article 4 of Protocol No. 4

Article 4 of Protocol No. 4 does not guarantee the right to an individual interview in all circumstances; the requirements of this provision may be satisfied where each alien has a genuine and effective possibility of submitting arguments against his or her expulsion.

In the present case, the applicants had an opportunity to notify the authorities of any reasons why they should not be returned either during the two identification procedures that they underwent, or at any other time during the not insignificant period of time they remained in Italy. The relatively simple and standardised nature of the refusal-of-entry orders could be explained by the fact that the applicants did not have any valid travel documents and had not alleged either that they feared ill-treatment in the event of their return or that there were any other legal impediments to their expulsion. Thus, the virtually simultaneous removal of the three applicants did not lead to the conclusion that their expulsion was "collective", and the Court found no violation of Article 4 of Protocol No. 4.

Article 13 taken together with Article 3

The Court held that there was no indication provided of any remedies by which the applicants could have complained about the conditions in which they were held. An appeal to the Justice of the Peace against the refusal-of-entry orders would have served only to challenge the lawfulness of their removal. Moreover, those orders were issued only at the end of their period of confinement. Consequently, there had been a violation of Article 13 taken together with Article 3.

Article 13 taken together with Article 4 of Protocol No. 4

The refusal-of-entry orders indicated expressly that the individuals concerned could appeal against them to the Agrigento Justice of the Peace. In that context the judge could examine any complaint about a failure to take account of the migrant's personal situation. As regards the non-suspensive nature of the above appeal, the Court held that the lack of suspensive effect of a removal decision did not in itself constitute a violation of Article 13 where, as

in the present case, the applicants did not allege that there was a real risk of a violation of the rights guaranteed by Articles 2 or 3 in the destination country. Accordingly, there had been no violation of Article 13 taken together with Article 4 of Protocol No. 4.

Article 41

The Court awarded each applicant €2,500 in respect of non-pecuniary damage, and all three applicants jointly €15,000 for costs and expenses.

The detention of an Algerian national in Malta whilst awaiting deportation was unlawful and in violation of Article 5

JUDGMENT IN THE CASE OF LOULED MASSOUD v. MALTA

(Application No. 24340/08)
27 July 2010

1. Principal facts

The applicant, Mr Louled Massoud, was an Algerian national born in 1960. He arrived in Malta from Libya by boat in June 2006. He did not carry any documents, and was immediately detained at police headquarters. He was subsequently charged and found guilty by the Court of Magistrates of aiding other persons to enter Malta, and was sentenced to eighteen months' imprisonment.

While in prison, on 17 April 2007, the applicant applied for asylum, and was interviewed on the same day. His asylum claim was rejected on 24 April, and he submitted an appeal. Once he served his sentence and was released from prison on 27 June 2007, the applicant was placed in a detention centre pending the determination of his asylum appeal. The appeal was rejected on 18 July 2007 as he did not provide convincing evidence that he would face a real risk or had a well-founded fear of persecution.

The applicant stayed in detention awaiting deportation under the Government's immigration policy until 6 January 2009 when his removal order was rescinded given the lack of prospect of his eventual deportation.

2. Decision of the Court

The applicant complained that he had been subjected to inhuman and degrading treatment arising from the conditions of his detention, in violation of Article 3. He argued that the Maltese legal system had not provided him with a speedy and efficient remedy, contrary to Article 5 § 4, and that his detention following the determination of his asylum claim had been arbitrary and unlawful, in breach of Article 5 § 1. Finally, he claimed that upon his arrest he had not been provided with the legal and factual grounds for his detention as prescribed by Article 5 § 2.

Article 3

Since the applicant had omitted to institute proceedings raising the Article 3 complaint before the competent national courts, this complaint was rejected by the Court for non-exhaustion of domestic remedies.

Article 5 § 4

The Court considered the effectiveness of each existing remedy under Maltese domestic law.

In the first place, the Court observed that, under Article 409A of the Criminal Code where a request could be made to the Court of Magistrates to examine the lawfulness of detention and order release from custody, the courts entrusted with hearing applications had limited competence. In particular, they were not capable of examining other circumstances which could render detention illegal, such as an incompatibility with the rights set forth in the Convention, the general principles embodied therein, and the aim of the restrictions for the purposes of Article 5 § 1.

The Court then moved on to analyse the remedy before the Immigration Appeals Board (IAB). It noted that the relevant legal provision limited the release from custody to cases where the identity of the detainee had already been verified. Furthermore, considering that such proceedings took at least one month to be decided and that they could last as long as three months or more, the Court highlighted that there had been cases where the decision was not made before the actual release date, rendering such a remedy devoid of any legal practical effect. Thus, the proceedings before the IAB could not be considered to determine requests speedily.

Finally, as for the constitutional remedy, the Court held that such proceedings were rather cumbersome for Article 5 § 4 purposes, and that lodging a constitutional application could not guarantee a fast review of the lawfulness of an applicant's detention.

In conclusion, the Court held that the applicant did not have at his disposal under domestic law an effective and speedy remedy for challenging the lawfulness of his detention. Hence, there had been a violation of Article 5 § 4.

Article 5 § 1

The applicant's detention in prison fell initially under Article 5 § 1 (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. It subsequently fell under sub-paragraph (a), namely, the lawful detention of a person after conviction by a competent court. These periods did not raise an issue before the Court. After he served his sentence, the applicant was transferred to a detention centre and detained "with a view to deportation" within the meaning of Article 5 § 1 (f). The period of detention to be considered for the purposes of the complaint was hence from 27 June 2007 to 6 January 2009, when he was released. His detention had lasted eighteen months and nine days, and the Court had to determine whether this was excessive, and whether the authorities conducted the deportation proceedings with due diligence.

The period, despite not being as striking as that in other cases, was not due to the need to wait for the courts to determine a legal challenge, as the applicant's asylum appeal had been determined three weeks in to his detention. Even considering that the applicant was undocumented, the Court found that the Government did not pursue the deportation matter vigorously, and did not enter into negotiations with the Algerian authorities in order to expedite the delivery of an identity document. Moreover, it was unlikely that the authorities could not have had, at their disposal, measures other than the applicant's prolonged detention to secure an eventual removal in the absence of any immediate prospect of his expulsion.

In light of the above, the Court doubted that the grounds for the applicant's detention – action taken with a view to his deportation under Article 5 § 1 (f) – remained valid for the whole period of his detention, following the rejection of his asylum claim, due to the likely lack of a realistic prospects of his expulsion and the possible failure of the authorities to pursue the proceedings with due diligence.

The Court moved on to determine whether the detention was lawful under national law, in accordance with a procedure prescribed by law, and whether there were sufficient guarantees against arbitrariness. It noted that the Immigration Act applied no limit to detention, and the applicant was subject to an indeterminate period of detention. Procedural safeguards were hence decisive, however the Court had already determined that the applicant did

not have any effective remedy to challenge the lawfulness and length of his detention. It followed that the Maltese legal system did not provide for a procedure capable of avoiding arbitrary detention pending deportation.

The Court concluded that the national system failed to protect the applicant from arbitrary detention, and his detention had not been "lawful" for the purposes of Article 5.

There had accordingly been a violation of Article 5 § 1 of the Convention.

Article 5 § 2

The Court declared this part of the complaint inadmissible for non-compliance with the six-month time limit.

Article 41

The Court awarded the applicant €12,000 in respect of non-pecuniary damage.

The applicant, a Syrian asylum seeker, was detained unlawfully in violation of Article 5, and did not have access to an effective remedy in relation to his proposed deportation

JUDGMENT IN THE CASE OF M.A. v. CYPRUS

(Application No. 41872/10)
23 July 2013

1. Principal facts

The applicant was a Syrian national of Kurdish origin, who left Syria on 21 May 2005 and entered Cyprus unlawfully later that year.

He claimed asylum in September 2005, however his application was dismissed by the Asylum Service on 21 July 2006. His appeal was dismissed by the Reviewing Authority. On 1 September 2008 the applicant's file was reopened by the Asylum Service in order to examine new information put forward by the applicant, mainly concerning his activities as the head of the Yekiti Party in Cyprus. It was determined that this did not form the basis of a new asylum claim, however in April 2011 the Reviewing Authority again decided to reopen the applicant's claim, and this time he was granted refugee status.

In the course of the domestic asylum proceedings the applicant was at risk of deportation to Syria. In May 2010, when the asylum proceedings had been reopened, the applicant, along with other Kurds from Syria, staged a demonstration in Nicosia to protest against the policy of the Asylum Service. A group of about 150 people established an encampment of around 80 tents on the pavement and remained there around the clock. By the end of the month the authorities had decided to remove the protestors, citing unsanitary conditions, the illegal use of electricity, and complaints from the public.

On 11 June 2010, between 3 a.m. and 5 a.m., about 250 officers conducted a removal operation at the encampment, leading protestors to mini buses and taking them to police headquarters. 22 protestors were deported on the same day and 44 others, like the applicant, were charged with unlawful stay and transferred to detention centres in Cyprus. Only those who were found to be refugees or bona fide asylum seekers were allowed to leave. On the same day deportation orders were issued in respect of those who were detained, and letters were prepared in English informing them of this decision. On 12 June 2010 the applicant and

43 other people of Kurdish origin submitted a request to the European Court of Human Rights for it to apply interim measures under Rule 39 to prevent their imminent deportation to Syria. On 14 June 2010 the Court indicated to the Cypriot Government that they should not be deported until the Court had had the opportunity to receive and examine all documents pertaining to their claims.

In August 2010 the Minister of the Interior declared the applicant an irregular migrant on public order grounds and issued deportation and detention orders on this basis. The Rule 39 interim measure in respect of the applicant was reviewed by the European Court and maintained.

The applicant brought habeas corpus proceedings before the Cypriot courts to complain about his detention. Ultimately, his appeal to the Supreme Court was dismissed on 15 October 2012 as, in the meantime, he had been released after having been granted refugee status.

2. Decision of the Court

Relying on Articles 2 and 3 of the Convention, the applicant complained that if deported to Syria he would be exposed to a real risk of death or torture or inhuman or degrading treatment. He also complained of the lack of an effective domestic remedy under Article 13 and that the only reason he had not been deported to Syria was because of the Rule 39 interim measure. Under Article 5 §§ 1(f), 2 and 4, the applicant complained that his detention for ten months from June 2010 to May 2011 was unlawful, that he was not informed of the grounds of his arrest promptly and in a language he could understand, and that he did not have an effective remedy to challenge the lawfulness of his detention. Lastly, relying on Article 4 of Protocol No. 4, he complained that the authorities had intended to deport him as part of a collective expulsion operation, without having carried out an individual examination.

Articles 2, 3 and 13

The Court held that, as the applicant had been granted refugee status and was no longer at risk of deportation to Syria, he could not claim to be a victim of violations of his rights under Articles 2 and 3. As a result, these complaints were declared inadmissible.

However, the applicant's complaint under Article 13 remained a live issue and was unaffected by the inadmissibility of the substantive claims under

Articles 2 and 3. In deportation cases the Court had taken the view that loss of victim status in respect of alleged violations of Articles 2 and 3 of the Convention because an applicant was no longer exposed to the threat of deportation did not necessarily render that complaint non-arguable for the purposes of Article 13. Although the decision to grant the applicant refugee status removed the risk that he would be deported, it did not acknowledge and redress his claim under Article 2 and 3 about the ineffectiveness of the judicial review proceedings. He could therefore still claim to be "victim" of a violation of Article 13, and his complaint was declared admissible.

When the first set of deportation and detention orders were issued on 11 June 2010, the applicant's file had been reopened and was under consideration by the Asylum Service, and such proceedings were, under domestic law, suspensive in nature. However, as admitted by the Government in their observations to the Court, a mistake was made by the authorities since the applicant was lawfully in Cyprus and should not have been subject to deportation. Nonetheless, the order remained in place for over two months, during which time the re-examination of the applicant's asylum case was still taking place, and he was not deported to Syria only because of the application of Rule 39.

The Court noted that no effective domestic judicial remedy was available to counter this error. Recourse to the Supreme Court against a deportation decision and an application for a provisional order for suspension of his deportation in that context did not offer an adequate remedy as such orders did not have automatic suspensive effect. Consequently, there had been a violation of Article 13 taken together with Articles 2 and 3.

Article 5 § 1

When considering the lawfulness of the applicant's detention, the Court divided the complaint into three parts.

Firstly, in relation to his transfer to police headquarters on 11 June 2010 along with other protestors and his stay there while awaiting identification and ascertainment of their immigration status, the Court held that the protestors had been left with little choice but to board the buses and remain in the headquarters. Given the coercive nature, scale and aim of the police operation, including the fact that it was carried out so early in the morning, there had been a *de facto* deprivation of liberty. Emphasising the importance of legal certainty in such circumstances, the authorities had not effected the applicant's

detention in accordance with any particular domestic legal provision that could have offered such certainty.

Secondly, the applicant's detention on the basis of the deportation and detention orders issued on 11 June 2010 on the ground that he was an immigrant staying unlawfully in Cyprus, when this was not in fact the case, was unlawful.

Thirdly, the procedure prescribed by national law was not followed in respect of the applicant's detention from 20 August 2010, as the applicant was not given notice of the new deportation and detention orders in accordance with domestic law.

Taken together, the Court therefore concluded that there had been a violation of Article 5 § 1 in respect of the applicant's entire period of detention, from 11 June 2010 until 3 May 2011.

Article 5 § 2

Upon his initial arrest and transfer to police headquarters, the applicant was screened in an identification procedure aimed at establishing which protestors were staying in Cyprus illegally. The Court accepted that the applicant was either informed that he had been arrested on grounds of unlawful stay or at least understood the reason for his arrest and detention. The fact that he filed a Rule 39 request seeking suspension of his deportation order the next day supported this conclusion. Accordingly, there was no violation of Article 5 § 2.

Article 5 § 4

The only recourse in domestic law for examining the lawfulness of the applicant's detention was under Article 146 of the Constitution. The average length of such proceedings, standing at eight months, was undoubtedly too long for the purposes of Article 5 § 4. The possibility for individuals to speed up their actions by reaching an agreement with the Government was rejected by the Court, as domestic remedies must be certain, and speediness should not depend on the parties reaching an agreement. Accordingly, there had been a violation of Article 5 § 4.

Article 4 of Protocol No. 4

The Court emphasised the importance of every case concerning deportation being looked at individually and decided on its own particular facts. In the

present case, some of the protestors arrested were allowed to return home as their immigration status was found to be in order and thus their presence on Cypriot territory was lawful. The fact that the protestors, including the applicant, were taken together to the police headquarters, that some were deported in groups, or that deportation orders and letters were phrased in similar terms and therefore did not specifically refer to earlier stages of respective applications, did not make this a collective measure. The Court found that each decision to deport a protestor had been based on the conclusion that they were an irregular immigrant following the rejection of his or her asylum claim or the closure of the file, which had been dealt with on an individual basis over a period of more than five years. Hence, there had been no violation of Article 4 of Protocol No. 4.

Article 41

The Court held that the Government was to pay the applicant €10,000 in respect of non-pecuniary damage.

The extremely high amount of bail was not contrary to the Convention in the specific circumstances of the case

GRAND CHAMBER JUDGMENT IN THE CASE OF MANGOURAS v. SPAIN

(Application no. 12050/04)
28 September 2010

1. Principal facts

The applicant, Apostolos Ioannis Mangouras, was a Greek national born in 1935. He was the captain of the ship *Prestige*, which in November 2002, while sailing off the Spanish coast, discharged the 70,000 tonnes of fuel oil it was carrying into the Atlantic Ocean when its hull sprang a leak. The oil spill caused an ecological disaster whose effects on marine flora and fauna lasted for several months and spread as far as the French coast.

A criminal investigation was opened and the applicant was remanded in custody with the possibility of release on bail of three million Euros (€3,000,000). The applicant challenged his detention, and in particular the amount of bail before the domestic courts, arguing it did not reflect his personal circumstances, and also that his advanced age had not been taken into account. His appeals were unsuccessful, and eventually the Constitutional Court dismissed his challenge by referring to the need to secure his presence at the trial, the seriousness of the offences in question, the national and international disaster caused by the oil spill, and the fact that the applicant was a nonnational who had no ties in Spain. The domestic courts had also been right, according to the Constitutional Court, to take the applicant's "professional environment" into account when setting the amount of bail.

The applicant was detained for 83 days and granted provisional release when his bail was paid by the ship owner's insurers. The Spanish authorities later authorised the applicant's return to Greece, on condition that the Greek authorities enforced compliance with the periodic supervision to which he had been subject in Spain. As a result, he had to report every two weeks to a police station. The criminal proceedings against him were still pending at the time of the judgment of the European Court of Human Rights.

2. Decision of the Court

Relying on Article 5 § 3 of the European Convention, the applicant alleged, in particular, that the sum set for bail in his case had been excessive and had been fixed without his personal circumstances being taken into consideration.

In the Chamber judgment of 8 January 2009, the Court held that there had been no violation of Article 5 § 3. The case was referred to the Grand Chamber under Article 43 at the applicant's request.

Article 5 § 3

The Court reiterated that the guarantee provided for by Article 5 § 3 was designed to ensure not the reparation of loss but, in particular, the appearance of the accused at the hearing. Its amount therefore had to be assessed principally by reference to the accused, his assets and his relationship with the persons who were to provide the security. It was clear from the structure of Article 5 in general, and the third paragraph in particular, that bail could only be required as long as reasons justifying detention prevailed. If the risk of absconding could be avoided by bail or other guarantees, the accused had to be released, bearing in mind that where a lighter sentence could be anticipated, the reduced incentive for the accused to abscond should be taken into account. The authorities had to take as much care in fixing appropriate bail as in deciding whether or not the accused's continued detention was indispensable.

Furthermore, while the amount of bail had to be assessed principally by reference to the accused and his assets it was not unreasonable, in certain circumstances, to take into account also the amount of the loss imputed to him.

The applicant had been deprived of his liberty for 83 days and had been released following the lodging of a bank guarantee of €3,000,000. In fixing bail the Spanish courts had taken into consideration the risk that the applicant might abscond, taking the view that it was essential to ensure his appearance in court. In addition to the applicant's personal circumstances, they had also had regard to the seriousness of the offence of which he stood accused, the impact of the disaster on public opinion and the applicant's "professional environment", namely the maritime transport of petrochemicals.

New realities had to be taken into consideration in interpreting the requirements of Article 5 § 3, namely the growing and legitimate concern

both in Europe and internationally in relation to environmental offences and the tendency to use criminal law as a means of enforcing the environmental obligations imposed by European and international law. The Court was of the view that the increasingly high standard being required in the area of human rights protection correspondingly required greater firmness in assessing breaches of the fundamental values of democratic societies. Hence, it could not be ruled out that the professional environment which formed the setting for the activity in question should be taken into consideration in determining the amount of bail, in order to ensure that the measure was effective.

Given the exceptional nature of the applicant's case and the huge environmental damage caused by the marine pollution, which had seldom been seen on such a scale, it was hardly surprising that the judicial authorities should have adjusted the amount required by way of bail in line with the level of liability incurred, so as to ensure that those responsible had no incentive to evade justice and forfeit the security.

In addition, the very fact that payment had been made by the ship owner's insurer appeared to confirm that the Spanish courts, when they had referred to the applicant's "professional environment", had been correct in finding – implicitly – that a relationship existed between the applicant and the persons who were to provide the security.

The Spanish courts had therefore taken sufficient account of the applicant's personal situation, and in particular his status as an employee of the ship's owner, his professional relationship with the persons who were to provide the security, his nationality and place of permanent residence and also his lack of ties in Spain and his age. In view of the particular context of the case and the disastrous environmental and economic consequences, the authorities had been justified in taking into account the seriousness of the offences in question and the amount of the loss imputed to the applicant.

Accordingly, the Court held that there had been no violation of Article 5 § 3.

Requirement for prompt judicial control over detention – violation of Article 5 § 3

JUDGMENT IN THE CASE OF MILOŠEVIĆ v. SERBIA

(Application no. 31320/05)
28 April 2009

1. Principal facts

The applicant, Slaviša Milošević, was born in 1972. In December 1999, a judicial investigation was opened in respect of the applicant on suspicion of him having committed numerous thefts. In January 2000 his whereabouts were unknown to the court and the judge issued a warrant ordering his detention for a period of up to one month. In April 2002, a lawyer was appointed by the court to represent the applicant in the proceedings, even though the applicant had still not been found.

The applicant was arrested on 20 January 2005, on the basis of the court's warrant of January 2000, and was taken to the district prison in Belgrade. After having made an unsuccessful attempt to contact the applicant's lawyer, the court appointed him a different one.

On 27 January 2005, the applicant was heard by a judge in his lawyer's presence. He denied all charges and explicitly stated he would not appeal against his detention. On 4 February 2005, his detention was extended by the court without having heard him or his lawyer in person. The applicant appealed against this extension of his detention, which was rejected by the court, again in his and his lawyer's absence.

The applicant's trial began on 2 March 2005. In May 2005 the applicant was found guilty, sentenced to a year and two months in prison. The court released him from detention pending his appeal which was ongoing at the time of the judgment of the European Court of Human Rights.

2. Decision of the Court

Relying on Article 5 § 3 (right to be brought promptly before a judge) and Article 2 of Protocol No. 4 (freedom of movement), the applicant complained of not having been brought promptly before a judge with the power to order his

release from detention, as a result of which his freedom of movement had been unduly restricted.

Article 5 § 3

The Court reiterated that an individual lawfully arrested or detained on suspicion of having committed a criminal offence must, under Article 5 § 3, be protected by a certain judicial control. That control must satisfy the requirement of promptness, be "automatic", that is not dependent on a previous application by the person concerned, and the detainee must be brought in person before "a judge or [an]other officer authorised by law" to determine whether to order his or her release pending trial.

Even where the initial detention was ordered by a domestic court this did not, the Court noted, preclude the subsequent application of the "promptness requirement" if, inter alia, the defendant was not heard when his detention was being considered.

The Court observed that there was no evidence in the case file which would suggest that the applicant's arrest and/or his subsequent detention had been in breach of Article 5 § 1 (c). However, looking at the facts of the case and given the relevant provisions of the Code of Criminal Procedure, the applicant had not been brought in person before a judge who had both an obligation to review his detention and the necessary power to order his release until, at best, 2 March 2005, more than forty-one days following his arrest.

There had accordingly been a breach of Article 5 § 3.

Article 2 Protocol 4

The Court held that, in view of its findings in respect of Article 5 § 3, it was not necessary to examine the applicant's complaint under this Article.

Article 41

The Court awarded the applicant €3,000 in respect of non-pecuniary damage and €500 for costs and expenses.

The extension of the applicant's pre-trial detention did not breach Article 5

JUDGMENT IN THE CASE OF MINJAT v. SWITZERLAND

(Application no. 38223/97)
28 October 2003

1. Principal Facts

The applicant, Mr Pol Laurent Minjat, was a Swiss national. On 26 June 1997, he was charged with embezzlement by the Geneva investigating judge (the judge) for having stolen one million francs[200] from his employer, Bank S. On the same day, the judge ordered the applicant's arrest and his pre-trial detention for a period of eight days at most. This meant that his pre-trial detention could only last until 4 July 1997.

On 27 June 1997, the judge applied to the Geneva Indictment Chamber to request an extension of the applicant's pre-trial detention, on the grounds that the investigation was ongoing and the reasons why it was launched were still relevant. At a hearing before the Geneva Indictment Chamber, on 1 July 1997, the prosecutor supported the judge's request and asked for a further extension of three months. The Geneva Indictment Chamber authorised the extension until 1 October 1997.

On 2 July 1997, the applicant appealed to the Federal Court, complaining of a lack of reasons given by the Indictment Chamber for extending his pre-trial detention, arguing that an unjustified decision could not constitute a reason for extension and alleging that there had been a violation of his right to liberty as guaranteed by the Federal Constitution.

On 23 July 1997, the Federal Court allowed the appeal and set aside the decision of the Geneva Indictment Chamber, however it did not grant his release on the basis that it was for the Geneva Indictment Chamber to rule again on his request for release. On 29 July 1997, the Geneva Indictment Chamber re-examined the case and authorised the extension of the applicant's pre-trial detention until 1 October 1997.

On 21 May 1999, the Geneva Criminal Court sentenced the applicant to 30 months' imprisonment for embezzlement. Bearing in mind he had been

200 1 million CHF was equivalent to 417,032 GBP at the time.

detained for 9 months and 4 days, the length of his remaining sentence was set to be 20 months and 26 days.

2. Decision of the Court

The applicant alleged that his detention from 4 to 29 July 1997 had been illegal within the meaning of Article 5 § 1 of the Convention, and that the Federal Court should therefore have ordered his immediate release, pursuant to Article 5 § 4 of the Convention.

Article 5 § 1

The Court held that the applicant's pre-trial detention from 4 to 29 July 1997 fell within Article 5 § 1 (c) of the Convention. The question to be determined by the Court was whether the pre-trial detention was unlawful within the meaning of Article 5 § 1; a task which the Court undertook by looking at Swiss domestic law and its implementation in practice.

The Court considered that under national legislation, the applicant could complain to the Federal Court that the Geneva Indictment Chamber had not met the requirements for extension of pre-trial detention; however the Court also noted that according to domestic case law, this did not automatically lead to the issuing of an immediate release, as in the present case. The Court noted that when the applicant appealed to the Federal Court on 2 July 1997, he did so alleging a failure by the Geneva Indictment Chamber to state the reasons for their application to extend his pre-trial detention. The Federal Court did not order his immediate release but remitted the case back to the Geneva Indictment Chamber for "prompt" reassessment. The Court found that this decision was consistent with domestic case law and that the applicant's detention during the relevant period was therefore lawful under domestic law.

The Court further noted that less than a month had elapsed between the expiry of the arrest warrant and the order for the applicant's continued detention and that the applicant had thereafter been detained in accordance with proper procedure. The applicant had been given a prison sentence and the period he had spent in pre-trial detention had been deducted in full from the sentence imposed. In those circumstances, the Court found that the applicant's detention during the relevant period had not been arbitrary. It accordingly held that there had been no violation of Article 5 § 1.

Article 5 § 4

In the light of its finding that the applicant's pre-trial detention was "lawful" for the purposes of Article 5 § 1, the Court found that there had been no violation of Article 5 § 4.

Decision of the Court of Appeal not to set a defective detention order aside was not unlawful, but the delays caused by its decision to remit the case to trial court violated Article 5 § 4

GRAND CHAMBER JUDGMENT IN THE CASE OF MOOREN v. GERMANY

(Application no. 11364/03)
9 July 2009

1. Principal facts

The applicant, Mr Burghard Theodor Mooren, was a German national born in 1963. On 25 July 2002 the applicant was arrested and remanded in custody on suspicion of tax evasion. His detention order was upheld by the District Court on 16 August 2002. During these proceedings, his counsel was refused access to the case file. The public prosecutor offered to orally inform him about the facts and evidence at issue, but counsel refused this offer. An appeal by the applicant to the Regional Court was dismissed on 9 September 2002.

On 14 October 2002 the Court of Appeal quashed the District Court's decision of 16 August 2002 and the Regional Court's decision of 9 September 2002. It declined, however, to take its own decision on the applicant's detention or to quash the detention order of 25 July 2002, which it considered as defective in law, but not void. The case was remitted to the District Court and the applicant remained in custody.

Upon remittal of the case, the District Court issued a fresh order for the applicant's detention on 29 October 2002, listing in detail his income and stating that there was a strong suspicion that he had evaded taxes on some twenty occasions between 1991 and June 2002. The court also decided to suspend the execution of the detention order subject to certain conditions. Nonetheless, in view of the fact that the Public Prosecutor's Office immediately lodged an appeal, the applicant's immediate release was not ordered.

In November 2002 the Regional Court dismissed the applicant's appeal against the fresh detention order. It likewise dismissed the appeal lodged by the Public Prosecutor's Office against the decision to suspend the execution of the detention order, and the applicant was released from prison on the same day. On 18 November 2002 his lawyer was authorised to consult the case file.

The applicant referred his case to the Federal Constitutional Court, but without success.

In March 2005 the District Court convicted the applicant on eight counts of tax evasion and sentenced him to a total of one year and eight months' imprisonment suspended on probation.

2. Decision of the Court

Relying on Article 5, the applicant complained that, by remitting his case back instead of quashing the detention order, the Court of Appeal had unlawfully deprived him of his liberty and had unduly delayed the judicial review proceedings. He further complained that his defence counsel had been refused access to the investigation file. The Chamber held that there had been no violation of Article 5 § 1, whereas there had been a violation of Article 5 § 4 in so far there had not been a speedy review of the lawfulness of the applicant's detention. Similarly, the refusal to grant the defence access to the case file during the judicial review proceedings was in breach of Article 5 § 4. The case was referred to the Grand Chamber under Article 43 at the applicant's request.

Article 5 § 1

In examining whether the applicant's detention was "lawful" within the meaning of Article 5 § 1, the Court first noted that the Düsseldorf Court of Appeal found that the detention order issued by the District Court on 25 July 2002 had failed to comply with the formal requirements of domestic law, as it did not describe in sufficient detail the facts and evidence establishing the grounds for the strong suspicion that the applicant was guilty of tax evasion or the grounds for his arrest. The detention order thus suffered from a formal defect. However, defects in a detention order did not necessarily render the underlying detention "unlawful" for the purposes of Article 5 § 1, unless the flaw amounted to a "gross and obvious irregularity".

According to the findings of the domestic courts, the substantive conditions of the applicant's detention – a strong suspicion that he had evaded turnover, income and trade taxes and the danger of collusion or of his absconding – were met and, while the formal defects in the above detention order made the order defective in law, they were not so serious as to render it null and void. The District Court had jurisdiction to issue the detention order and it had done so after hearing representations from the applicant. Therefore, the Court

considered that the detention order of 25 July 2002 did not suffer from a "gross and obvious irregularity" within the meaning of its case-law so as to be *ex facie* invalid.

Turning to the question whether the applicant could have foreseen that the domestic courts would consider the detention order as merely "defective" so that it would remain a valid basis for his detention until it was quashed or replaced, the Court noted that the distinction made under German law between "defective" and "void" detention orders was well-established in the domestic courts' case-law, even if, as the applicant had alleged, there was no basis for it in the Code of Criminal Procedure. Further, even though the Court of Appeal's decision to remit ran counter to the wording of the Code requiring the appeal court to take the decision on the merits, it too was based on a well-established jurisprudential exception that applied in certain limited circumstances. While the Court considered that judicial exceptions to an express statutory rule should be kept to a minimum to avoid compromising legal certainty, the Court of Appeal had expressly cited earlier case-law in situations comparable to the applicant's, so that its decision on this point had been sufficiently foreseeable. Therefore, the applicant, if necessary with the advice of his counsel, could have foreseen the Court of Appeal's finding on this point.

Lastly, the Court considered that remitting a case to a lower court was a recognised technique for establishing in detail the facts and for assessing the evidence relevant to a court's decision and could not as such be considered arbitrary. In fact, in circumstances such as those in the present case, the benefits of remitting the case to a lower court, which had full command of the case-file and more precise knowledge of the suspect's personal situation and of the state of the investigations against him, could outweigh the inconvenience caused by the delay and even serve to avoid unnecessary delays. What was more, under domestic law, the District Court's fresh decision was subject to time constraints in that it had to be taken speedily and it was that court which, following the remittal, had to arrange for a renewed hearing of the parties. Having regard to its case-law, the Court held that the time that elapsed between the Court of Appeal's finding that the detention order was defective and the issuing of a fresh detention order by the District Court did not render the applicant's detention arbitrary.

The Court concluded that the applicant's detention was "lawful" and "in accordance with a procedure prescribed by law" for the purposes of Article 5 § 1. There had therefore been no violation of that article.

Article 5 § 4

Regarding the speed with which the review was conducted

The Court reiterated that Article 5 § 4, in guaranteeing to detained persons a right to institute proceedings to challenge the lawfulness of their deprivation of liberty, also proclaimed their right to a speedy judicial decision concerning the lawfulness of detention and ordering its termination if it proved unlawful. The Court held that that the decision by the Court of Appeal to remit the case had unjustifiably delayed the process of judicial review of the legality of the detention order. A total of two months and twenty-two days had elapsed between the date the applicant sought judicial review on 7 August 2002 and the date the District Court ordered his release. It had therefore failed to decide the lawfulness of the applicant's detention on remand "speedily", and there was a violation of Article 5 § 4.

Regarding counsel's access to the case file

Proceedings conducted under Article 5 § 4 before a court examining an appeal against detention must be adversarial and always ensure "equality of arms" between the parties, the prosecutor and the detained person. Equality of arms was not ensured if the defence was denied access to those documents in the investigation file which were essential to effectively challenge the lawfulness of the detention. The Court found that the offer of an oral account of the facts and evidence and the provision of a four-page overview had been insufficient when defence counsel had not been given access to the parts of the case file on which the suspicion against the applicant was essentially based. There had therefore been a violation of the fairness requirements of Article 5 § 4.

Article 41

The Court awarded the applicant €3,000 in respect of non-pecuniary damage and €5,650 in costs and expenses.

The excessive length of the judicial review proceedings relating to the applicant's continued detention in a psychiatric hospital violated Article 5 § 4

GRAND CHAMBER JUDGMENT IN THE CASE OF MUSIAL v. POLAND

(Application no. 24557/94)
25 March 1999

1. Principal Facts

The applicant, Mr Zbigniew Musial, was a Polish national born in 1953. In 1986 criminal proceedings were initiated against him on suspicion of the manslaughter of his wife. He was examined by a medical panel who found that, on health grounds, he could not be held criminally responsible and that he was a threat to public order. The district prosecutor decided to discontinue the criminal proceedings and requested that the applicant be committed to a psychiatric institution.

On 8 February 1988 the regional court committed the applicant to a mental hospital and concluded that he posed a threat to public order. This decision was upheld by the Supreme Court and on 13 April 1988 the applicant was placed in Rybnik Psychiatric Hospital. His detention was extended by the regional court on six occasions between 4 November 1988 and 17 December 1990, having regard to the applicant's medical file and the opinions of psychiatrists at the Rybnik Psychiatric Centre which indicated that his condition was unchanged.

On 4 April 1991 the applicant's officially appointed lawyer requested his release from the psychiatric hospital. On 27 May 1991 the regional court again refused to order the applicant's release, finding that it would entail a threat to public order. Detention was further extended on 27 December 1991 and 22 June 1992.

On 16 March 1993 the applicant's lawyer lodged a further request for the applicant's release with the regional court. In addition, he insisted that psychiatrists from Cracow University examine the applicant as he was convinced that this was the only institution from which an unbiased opinion could be obtained. In their opinion of 19 April 1993, the Rybnik Hospital psychiatrists stated that the applicant's condition required his continued detention and suggested that in view of his repeated requests for a medical examination from

another institution, it would be advisable to order such an examination. As a result, on 26 April 1993 the regional court ordered that the applicant's condition should be assessed by psychiatrists from Cracow University.

On 5 May 1993 the regional court found that the applicant could undergo the necessary medical examination in the Psychiatric Department of Cracow Detention Centre. However, it was not possible for him to be admitted since the Centre required an order for his detention on remand. Additionally, the applicant complained in a letter to the regional court that any examination by Cracow Detention Centre would be biased and threatened to go on hunger strike if he was brought there for an examination.

On 1 and 2 September 1993 Cracow University informed the regional court that the applicant could be admitted to the University hospital in late October or early November 1993, after completion of an analysis of his medical file. On 22 September 1993 the applicant's medical file was sent to Cracow University. On 17 December 1993 the University informed the regional court that the applicant would be admitted for an out-patient examination from 31 January to 4 February 1994. On 24 January 1994 the regional court informed the applicant that his file had been transmitted to the Psychiatric Department of the Cracow University.

From 31 January to 4 February 1994 the applicant underwent an examination at Cracow University. In the ensuing months the applicant requested access to his medical file on two occasions, but this was refused as Cracow University were still analysing the file in order to prepare a report. On 30 November 1994 the psychiatrists from Cracow University stated that the applicant's condition required continued detention and that the grounds on which his committal to a psychiatric institution had been ordered had not ceased to exist. This opinion was submitted to the regional court on 15 December 1994. Consequently, on 9 January 1995 the court decided that the applicant's detention should be maintained.

Subsequently, twice during 1996, the regional court ordered that the applicant should remain in detention in light of later medical opinions. On 28 September 1996 the applicant attempted to commit suicide at Rybnik Psychiatric Hospital, and on 23 June 1997 the regional court ordered his release.

2. Decision of the Court

The applicant submitted that the proceedings seeking a judicial review of

his psychiatric detention, instituted by his request for release of 16 March 1993, were unreasonably long, in violation of Article 5 § 4.

Article 5 § 4

The Court began by reiterating the well-established principle that a person of unsound mind who is compulsorily confined in a psychiatric institution for a lengthy period is entitled under Article 5 § 4 to take proceedings at reasonable intervals before a court to put in issue the "lawfulness" of his detention. This is because it is possible that the reasons initially warranting confinement may cease to exist. The Court went on to highlight that this right to initiate proceedings also entitles individuals to a speedy judicial decision.

In the present case, one year, eight months and eight days lapsed between the regional court acceding to the applicant's request that his condition be examined by psychiatrists from Cracow University and the decision to continue his detention. The Court stated that such a lapse of time was incompatible with the speediness requirement of Article 5 § 4 unless there were exceptional grounds to justify it.

As such, the Court went on to investigate whether such exceptional grounds existed in the present case. Firstly, it found that the applicant could not be said to have waived his procedural rights under Article 5 § 4 by expressing an explicit wish to be examined by doctors from an institution other than Rybnik Hospital. Moreover, the Court held that the fact the regional court appointed experts at the applicant's specific request did not in itself discharge that court from its obligation to rule speedily on his request for release. No reason was found to depart from the principle that the primary responsibility for delays resulting from the provision of expert opinions rests ultimately with the State.

Secondly, while the Court acknowledged that the complexity of the medical issues involved in a case is a factor which may be taken into account when assessing compliance with Article 5 § 4, this does not absolve national authorities of their essential obligations under this provision. In the present case, the Court found there was no evidence of a causal link between the complexity of the applicant's medical condition and the delay in the preparation of the expert opinion. Therefore, the Court held that there was no evidence of any exceptional grounds justifying the excessive length of judicial review proceedings and as such there had been a violation of Article 5 § 4.

Article 41

The Court awarded the applicant 15,000 zlotys as compensation for non-pecuniary damage.[201]

201 Equivalent to £3,000 at the relevant time.

Detention of a person on remand without bringing her before an independent officer and adequately reviewing the lawfulness of detention violated Article 5 §§ 3 and 4

GRAND CHAMBER JUDGMENT IN THE CASE OF NIKOLOVA v. BULGARIA

(Application no. 31195/96)
25 March 1999

1. Principal Facts

The applicant was a Bulgarian national, Mrs Ivanka Nikolova. In October 1995, she was arrested and charged on suspicion of misappropriating large funds of a State-owned enterprise where she worked as a cashier and accountant. As the applicant was charged with a crime punishable by more than ten years' imprisonment, the investigator and a prosecutor decided to detain her on remand on the basis of a legal provision applicable to persons charged with committing a serious wilful crime.

The applicant appealed against her detention to the Chief Public Prosecutor's Office on the grounds that she had not attempted to abscond or obstruct the investigation in the more than six months prior to her arrest during which she had known about the criminal charges against her, that she could not reoffend as she was no longer working as cashier or accountant, and on medical grounds. Before sending the appeal to the Chief Public Prosecutor's Office, a regional prosecutor confirmed the detention on remand. The decision mentioned that Article 152 § 2 of the Code of Criminal Procedure, which stated that detention could not be imposed if there was no danger that the person would abscond, obstruct justice or reoffend, could only be applied by the investigator and his supervising prosecutor. The Chief Public Prosecutor's Office dismissed the applicant's request for release and a further appeal.

In November 1995, the applicant again appealed against her detention on remand to the Plovdiv Regional Court. The court dismissed the appeal without the participation of the parties, concluding that detention on remand was required by law for crimes punishable by ten or more years' imprisonment, and that the applicant had failed to demonstrate medical evidence reflecting her state of health at the relevant time.

In February 1996, the prosecutor ordered the applicant to be released from detention and put under house arrest, on account of her health condition following urgent surgery.

2. Decision of the Court

The applicant relied on Articles 5 § 3, 5 § 4 and 13 to complain that she had not been brought before a competent authority exercising judicial power, that the lawfulness of her detention was not reviewed and that she did not have access to an effective remedy.

Article 5 § 3

The Court first recalled that, under Article 5 § 3, the role of the officer authorised by law to exercise judicial power is to review the circumstances of the detention, by reference to legal criteria, and decide whether detention is justified. To ensure that the detainee is protected against arbitrariness or an unjustified deprivation of liberty, the officer must be independent of the executive and of the parties and hear the individual in person. The independency and impartiality of the officer will be questioned if there is a possibility that the officer will later intervene in criminal proceedings on behalf of the prosecuting authority. If concluding that detention is not justified, the officer must have the power to make a binding order for the release of the detainee.

In the present case, the applicant was brought before an investigator who did not have the power to order her release, was not procedurally independent from the prosecutor and in addition there was a possibility that he would act as prosecutor at the applicant's trial. Even if the applicant had been heard by a prosecutor, the prosecutor would not have been sufficiently independent and impartial as he could subsequently act as a party to the criminal proceedings. The Court thus concluded that there had been a violation of Article 5 § 3.

Article 5 § 4

The Court reiterated that arrested or detained persons are entitled to a review of the lawfulness of their deprivation of liberty, which includes assessing compliance with domestic procedural requirements and the existence of a reasonable suspicion or legitimate purpose justifying detention. The court examining the appeal against detention must ensure that proceedings are adversarial and the principle of equality of arms between the parties is

respected. If the person is being detained on the basis of Article 5 § 1 (c), a hearing must be granted.

In the applicant's case, the Court noted that the domestic legal framework determined that a person charged with a "serious wilful crime" was detained on remand unless he or she was able to demonstrate beyond doubt that there was no danger of absconding, reoffending or obstructing justice. Only in exceptional circumstances could a person rebut the presumption that such danger existed. The Court further observed that, in accordance with domestic case-law, the question of whether the charges were supported by sufficient evidence should not be considered by the judge examining an appeal against detention on remand, but rather by the prosecutor. Hence the Regional Court limited its examination of the case to verifying whether the applicant had been charged with a "serious wilful crime" and whether she should be released on medical grounds.

When the applicant submitted an appeal challenging the grounds for her detention, including the soundness of the charges against her and the weakness of the evidence, the Regional Court failed to consider these arguments and their relevance for the examination of the lawfulness of the detention on remand.

The Court asserted that, although a judge is not required to address every argument in an appeal, it would be incompatible with Article 5 § 4 for a judge to disregard concrete facts invoked by the appellant that are capable of raising doubts as to the lawfulness of detention. By not taking into consideration the concrete facts submitted by applicant, which did not appear implausible or frivolous, the Regional Court failed to conduct a judicial review with the scope and nature required by Article 5 § 4. The Court also noted that the proceedings were not adversarial or conducted with equality of arms between the parties, as the Regional Court reached its conclusion after receiving written comments by the prosecutor recommending the dismissal of the appeal, which the applicant was not allowed to reply to. Furthermore, the Regional Court examined the case in private without holding a hearing.

For the reasons described above, the Court found that here had been a violation of Article 5 § 4.

Article 13

The applicant submitted that the impossibility of obtaining redress for the violation of Article 5 §§ 3 and 4 resulted in a breach of Article 13. The Court

emphasised that Article 5 § 4 constitutes *lex specialis* in relation to the general protection provided by Article 13 and that the applicant's complaint was based on the same facts that the Court had examined under Article 5 § 4. Accordingly, having found a violation of Article 5 § 4, the Court concluded that it was not necessary to examine the applicant's complaint under Article 13.

Article 41

The Court held that the finding of a violation constituted sufficient just satisfaction in respect of any non-pecuniary damage suffered by the applicant. It awarded the applicant BGL 14,000,000[202] for costs and expenses.

202 Equivalent approximately to €7,158 at the time.

The applicant's detention to prevent him from committing concrete offences in connection with a football match was justified under Article 5 § 1 (b)

JUDGMENT IN THE CASE OF OSTENDORF v. GERMANY

(Application no. 15598/08)
7 March 2013

1. Principal Facts

The applicant, Mr Henrik Ostendorf, lived in Bremen and was a supporter of Werder Bremen football club and attended the club's matches regularly. He was registered by the Bremen police in a database on persons prepared to use violence in the context of sports events. In this database, eight separate incidents involving the applicant at football games were listed. In addition, he was registered in a similar nation-wide database which contained the names of individuals against whom criminal investigation proceedings were opened for offences in the context of sports events.

On 10 April 2004, the applicant and around forty other football fans travelled from Bremen to Frankfurt am Main in order to attend the match of Eintracht Frankfurt football club against Werder Bremen football club. On their arrival, the Frankfurt am Main police verified the identities of members of the group, most of whom were known to them as football hooligans prepared to use violence. The applicant had been specifically identified as a "gang leader". The police searched the group and seized a mouth protection device and several pairs of gloves filled with quartz sand from members other than the applicant.

The group were told that they would be accompanied to the football stadium by the police and that every person leaving the group would be arrested. Next, under police surveillance, the group went to a pub. When the group left the pub, the police noted that the applicant was no longer with them. He was then found by the police in a locked cubicle in the ladies' bathroom and was arrested there at approximately 2.30pm. He was brought to the police station close to the football stadium and his phone was seized. He was released at approximately 6.30pm on the same day, one hour after the football match had ended and his phone was returned to him on 15 April 2004.

On 13 April 2004 the applicant lodged a complaint with the Frankfurt am Main Police Headquarters claiming his detention and the seizure of his phone

was unlawful. This complaint was dismissed as inadmissible since the applicant had been released prior to lodging his complaint. The complaint in relation to his phone was also deemed devoid of purpose since it had been returned to him.

On 6 September 2004 the applicant, represented by counsel, brought an action against the Land of Hesse in the Frankfurt am Main Administrative Court requesting that the court declare his detention and the seizure of his phone unlawful. On 14 June 2005 this action was dismissed, and the authorities' action was deemed lawful. Further appeals by the applicant challenging the lawfulness of the police's actions were also unsuccessful.

2. Decision of the Court

The applicant complained that his detention for preventive purposes had violated his right to liberty as set out in Article 5. In particular, he claimed that the detention did not fall within any of the sub-paragraphs of Article 5 § 1. In addition, the applicant alleged that his entry into the Bremen police database violated his right to a fair and public hearing under Article 6.

Article 5

The Court began by stressing that sub-paragraphs (a)-(f) of Article 5 § 1 contain an exhaustive list of permissible grounds for a deprivation of liberty and that no deprivation of liberty will be lawful unless it falls within one of those grounds. Next, the Court confirmed there had been a deprivation of liberty in the present case, despite the relatively short duration of the detention, and thus that Article 5 was engaged.

Then, the Court examined the possibility that the applicant's detention was justified under Article 5 § 1 (c) and fell within the meaning of detention reasonably considered necessary to prevent him committing an offence. The Court was satisfied that there were sufficient facts and information which would satisfy an objective observer that the applicant was planning to arrange and take part in a hooligan brawl in or around Frankfurt am Main, during which concrete and specific criminal offences, namely bodily assaults and breaches of the peace, would be committed. Thus, the applicant's detention could be classified as effected to prevent him committing an offence.

In relation to whether this detention was reasonably considered necessary in order to avert the commission of those offences, the Court noted that hooligan

brawls are usually arranged in advance but do not take place inside football stadiums. Thus, the Court held that detaining the applicant for a relatively short duration was necessary to prevent the commission of an offence.

However, detention under Article 5 § 1 (c) must also be for the purpose of bringing an individual before the competent legal authority. The second limb of Article 5 § 1 (c) only governs pre-trial detention and not custody for preventive purposes. In the present case, the aim of the detention was purely preventive as the applicant's preparatory acts were not punishable under German law. Therefore, the Court found that the applicant's detention could not be justified under Article 5 § 1 (c) but considered that detention for purely preventive purposes could potentially be justified under Article 5 § 1 (b).

When examining the applicability of Article 5 § 1 (b), the Court found that the obligation incumbent on the applicant, to keep the peace by not setting up or taking part in a hooligan brawl at the said time and place, was sufficiently "specific and concrete" for the purposes of this provision. The Court attached significant importance to the fact that the obligation existed with respect to a specific time, place and offence, namely the hours before, during and after the football match, the city of Frankfurt and the offences of bodily assaults and breach of the peace.

In addition, the Court made clear that the applicant must have failed in his duty to fulfil this obligation in order for his detention to be justified. This meant that he must have taken clear and positive steps which indicated that he would not fulfil said obligation. In the present case, the Court was satisfied that the applicant was aware of the specific act he was to refrain from committing after he was ordered to stay with the group of supporters and that he showed himself not willing to do so by trying to evade police surveillance.

Next, the Court went on to verify whether the detention in the present case was aimed at securing the fulfilment of the obligation and was not punitive in character. It found that since the result of the detention was that there was no brawl, no criminal proceedings were initiated and the police did not act under the provisions of the Criminal Code, the detention did not have a punitive character.

Subsequently, it was necessary to determine whether the basis for the detention ceased to exist as soon as the obligation had been fulfilled. The Court held that the applicant's obligation was fulfilled, for the purposes of Article 5 §

1 (b) insofar as it ceased to exist once the football match had ended and other football hooligans had dispersed so that a brawl in Frankfurt could no longer be arranged. In accordance with Article 5 § 1 (b), this was the moment at which he was released.

Finally, the Court had to decide whether an appropriate balance had been struck between the importance of fulfilling the obligation and the importance of the right to liberty. In the instant case, brawls which routinely caused bodily assaults and breaches of the peace on a large scale posed a significant threat to the security of the football matches. Furthermore, the applicant was reasonably considered the leader of the group and was unwilling to comply with the duty to keep the peace by not organising a brawl. Therefore, the Court found that the applicant's detention for a relatively short period of time was proportionate to the aim of securing the fulfilment of the obligation.

Taking into account all of the above, the Court found that the applicant's detention was justified under the second limb of Article 5 § 1 (b) and thus that there was no violation of Article 5 § 1.

Article 6

The Court rejected the applicant's complaint in relation to his entry into the police database due to his failure to exhaust domestic remedies.

The applicant's detention during police questioning breached Article 5 § 1 and his excessively long detention on remand breached Article 5 § 3

JUDGMENT IN THE CASE OF OSYPENKO v. UKRAINE

(Application no. 4634/04)
9 November 2010

1. Principal Facts

The applicant, Mr Yaroslav Osypenko, was involved in a bar fight in Slovyansk early in the morning of 1 January 2002 in a bar called Tor, having celebrated New Year's there. The applicant's friend, K, picked a fight with P, another visitor to the bar. This escalated into a big fight in which the applicant took part on the side of K. On 14 January 2002 the Slavyansk town police instituted criminal proceedings for disorderly conduct in relation to this fight.

On the evening of 24 January 2002, the applicant and K were attacked by strangers. As a result of this attack, the applicant was injured and K died. At 2.30am on 25 January 2002, the police arrived at the applicant's home and took him to the local police station in order to question him as an eyewitness to K's death.

At 11am the police decided that they would also question the applicant as a witness in relation to the fight on 1 January. He was questioned in respect of that incident between 3pm and 7pm by a different police officer. Between 7pm and 9pm the police also questioned P and other victims of the fight, who, when confronted with the applicant, identified him as one of the persons who had injured them. At 9.30pm the police investigator drew up an arrest order authorising the preliminary detention of the applicant as a suspect in the crime of disorderly conduct in the bar Tor.

On 28 January 2002 the applicant was charged with this crime and brought before the Town Court which extended his preliminary detention, as a temporary preventive measure, up to 31 January 2002. The court noted that the case file did not contain sufficient information characterising the applicant or evidence that he might intend to abscond. On 31 January 2002 the Town Court ordered the applicant's detention as a preventive measure having regard to his character, the circumstances of the crime, the gravity of the offence and the necessity to ensure the execution of procedural decisions.

On 11 May 2002 the Town Court committed the applicant for trial and upheld the preventive measure in respect of the applicant, without giving any reasons. The Town Court decided to maintain the applicant's detention in custody again on 12 August 2002, without giving any reasons.

On 4 April 2003 the applicant lodged an application with the Town Court alleging that on 25 January 2002 he had been unlawfully taken to the police station, that he was unlawfully held there until 28 January 2002 and that his subsequent pre-trial detention was also unlawful. On 22 May 2003 the applicant was informed that it was too late to challenge the lawfulness of the preliminary detention between 25 and 28 January 2002 as the case was at trial stage and the rest of his application would be considered in the course of the court hearing in his criminal case.

On 26 June 2003 the Town Court found that the applicant was being detained lawfully and on 4 November 2003 rejected the applicant's request to change the preventive measure, noting that his further detention was necessitated by the gravity of the charges. A further request to change the measure was rejected on 24 May 2004.

On 7 June 2004 the Town Court found the applicant guilty of disorderly conduct and sentenced him to four years' imprisonment which he was released from serving. The court also found that his preliminary detention had been lawful and no wrongdoing on the part of the police could be discerned. It ordered that the applicant be released immediately. This judgment was upheld by the Regional Court of Appeal and the Supreme Court.

2. Decision of the Court

The applicant complained that between 25 and 28 January 2002 he had been unlawfully deprived of his liberty as it could not be justified under any of the sub-paragraphs of Article 5 § 1. In addition, he alleged that the length of his pre-trial detention violated Article 5 § 3 and that, contrary to Article 5 § 4, his detention had not been properly and speedily considered by the Town Court.

Article 5 § 1

The Court first considered the applicant's complaints in relation to the period between 2.30am and 3pm on 25 January 2002. It found that, regardless of the dispute over whether the applicant went to the police station of his own

free will or as a result of police coercion, there had been a de facto deprivation of liberty. It was unrealistic to assume that during this period of interrogation the applicant had been free to leave the police station.

Having established the existence of a deprivation of liberty, the Court went on to examine whether it could be justified under Article 5 § 1 (c) which covers detention on suspicion of having committed an offence. In this regard, the Court noted that while there was a certain indication that the domestic authorities started to treat the applicant as a suspect after 3pm on 25 January 2002, there was no evidence to suggest that they did so earlier. As such, it was accepted that the police had treated the applicant as a witness until this point and that his detention could not fall under Article 5 § 1 (c).

Next, the applicant's complaint was examined under Article 5 § 1 (b) which covers detention in order to secure the fulfilment of an obligation prescribed by law. In the period under examination the applicant was held in the police station for questioning on account of K's death and for questioning on account of the fight in the bar Tor. In respect of the first line of questioning, the Court held that there was no legal obligation to give witness evidence with regards to the attack on the applicant and K. Instead, the applicant was legally classed as an interviewee who had a right, but not an obligation to make a statement.

In relation to the second line of questioning with respect to the bar fight, the situation was different since criminal proceedings had already been instituted and the relevant legal framework was not the same. Notwithstanding this difference in circumstances, the legal obligation to give witness evidence only arose under the condition that a person had been duly summoned and the compulsory appearance of a witness was only permissible if they had previously failed to appear for questioning without a valid reason. The procedure for summoning witnesses was not applied in the present case. Accordingly, the Court could not find that the applicant was under a lawful obligation to give evidence in respect of the bar fight.

Moreover, this deprivation of liberty was not proportionate. The Court attached weight to the fact that the fight had occurred twenty-four days previously and involved no urgent issues and that no attention was paid to the applicant's physical condition following being attacked. Consequently, it was deemed that a fair balance had not been struck between the need to ensure the immediate questioning of the applicant and the importance of the right to liberty.

Therefore, the Court was unable to find any justification for the applicant's deprivation of liberty under Article 5 § 1 (b) or under any of the other sub-paragraphs of Article 5 § 1. As a result, it found that there had been a violation of Article 5 § 1 with respect to the period between 2.30am and 3pm on 25 January 2002.

The Court then examined the period after 3pm on 25 January 2002 until the court decision of 28 January 2002. The applicant asserted that the overall length of his preliminary detention on suspicion of a crime without a court order exceeded seventy-two hours, in breach of domestic law. However, the Court found that as the applicant had failed to specify whether the judicial decision authorising the applicant's preliminary detention as a suspect had been taken before or after 3pm on 28 January 2002, it could not determine whether the applicant's detention was in compliance with the seventy-two hour rule. Thus, in respect of this latter period, the Court found there had been no violation of Article 5 § 1.

Article 5 § 3

The Court began by clarifying that, for the purposes of Article 5 § 3, the applicant's detention began on 25 January 2002 and continued without interruption until his release by the Town Court on 7 June 2004. It lasted a total of two years, four months and twelve days. It was accepted that the applicant's detention was initially justified by the need to ensure the execution of procedural decisions and the gravity of the charges. However, with the passage of time, the Court highlighted that those grounds inevitably became less and less sufficient.

Consequently, the domestic authorities were obliged to analyse the applicant's personal situation in greater detail and to give specific reasons for holding him in custody. The Court considered it to be unacceptable that the Town Court found it possible to warrant the applicant's detention in custody without giving any reasons for such decisions, relying exclusively on the gravity of the charges. Therefore, the Court held that the applicant's detention on remand had been renewed several times on grounds which could not be regarded as sufficient and that as a result there had been a violation of Article 5 § 3.

Article 5 § 4

The Court declared the applicant's claim under Article 5 § 4 inadmissible as he had failed to comply with the six-month time limit for lodging his complaint.

Article 41

The Court awarded the applicant €2,500 in respect of non-pecuniary damage.

Forced committal to a psychiatric hospital to prevent deterioration of health was not justified and violated Article 5 § 1

JUDGMENT IN THE CASE OF PLESÓ v. HUNGARY

(Application No. 41242/08)
2 October 2012

1. Principal facts

The applicant, Tamás Plesó, was a Hungarian national born in 1975.

The applicant's mother, who was concerned about his "strange behaviour" and about the fact that he had not taken up a proper job, contacted the psychiatrist Dr M. who diagnosed the applicant with "paranoid schizophrenia under observation" in September 2007 and conducted a number of counselling sessions with him together with a psychologist. Following the applicant's refusal to attend further sessions, Dr M. requested the District Court to order his mandatory institutional treatment.

At a court hearing on 11 December 2007, a guardian was appointed for the applicant for the purpose of the proceedings. Dr M. was heard, and she indicated her suspicion that the applicant suffered from paranoid schizophrenia. Questioned by the court, the applicant stated that he was considering seeking help from health professionals, with the exception of Dr M. During the hearing, the court ordered a forensic psychiatrist, Dr H., to prepare a medical opinion about the applicant's condition. This psychiatric evaluation was done during a forty minute break in the court hearing. Neither the guardian nor the applicant had the opportunity to learn about the expert opinion prior to the resumed hearing. Dr H. considered that the applicant suffered from delusional schizophrenia and specified that she considered his treatment necessary as otherwise his health would decline. In her opinion, the applicant could not take care of himself and thus represented a significant danger to himself. Upon her suggestion that a decision on compulsory treatment be postponed for six months, in order to observe his conduct, the judge pointed out that no such option was allowed under relevant domestic law.

On 18 December 2007, the District Court ordered the applicant's mandatory institutional treatment, on the basis of the relevant sections of the Act on Health Care and the jurisprudence of the Supreme Court. Relying on the medical

opinions provided, the court accepted that he suffered from schizophrenia with grandiose delusions and it was satisfied that he posed a danger to his own health by failing to voluntarily subject himself to psychiatric treatment and by not looking after himself. It affirmed that appropriate medical treatment would improve his condition and that, if untreated, his health would decline.

The applicant's guardian appealed, arguing that the conditions for mandatory treatment as required by the Health Act were not fulfilled, since the evidence provided by the two psychiatrists did not prove that the applicant was a significantly dangerous character but consisted of no more than vague predictions of an eventual deterioration of his condition. The regional court dismissed the appeal in February 2008 and on 27 March 2008 the applicant was admitted to the psychiatric department of a hospital. Initially he received treatment in the closed ward but after two weeks in the regular ward. On 25 April 2008, a court ordered his release, relying on the opinion of another forensic expert according to whom the applicant suffered from schizophrenia, but represented no direct danger and was willing to accept voluntary treatment, and held that the conditions for mandatory treatment were no longer met.

2. Decision of the Court

Relying on Article 5 § 1, the applicant complained that his compulsory confinement had amounted to an unjustified deprivation of his liberty.

Article 5

It was not disputed in the present case that the applicant's compulsory confinement in a psychiatric hospital constituted a "deprivation of liberty". In order to comply with Article 5, any detention needs to be "lawful", and any measure depriving a person of his liberty should issue from and be executed by an appropriate authority and should not be arbitrary.

The Court stated that notion of arbitrariness in the context of Article 5 varies to a certain extent depending on the type of detention involved. However, one general principle established in its case-law was that detention will be arbitrary where, despite complying with the letter of national law, there has been an element of bad faith or deception on the part of the authorities. The condition that there be no arbitrariness further demanded that both the order to detain and the execution of the detention must genuinely conform with the purpose of the restrictions permitted by the relevant sub-paragraph of Article 5 § 1.

There must in addition be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention.

Moreover, the Court outlined the three minimum conditions for the lawful detention of an individual on the basis of unsoundness of mind under Article 5 § 1 (e): he must reliably be shown to be of unsound mind, that is, a true mental disorder must be established before a competent authority on the basis of objective medical expertise; the mental disorder must be of a kind or degree warranting compulsory confinement; and the validity of continued confinement must depend upon the persistence of such a disorder.

The applicant's involuntary hospitalisation had been ordered on the basis of the Act on Health Care and the case law of the Hungarian Supreme Court. While the Court thus accepted that his detention in hospital had a formal basis in national law, it observed that the procedure followed was marked by the risk of arbitrariness.

The Hungarian courts had reached their conclusion – that the applicant was unwilling to undergo treatment voluntarily and that this situation represented a significant danger to his health – almost exclusively by relying on the medical opinions obtained. The Court noted that the case law applied in the case did not provide guidance as to the precise meaning of the notion "significant danger" in this context and, in particular, whether it extended to a potential deterioration in the concerned person's mental health. In those circumstances, reliance to such an extent on medical opinions was difficult to reconcile with the paramount importance of independent and impartial judicial decision-making in cases pertaining to personal liberty. This was all the more so since the key opinion had been drawn up in a 40-minute court session break.

The applicant had not represented an imminent danger to others or to his own life or limb; only the medically predicted deterioration of his own health was at stake. In those circumstances, the authorities would have been obliged to strike a fair balance between the competing interests resulting, on the one hand, from society's responsibility to ensure the best possible health care for those with diminished faculties and, on the other hand, the individual's inalienable right to self-determination, including the right to refuse medical intervention, or the "right to be ill". However, the Hungarian courts had not made a true effort to achieve this balance.

While noting that the law and practice concerning compulsory confinement varied among the Council of Europe Member States, the Court considered that the States' margin of appreciation in this field, where the core right of personal liberty was at stake, was not a wide one. The Court underlined that involuntary hospitalisation might be used only as a last resort for want of a less invasive alternative, and only if it carried true health benefits without imposing a disproportionate burden on the person concerned.

The applicant had not previously been subjected to psychiatric treatment. He had, moreover, no history of presenting a danger to others, let alone of criminal conviction. The Hungarian courts had essentially relied on his refusal to undergo hospitalisation, in which they perceived proof of his lack of insight into his condition, which – according to the courts – entailed the risk of his health declining. The Court could not accept this line of reasoning, as it represented a circular argument and was incompatible with the effective protection of Convention rights. When ordering the applicant's psychiatric detention, the Hungarian courts had given no in depth consideration to the reasons for his choice to refuse hospitalisation, the actual nature of the envisaged involuntary treatment or the medical benefits which could be achieved through it, or the possibilities of applying a period of observation or requiring him to pursue outpatient care. Finally, it was remarkable that the courts had attached no importance to the applicant's non-consent despite the fact that his legal capacity had not been removed. The Court was therefore not persuaded that the applicant's mental disorder had warranted compulsory confinement, and there had been a violation of Article 5 § 1.

Article 41

The applicant was awarded €10,000 in respect of non-pecuniary damage and €2,500 for costs and expenses.

The applicant's detention on remand and pending extradition was found to be unlawful and excessively lengthy resulting in violations of Article 5 § 1

JUDGMENT IN THE CASE OF QUINN v. FRANCE

(Application no. 18580/91)
22 March 1995

1. Principal Facts

The applicant, Mr Thomas Quinn, was an American national born in 1937 who had been living in Paris. Following ninety-three complaints by French investors, an investigation was opened in France in 1988. The investors had been approached by brokers established in Switzerland and Lichtenstein who sold them artificially inflated shares on the American market by sham companies. Criminal proceedings were instituted against eleven individuals, including the applicant.

The applicant was arrested on 1 August 1988, in possession of two false Greek passports, and was charged with fraud, offences under the legislation on the issuing of securities and forgery of administrative documents. On the day of his arrest, the applicant was remanded in custody at the Santé prison in Paris. This detention on remand was extended on three occasions by four months at a time by the investigating judge on the grounds that detention was the sole means of ensuring the applicant's appearance at trial.

The applicant appealed to the Indictment Division of the Paris Court of Appeal against the final order extending his detention on remand. On 2 August 1989 the court set aside the contested order, ruling that detention was no longer necessary for establishing the truth in the investigation or on the grounds of public order. The applicant had provided guarantees as regards his place of residence and his movements which satisfied the court that he would appear for trial. The decision was immediately enforceable however the applicant was not immediately released. His release was subject to the decision being notified by the public prosecutor responsible for its execution and to completion of the relevant formalities.

On 4 August 1989, a Geneva investigating judge sent by fax to the Paris prosecutor's office a request for the applicant's provisional arrest with a view to his extradition. This request was transmitted through Interpol on 5 August

1989 and through diplomatic channels on 16 August 1989. The Paris public prosecutor ordered the applicant's provisional arrest. Mr Quinn, who was still detained in the Santé prison, was arrested there. He was questioned by the prosecutor and placed in detention with a view to extradition.

In the course of the extradition proceedings, the applicant applied three times for his release, relying each time on Article 5 of the Convention. The Indictment Division dismissed the three applications on the grounds of the risk of his absconding and the lack of guarantees to ensure his presence in connection with further proceedings. On the question of the length of his detention, it considered that the proceedings had been conducted uninterruptedly and without delay. On 24 January 1991 the Prime Minister granted the Swiss authorities' request for the applicant's extradition. The order was served on him on 19 February 1992.

The applicant appeared before the Paris Criminal Court while in detention with a view to extradition. On 10 July 1991 he was found guilty of fraud to the detriment of ninety-three persons and of organising a campaign to solicit the public in connection with transactions involving foreign securities in France, without prior authorisation. He was sentenced to four years' imprisonment and fined 300,000 French francs (FRF).[203] On appeal this was reduced to four years' imprisonment, one of which was suspended.

The applicant, who had been in detention on remand from 1 August 1988 to 4 August 1989 and then for the duration of the court proceedings in the domestic case (a total of approximately one year and eleven months), was extradited to Switzerland on 24 September 1992 after having completed his sentence.

2. Decision of the Court

The applicant complained that his detention on remand and his detention pending extradition violated Articles 5 § 1, 5 § 3 and 18. He alleged an abuse of the extradition procedure for purposes relating to the investigation in France and complained of the unlawfulness of his detention in connection with that procedure and of the length of his pre-trial custody.

203 Equivalent to £39,000 at the relevant time

Article 5 § 1

The Court began by examining the applicant's detention on remand. It acknowledged that some delay in executing a decision ordering the release of a detainee was understandable. However, in the instant case the Court noted that eleven hours passed after the Indictment Division's decision without that decision being notified to the applicant or any move being made to commence its execution. It found that the fact the applicant remained in detention until 4 August 1989 after the decision directing he be released "forthwith" on 2 August 1989 constituted a violation of Article 5 § 1 (c).

In relation to the applicant's detention with a view to extradition, the Court found that it was in principle justified under Article 5 § 1 (f). It noted that Article 5 § 1 required that any detention was lawful, meaning it must be in conformity both with national law and with the purpose of Article 5, to protect individuals from arbitrariness. The Court did not discern any evidence that the detention pending extradition pursued an aim other than that for which it was ordered or that it was pre-trial detention in disguise. It held that the fact the proceedings were conducted concurrently could not warrant the conclusion that there was abuse of the extradition procedure and there was no evidence that the detention was unlawful for the purposes of national law.

Notwithstanding this finding, the Court noted that, at almost two years, the applicant's detention with a view to extradition was unusually long. It was stressed that the wording of the Convention makes clear that a deprivation of liberty under Article 5 § 1 (f) will only be justified for as long as extradition proceedings are being conducted. Consequently, if such proceedings are not being pursued with due diligence, the detention will cease to be justified under the Convention. In the extradition proceedings in the instant case, the Court held that there were delays of sufficient length to render the total duration of the proceedings excessive. Moreover, it found that the remedies of which the applicant availed himself did not significantly delay the proceedings. Accordingly, the Court found there had been a violation of Article 5 § 1 (f) in addition to the violation of Article 5 § 1 (c).

Article 5 § 3

When examining the applicant's complaint under Article 5 § 3, the Court first made clear that this provision only applies in relation to detention under Article 5 § 1 (c). Therefore, it is not applicable in relation to the applicant's detention

with a view to extradition. The Court proceeded to examine the applicant's detention on remand under Article 5 § 3. It concluded that this period of detention was not excessive and found no evidence of negligence on behalf of the authorities. Thus, there was no violation of Article 5 § 3.

Article 18

When examining the applicant's complaint under Article 5, the Court concluded that there was no evidence of an abuse of the extradition procedure. Thus, it found it unnecessary to re-examine this allegation under Article 18.

Article 50 (now Article 41)

The Court awarded the applicant 60,000 FRF in respect of non-pecuniary damage and 150,000 FRF for his costs and expenses.[204]

204 Equivalent to a total of £27,300 at the relevant time

The failure to overcome linguistic obstacles for the provision of individualised treatment of a patient with a mental disorder held in compulsory confinement amounted to violations of Articles 3 and 5 § 1 (e)

GRAND CHAMBER JUDGMENT IN THE CASE OF ROOMAN v. BELGIUM

(Application no. 18052/11)
31 January 2019

1. Principal Facts

The applicant was a Belgian national, Mr René Rooman, who was born in 1957 and belonged to the German-speaking minority in Belgium.

In 1997, the applicant was convicted for a number of offences relating to indecent assault and rape of a minor, theft, destruction and damage, and possession of prohibited firearms. Following these convictions and further crimes committed while in prison, and on the basis of psychological, neuropsychiatric and psychiatric reports, the domestic authorities ordered his placement in compulsory confinement. On 21 January 2004, the applicant entered a social-protection facility located in the French-speaking region of Belgium, where he was still detained at the time of the European Court's judgment. A psychiatric expert reported that he required long-term therapy over several years to treat his paranoiac psychosis, and that psychopharmacological and psychotherapeutic treatment had to be administered in parallel and take place in German.

Between 2004 and 2017 the applicant was held in a facility where no German-speaking staff was available to provide him treatment and assistance. For a limited period, he was assisted by a German-speaking nurse and had occasional visits from German-speaking experts, however this was not carried out on a regular basis or in a long-term fashion. The applicant made several applications to the Social Protection Board ("CDS") for conditional discharge and submitted judicial appeals without success. Although the CDS indicated on numerous occasions that the obstacles in communication with the applicant resulted in the deprivation of treatment for his mental disorders and made specific recommendations to the authorities, these were not implemented in practice.

In an updated report from 2015, three experts that examined the applicant separately concluded that his paranoia-like delusional disorder, psychotic personality and neuropsychological condition persisted and the latter was practically identical to what it had been in 2009. In 2017 the Social Protection Division issued a judgment dismissing the applicant's request for final or conditional discharge. It noted that, since August 2017, the applicant had been having contact with a German-speaking psychologist and psychological and welfare assistants. He was able to visit a German-speaking psychiatrist had one outing per month accompanied by a German-speaking nurse. The applicant also had access to a German interpreter whenever necessary.

2. Decision of the Court

The applicant complained that his compulsory confinement without psychological and psychiatric treatment amounted to violations of Articles 3 and 5. On 18 July 2017, a chamber of the Court found that there had been a violation of Article 3 and no violation of Article 5 § 1. The case was referred to the Grand Chamber under Article 43 at the applicant's request.

Article 3

The Court noted that Article 3 prohibits in absolute terms torture or inhuman or degrading treatment or punishment, which has reached a minimum level of severity and is assessed considering all the circumstances of the case. Treatment is considered to be degrading when it arouses feelings of fear, anguish and inferiority in the victim. Measures depriving persons of their liberty inevitably involve an element of suffering and humiliation, however States must ensure that persons are detained in conditions compatible with Article 3 and respecting their human dignity. Consideration must be given to the individual's health and the effect on him or her of the manner in which detention is executed, as well as the adequacy of medical assistance and care.

In relation to the period between 2004 and 2017, the Court found that the authorities failed to provide treatment for the applicant's health condition and to explore further possibilities for the linguistic obstacles faced, as they justified the lack of psychotherapeutic treatment by simply deciding that the applicant could not be placed in a less secure German-speaking facility and stating that there was no German-speaking staff available where he was placed. The Court concluded that there had been a violation of Article 3 during this period. Regarding the period subsequent to August 2017, although

shortcomings remained in the measures proposed to treat the applicant, the Court noted that the threshold of severity had not been met, and therefore there had been no violation of Article 3 during this time.

Article 5

The Court stressed that compliance with Article 5 § 1 requires that detention is lawful, respecting a procedure prescribed by law and excluding arbitrariness. Detention must be in keeping with the purpose of the restrictions of liberty permitted by the sub-paragraphs of Article 5 § 1. In relation to persons with mental disorders, an individual may only be deprived of his liberty for being of "unsound mind" if three conditions are met: (i) there is evidence showing that the person is of unsound mind; (ii) the mental disorder is of a kind or degree that warrants compulsory confinement; and (iii) continuous confinement is justified by the persistence of such a disorder. Compulsory confinement may be required to provide treatment to the person or to control and supervise the person to prevent him or her from causing harm to himself or to others.

The Court has attached increased importance to the need to provide treatment for a mental illness or to reduce the dangerousness of persons deprived of their liberty. In this case, the Court clarified and refined the principles in its case-law, by expressly acknowledging that Article 5 § 1 (e) serves a function of social protection as well as a therapeutic function, that protects the interests of the person of unsound mind in receiving appropriate and individualised treatment.

Noting the existence of a link between the lawfulness of the detention and the appropriateness of treatment provided, the Court stated that the authorities are under an obligation to provide psychiatric and psychological treatment to an individual in compulsory confinement. The detention of a mental health patient under Article 5 § 1 (e) will only be lawful if effected in a hospital, clinic or other appropriate institution with that purpose. The scope of the treatment provided must include an individualised programme that takes into account the specificities of the detainee's mental health with a view to prepare him for a possible reintegration in society.

The Court noted that the assessment of the medical therapy provided and the link between the purpose of detention and the conditions in which they were carried out will be scrutinised differently depending on whether the complaints were submitted under Article 3 or Article 5 § 1. A finding that there has not been a violation of one of the provisions does not exclude the possibility of finding a violation of the other.

In the present case, the issue was the absence of a treatment and therapy that were adapted to the applicant's situation, particularly his language barrier. The Court first confirmed that the applicant's deprivation of liberty was within the scope of Article 5 § 1 (e). Regarding the lawfulness of the compulsory confinement, the order followed a procedure prescribed by law and met the three conditions mentioned above. In relation to the link between the aim of detaining the applicant and the appropriateness of the treatment he received, the Court examined two distinct periods.

From 2004 until August 2017, the Court concluded that the authorities disregarded the importance of a dialogue between a mental health patient and the therapist and effectively failed to provide the applicant with individualised therapy adapted to the applicant's condition, which resulted in significant negligence over a period of over 13 years. The Court hence found that the manner in which compulsory confinement was executed in this period amounted to a violation of Article 5 § 1.

As regards the period subsequent to August 2017, the Court noted the efforts made by the authorities to provide access to treatment which was coherent and adapted to the applicant's situation, concluding that the treatment available was in line with the therapeutic aim of compulsory confinement. Accordingly, the link between the purpose of the deprivation of liberty and the conditions in which it took place existed and the Court found that there had been no violation of Article 5 § 1.

Article 41

The Court awarded the applicant €32,500 in respect of non-pecuniary damage.

The applicant's continued pre-trial detention was in breach of Article 5 § 3 due to the lack of relevant and sufficient reasons

JUDGMENT IN THE CASE OF ŠOŠ v. CROATIA

(Application no. 26211/13)
1 December 2015

1. Principal Facts

The applicant, Vlatko Šoš, was a Croatian national living in Zagreb. He was held in pre-trial detention for two and half years on suspicion of drug trafficking.

The applicant was arrested on 19 May 2011 in connection with his alleged participation in an organised international drug-trafficking scheme. His pre-trial detention was initially based on three grounds: the risk of collusion by suborning witnesses, the risk of reoffending and the gravity of the charges. The risk of collusion ground was dropped in August 2011, given that all the relevant witnesses had been questioned, and the gravity of the charges ground was dropped in February 2013, given changes in the relevant domestic law. The applicant lodged a number of appeals to challenge the court decisions extending his pre-trial detention, arguing that his detention was constantly extended without taking into account his particular situation: the fact that he was a self-employed car mechanic with no previous history of criminal offences and with only a tenuous link to the criminal investigation in question due to him being acquainted with one of the other defendants. Additionally, the applicant pointed out that the reasons given for his continued detention were neither relevant nor sufficient. He argued that Split County Court had collectively extended the pre-trial detention of all the defendants in the proceedings, without taking into account his specific arguments.

The appeals were all dismissed, notably in decisions by the Constitutional Court of December 2011, February and November 2012 as well as in a decision of September 2013 by the Supreme Court. The applicant was eventually released on 19 November 2013 as the maximum statutory time-limit for his detention had expired. The criminal proceedings against the applicant were still pending at the time of the European Court of Human Right's judgment.

2. Decision of the Court

The applicant complained under Article 5 that his continued pre-trial detention had been arbitrary and had not been based on relevant and sufficient reasons.

Article 5 § 3

The Court reiterated that the question whether a period of detention is reasonable under Article 5 § 3, cannot be assessed in abstracto. Whether it is reasonable for an accused to remain in detention must be assessed in each case, and continued detention can be justified only if there are specific indications of a genuine requirement of public interest. The period of the applicant's detention to be taken into consideration began on 19 May 2011 (the date of his arrest) and ended on 19 November 2013 (when he was released) so amounted to two years and six months. The Court emphasised that national authorities must put forward convincing reasons for keeping a person in detention for such a long time.

The applicant's pre-trial detention was initially based on three grounds: risk of collusion by suborning witnesses, risk of reoffending, and the gravity of the charges. The first cited ground ceased existing once all evidence had been heard on 18 August 2011. Similarly, the ground of gravity of the charges could no longer be applied after January 2013 following changes in the relevant domestic law. Thereafter the applicant's detention was extended solely on the ground of a risk of reoffending.

The Court examined the grounds relied on in turn. With regard to the risk of collusion by suborning witnesses, it noted that at the initial stages of the proceedings the investigating judge found that it was necessary to question a number of witnesses who had relevant knowledge of the offences and knew the applicant. Having in mind the particular complexity of the case at issue, this reason was "relevant" and "sufficient" to justify the detention.

With regard to the gravity of charges, the Court reiterated that while that may be a relevant element in the overall assessment, the need to continue deprivation of liberty could not be assessed from a purely abstract point of view, taking into consideration only the gravity of the offence. However, by reason of their particular gravity and the public reaction to them, certain offences could give rise to public disquiet capable of justifying pre-trial detention, at least for

a certain time. Nevertheless, it could be regarded as relevant and sufficient only provided that it was based on facts capable of showing that the accused's release would actually prejudice public order.

In this case the national courts did not explain why the applicant's continued detention was necessary in order to prevent public disquiet and did not examine whether the applicant presented a danger for public safety, given the specific circumstances of his case and the charges held against him, and hence this argument could not be seen as sufficient for ordering or extending the applicant's detention.

Finally, with regard to the extension of the applicant's detention on the ground of the risk of reoffending, the domestic courts did not point to any aspects of the applicant's character or behaviour that would justify their conclusion that he presented such a risk. They paid no heed to his clean criminal record and his employment. Although the applicant consistently insisted on the need to devote proper attention to his particular situation, the domestic courts continued applying detention orders without a proper assessment of his case in the context of the detention orders against nine other defendants and failed to thoroughly examine the possibility of applying a less severe measure of restraint.

By failing to sufficiently refer to the relevant matters pertinent to the applicant's specific situation the domestic authorities extended his detention on grounds which could not be regarded as "relevant" and "sufficient", in violation of Article 5 § 3 of the Convention.

Article 41

The Court held that Croatia was to pay the applicant €2,600 in respect of non-pecuniary damage, and €5,000 in respect of costs and expenses.

The detention of individuals for seven hours without a criminal charge, in order to prevent them from instigating violence the day of a football match, did not violate Article 5

GRAND CHAMBER JUDGMENT IN THE CASE OF S., V. AND A. v. DENMARK

(Applications nos. 35553/12, 36678/12 and 36711/12)
22 October 2018

1. Principal Facts

The applicants were three Danish nationals, Mr S., Mr V. and Mr A. In 2009, they travelled to Copenhagen to attend a football match between Denmark and Sweden. The day of the match the police detained 138 football supporters to prevent hooliganism, including the three applicants. The applicants were detained for a period under eight hours without being charged with a criminal offence, on the basis of section 5(3) of the Police Act which allowed for detention to prevent disturbance of public order or a danger to the safety of individuals. This provision could only be applied when less intrusive measures were inadequate and the period of detention had to be as short as possible, not exceeding six hours unless exceptional circumstances justified it.

Upon release, the applicants sought compensation and requested the examination of the lawfulness of their detention, arguing that they had not been involved nor intended to become involved in any altercations. The City Court found that the police had received intelligence prior to the football match confirming intentions to instigate violence and, after the first large fight erupted before the match, there was a concrete and imminent risk of disturbance of public order that the police were under a duty to prevent. The court accepted evidence confirming that the applicants were detained after having been seen or heard inciting others to start a fight, and that all applicants had been detained several times before in connection with similar events. According to the police, their strategy had given due consideration to the six-hour time limit. As the game would start at 8 p.m., the police had planned to initiate proactive dialogue with the spectators from 12 noon and avoid detentions early in the day, to prevent the detainees from being released during or shortly after the football match and possibly participate in the brawls. Due to ongoing violence, the police deemed it necessary to extend the six-hour limit and started releasing detainees after midnight, when it was unlikely that fights would resume. In

the absence of less severe measures that could have been taken to avoid the risk of additional unrest, the court found that the grounds for detention of the applicants had been lawful. In 2011 the High Court of Western Denmark upheld the judgment and leave to appeal to the Supreme Court was refused.

2. Decision of the Court

The applicants submitted that their preventive detention had breached Article 5.

Article 5

The Court stressed that the purpose of Article 5 is to prevent arbitrary or unjustified deprivations of liberty, and examined whether the applicants' detention had been justified under sub-paragraphs (b) or (c) of Article 5 § 1.

Regarding sub-paragraph (b), the Court noted that the provision permits detention of a person in order to compel him or her to fulfil a specific and concrete obligation already incumbent on the person. A wide interpretation of this provision would entail a risk of arbitrary deprivation of liberty and result in consequences incompatible with the rule of law. For this reason, the obligation not to commit a criminal offence must be "specific and concrete", meaning that the potential victim and the time and place of the imminent offence is sufficiently specified, the person to be detained is informed that he or she should refrain from committing such act, and that person has shown not to be willing to refrain from doing so.

In the present case, the applicants were not given any specific orders or a warning of the consequences of their failure to comply with an order or to refrain from committing a certain act. The Court considered that the presence of the police before, during and after the match could not be compared to the specific measures, enumerated in the case of *Ostendorf v. Germany*[205], required to make an individual aware of the specific act that he or she must refrain from committing, such as instigating hooligan fights. The Court thus found that the applicants' detention was not covered by Article 5 § 1 (b).

The Court noted that Article 5 § 1 (c) justifies detention on three different grounds – on reasonable suspicion of having committed an offence, when it is

205 *Ostendorf v. Germany*, judgment of 7 March 2013, no. 15598/08, (included as a summary in this publication).

reasonably considered necessary to prevent a person committing an offence, and to prevent a person from fleeing after having committed an offence. In *Ostendorf*, the Court had considered that sub-paragraph (c) governed pre-trial detention and therefore only permitted deprivation of liberty in connection with criminal proceedings. In the present case, the Court revisited and clarified its earlier case-law and concluded that the first and second limbs of Article 5 § 1 (c) are separate and constitute distinct grounds for deprivation of liberty. As such, a person may be lawfully detained outside the context of criminal proceedings, provided the individual is protected from arbitrariness.

As to the requirement that the person is detained "for the purpose of bringing him before the competent legal authority", the Court stated that this applies to all the categories of cases referred to in Article 5 § 1 (c). The requirement must however be interpreted with a certain degree of flexibility, particularly when the intention to bring the applicant before a competent legal authority does not materialise for some reason, which includes cases of preventive detention. The purpose of the applicants' detention was not to bring them before a judge but to release them as soon as the risk of disturbance of public order or danger to the safety of others had passed. Strict compliance with the purpose requirement would exclude any sort of short-term preventive detention and make it impracticable for the police to fulfil their duties of maintaining order and protecting the public.

The Court concluded that preventive detention fell within the second limb of Article 5 § 1 (c) if the person was released after a short period of time, either because the risk had passed or a prescribed time-limit had expired, regardless of the purpose requirement. Any flexibility applied in this matter had to comply with the safeguards of Article 5 § 1, namely that the deprivation of liberty is lawful, reasonably considered necessary, that the individual is protected from arbitrariness and that the authorities have evidence of the likelihood that the detainee would be involved in the commission of a concrete and specific offence had it not been prevented by detention.

The Court also assessed whether the additional safeguards of paragraphs 3 and 5 should apply to preventive detention. Under Article 5 § 3, if the person has been released and is therefore no longer arrested or detained, there is no obligation to bring him or her promptly before a judge. The requirement that a person detained be entitled to a trial or to release pending trial is not applicable in preventive detention, as no criminal proceedings would have been initiated. However, preventive detention is subject to the safeguards established by

Article 5 § 5, and the judicial review of the lawfulness of detention is inherent in the examination of a compensation claim.

Applying the abovementioned principles to the case, the Court found that the applicants' detention fell within the second limb of Article 5 § 1 (c), under a flexible interpretation of the purpose requirement. The Court noted that the strategy used by the police had taken due consideration of the six-hour time limit and the detention of the applicants beyond this limit was justified due to continuous violence, an exceptional circumstance prescribed by law and accepted by the domestic courts. In the absence of any indication that the domestic courts' assessment was arbitrary or manifestly unreasonable, the Court relied on the interpretation of the substantive and procedural rules by the national courts and accepted that the detention was lawful.

The Court further considered that, for the purposes of Article 5 § 1 (c), the offence was sufficiently specific and concrete and the authorities provided enough evidence that the applicants were likely to commit an offence had it not been prevented by their detention. Consideration was given to the number of provisions in domestic law specifying which criminal acts the applicants should refrain from committing. The Court noted that the police had already taken a careful approach with lenient measures that had proved insufficient, thus the applicants' detention could reasonably be considered necessary to prevent them from instigating hooliganism. Regarding the duration of detention, the Court was satisfied that the applicants were released as soon as the imminent risk had passed and the detention was not extended beyond what was necessary.

In light of the above, the Court found that the preventive detention of the applicants complied with Article 5 § 1 (c) and that there had been no violation of Article 5.

The applicant's detention in a psychiatric institution violated the Convention

GRAND CHAMBER JUDGMENT IN THE CASE OF STANEV v. BULGARIA

(Application no. 36760/06)
17 January 2012

1. Principal facts

The applicant, Rusi Kosev Stanev, was a Bulgarian national born in 1956. In 2001 the Bulgarian courts found that the applicant had been suffering from schizophrenia since 1975. He was found to be partially incapacitated, and in 2002 he was placed under the partial guardianship of a council officer.

Without consultation or notice, in December 2002 the applicant's guardian placed him in a social care home for men with psychiatric disorders, and the director of the home subsequently became the applicant's guardian. The applicant was only allowed to leave the institution with the director's permission.

Conditions in the social care home were such that following official visits in 2003 and 2004, the Council of Europe's Committee for the Prevention of Torture and Degrading Treatment or Punishment (CPT) considered the conditions in the home to meet the threshold required for a finding of inhuman and degrading treatment. The CPT noted that the buildings were dilapidated, running water was not available and sanitary facilities were of poor condition and located outside. The CPT further found that the heating and residents' diet were inadequate, that residents led passive, monotonous lives due to the unavailability of activities and finally, that clothes were not returned to the correct owners once washed.

In November 2004, the applicant attempted to restore his legal capacity. In 2005 following a medical report, prosecutors refused to bring a case for restoration of legal capacity, finding that the applicant could not cope alone and that the institution was the most suitable place for him. A later private medical report however, found that the applicant had been incorrectly diagnosed with schizophrenia.

2. Decision of the Court

The applicant complained to the Court: (a) that the living conditions in the care home violated Article 3, the prohibition of inhuman and degrading treatment; (b) that he was denied an effective remedy due to the impossibility under Bulgarian law of challenging his placement in the care home; (c) that there was a violation of Article 5 §§ 1, 4 and 5 in that he was deprived of his liberty unlawfully and arbitrarily by being placed in a care home; (d) there was a violation of Article 6 in that the applicant could not apply to the court to seek release from partial guardianship; and (e) that the restrictions resulting from partial guardianship infringed Article 8. Jurisdiction was relinquished to the Grand Chamber.

Article 5 § 1

The Court observed that the applicant was housed in a block which he was able to leave, but the time he spent away from the institution and the places where he could go were always subject to controls and restrictions. The system of leave of absence and the fact that management kept the applicant's identity papers placed significant restrictions on his personal liberty. It was noted that the Government had not shown that the applicant's state of health put him at immediate risk or required the imposition of any special restrictions to protect him.

The duration of his placement in the Pastra social care home was not specified and was therefore indefinite. At the time of the European Court's judgment, he had lived there for more than eight years, and must have felt the full adverse effects of the restrictions imposed on him. He was not asked to give his opinion on his placement in the institution and never explicitly consented to it. At least from 2004, he explicitly expressed his desire to leave the institution, both to psychiatrists and through his applications to the authorities to have his legal capacity restored. The Court was not convinced that he ever consented to the placement, even tacitly, and concluded that Article 5 § 1 was applicable.

As the decision by the applicant's guardian to place him in an institution for people with psychiatric disorders without having obtained his prior consent was invalid under Bulgarian law, his deprivation of liberty was in violation of Article 5. In any event, that measure was unlawful within the meaning of Article 5 § 1 since none of the exceptions under that Article applied, including Article 5 § 1 (e) - the lawful detention of a person of "unsound mind". The lack

of a recent medical assessment alone would have been sufficient to conclude that his placement in the home was unlawful, but in addition it had not been established that he posed a danger to himself or to others. The Court also noted deficiencies in the assessment of whether he still suffered from a disorder warranting his confinement. Indeed, no provision was made for such an assessment under the relevant legislation.

Hence, the applicant's placement in the home was unlawful and not justified by Article 5 § 1 (e). There had therefore been a violation of Article 5 § 1.

Article 5 § 4

The Bulgarian Government had not indicated any domestic remedy capable of providing the applicant with a direct opportunity to challenge the lawfulness of his placement in the care home. The Court also noted that the Bulgarian courts were not involved in the applicant's placement in the care home and that Bulgarian legislation did not provide for periodic judicial review of internment. There had therefore been a violation of Article 5 § 4.

Article 5 § 5

The Court found that it had not been shown that the applicant had or would have access either prior to the Court's judgment or subsequently, to a right to compensation concerning his unlawful detention/loss of liberty. There was therefore a violation of Article 5 § 5.

Article 3

The Court observed that Article 3 prohibited the inhuman and degrading treatment of anyone in the care of the authorities, whether the detention was ordered in the context of criminal proceedings or admission to a care home.

When considering the conditions in the home, the Court found that in keeping with CPT's findings: (a) the food was insufficient and of poor quality; (b) the building were inadequately heated: in winter the applicant had to sleep in his coat; (c) the applicant could only shower once per week in an unhygienic and dilapidated bathroom; and (d) the sanitary facilities were found in an execrable state and access to them was dangerous. Given that the applicant had been exposed to the home's conditions for approximately eight years, the treatment amounted to a violation of Article 3. The Government's attempt to argue that lack

of financial resources had precluded it from renovating the home could not be accepted as a justification for the conditions that the applicant was subjected to.

Article 13

The Court observed that the applicant's placement in the care home was not regarded as detention under Bulgarian law and that the applicant did not therefore have entitlement to compensation. The remedies in question were hence not effective within the meaning of Article 13.

Article 6 § 1

The Court found that the applicant was unable to apply for the restoration of his legal capacity other than through his guardian or an individual listed in the Bulgarian Criminal Code. Further, under Bulgarian law, no legal distinction was made between those partially and fully deprived of legal capacity and there was no periodic review of an incapacity decision.

The Court found that although the right of access to the courts was not absolute, the right to ask a court to review a declaration of incapacity was one of fundamental procedural importance for the protection of those who had been partially deprived of legal capacity. It followed that those deprived of their liberty as a result of being considered incapacitated, should in principle have direct access to the courts. According to a recent study, 18 out of 20 national European legal systems allowed direct access to the courts for any partially incapacitated person wishing to have her or his status reviewed. In 17 countries such access was even open to those declared fully incapacitated. There was therefore a European agreement as concerns granting legally incapacitated individuals direct access to the courts.

Article 6 § 1 had therefore to be interpreted as guaranteeing in principle that anyone in the applicant's position had direct access to a court to seek restoration of his or her legal capacity. As direct access was not guaranteed with a sufficient degree of certainty by the relevant Bulgarian legislation, there had been a violation of Article 6 § 1 in the circumstances.

Article 41

The Court held that Bulgaria was to pay the applicant €15,000 in respect of non-pecuniary damage.

The applicant's detention as a "prohibited immigrant" breached Article 5 due to the absence of a remedy to challenge its lawfulness; its excessive length and the degrading conditions – Malta to adopt general measures under Article 46

JUDGMENT IN THE CASE OF SUSO MUSA v. MALTA

(Application no. 42337/12)
23 July 2013

1. Principal Facts

The case was brought by Mr Ibrahim Suso Musa, allegedly a Sierra Leone national, who entered Malta irregularly by boat on 8 April 2011. Upon arrival, he was arrested by the police and presented with a document containing both a Return Decision and a Removal Order in view of his presence as a "prohibited immigrant" under Maltese immigration law. He was defined as such due to the irregular manner of his entry and the fact that he did not have sufficient means to support himself.

The Return Decision informed the applicant of the possibility to apply for a period of voluntary departure. Yet, the lower half of the same document contained a Removal Order based on the rejection of the applicant's request for a period of voluntary departure. The reasons for the rejection were listed as the risk that the applicant might abscond; the fact that his application for legal stay was considered to be manifestly unfounded or fraudulent; and that he was considered to be a threat to public policy, public security or national security.

The applicant was informed of his right to appeal against the Return Decision and Removal Order before the Immigration Appeals Board (IAB) within three working days. However, no further information was provided on the appeals procedure or the availability of legal assistance.

On the basis of the Return Decision and the Removal Order, the applicant was detained in Safi Barracks. These detention centres were located on two military bases, and according to the Committee for the Prevention of Torture (CPT) and the International Commission of Jurists (ICJ) at odds with international law and standards which stated that detained migrants should be held in specifically designed centres catering for their particular needs. On 14 April 2011, whilst in Safi Barracks, the applicant initiated his application for asylum. This application was rejected on 31 December 2011, as the applicant was deemed

not to meet the criteria for refugee status. The applicant appealed this decision on 24 January 2012, but the Refugee Appeals Board rejected the appeal on 2 April 2012.

Separately, the applicant lodged an application with the IAB to challenge the legality of his detention. He argued that the decision to detain him, as well as his ongoing detention were contrary to the law. Specifically, with regards to the initial detention decision, he argued that no assessment was made as to the possibility of exploring "other sufficient and less coercive measures" and that the authorities had decided without any individual assessment that he presented a risk of absconding and that he was avoiding or hindering the return or removal procedure. In addition, he complained that this decision was taken without giving him the opportunity to request voluntary departure. In relation to his ongoing detention, the applicant argued this was unlawful since once he had initiated his asylum application in April 2011 return proceedings could not continue. On 5 July 2012 the IAB rejected his application.

While the above procedures were pending, on 16 August 2011, a riot broke out at Safi Barracks which left a number of detained migrants, police officers and soldiers injured. On the day of the riot twenty-three migrants, including the applicant, were arrested and charged with a number of offences including damage to private property, use of violence against public officers, refusal to obey lawful orders and breach of public peace and good order. The arrested men were taken to Corradino Correctional Facility to await the outcome of the criminal proceedings. On 30 January 2012, the Court of Magistrates granted the applicant bail and he was released from Corradino Correctional Facility and returned to Safi Barracks.

The applicant was released on 21 March 2013, following 546 days of immigration detention. At some point in January 2013, the applicant was interviewed by the authorities in the presence of a representative from the Consulate of the Republic of Sierra Leone in the context of arranging his deportation. However, following this meeting the consul informed the Maltese authorities that the applicant was not a Sierra Leone national and consequently they could not assist any further.

2. Decision of the Court

The applicant complained that the Maltese legal system had not provided him with a speedy and effective remedy, contrary to Article 5 § 4. In addition,

he complained that his detention in Safi Barracks was not carried out in accordance with Article 5 § 1 (f), as it was not to prevent his unauthorised entry into Malta or with a view to his deportation. Finally, he complained that he was not provided with any information in relation to the specific reason for his detention, contrary to Article 5 § 2.

Article 5 § 4

The Court began by highlighting that the purpose of Article 5 § 4 is to ensure that detained persons have the right to bring court proceedings for a review of the procedural and substantive lawfulness of their detention. It stressed that the domestic remedies available must be sufficiently certain so as to meet the requirements of accessibility and effectiveness.

First, the Court examined the constitutional jurisdiction in Malta. It noted that it had previously held that lodging a constitutional application did not ensure a speedy review of the lawfulness of an applicant's detention due to the cumbersome nature and the excessive duration of such proceedings.

Next, the Court considered the possibility put forward by the Government that the applicant could have applied for release under the Immigration Act. It observed that the relevant provisions of the Immigration Act dealt only with the provisional release from detention and did not require any examination of lawfulness. Therefore, the Court concluded that the applicant did not have an effective remedy at his disposal that met the requirements of Article 5 § 4 and that consequently this right had been breached.

Article 5 § 1

Article 5 § 1 (f) has two separate limbs which cover two types of immigration detention; firstly, to prevent an unauthorised entry and secondly, with a view to deportation. The Court reiterated some of the principles set out in *Saadi v. the United Kingdom*[206] in relation to the interpretation of Article 5 § 1 (f). Notably, until a State has "authorised" entry to a country, any entry is "unauthorised" and the detention of a person who wishes to effect entry and who needs but does not yet have authorisation to do so, can be detained to "prevent his effecting an unauthorised entry". In addition, in relation to the second limb of Article 5 § 1 (f), detention with a view to deportation is only permitted for as long

206 *Saadi v. the United Kingdom*, Grand Chamber judgment of 29 January 2008, no. 13229/03

as such proceedings are being processed with due diligence. In *Saadi* the Court also stated that detention under Article 5 § 1 (f) only has to be lawful, and not arbitrary. It does not have to be necessary.

When applying these principles to this specific case, the Court noted that its case law did not offer specific guidelines as to when immigration detention ceases to be covered by the first limb of Article 5 § 1 (f) and as such this issue was largely dependent on national law. Given the conflicting interpretations of the Refugee Status Regulations by the Maltese Government and the IAB, the Court determined that the first issue to be addressed under this complaint was the quality of national law and its compatibility with the rule of law.

There was a dispute as to whether Maltese law authorised the detention of prohibited immigrants only up until the moment where an individual applied for asylum or whether this detention continued to be lawful pending the determination of their asylum claim. However, the Court accepted that there was a legal basis for the applicant's detention and found the principal question to be whether or not the detention was arbitrary.

In this regard, the Court raised concerns about the place and conditions of detention, described by the CPT and the ICJ as inhuman and degrading. It also referenced the excessive length of the immigration detention. The Court held that since periods of three months pending determination of a claim had been deemed unreasonable in earlier case law, the six-month period in the instant case must also be considered unreasonable. Therefore, the Court found the applicant's detention up until the determination of his asylum application violated Article 5 § 1 (f).

As to the applicant's detention from 2 April 2012 to 21 March 2013, since the attempts to deport the applicant were not initiated until January 2013, detention prior to this period could not be said to have been for the purposes of deportation. Moreover, the Court found that during the subsequent two months there were barely any real steps taken to secure the applicant's deportation and by 11 February 2013 it was clear that there was no real prospect of deporting him. Thus, both periods of detention, pending and following the determination of the applicant's asylum application, constituted a violation of Article 5 § 1 (f).

Article 5 § 2

The Court found the applicant had been given sufficient information about the reasons for his arrest in the Return Decision and Removal Order and thus declared his complaint under Article 5 § 2 inadmissible as manifestly ill-founded.

Article 46

The Court determined that the problems raised in this application could subsequently give rise to numerous other well-founded applications. Consequently, it called for general measures to be implemented at a national level. Specifically, it recommended that Malta established a mechanism with the relevant procedural safeguards which allowed individuals to challenge the lawfulness of their detention within Convention-compatible time-limits. Further, the Court recommended Malta to take general measures to improve the conditions of immigration detention and to limit detention periods.

Article 41

The Court awarded the applicant €24,000 in respect of non-pecuniary damage and €3,000 in respect of costs and expenses.

The extension of the applicant's pre-trial detention and her inability to benefit from a judicial remedy breached Article 5

JUDGMENT IN THE CASE OF SVIPSTA v. LATVIA

(Application no. 66820/01)
9 March 2006

1. Principal Facts

The applicant, Mrs Astrīda Svipsta, was a Latvian national under investigation on suspicion of organising and instigating a murder that had been committed on 17 February 2000. She was arrested on 1 June 2000, and the next day she was placed on remand in custody for an initial period of two months by an order of the Riga City Kurzeme District Court.

The applicant's detention on remand was subsequently extended on six occasions: on 26 July, 20 September and 22 November 2000 and on 25 January, 29 March and 30 April 2001. The reasons for the Latvian courts' decisions to extend the detention included the prosecutor needing more time to collect, analyse and prepare evidence from witnesses and various national and international authorities, the seriousness of the offence, that the crime in question had been committed by an organised group and, in some instances, the risk that she might reoffend or seek to evade justice.

The applicant appealed these decisions on six occasions between 15 August 2000 and 11 May 2001, but was unsuccessful. Just one decision of the six, dated 17 April 2001, referred to specific conduct of the applicant in which continued detention was justified, namely on account of her personality and a risk of collusion, since she had allegedly made arrangements for her co-defendants to flee the country.

The final court order authorising the detention of the applicant made on 30 April 2001 expired on 18 May 2001. Nonetheless, the applicant was kept in detention beyond this date, pursuant to Article 77(5) of the Latvian Code of Criminal Procedure, for four months and twenty-three days, without judicial authorisation. During this period, the prosecutor refused the applicant access to her defence file, on which her continued detention was based.

On 11 October 2001, the Riga Regional Court committed the applicant for trial and ordered that she remain on remand pending trial without giving reasons for

this. The applicant appealed but on 19 October 2001 the appeal was rejected, the judge reminding the applicant that she stood accused of a crime punishable by life imprisonment, and that the detention reflected the seriousness of the offence and her personality.

On 13 September 2002, the applicant was convicted of manslaughter and sentenced to 12 years' imprisonment, which was reduced to ten years on appeal by the Criminal Division of the Supreme Court in Latvia. The applicant then appealed to the Latvian Senate of the Supreme Court, however the appeal was dismissed.

2. Decision of the Court

The applicant alleged that her detention on remand had failed to satisfy the requirements of Article 5 § 1 of the Convention and that it had exceeded a reasonable time, in breach of Article 5 § 3. In addition, the applicant contested that she had been denied an effective judicial review of her detention on remand, in breach of Article 5 § 4. Finally, the applicant complained of the duration of the criminal proceedings against her, in breach of Article 6.

Article 5 § 1

The Court noted that the relevant period to be examined commenced on 1 June 2000, the date when the applicant was first arrested and ended when she was convicted at first instance, on 13 September 2002. In order to determine whether there had been a violation, the Court looked at different periods during the applicant's detention and examined their conformity with Article 5 § 1.

Considering first the periods between 1 June 2000 and 18 May 2001, and between 11 October 2001 and 13 September 2002, the Court found that these periods of detention were in conformity with domestic law and complied with Article 5 § 1.

However, between 18 May 2001 and 11 October 2001, the applicant was detained by the authorities in an automatic fashion. In the Court's view Article 77(5) of the Latvian Code of Criminal Procedure did not make explicit reference to the requirement to keep the defendant in detention and lent itself to more than one interpretation. This automatic extension of the applicant's pre-trial detention had been the result of a generalised practice on the part of the Latvian authorities, which had no precise basis in legislation and had clearly

been designed to compensate for the deficiencies in the Code of Criminal Procedure. The domestic provision's failure to ensure judicial certainty and protection against arbitrary detention meant that the provision in question therefore failed to satisfy the requirements of "lawfulness" laid down by Article 5. Consequently, the Court held that the automatic extension of pre-trial detention violated Article 5 § 1 of the Convention.

Article 5 § 3

The Court noted that the detention of the applicant had been extended six times and that the applicant had appealed the extensions. The pre-trial detention had lasted for over two years and three months.

The orders were drafted using a pro forma model and with the exception of the order dated 17 April 2001, they mostly used identical reasoning. The reasons for extending the applicant's pre-trial detention had been brief and abstract, going no further than mentioning certain statutory criteria while omitting to specify how those criteria applied to the individual case of the applicant. Although it referred to actual evidence relating to the applicant, the Court still deemed the decisions insufficient for the purpose of compliance with Article 5 § 3.

Moreover, the Court accepted that the seriousness of the offence for which the applicant was being investigated was, on its own, initially sufficient to detain her. However, the longer the applicant was deprived of her liberty, the factors justifying her detention became less relevant. For example, the ability of the applicant to obstruct the investigation was non-existent once she had been committed to trial. Given that the reasons for the extensions stayed the same, providing insufficient basis to continue to detain the applicant, the Court held that there was a violation of Article 5 § 3.

Article 5 § 4

The Court emphasised the fundamental guarantee which flows from Article 5 § 4, which is the right to an effective hearing by the judge examining an appeal against detention.

The Court first looked at the reasons for the orders extending the applicant's detention. As noted above, the Court observed the summary fashion of the form and content of the orders. Given that the orders had failed to effectively examine the parties' observations or link them to the conduct of the applicant,

or illustrate that reasons for detention raised by the prosecution would come to fruition, the applicant's pre-trial detention had been decided on the basis of orders which gave no satisfactory reasons. In the Court's view, the practice of the court of first instance amounted to a classic case of denial of the fundamental guarantees contained in Article 5 § 4.

The Court then examined the fact that the applicant's lawyer had not been allowed access to the investigation file during 2001, despite the fact that it contained a number of elements which had been 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. The Court acknowledged the need for criminal investigations to be conducted efficiently, which may imply that part of the information collected is to be kept secret in order to prevent the accused from tampering and undermining the course of justice. However, this legitimate goal cannot be pursued at the expense of substantial restrictions on the rights of the defence. Hence, Article 5 § 4 had been violated.

In relation to the adequacy of the remedy available, following the applicant's committal to trial, there was no timelimit on the extension; in principle, it remained in force until delivery of the judgment. There had been no remedy available in Latvian law enabling the lawfulness of the applicant's detention to be periodically reviewed during the trial stage. In addition, despite of the applicant's appeals there had been no clear legal basis as a matter of practice to allow such a remedy, which ultimately fell short of the requirements of accessibility and effectiveness laid down by Article 5 § 4.

Article 6 § 1

The Court observed that the proceedings in question lasted 3 years, 8 months and 6 days. However, given the complexity of the case and the time required for the evidence to be considered by all parties, the Court considered that the overall duration of the proceedings did not breach Article 6.

Article 41

The Court awarded €3,000 to the applicant in respect of all cost and expenses.

Continued confinement in a mental hospital was wrongly based on police reports instead of medical evidence, violating Article 5 § 1 (e)

JUDGMENT IN THE CASE OF TRAJČE STOJANOVSKI v. THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA

(Application no. 1431/03)
22 October 2009

1. Principal facts

The applicant was born in 1973. In July 1998, the Štip Court of First Instance ordered that he be detained indefinitely for compulsory psychiatric treatment in a closed medical institution.

This measure was applied as a result of him having knocked down a person who quarrelled with his father in a court building in October 1995. The person he hit sustained severe head injuries and died a few days later. The applicant also hit a judge and had to be prevented from assaulting a third person. The court found that the applicant was "slightly mentally retarded" and considered him aggressive and a danger to the public. Two medical reports were drawn up confirming that the applicant was mentally ill and needed medical treatment in a specialised psychiatric hospital. The confinement order was enforced immediately.

On two occasions, in October 1999 and in April 2003, the hospital in which the applicant was interned requested the domestic court to amend the confinement order and release him on condition that he underwent compulsory psychiatric treatment. The hospital considered that he had demonstrated good behaviour, had established and maintained good relationships with the staff and other patients, and there had not been any neurotic or psychiatric disorder since his confinement. The 2003 request was made with the stated aim of a faster and more efficient re-socialisation and reintegration of the applicant, and the applicant was transferred to an open ward of the hospital. The public prosecutor supported the hospital's proposal. However, the hospital's requests were dismissed both times by the court. The court relied on reports by the police which indicated that the applicant had left the hospital several times and his visits to his village had been perceived as a threat by other villagers.

On 6 January 2004 the applicant left the hospital without consent and remained at large until 8 June 2004, when the police returned him. On 9 February 2004 the applicant appealed the decision not to release him, and complained that the court had not based its decision on relevant facts, arguing that the expert opinions of the hospital and the responsible medical officer who had treated him were the only evidence relevant for the court. In submissions of 31 March 2004, the public prosecutor supported the applicant's appeal and his request that the case be remitted for fresh consideration.

However, in April 2004, the Štip Court of Appeal dismissed the appeal; the court stated that the hospital's proposal was irrelevant as it was not binding on it. It ruled that on the basis of the results of the medical treatment it was free to decide whether the applicant was fit to be discharged from the hospital and treated on release. Lastly, it concluded that the applicant had escaped from the hospital several times and had presented a threat to the public. It was therefore too early to consider him fit for release. No further reviews were carried out. In February 2007, the applicant was placed in a semi-open ward of the hospital where he remained up until the time of the judgment of the European Court of Human Rights. He could not leave the hospital unless authorised by a doctor.

In November 2008 the hospital applied again, unsuccessfully, to have the applicant conditionally released from confinement, his legal capacity removed, and a guardian appointed to him. After consulting two doctors from the hospital and a Social Care Centre representative, the court found no one suitable to be appointed as the applicant's guardian.

2. Decision of the Court

Relying on Article 5 § 1, the applicant complained that his continued confinement in the hospital had been unlawful since the courts had wrongly based their decisions on police reports instead of on the findings of the hospital.

Article 5 § 1

The Court reiterated that in order for the detention to comply with the "lawfulness" requirement in Article 5, detention had to be in conformity with domestic law. Further, detention of an individual could only be justified where other, less severe measures had been considered and held to be insufficient to safeguard the individual or public interest.

The applicant was detained in a semi-open ward which he could leave only with prior authorisation from the responsible medical officer. The applicant's confinement in the hospital hence amounted to a "deprivation of liberty" within the meaning of Article 5 § 1.

The Court noted that the 1998 confinement order was issued by a court. Consequently, the applicant's initial deprivation of liberty was lawful detention under Article 5 § 1 (a). However, the particular circumstances of this case, and especially the reasons which the domestic courts had advanced for the applicant's continued detention, put into question the continued applicability of sub-paragraph (a). The 2003 review did not make any reference to the applicant's conviction of 1998, but rather focused on his mental health with reference to the interests of the public, if released. By the time of the 2003 review, there was no longer a causal connection between the applicant's conviction and his detention, and in fact it was not disputed between the parties that the lawfulness of the applicant's detention fell to be determined on the basis of Article 5 § 1 (e).

The Court outlined the three minimum conditions for the lawful detention of an individual on the basis of unsoundness of mind under Article 5 § 1 (e): he must reliably be shown to be of unsound mind, i.e. a true mental disorder must be established before a competent authority on the basis of objective medical expertise; the mental disorder must be of a kind or degree warranting compulsory confinement; and the validity of continued confinement must depend upon the persistence of such a disorder.

The Court established that the hospital's request was made with a view to securing the applicant's conditional release since his mental disorder no longer satisfied the second and/or third conditions. The domestic court dismissed this request, disregarding the hospital's opinion as not binding on them and instead relying solely on the perceived fears of the villagers – information provided by the police regarding the applicant's behaviour outside the hospital.

In the Court's view, the 2003 review did not reveal any objective sign that the applicant presented a threat or danger to the community. There had been no evidence before the courts of a risk that the applicant would reoffend if released. In addition, there was no indication in the hospital's reports that the applicant was still aggressive or presented a risk to the public. Instead, the applicant had been described by the hospital as cooperative, having regularly received his mild therapy.

Hence, the applicant's mental disorder had not been of the kind or degree to justify his continued compulsory confinement, or to mean that the validity of the confinement could be derived from the persistence of such a disorder. The applicant's continued confinement was manifestly disproportionate to his state of mind at that time and unnecessary, and hence the Court held unanimously that there had been a violation of Article 5 § 1 (e).

Article 41

The Court awarded the applicant €1,500 for non-pecuniary damage and €1,540 for costs and expenses.

The conversion of a fine into imprisonment despite the fine being paid and associated proceedings violated Article 5 § 1(b), 5 § 2, and 5 § 5

JUDGMENT IN THE CASE OF VELINOV v. THE FORMER YUGOSLAV REPUBLIC OF MACEDONIA

(Application no. 16880/08)
19 September 2013

1. Principal facts

The applicant was born in 1952 and was an employed driver. On 30 June 2000, the Ministry of the Interior instituted misdemeanour proceedings against him for driving a bus which was not roadworthy.

On 22 September 2000 Štip Court of First Instance convicted the applicant of a minor offence and ordered him to pay a fine in the amount of MKD 2,000[207] within fifteen days of the judgment becoming final. The court also stated that if the applicant did not pay the fine it would be converted into a prison sentence. On 14 November 2001 the trial court ordered the applicant to pay the fine and appear in court on 26 November 2001 in order to submit proof of payment. The letter informing him of the court order was served on his son. On 7 February 2002 a trial court judge converted the fine into a two-day prison sentence.

On 12 February 2002 the detention order was served on the applicant in person, and he was informed that he would start serving the sentence on 15 March 2002. On 13 February 2002 the applicant paid the fine but did not submit a copy of a payment slip to the trial court. On 28 October 2002 he was arrested in his house but not informed of the reasons for his arrest until the afternoon on 29 October 2002. After he had submitted a copy of the payment slip, he was released from prison.

On 22 November 2002 the applicant contacted the Ministry of Justice with a view to securing an out-of-court settlement and the payment of MKD 310,000[208] in respect of non-pecuniary damage for what he claimed had been the unlawful deprivation of his liberty. The Ministry rejected the applicant's request, stating that he had not presented any evidence that he had been wrongfully convicted

207 Equivalent to €33.

208 Equivalent to €5,060.

or detained. The applicant then brought a civil action against the State, where he stated inter alia that the signature on the delivery receipt of the court's letter of 14 November 2001 was not his. The court dismissed the claim and held that the letters of 14 November 2001 and 12 February 2002 had been properly served on the applicant, and that his son had at the time been mature and could have understood the contents. It also noted that on 13 February 2002 the applicant had paid the fine without notifying the court. The applicant unsuccessfully appealed against this decision, arguing inter alia that it had been the State's responsibility to have in place a system of registering payments.

2. Decision of the Court

The applicant complained under Article 5 § 1 that he had been unlawfully deprived of his liberty when imprisoned on 28 October 2002. He further complained under Article 5 § 2 that he had not been informed of the reasons for his imprisonment, and relying on Article 5 § 5, that he had not received any compensation for the unlawful imprisonment. The applicant also complained of violations under Articles 6 and 13.

Article 5 § 1

The Court reiterated that in order for detention to comply with the "lawfulness" requirement in Article 5, it has to conform with domestic law in the first place. The detention of an individual is a serious measure only justified where other, less severe measures have been considered and held to be insufficient.

The applicant was imprisoned in Štip Prison between 28 and 29 October 2002. The Court examined the case under Article 5 § 1 (b), which allows for lawful detention if carried out pursuant to a court order. The Court noted that there was no doubt that the detention order of 7 February 2002 was issued in "accordance with a procedure prescribed by law", and here recalled that "lawfulness" was required in respect of both the ordering and the execution of measures involving deprivation of liberty.

The Court examined whether the payment of the fine after it had been converted into a prison sentence made the applicant's subsequent imprisonment unlawful. It noted that there was no statutory provision regarding the execution of a prison sentence converted from a fine, which, after the conversion, was paid in full. According to the relevant legislation, in case of partial payment of a fine, the remainder which was not paid would have been converted into a

prison sentence. Subsequent payment of the remainder entailed termination of the execution of the sentence. There was no reason why those rules could not have been relied on in the circumstances of the present case, where the fine had been paid in full before the execution of the converted prison sentence started. It was evident from the release order issued by Štip Prison that the applicant was released on the basis of evidence that the fine had been paid. In such circumstances, the basis for the applicant's detention under Article 5 § 1 (b) ceased to exist as soon as he complied with the payment order.

In relation to the fact that the applicant had not notified the court that he had paid the fine, the Court observed that there was no statutory provision requiring him to do so. Furthermore, the applicant was arrested and imprisoned over eight months after the detention order had been issued and the fine had been paid. In the Court's view, the applicant's failure to notify the trial court could not release the State from the obligation to have in place an efficient system of recording the payment of court fines. The decision-making process in matters where a person's liberty is at stake should take into account all the relevant circumstances of the case and require the State to take all necessary measures in order to avoid liberty being unduly restricted. The Court hence considered that the applicant's detention was contrary to Article 5 § 1 (b).

Article 5 § 2

According to Article 5 § 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 that, if he saw fit, he could apply to a court to challenge its lawfulness. The Court noted that in the compensation proceedings the trial court established that the police officers who had arrested the applicant in his house had had the arrest order in their possession, but they had failed to hand it over, and concluded that the applicant had not been informed of the reasons for his arrest. The applicant was released as soon as he provided a copy of the payment slip, which he did immediately after he had learnt why he was being deprived of his liberty. The Court hence found that the applicant was not informed of the reasons for his arrest as required under Article 5 § 2.

Article 5 § 5

The domestic courts dismissed the applicant's compensation claim, despite finding that he had not been informed of the reasons for his arrest in contravention with domestic law. The Government admitted this amounted to

a violation of the applicant's rights under Article 5 § 5 and the Court agreed. Furthermore, it did not appear that reopening the proceedings following a judgment in which the European Court found a violation of the Convention would have secured such a right for the applicant. Considering the circumstances of the case, the Court found that requiring the applicant to seek a re-opening of the compensation proceedings placed a disproportionate burden on him, and stated that there had been a violation of Article 5 § 5.

Article 6

The Court considered that the length of the compensation proceedings was excessive and failed to meet the reasonable-time requirement of Article 6 § 1, in violation of that provision.

Article 13

The applicant complained that he had had no effective remedy whereby he could have raised the issue of the excessive length of the compensation proceedings in his case. The Court saw no reason to depart from its earlier case-law in which it had found a violation of Article 13, taken in conjunction with Article 6, due to lack of an effective remedy concerning length-of-proceedings cases, and concluded that there had been a breach of Article 13, taken in conjunction with Article 6.

Article 41

The Court awarded the applicant €1,500 for non-pecuniary damage, €410 for costs and expenses in the compensation proceedings and €850 for the proceedings before the Court.

Detention at a sobering-up centre without considering the application of less severe measures to an intoxicated person amounted to a violation of Article 5

JUDGMENT IN THE CASE OF WITOLD LITWA v. POLAND

(Application no. 26629/95)
4 April 2000

1. Principal Facts

The applicant was Mr Witold Litwa, a Polish national born in 1946 and with seriously impaired sight. On 5 May 1994, the applicant went to a post office accompanied by a friend, W.K., and by his guide dog. Upon realising that his post-office boxes had been opened and were empty, the applicant complained to the post-office clerks. Alleging that the applicant was drunk and behaving offensively, the clerks called the police and the applicant was taken to a sobering-up centre. The form recording the applicant's stay at the sobering-up centre included a detailed examination and description of his behaviour. The applicant's behaviour, mental and physical state were assessed as "good". He remained detained at the centre for six hours and thirty minutes, until a doctor assessed him as "sober" and he was released.

After his release, the applicant requested the prosecutor to institute criminal proceedings against the police officers and the staff at the sobering-up centre, alleging he had been beaten by the police and mistreated by the staff. The District Prosecutor opened an investigation on suspicion that offences of assault, theft and infringement of personal rights had been committed. In 1996, after the police heard evidence from the policemen and W.K. and concluded that no offence had been committed, the District Prosecutor confirmed the decision to discontinue the proceedings.

In the meantime, the applicant also submitted a claim for compensation at the Regional Court for "unlawful attacks by agents" and "theft of personal possessions". The Regional Court dismissed the complaint on the grounds that the applicant's arrest had been justified. The applicant appealed this decision, arguing that it had only been based on statements from the police and stating that his personal belongings had been stolen. The Court of Appeal dismissed the applicant's appeal on 25 January 1995.

2. Decision of the Court

Relying on Article 5, the applicant submitted that he had been unlawfully deprived of his liberty.

Article 5

The Court found that the applicant's confinement in the sobering-up centre amounted to a "deprivation of liberty" within the meaning of Article 5 § 1. The Court noted that a deprivation of liberty will be unlawful unless it falls within one of the permissible grounds exhaustively listed in Article 5 § 1.

In the present case, the Court agreed with the parties that the deprivation of liberty was not covered by sub-paragraphs (a), (b), (c), (d) or (f) of Article 5 § 1 and proceeded with an examination of whether it was justified under paragraph (e), particularly whether it had been a "lawful detention of [...] alcoholics".

To interpret the meaning of the term "alcoholics", the Court was guided by Articles 31 to 33 of the Vienna Convention of 23 May 1969 on the Law of Treaties. It noted that the process of interpretation must start with ascertaining the ordinary meaning of the term, within its context and the object and purpose of the provision.

The Court first noted that the list of situations where detention is allowed contained in Article 5 § 1 is an exception to a general rule, and cannot therefore be given an extensive interpretation. It also noted that the word "alcoholics" is found in a context that includes references to other categories of individuals (persons spreading infectious diseases, persons of unsound mind, drug addicts and vagrants), for whom deprivation of liberty may be justified in order to protect public safety or their own interests. The term "alcoholics" should therefore be interpreted to encompass not only the detention of persons in a clinical state of alcoholism, but also those who are not medically diagnosed as alcoholics but whose conduct and behaviour pose a threat to public order or to their own health or personal safety. The Court further noted that this did not mean that Article 5 § 1 (e) may be interpreted as permitting the detention of an individual merely because of his or her alcohol intake. Confirming that this interpretation was in line with the preparatory work on the Convention, the Court concluded that the applicant's detention fell within the scope of Article 5 § 1 (e).

The Court further assessed whether the detention had been "lawful" and free from arbitrariness. To comply with these criteria, the deprivation of liberty must be effected in accordance with a procedure prescribed by law, compatible with the purpose of Article 5 and necessary in the circumstances of the case.

The Court considered that the applicant's detention had a legal basis in Polish law, however it raised doubts as to whether the applicant had behaved in such a way that he posed a threat to the public or himself, or to his own health, well-being or personal safety. As the detention of an individual is such a serious measure, other less severe measures must have been considered and found insufficient to safeguard the individual or the public interest. In the applicant's case, the authorities disregarded several measures provided by domestic law that could have been applied to an intoxicated person, including taking the person to a public healthcare establishment or to his place of residence.

As such, the Court considered that the applicant's detention had not been lawful under Article 5 § 1 (e) and amounted to a violation of Article 5.

Article 41

The Court awarded the applicant PLN 8,000 in respect of non-pecuniary damage and PLN 15,000[209] for his costs and expenses.

209 These two amounts were equivalent to approximately €2,000 and €3,750 at the time.

The detention of four applicants in the transit zone of Sheremetyevo airport was found to be in violation of Articles 3 and 5

GRAND CHAMBER JUDGMENT IN THE CASE OF Z.A. AND OTHERS v. RUSSIA

(Application nos. 61411/15, 61420/15, 61427/15 and 3028/16)
21 November 2019

1. Principal Facts

The case was brought by four applicants: Mr Z.A., an Iraqi national born in 1987, Mr M.B., who held a passport issued by the Palestinian Authority and was born in 1988, Mr A.M., a Somali national born in 1981 and Mr Hasan Yasien, a Syrian national born in 1975.

The applicants, as a consequence of being deported from, or returned by, various other states found themselves involuntarily in the transit zone of Sheremetyevo Airport in Moscow at different times between April and September 2015. Upon their arrival at Sheremetyevo Airport, the Russian Border Guard Service of the Federal Security Service ("the BGS") seized their passports and only handed them to the aircraft crews when the applicants were about to take flights out of Sheremetyevo Airport.

According to the applicants' description of the conditions of their stay, they slept on mattresses on the floor in the boarding area, which had been constantly lit, crowded and noisy. There was one shower available to them that was free of charge and they had to ask for permission to use it. The applicants had no access to fresh air or outdoor exercise. They also had no access to a notary, which had precluded them from issuing notarised powers of attorney required under Russian law to appoint a representative who could communicate with the public authorities on their behalf, and all their medical requests were dismissed. The applicants' access to a lawyer remained within the discretion of the BGS officers on duty in the transit zone and had never been guaranteed. All meetings of the applicants with the lawyers who had been introduced to them by the Russian office of the UNHCR had taken place in the presence of two or three BGS officers.

Mr Z.A., Mr M.B. and Mr Yasien, spent between five and eight months in the transit zone of Sheremetyevo Airport. Mr Z.A. and Mr M.B. applied for asylum

and were refused on the grounds that they had not put forward convincing reasons why they personally feared persecution. They both appealed their decision, first to the Federal Migration Service of Russia ("the Russian FMS") and then to the Basmannyy Court. Their appeals were dismissed. Mr Yasien appealed to the Russian FMS and the Zamoskvoretskiy Court and failed on both counts.

Mr A.M. spent nearly two years in the zone. His asylum application was refused on the grounds that the applicant's family had continued living in Somalia without being persecuted and that he had worked in Yemen. The Moscow Region FMS concluded that the applicant had not left Somalia for any of the reasons listed in Federal Law FZ-4528-1 of 19 February 1993 (with amendments, "the Refugees Act"), and thus could be deported there.

2. Decision of the Court

The applicants complained under Article 5 § 1 of the Convention that they had been unlawfully detained in the transit zone of Sheremetyevo Airport pending examination of their asylum applications. Relying on Article 3 of the Convention, they further complained that the conditions of their detention had been inadequate. On 28 March 2017, the Chamber held, by a majority, that there had been violations of Article 5 § 1 and Article 3 of the Convention. At the Government's request under Article 43, the case was referred to the Grand Chamber.

Article 1 of the Convention

The Court first considered whether the applicants fell within Russian jurisdiction in accordance with the meaning of Article 1 of the Convention. As the transit zone of Sheremetyevo Airport was part of Russian territory, the applicants were within the jurisdiction of Russia during the events of the present case.

Article 5

The Court began by reiterating that in order to determine whether someone had been "deprived of his liberty" within the meaning of Article 5, the starting-point must be his or her specific situation in reality and account must be taken of a whole range of factors such as the type, duration, effects and manner of implementation of the measure in question. It also emphasised the importance

of drawing a distinction between a restriction on liberty of movement and deprivation of liberty in the context of confinement of foreigners in airport transit zones and reception centres for the identification and registration of migrants.

In doing so, the Court looked at the applicants' individual situation and their choices, the applicable legal regime of the respective country and its purpose, the relevant duration especially in the light of the purpose and the procedural protection enjoyed by applicants pending the events, as well as the nature and degree of the actual restrictions imposed on or experienced by the applicants. The Court drew a distinction with land border zones and emphasised that it was clear that the applicants could not only not enter the rest of Russia, but that the practical and real possibility to leave the transit zone to travel elsewhere without a direct threat to their life or health did not exist because of the logistical and bureaucratic impediments.

The Court noted that it was clear that the Russian authorities were entitled to carry out the necessary verifications and examine the applicants' claims before deciding whether or not to admit them. However, having regard in particular to the lack of any domestic legal provisions fixing the maximum duration of the applicants' stay, the largely irregular character of the applicants' stay in the Sheremetyevo airport transit zone, the excessive duration of such stay and considerable delays in the domestic examination of the applicants' asylum claims, the characteristics of the area in which the applicants were held, the control to which they were subjected during the relevant period of time and the fact that the applicants had no practical possibility of leaving the zone, the Court considered that the applicants were deprived of their liberty within the meaning of Article 5 and that therefore Article 5 § 1 was applicable.

There was no clearly defined statutory basis for the applicants' detention which the Court noted would in itself have been sufficient to constitute a violation of Art 5. The Court found that this was combined with factors such as the long duration of the applicants' stay in the airport transit zone, the delays in communicating decisions taken by the Russian administrative and judicial bodies, as well as being confined in a place which was clearly inappropriate for a long-term stay. These exacerbating facts also led the Court to decide that there had been a violation of Article 5 § 1 (f) of the Convention in respect of each applicant.

Article 3

With regard to Article 3 and on the basis of the available material, the Court could clearly see that the conditions of the applicants' stay in the transit zone of Sheremetyevo Airport were unsuitable for an enforced long-term stay. In the Court's view, a situation where a person not only has to sleep for months at a stretch on the floor in a constantly lit, crowded and noisy airport transit zone without unimpeded access to shower or cooking facilities and without outdoor exercise, but also has no access to medical or social assistance, fell short of the minimum standards of respect for human dignity. The situation was also aggravated by the fact that the applicants were left to their own devices in the transit zone, in disregard of Russian domestic rules granting every asylum-seeker the right to be issued with an examination certificate and to be placed in temporary accommodation facilities pending examination of the asylum application.

Taken together, the appalling material conditions which the applicants had to endure for such long periods of time, the extremely long duration of their applicants' detention, and the complete failure of the authorities to take care of the applicants, constituted degrading treatment contrary to Article 3 of the Convention.

Article 41

The Court awarded €15,000 to Mr M.B., €20,000 each to Mr Z.A. and Mr Yasien and €26,000 to Mr A.M. in respect of non-pecuniary damages in relation to both the violations found, and €19,000 to all applicants jointly in respect of all cost and expenses.

An overview of Article 5 judgments against the countries in the region

Albania

1. ***Frroku v. Albania*, application no. 47403/15, 18 September 2018**

The applicant, a Member of Parliament, had three sets of proceedings brought against him. Even though authorisation was not given for his detention in relation to the third set of proceedings, the deprivation of his liberty was nonetheless lawful in the framework of the first and second criminal proceedings. No violation of Article 5 § 1.

2. ***Delijorgji v. Albania*, application no. 6858/11, 28 April 2015**

Criminal proceedings were brought against the applicant for murder and breach of the rules on explosives. Having regard to the inconsistent interpretation of the domestic courts in relation to the starting point of the running of the time-limit of detention "pending trial", the applicant's deprivation of liberty was not attended by adequate safeguards against arbitrariness, and in addition the applicant was kept in a state of uncertainty as to the grounds of his continued detention under house arrest, constituting a violation of Article 5 § 1. There was also a breach of Article 5 § 4 of the Convention in relation to the authorities' failure to examine "speedily" the applicant's first request for release.

3. ***Grori v. Albania*, application no. 25336/04, 7 July 2009**

The applicant, an Albanian national, was convicted *in absentia* in Italy for murder and illegal possession of firearms. He was serving a life sentence and complained of receiving inadequate medical treatment in prison, and about the unlawfulness of his detention based on the Albanian enforcement of a life sentence that was imposed by the Italian courts in his absence. Violation of Article 5 § 1 since the legal basis for the detention did not meet the qualitative components of the "lawfulness" requirement, and the legal basis was imported from international law not yet in force in Albania, not making it foreseeable and hence not in accordance with domestic law. The Court also found violations of Articles 3 and 34.

Bosnia and Herzegovina

4. ***Al Husin v. Bosnia and Herzegovina (No.2),* application no. 10112/16, 25 June 2019**

The applicant was a Syrian national convicted and imprisoned for acts he committed when in the mujahedin. His Bosnian citizenship was revoked and he was placed in detention. Following numerous countries being contacted as places of removal for the applicant with no success, the applicant was released years later. Violation of Article 5 § 1 as the grounds for the detention did not remain valid throughout due to the lack of a realistic prospect of his expulsion. No violation of Article 5 § 4 was found since the applicant was given access to evidence against him and could effectively challenge its reasonableness.

5. ***Čović v. Bosnia and Herzegovina,* application no. 61287/12, 3 October 2017**

The applicant was detained for almost one year on suspicion of war crimes. His detention was regularly reviewed and extended, and his various appeals, including to the Constitutional Court, were rejected. The Constitutional Court's rejection was based on not being able to reach a majority and did not deal with the admissibility or merits – this denied him an effective procedure and failed to afford a realistic possibility of using the remedy, violating Article 5 § 4.

6. ***Hadžimejlić and Others v. Bosnia and Herzegovina,* application nos. 3427/13, 74569/13, 7157/14, 3 November 2015**

The three applicants challenged their detainment in a social care home, and the municipal courts concluded upon examination that the applicants' current state did not warrant their confinement. However, as the applicants were not released their placement in the social care home was not ordered in accordance with 'a procedure prescribed by law' within the meaning of Article 5 § 1 and thus violated this provision.

7. ***Al Husin v. Bosnia and Herzegovina,* application no. 3727/08, 7 February 2012**

The applicant was a Syrian national convicted and imprisoned for acts he committed when in the mujahedin. His Bosnian citizenship was revoked and he was placed in detention. He claimed asylum but his request was dismissed

and a deportation order was issued. Violation of Article 5 § 1 as there had been no grounds for the first part of his detention due to the fact that there had been no deportation order until three years after the applicant was detained. There was also a violation of Article 3.

8. ***Al Hamdani v. Bosnia and Herzegovina*, application no. 31098/10, 7 February 2012**

The applicant was an Iraqi national convicted and imprisoned for acts he committed when in the mujahedin. A deportation order was issued against him and he was released from detention but remained under surveillance. Violation of Article 5 § 1 as there had been no grounds for the first part of his detention due to the fact that there had been no deportation proceedings instituted during this period.

9. ***Hadžic and Suljić v. Bosnia and Herzegovina*, application nos. 39446/06, 33849/08, 7 June 2011**

The two applicants were detained in the psychiatric annex of a prison, which had overcrowded dormitories, inadequate nursing staff, and inadequate treatment for the patients in the prison. The government aimed to move all patients from the annex to a better facility, but the applicants remained in the annex until a court ordered their transfer to prison. The detention was ruled unlawful under Article 5 § 1 (e) as the annex was not an appropriate institution.

10. ***Palić v. Bosnia and Herzegovina*, application no. 4704/04, 15 February 2011**

The applicant's husband was a victim of enforced disappearance during the war of 1992-95. The Human Rights Chamber, set up by the 1995 Dayton Peace Agreement, found a breach of the right to life, the prohibition of ill-treatment, and unlawful detention. The authorities paid monetary compensation and carried out investigative acts, leading to the husband's remains being located and the alleged perpetrators behind the disappearance being arrested. No violation of Article 5, or Article 2 and 3, was found since the authorities had carried out an effective investigation.

11. ***Halilovic v. Bosnia and Herzegovina*, application no. 23968/05, 24 November 2009**

The applicant attempted to kill someone under the delusion that that person was persecuting him. The applicant was found not guilty because of insanity and the case was referred to the Social Work Centre. He was placed in the prison forensic psychiatric annex and the Social Work Centre decided that his stay should be indefinite. The applicant was detained pursuant to an administrative decision and not a competent civil court's – violation of Article 5 § 1 (e) based on the authorities failing to comply with an essential procedural requirement.

12. ***Tokić and Others v. Bosnia and Herzegovina*, application no. 12455/04, 8 July 2008**

The four applicants were charged with criminal offences, found not guilty by reasons of insanity and ordered to be detained in the psychiatric wing of a prison. The applicants complained about the unlawfulness of their detention because of new legislation requiring the competent civil court to take a decision regarding their compulsory confinement. Since no such decision had taken place, a violation of Article 5 § 1 was found.

Croatia

13. ***Oravec v. Croatia*, application no. 51249/11, 11 July 2017**

The applicant was arrested and detained on suspicion of drug trafficking, but later released by an investigating judge. The prosecutor appealed against the release and the applicant was re-arrested and detained. The applicant's complaints to the Constitutional Court were unsuccessful. The Court found no violation of Article 5 § 1, as the detention had been lawful as a maximum period of detention had been prescribed in the law. A violation of Article 5 § 4 was however found due to the lack of adversarial procedure on appeal.

14. ***Merčep v. Croatia*, application no. 12301/12, 24 April 2016**

The applicant was arrested on suspicion of war crimes against the civilian population and investigations were opened. He was placed in pre-trial detention on the grounds of the risk of suborning witnesses and the gravity of the charges against him. After the indictment, the detention was extended due to the gravity of the charges and the risk of public disturbance if released, and

his detention lasted for over a year and a half. No violation of Article 5 § 3 was found as there were relevant and sufficient reasons throughout the detention.

15. ***Milanković and Bošnjak v. Croatia*, application nos. 37762/12, 23530/13, 24 April 2016**

The applicants were arrested on suspicion of war crimes against the civilian population and investigations were opened. They were placed in pre-trial detention on the grounds of the risk of suborning witnesses and the gravity of the charges against them. After the indictment, the detention was extended due to the gravity of the charges and the risk of public disturbance if released. After two years in detention, one of the applicants was acquitted and released; the other applicant was found guilty and sentenced to ten years' imprisonment. No violation of Article 5 § 3 was found on the basis that there were relevant and sufficient reasons for the detention.

16. ***ŠOŠ v. Croatia*, application no. 26211/13, 1 December 2015**

The applicant was arrested in connection with his alleged participation in an organised international drug-trafficking scheme. His pre-trial detention was initially based on three reasons: his risk of collusion, risk of reoffending, and the gravity of the charges. Two of the reasons were later dropped. The applicant appealed to challenge the extensions of his detention as his particular situation had not been taken into account but all appeals were dismissed. Violation of Article 5 § 3 as the pre-trial detention of about two and half years had been excessively long.

17. ***Nenad Kovačević v. Croatia*, application no. 38415/13, 24 November 2015**

After being released from pre-trial detention the applicant became unavailable to the authorities, and was found guilty of murder after a trial *in absentia*. He was arrested in Bosnia and Herzegovina and extradited to Croatia to serve his sentence. The applicant's request to re-open the proceedings was granted, and he was detained pending the re-trial for six months in order to avert the risk of him absconding. No violation of Article 5 § 3 as relevant and sufficient grounds for the applicant's continued detention were given.

18. ***Jović v. Croatia,* application no. 45593/13, 13 October 2015**

The applicant was arrested on suspicion of war crimes and placed in pre-trial detention due to his risk of absconding, risk of collusion, and the seriousness of the charges. He was indicted and remanded in detention during the proceedings. He was found guilty and sentenced to five years' imprisonment, but the case was appealed and remitted for procedural flaws. The applicant's detention was also extended based on him being a flight risk. He appealed the detention extension, ultimately to the Constitutional Court, but it was rejected each time as inadmissible as a new decision on detention had been made. Violation of Article 5 § 4 due to the failure to decide on the merits of the constitutional complaints, making a proper and meaningful review of detention impossible.

19. ***V.R. v. Croatia,* application no. 55102/13, 13 October 2015**

The applicant was arrested on suspicion of sexual abuse and indecent behaviour. He was put in pre-trial detention for risk of reoffending and collusion. Extensions of the detention were granted and the applicant's appeals were dismissed; his appeal to the Constitutional Court was declared inadmissible as a new decision on detention had been made. Violation of Article 5 § 4 as there was a failure to decide on the merits of the constitutional complaints, making a proper and meaningful review of detention impossible.

20. ***M.S. v. Croatia (No. 2),* application no. 75450/12, 19 February 2015**

The applicant was diagnosed with psychiatric disorders and admitted against her will to a clinic where she was tied to a bed and kept in that position until the next morning. A county court ordered her continued confinement in the clinic and the decision was upheld by a panel despite the applicant's request for her discharge. Violation of Article 5 § 1 due to the lack of adequate procedural safeguards, including an appointed legal aid lawyer who proved to be ineffective. There was also a violation of Article 3 for ill-treatment during her confinement and for lack of an investigation in this regard.

21. ***Dragin v. Croatia,* application no. 75068/12, 24 July 2014**

The applicant was arrested on suspicion of incitement to commit aggravated murder and for unlawfully possessing firearms and explosives. He was remanded in custody and his detention was regularly extended for his risk of reoffending

– he appealed these extensions. After his initial conviction was overturned, he remained in detention for the maximum legislative period before trial and it was extended under a different provision. No arbitrariness in the interpretation or application of the domestic law was found – Article 5 § 1 (c) was not violated. Violation of Article 5 § 3 as delays in the proceedings, with a total length of over three years, and the authorities' disregard for considering other preventative measures were all irreconcilable with the requisite of "special diligence" in such cases.

22. ***Margaretić v. Croatia*, application no. 16115/13, 5 June 2014**

The applicant was arrested on charges of conspiracy and abuse of power. His 14 months long pre-trial detention was extended until he was released under preventative measures including seizure of travel documents. Violation of Article 5 § 3 regarding the excessive length of the detention in light of the applicant's circumstances, including his bail amount being set excessively high. Violation of Article 5 § 4 as the applicant's constitutional complaint was not examined on its merits and instead was dismissed without any relevant reasoning.

23. ***Orban v. Croatia*, application no. 5611/12, 19 December 2013**

The applicant was arrested on suspicion of abuse of power, fraud, and false accounting. He was remanded in custody for the risk of tampering with evidence and the gravity of the charges. His year and a half detention was extended numerous times and his appeals against these were dismissed. Violation of Article 5 § 3 due to the authorities' failure to provide relevant and sufficient reasons for the detention.

24. ***Perica Oreb v. Croatia*, application no. 20824/09, 31 October 2013**

The applicant was held in pre-trial detention for over two years between the beginning of a police investigation and his conviction, whilst being temporarily released for about a month because of a successful appeal. All other appeals by the applicant were dismissed. Violations of Article 5 § 3 and 5 § 4 as the excessively long detention was not justified and his constitutional complaints were dismissed without the extension of the period of detention being examined on the merits. There was also a violation of Article 6 § 2.

25. ***Trifković v. Croatia*, application no. 36653/09, 6 November 2012**

The applicant was held in pretrial detention for more than three years on suspicion of supplying heroin. His appeals against his detention were dismissed. Articles 5 § 3 and 5 § 4 were violated due to the excessive length of the detention after his arrest and because his constitutional complaints were dismissed without the extension of the detention being examined on the merits.

26. ***Osmanović v. Croatia*, application no. 67604/10, 6 November 2012**

The applicant was charged with attacking two off-duty police officers. He was remanded in custody for eight days on the basis that he could reoffend and because of the gravity of the charges. No violation of Article 5 § 3 was found because there were relevant and sufficient reasons for his remand in custody. Violation of Article 5 § 4 as the applicant's constitutional complaint was dismissed solely because he was no longer detained, which did not satisfy the requirements of effective review.

27. ***Grubić v. Croatia*, application no. 5384/11, 30 October 2012**

The applicant was convicted of armed robbery and aggravated murder, and sentenced to 30 years' imprisonment. He alleged that the maximum permissible period for which he could be detained pending his appeal had expired and his subsequent detention was unlawful. No violation of Article 5 § 1 since the decisions taken conformed with domestic law and were clarified by guidelines and settled practice of the Supreme Court.

28. ***Dervishi v. Croatia*, application no. 67341/10, 25 September 2012**

The applicant was arrested on suspicion of trafficking in heroin and put in pre-trial detention for a total of three years and six months which was extended numerous times on the grounds he might tamper with evidence, reoffend, and for the gravity of the charges. Violation of Article 5 § 3 as the delays in evidence examination, the lengthy period without any development in the proceedings, and the constant disregard for considering other preventative measures were all irreconcilable with the requisite of "special diligence" in such cases.

29. ***Krasniqi v. Croatia,*** **application no. 4137/10, 10 July 2012**

The applicant was found guilty of committing four murders and was sentenced *in absentia* to 20 years in prison. He was arrested in Germany and extradited to Croatia where he was put in pre-trial detention whilst criminal proceedings against him were reopened. No violation of Article 5 § 1 (a) was found since the decisions made conformed with domestic law and were clarified by the guidelines and the settled practice of the Supreme Court.

30. ***Sebalj v. Croatia,*** **application no. 4429/09, 28 June 2011**

Several sets of criminal proceedings were brought against the applicant. He was detained after the maximum statutory period for his detention had expired on the basis of a detention order issued in parallel criminal proceedings, without the detention being based on a statutory provision or judicial practice; this was incompatible with legal certainty and arbitrariness, violating Article 5 § 1 (c). The disregard for the applicant's submissions in his appeal to the appeal court and Constitutional Court failed to provide judicial review of the scope and nature required by Article 5 § 4. There were also violations of Article 6 § 1 and 6 § 3.

31. ***Krnjak v. Croatia,*** **application no. 11228/10, 28 June 2011**

The applicant was found guilty of war crimes and sentenced to eight years' imprisonment. He was in pre-trial detention and his constitutional complaint was declared inadmissible as a fresh decision on detention had been adopted in the meantime. The declaration of inadmissibility did not satisfy the requirement to afford applicants a realistic possibility of using the remedy, falling short of the obligation to review the detention's lawfulness in violation of Article 5 § 4. No violation of Article 5 § 1 (c) as adequate reasons had been provided.

32. ***Bernobic v. Croatia,*** **application no. 57180/09, 21 June 2011**

The applicant was detained on suspicion of trafficking illegal drugs. His constitutional complaint was declared inadmissible as a fresh decision on detention had been adopted in the meantime. No violation of Article 5 (1) as the time that elapsed between the detention order being found defective and the new detention order being issued did not render the detention arbitrary. No violation of Article 5 (3) as the proceedings complied with the requirements of efficiency and "special diligence" was thus observed. The declaration of

inadmissibility did not satisfy the requirement to afford applicants a realistic possibility of using the remedy, falling short of the obligation to review the detention's lawfulness, violating Article 5 § 4.

33. ***Suput v. Croatia,*** **application no. 49905/07, 31 May 2011**

The applicant was in pre-trial detention for almost two years on suspicion of war crimes against prisoners of war. He complained about receiving inadequate medical care and the repeated extensions of his detention. The conduct of the criminal proceedings complied with the requirements of efficiency, and the domestic authorities did observe special diligence in handling the applicant's case – no violation of Article 5 § 3.

34. ***Getos-Magdic v. Croatia,*** **application no. 56305/08, 2 December 2010**

The applicant was put in pre-trial detention on suspicion of war crimes. She complained about the almost two year length of her detention and its repeated extensions. No violation of Article 5 § 3 was found because the conduct of the criminal proceedings complied with the requirements of efficiency. Her constitutional complaint was declared inadmissible as a fresh decision on detention had been adopted in the meantime. The declaration of inadmissibility did not satisfy the requirement to afford applicants a realistic possibility of using the remedy, falling short of the obligation to review the detention's lawfulness, violating Article 5 § 4.

35. ***Hadi v. Croatia,*** **application no. 42998/08, 1 July 2010**

The applicant complained about the unlawfulness of his detention on charges of aggravated larceny and the inadequacy of the proceedings concerning the lawfulness of that detention. No violation of Article 5 § 1 since the five days between finding one detention order defective and issuing a new one did not render it arbitrary and hence the detention was in accordance with a procedure prescribed by law. The applicant's constitutional complaint was declared inadmissible as a fresh decision on detention had been adopted in the meantime. The declaration of inadmissibility did not satisfy the requirement to afford applicants a realistic possibility of using the remedy, falling short of the obligation to review the detention's lawfulness, violating Article 5 § 4.

36. ***Pesa v. Croatia*, application no. 40523/08, 8 April 2010**

The applicant was arrested and remanded in custody on suspicion of taking bribes. By focusing on the gravity of the charges to extend the applicant's detention and not taking into account alternative preventative measures or other guarantees designed to secure his trial appearance, the authorities prolonged the detention for almost two years on grounds which were not sufficient, violating Article 5 § 3. The applicant's constitutional complaint was declared inadmissible as a fresh decision on detention had been adopted in the meantime. This did not satisfy the requirement to afford applicants a realistic possibility of using the remedy, falling short of the obligation to review the detention's lawfulness, violating Article 5 § 4. There was also a violation of Article 6 § 2.

Montenegro

37. ***Bigović v. Montenegro*, application no. 48343/16, 5 March 2019**

The applicant was arrested and detained for risk of absconding in 2006. His detention was extended for the next four years and seven months for the same reason. He was convicted in 2012 and his conviction was upheld on appeal in 2015. He applied for release numerous times for health reasons. A violation of Article 5 § 1 (c) was found for the lack of precision in detention orders in respect of the duration of extensions and the lack of consistency in applying statutory time-limits for re-examination of grounds. Violation of Article 5 § 3 was found as the detention was not regularly reviewed and as it was insufficiently justified. The Court also found a violation of Article 3 concerning the conditions of the detention.

38. ***Šaranović v. Montenegro*, application no. 31775/16, 5 March 2019**

The applicant was detained for two and a half years on suspicion of being behind the murder of the brother of the leader of a criminal organisation. The applicant was then murdered outside his house and his wife continued the proceedings. Violation of Article 5 § 1 (c) was found because part of the detention had no legal basis as it was not reviewed after the 30-day time limit set down in the law. There was lack of precision in detention orders in respect of the duration of extensions and lack of consistency on applying statutory time-limits for re-examination of grounds.

39. ***Mugoša v. Montenegro,* application no. 76522/12, 21 June 2016**

The applicant was detained on suspicion of murder, and this was extended twice corresponding with two-month time limits for extending detention. He argued for his release because no decision was issued after the following two months to extend his detention, although it was eventually extended. Violation of Article 5 § 1 (c) was found as the detention was unlawful for the days between the complaint and extension due to the lack of precision in detention orders in respect of the duration of extensions and the lack of consistency in applying statutory time-limits for re-examination of grounds. There was also a violation of Article 6 § 2.

40. ***Bulatović v. Montenegro,* application no. 67320/10, 22 July 2014**

The applicant was a Montenegrin national extradited from Spain, having been found guilty of murder *in absentia*. The criminal proceedings against him were re-opened and he was placed in detention, which was extended until his conviction was upheld. He requested that the criminal proceedings be expedited, and the Supreme Court ruled that they were unreasonably long and awarded him compensation. Violation of Article 5 § 3 was found due to the excessive length of the detention. There was also a violation of Article 3.

North Macedonia

41. ***Selami and Others v. North Macedonia*, application no. 78241/13, 1 March 2019**

The applicants were a family complaining about the low compensation awarded for the unlawful detention and ill-treatment of their husband and father, and one of the sons was considered to be an indirect victim. A violation of Article 5 § 5 was found in relation to the low compensation. There was also a violation of Article 3.

42. ***Ramkovski v. the Former Yugoslav Republic of Macedonia*, application no. 33566/11, 8 February 2018**

The applicants were father and daughter suspected of criminal conspiracy and tax evasion. They were arrested and put in pre-trial detention initially for 30 days; however the detention was extended several times with their appeals being dismissed. A violation of Article 5 § 3 was found because of the lack of relevant and sufficient grounds for extending the detention.

43. ***Miladinov and Others v. the Former Yugoslav Republic of Macedonia,*** **application nos. 46398/09, 50570/09, 50576/09, 24 April 2014**

Two of the applicants were remanded in custody whilst the third was under house arrest. The house arrest and the custody detention were extended on numerous occasions. Violation of Article 5 § 3 was found for the lack of concrete and sufficient reasons for the detention on remand. Violation of Article 5 § 4 was also found for the lack of an oral hearing in the proceedings to review the detention, and the non-observance of the equality of arms principle in the proceedings to extend detention.

44. ***Velinov v. the Former Yugoslav Republic of Macedonia,*** **application no. 16880/08, 19 September 2013**

The applicant was convicted of a minor offence and was ordered to pay a fine, otherwise the fine would be converted into a prison sentence. The fine was converted but the applicant had paid the fine without notifying the trial court. He was imprisoned but later released upon producing the required evidence. Violation of 5 § 1 (b) as the State did not take all necessary measures to avoid the applicant's liberty being unduly restricted. Violation of Article 5 § 2 as the applicant was not informed of the reasons for his arrest. Article 5 § 5 was also violated for the lack of compensation despite a violation of Article 5 § 2 having been established. There were also violations of Articles 6 and 13.

45. ***El-Masri v. the Former Yugoslav Republic of Macedonia,*** **application no. 39630/09, 13 December 2012**

The applicant was a German national who travelled to Macedonia. He was interrogated at the border and taken to a hotel where he was interrogated repeatedly, threatened, and forced to confess he was a member of Al-Qaeda. He was then taken to the airport, where he was beaten severely before being put on a plane to Afghanistan, where he remained for four months. He was eventually returned to Germany. The detention in the hotel and airport were unauthorised, unsubstantiated, undocumented, and no effective investigation took place, violating Article 5. Articles 3, 8, 10, 13 were also violated.

46. ***Vasilkoski and Others v. the Former Yugoslav Republic of Macedonia*, application no. 28169/08, 28 October 2010**

The 38 applicants were arrested on suspicion of having misappropriated millions of euros worth of toll charges. They were detained pending investigation and this was extended numerous times, with appeals being unsuccessful. Violation of Article 5 § 3 was found because the courts had extended the detention with the same brief formula of grounds without regard to the applicants' personal situations or to alternative preventative measures.

47. ***Mitreski v. the Former Yugoslav Republic of Macedonia*, application no. 11621/09, 25 March 2010**

The applicant was arrested and an investigating judge ordered him to remain under house arrest for 30 days. On appeal by the public prosecutor, a panel reversed the house arrest order and ordered the applicant's detention in prison. Violation of Article 5 § 4 for the procedural failure preventing the applicant from effectively participating in the proceedings before the panel.

48. ***Trajce Stojanovski v. the Former Yugoslav Republic of Macedonia*, application no. 1431/03, 22 October 2009**

The applicant, who was disabled, had knocked down a person who died a few days later. The domestic court ordered the applicant to be detained indefinitely for compulsory psychiatric treatment in a closed medical institution – the court considered him aggressive and a danger to the public. The hospital later requested his release saying his condition improved. The court dismissed these requests, relying on police reports indicating fear from villagers. The applicant's detention was initially deemed lawful under Article 5 § 1 (a) but over time there was no longer a causal connection between his conviction and detention. Violation of Article 5 § 1 (e) since the applicant's mental disorder was not of the kind or degree to justify his continued compulsory confinement nor could the validity of the confinement be derived from the persistence of the disorder.

49. ***Lazoroski v. the Former Yugoslav Republic of Macedonia*, application no. 4922/04, 8 October 2009**

A high-ranking officer in the Intelligence Service gave a verbal order for the applicant's arrest on suspicion that he was armed and could leave the State.

The applicant was taken to the police station where he was detained for a day. The investigating judge found that he had been lawfully deprived of his liberty on suspicion of arms trafficking. Violation of Article 5 § 1 (c) since there was no evidence provided to suggest the applicant was involved in arms trafficking and thus no "reasonable suspicion" could be sufficiently justified as a basis for the applicant's detention. No reasons were given to the applicant for his arrest, violating Article 5 § 2. There was also a violation of Article 6.

Serbia

50. ***Purić and RB v. Serbia*, applications nos. 27929/10, 52120/13, 15 October 2019**

The applicants, detained on different charges, were initially detained on the grounds that they would obstruct justice, reoffend, and the severity of the potential sentence and the nature of the alleged crimes, however later the latter two became the sole grounds, and they were detained for three months and one month respectively. The Constitutional Court found no violations of the applicants' right to liberty and security. The Court found that the national courts assessed the detention from an abstract and formalistic perspective without showing that the applicants' release would actually disturb public order, violating Article 5 § 3.

51. ***Mitrović v. Serbia*, application no. 52142/12, 21 March 2017**

The applicant was detained in Serbia on the basis of a decision by the courts of the "Republic of Serbian Krajina" – an internationally unrecognised entity. Violation of Article 5 § 1 as the Serbian authorities had conducted no proceedings for the recognition of the decision.

52. ***Grujović v. Serbia*, application no. 25381/12, 21 July 2015**

The applicant was extradited from Austria to Serbia where several sets of criminal proceedings were opened against him. He was placed in detention on remand which was continually extended. He was convicted but the judgment was remitted on appeal for retrial. The applicant's detention continued and his further appeals were rejected. The excessive length of almost seven and a half years of detention violated Article 5 § 3. Article 6 § 1 was also violated.

53. ***Lakatoš and Others v. Serbia*, application no. 3363/08, 7 January 2014**

The five applicants complained they had been ill-treated by the police when arrested on suspicion of carrying out a series of robberies that targeted elderly people. Three of the applicants were held in pre-trial detention for more than a year and eight months, with eleven extensions by the national courts. The grounds for detention did not show that the release of the accused would actually disturb public order and thus could not be regarded as relevant and sufficient justifications for the detention, violating Article 5 § 3. There was also a violation of Article 3.

54. ***Luković v. Serbia*, application no. 43808/07, 26 March 2013**

The applicant was arrested and detained on suspicion of organising a criminal group and of corruption. His pre-trial detention was extended several times until his eventual release on bail. No violation of Article 5 § 3 since the grounds keeping the applicant in detention were regularly reviewed and justified, and the period of nearly four years of proceedings was justified by the exceptional complexity of the case.

55. ***Dermanovic v. Serbia*, application no. 48497/06, 23 February 2010**

A criminal investigation was opened against the applicant on suspicion of abuse of power and forging official documents. The district court ordered his detention on the ground that there was a risk of flight. The applicant's appeal against the order and a request to be released on bail were dismissed. His case was remitted on appeal and his detention continued, amounting to two years and two months. Requests by the applicant to be released were dismissed. The domestic courts did not verify whether the initial ground for placement in custody remained valid throughout the proceedings, and the authorities failed to consider alternative preventative measures, violating Article 5 § 3.

56. ***Milosevic v. Serbia*, application no. 31320/05, 28 April 2009**

The applicant was arrested on suspicion of committing numerous thefts and taken to prison. His detention was extended without having been heard. His appeal against the detention was rejected. The applicant had not been brought in person before a judge who had the obligation to review and the power to order his release until more than 41 days following his arrest, violating Article 5 § 3.

57. *Vrencev v. Serbia*, application no. 2361/05, 23 September 2008

The applicant was arrested on suspicion of illicit possession of narcotics. He was released 20 days later after a hearing in which he was found guilty. No violation of Article 5 § 1 was found despite the courts failing to note the applicant's correct address. It took 20 days for the applicant to be brought in person before a judge, and the applicant's right to be released pending trial had been breached, violating Article 5 § 3. The delays and lack of an oral hearing in the proceedings before the Supreme Court violated Article 5 § 4. The Court also recognised that the applicant had no enforceable right to compensation in any ensuing civil suit, violating Article 5 § 5.

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