“Deprivation of liberty not linked to a criminal procedure under Article 5 of the ECHR”

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INTRODUCTION

Deprivation of liberty is one of the most serious restrictive measures affecting physical, legal, social, psychological and other aspects of human lives.

Article 5 § 1 of the European Convention of Human Rights contains a list of permissible grounds of deprivation of liberty, a list which is exhaustive. However, the applicability of one ground does not necessarily preclude that of another; a deprivation of liberty may, depending on the circumstances, be justified under one or more sub-paragraphs.

To be precise The Convention in its Article 5 § 1 (e) permits "the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics, drug addicts or vagrants". Furthermore Article 5 § 1 (f) establishes that 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.

These classifications share one common factor: they refer to states of socially dangerous conditions or attitudes, even administratives illicits, but in our opinion they do not constitute any crime.

Certain types of behaviour, however, are considered to be criminal and therefore fall under the Criminal Code in some European States. This piece of work will be on the subject of deprivation of liberty without criminal proceedings, and the requirements established by the European Court of Human Rights.

Firstly we are going to start with the questions and problems posed by the application of Article 5 § 1 (e). We have separated the paragraph 1-e in two parts to facilitate its understanding: on one side deprivation of liberty of persons of unsound mind and on the other, detention of persons for the prevention of the spreading of infectious diseases, alcoholics, drug addicts and vagrants. Finally we will focus on the expulsion of aliens.

PERSONS OF UNSOUND MIND: DEPRIVATION OF LIBERTY UNDER ARTICLE 5-1-E OF THE ECHR

Europe is the region of the world in which is more abundant the normative one about mental health. Special interest has the recommendations of the committee of ministers of the council of Europe so we can highlight the following ones: Recommendation Nº REC (83) 2, concerning the legal protection of persons suffering from mental disorder placed as involuntary patients. Recommendation Nº REC (92) 6, on a coherent policy for people with disabilities Recommendation Nº REC (2004) 10, concerning the protection of human rights and dignity of persons with mental disorder

They set up the guidelines that should be taken into account by the states members when enacting their national laws. Most of the principles fixed in these recommendations have been established by the ECHR´s case law for 60 years.

Made these considerations, we will try to answer the most important questions about involuntary confinement of persons of unsound mind from the view of the EHRC.

When can a person of unsound mind be deprived of his/her liberty? In the Court's opinion, except in emergency cases, the individual concerned should not be deprived of his liberty unless he or she has been reliably shown to be of "unsound mind". No one may be confined as "a person of unsound mind" in the absence of medical evidence establishing that his mental state is such as to justify his compulsory hospitalisation.

It is recalled that an individual cannot be deprived of his liberty on the basis of unsoundness of mind unless three minimum conditions are satisfied: he must reliably be shown to be of unsound mind; the mental disorder must be of a kind or degree warranting compulsory confinement; and the validity of continued confinement depends upon the persistence of such a disorder[1]. There must be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention. In principle, the "detention" of a person as a mental health patient will only be "lawful" for the purposes of sub-paragraph (e) of paragraph 1 (art. 5-1-e) if effected

[1] Case of H.L v United Kingdom § 98, Winterwerp v the Netherlands § 39 , Luberti v. Italy § 27, Johnson v. United Kingdom § 60, Hutchison Reid v. the United Kingdom § 47 and Verbanov v Bulgaria § 40

in a hospital, clinic or other appropriate institution authorised for that purpose. However, subject to the foregoing, (art. 5-1-e) is not in principle concerned with suitable treatment or conditions[2]. The Court's case-law refers rather to the applicant being properly established as suffering from a mental disorder of a degree warranting compulsory confinement. Such confinement may be necessary not only where a person needs therapy, medication or other clinical treatment to cure or alleviate his condition, but also where the person needs control and supervision to prevent him, for example, causing harm to himself or other persons

How long does the confinement last? The Court has stated that the validity of continued confinement depends upon the persistence of such a disorder[3]. In its view it does not automatically follow from a finding by an expert authority that the mental disorder which justified a patient's compulsory confinement no longer persists, that the latter must be immediately and unconditionally released into the community. It must also be observed that in the field of mental illness the assessment as to whether the disappearance of the symptoms of the illness is confirmation of complete recovery is not an exact science. Whether or not recovery from an episode of mental illness which justified a patient's confinement is complete and definitive or merely apparent cannot in all cases be measured with absolute certainty. It is the behaviour of the patient in the period spent outside the confines of the psychiatric institution which will be conclusive of this. In the view of the Court it must also be acknowledged that a responsible authority is entitled to exercise a similar measure of discretion in deciding whether in the light of all the relevant circumstances and the interests at stake it would in fact be appropriate to order the immediate and absolute discharge of a person who is no longer suffering from the mental disorder which led to his confinement. That authority should be able to retain some measure of supervision over the progress of the person once he is released into the community and to that end make his discharge subject to conditions[4]

Who is empowered to order the confinement? The Court states that the decisions ordering or authorising detention should be issued from bodies which possesses the

[2] Cases of Winterwerp v The Netherlands § 51, Ashingdane v The United Kingdom §44, Aerts v Belgium § 46 , Hutchinson Reid v the United Kingdom § 49
[3] Case of Winterwerp v The Netherlands §39
[4] Case of Johson v United Kingdom § 61 and 63

characteristics of a "court" or furnishes the guarantees of judicial procedure required by Article 5 paragraph 4.[5]

When does the placement become a deprivation or a restriction upon liberty? In order to determine whether there has been a deprivation of liberty, the starting-point must be the specific situation of the individual concerned and account must be taken of a whole range of factors arising in a particular case such as the type, duration, effects and manner of implementation of the measure in question. The distinction between a deprivation of and restriction upon liberty, is merely one of degree or intensity and not one of nature or substance[6]. In the case of H. M. v. Switzerland, it was held that the placing of an elderly applicant in a foster home, to ensure necessary medical care as well as satisfactory living conditions and hygiene, did not amount to a deprivation of liberty within the meaning of Article 5 of the Convention. In particular, it was not established that H.M. was legally incapable of expressing a view on her position, she had often stated that she was willing to enter the nursing home and, within weeks of being there, she had agreed to stay. This combined with the regime of the foster home (an open institution which allowed freedom of movement and encouraged contacts with the outside world) allows a conclusion that the facts of the H.M. case were not of a "degree" or "intensity" sufficiently serious to justify the conclusion that she was detained. In Nielsen v Denmark the mother committed the minor to an institution in the exercise of her parental rights, pursuant to which rights she could have removed the applicant from the hospital at any time. The restrictions on the applicant's freedom of movement and contacts with the outside world were not much different from restrictions which might be imposed on a child in an ordinary hospital and in general, conditions in the Ward were said to be 'as similar as possible to a real home'

GUARANTEES

The deprivation of liberty of persons of unsound mind enjoys the same safeguards as other deprivations of liberty within article 5 of the ECHR. Leaving aside the safeguard of the procedure prescribed by law, and the impartiality of the court, we will focus on the review of the deprivation of liberty and the term during which the decision on the lawfulness of the detention should be given.

[5] Case of Winterwerp v The Netherlands § 67
[6] Case of Guzzardi v. Italy § 92, Ashingdane v United Kingdom § 41

REVIEW. Article 5 § 4 provides the right to an individual deprived of his liberty to have the lawfulness of that detention reviewed by a court in the light, not only of domestic law requirements, but also of the text of the Convention, the general principles embodied therein and the aim of the restrictions permitted by paragraph 1. This does not guarantee a right to review of such scope as to empower the court on all aspects of the case or to substitute its own discretion for that of the decision-making authority. The review should, however, be wide enough to bear on those conditions which are essential for the lawful detention of a person, in this case, on the ground of unsoundness of mind[7].

The remedy of habeas corpus can on occasions constitute an effective check against arbitrariness in this sphere. It may be regarded as adequate, for the purposes of Article 5 par. 4 (art. 5-4), for emergency measures for the detention of persons on the ground of unsoundness of mind. Such measures, provided they are of short duration, are capable of being "lawful" under Article 5 par. 1 (e) (art. 5-1-e) even though not attended by the usual guarantees such as thorough medical examination. The authority empowered to order emergency detention of this kind must, in the nature of things, enjoy a wide discretion, and this inevitably means that the role of the courts will be reduced.

A person of unsound mind who is compulsorily confined in a psychiatric institution for an indefinite or lengthy period is in principle entitled, at any rate where there is no automatic periodic review of a judicial character, to take proceedings "at reasonable intervals" before a court to put in issue the "lawfulness" – within the meaning of the Convention - of his detention[8]

REASONABLE TIME-LIMIT. The court has established that there was a violation of Article 5 para. 4 if decisions cannot be regarded as having been taken at reasonable intervals: 18 months and ten days[9]**,** five months[10], four months[11]**,** or five weeks[12]

COMPARATIVE LAW

[7] Case of X v. United Kingdom §57-58, Ashingdane v United Kingdom § 52 , E. v. Norway § 50, and Hutchison Reid v United Kingdom § 64
[8] Case of X v. the United Kingdom § 52, Megyeri v Germany § 22
[9] Case of Luberti v Italy § 37
[10] Case of Van der Leer v The Netherlands §36
[11] Case of Koendjbiharie v The Netherlands §29
[12] Case of E v Norway § 65-66

For the initial period of involuntary hospitalizations, mostly occurring on an emergency basis, several countries have similar regulations regarding the maximum time allowed for a decision to be made. The range of these periods varies from 24 hours, to 72 hours. In Sweden only, the institution has the authority to prolong this initial period for four weeks. If the patient does not consent to be hospitalized, the institution is obligated within the specified period to inform the authorities, usually the court, responsible for deciding on further involuntary stay (and treatment) of the patient. A few countries define the period of time within which the authorities must hold relevant hearings. These range from two (Bulgaria, Italy, Poland) to three (Spain), five (Slovak Republic), seven (Czech Republic) and ten days (Greece), following the date on which the information on involuntary hospital admission has been communicated to the relevant authority. For the next step, the order of further detainment, variation in the defined period significantly increases: it ranges from one week (Italy), two weeks (Israel, Poland), one month (Lithuania), six weeks (Germany) and three months (Bulgaria, Czech Republic, Slovak Republic and Sweden) up to six months (England, Greece, Spain). If another decision is necessary or regular re-assessments are performed by the authorities, the range of permissible time-periods is again considerable. They vary from a one-week extension (Italy), to three months from the initial six-week period (Germany), six months (England, Lithuania, Spain, Sweden) or one year (Czech Republic, Slovak Republic).

Bulgaria, Greece and Poland do not state a permissible extension period after the expiration of that time initially decided by the relevant authority. For even more countries a maximum duration of detention that might be reached after several decisions on prolongation is unclear. Only Germany defines a maximum of twelve months (in the civil commitment law, and 24 months in the guardianship law, respectively), whereas some other countries provide further extension periods of six (Lithuania, Sweden) or twelve months (Czech Republic, Slovak Republic). Although possible limitations of such periods might be reached when patients ask for re-assessment or lodge a complaint, only Greece requires a special standard of issuing professional recommendations for deciding on detention periods longer than six months: the necessity of this coercive measure must be approved by three psychiatrists, one working in the hospital in which the patient is currently treated, and two appointed by the public prosecutor. In contrast to other European countries, Bulgaria does not assign the

authority to terminate an involuntary stay before the period defined by the authorities expires to the hospital or to (high-ranking) physicians in the hospital and in Sweden, there is no obligation to inform the relevant authorities about these decisions.

Some states have special regulations that specifically concern involuntary assessments, separate from the process of treatment, in psychiatric hospitals. Bulgaria and Germany strictly separate legal decisions on involuntary placement and treatment. Greece and Spain have not included special references to involuntary treatment in their legal texts. England, Lithuania, Poland, Slovak Republic and Sweden bind the decisions on involuntary treatment to the presence of the basic clinical conditions required for involuntary admission. Although mentioned generally, the legal texts of Bulgaria, England, Greece, Lithuania and Spain do not contain standards on the use of restraint and seclusion of psychiatric patients.

DEPRIVATION OF LIBERTY UNDER ARTICLE 5-1-E OF THE ECHR

People mentioned in paragraph 1.E of Article 5 can be deprived of their freedom because they are dangerous for public safety but also because their own interests may need their detention.
The problem to apply sub-paragraph 1.E is that the meaning of the words used is not defined and delimited by The Court, and that causes a lot of trouble to interpret the law. We are going to analyze each term.

PREVENTION OF THE SPREADING OF INFECTIOUS DISEASES

What is the definition of an infectious disease?
The Court does not give a definition of infectious disease but considers HIV virus dangerous for public health and safety.
In the case of **ENHORN vs SWEEDEN**[13], Mr Enhorn was detained and shutted in to prevent the applicant from spreading the HIV disease. The order to deprive him of his freedom was legally binding for almost seven years. The Court notes that Mr. Enhorn´s compulsory confinement was imposed pursuant to section 38 of the 1988 Act, but the Government have not provided any example of less severe measures which might have

[13] Case of Enhorn v. Sweden § 49, 50, 51 and 52.

been considered for the applicant in the period from 16 February 1995 until 12 December 2001, but was apparently found to be insufficient to safeguard public interest. He was obliged not to drink alcohol, in order not to lose control of their acts as well as consulting a psychiatrist, but in either case, no treatment was provided.

The Court[14] found that the compulsory isolation of the applicant was not the last resort to prevent him from spreading the HIV virus because less severe measures were not considered and it was found to be insufficient to safeguard the public interest. There has been a violation of article 5.1.

ALCOHOLICS

What is the meaning given to the term *"alcoholics"?*

The Court[15] in application of articles 31 to 33 of the Vienna Convention of 23 May 1969 on the Law of Treaties, the interpretation must be in accordance with its ordinary meaning. The word "alcoholics", in its common usage, denotes people who are addicted to alcohol. The Court considers that people who are not medically diagnosed as "alcoholics" but whose conduct and behaviour under the influence of alcohol pose a threat to public order or to themselves can be taken into custody for public protection or for their own interests, such as their health or personal safety. It does not permit the detention of an individual merely because of his alcohol intake.

We can highlight two leading cases: **WITOLD LITWA vs. POLAND[16],** and **HILDA HAFSTEINSDÓTTIR vs. ICELAND.**

Mr. Litwa was a disabled person. He was blind in one of his eyes. He was confined for six hours and thirty minutes in a sobering-up centre.

The Court found that there was a violation of article 5 indeed. The Law of 26 October 1982 provides with different measures which may be applied to an intoxicated person and the detention order to stand in a sobering-up centre is the most extreme. He could be taken to a public health centre or to his residence. The Court states with certainty, that the applicant´s behaviour under the influence of alcohol posed a threat to public safety or that his own health, well-being or personal safety was endangered.

In the case of **HILDA HAFSTEINSDÓTTIR vs. ICELAND[17]**, Ms. Hafsteinsdottir was detained under police custody for drunkenness and disorderly conduct, on six occasions. Each time, she spent the night in a cell and was released in the morning. The

[14] Case of Enhorn v. Sweden, § 55.
[15] Case of Litwa v. Poland, § 55, 57, 60, 61 and 62.
[16] Case of Litwa v. Poland § 77, 79, and 80.
[17] Case of Hafsteinsdottir v. Iceland, § 3, 11, 36, 42, and 56.

Court established that the confinement on the six occasions at issue in a cell at various Reykjavík Police stations is a deprivation of liberty. Also considers that her conduct and behavior were under the strong influence of alcohol and could reasonably entail a threat to public order but the Court considers that the case is a violation of article 5, because the law, applicable at the material time, was not enough precise and accessible to avoid all risks of arbitrariness. The 1988 Police Rules did not determine, in a clear way, the duration of the detentions.

DRUG ADDICT

What is the meaning given to the term *"drug addict"?*

The Convention does not contain a definition of the term *"drug addict"*.

In the **CASE OF BIZZOTTO vs. GREECE[18],** Mr. Bizzotto was sentenced to eight years of imprisonment (reduced thanks to an appeal to six years). He was also ordered to be placed in an appropriate centre to receive treatment for his drug addiction. Mr. Bizzotto was never accepted in any such institution; he served his sentence in Patras Prison. The Court stated that there must be some relationship between the ground of permitted deprivation of liberty relied on and the place and conditions of detention.

Mr. Bizzotto´s deprivation of freedom did not comply with the measures ordered against him, but it was the consequence of his conviction as a drug dealer. It was incumbent on the State to provide the infrastructure to meet the requirements of Law no. 1729/1987, but there was no violation of article 5.

VAGRANCY

What is the meaning given to the term *"vagrancy"?*

The Convention[19] does not contain a definition of the term "vagrant". So The Court use the definition on Article 347 of the Belgian Criminal Code: "Vagrants are persons who have no fixed abode, no means of subsistence and no regular trade or profession". These three conditions are cumulative: they must be fulfilled at the same time with regard to the same person. The case law in this matter was build up by the Court in the **CASES OF DE WILDE, OOMS AND VERSYP vs. BELGIUM[20].**

Wilde, Ooms, and Versyp were declared in a state of vagrancy and put at Government ´s disposal.

[18] Case of Bizzotto v. Greece, § 7, 8, 29, 31, 33, 34 and 35.
[19] Cases of Wilde, Ooms, Versyp v. Belgium, § 68.
[20] Cases of Wilde, Ooms, Versyp v. Belgium § 65, 69 and 70.

The Court argued that temporary distress or misery may drive a person to give himself up to the police to be detained. This does not necessarily mean that the person so asking is in a state of vagrancy and even less that he is a professional beggar or that his state of vagrancy results from one of the circumstances (idleness, drunkenness or immorality) which, under Section 13 of the Belgian Act of 1891, may entail a more severe measure of detention.

Also The Court considers that the right to freedom is very important in a "democratic society" within the meaning of the Convention 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. Having thus the character of a "vagrant" they could, under Article 5.1.E, be made the subject of a detention provided that it was ordered by the competent authorities and in accordance with the procedure prescribed by Belgian law. There was no violation of article 5.1.

SOCIETY PROTECTION AND RISKS OF RECIDIVISM

The States Member of the European Council have chosen different ways of shielding the public from convicted offenders who acted with full criminal responsibility at the time of the offence and whose risk committing further serious offences on release from detention and therefore present a danger to the public.

Eight Convention States have adopted systems of preventive detention regarding convicted offenders who acted with full criminal responsibility when committing their offences, and who are considered dangerous for the public as they are liable to re-offend. These include Germany, Austria, Denmark, Italy, Liechtenstein, San Marino, Slovakia and Switzerland. Preventive detention in these States is ordered, as a rule, by the sentencing Courts and is generally executed after the persons concerned have served their prison judgment (with the exception of Denmark, where preventive detention is ordered instead of a prison judgment). The detainee´s dangerousness is reviewed on a periodic basis and they are released on probation if they are no longer dangerous for the public. In many other Convention States, there is no system of preventive detention and offenders' dangerousness is taken into account both in the determination and in the execution of their judgment. The sentencing Courts in the United Kingdom expressly distinguish between the punitive and the preventive part of a life sentence. The retributive or tariff period is fixed to reflect the punishment of the offender. Once the retributive part of the sentence has been served, a prisoner is considered as being in

custody serving the preventive part of his sentence and may be released on probation if he poses no threat to society.

Which is the doctrine of The Court in preventive detention?

Preventive detention did not serve to avenge past offences but to prevent future ones. The preventive detention, in the M. Vs Germany case[21] beyond the ten-year point was not ordered in the judgment of the sentencing Court read in conjunction with the provisions of the Criminal Code applicable at the time of that judgment. The Court found a violation of Article 5.1.

In the other side, The Court[22] has affirmed, that the Belgian system of placement of recidivist and habitual offenders at Government's disposal ordered in addition to a prison sentence, constituted detention "after conviction by a competent court" for the purposes of Article 5.1.a).

The Court[23] found that is necessary a sufficient causal connection between the conviction and the continuous detentions after years of imprisonment.

In the case studied, the applicant´s continuous detentions beyond the twenty-year term was in conformity with the judgment of the sentencing court, which had passed a sentence of life imprisonment and had expressly stated that the applicant had been sentenced to imprisonment for the rest of his life as provided by the Criminal Code, and not for a period of twenty years as set out in the Prison Regulations, subordinate legislation in force at the time.

No violation of Article 5.1 was found in Waite vs The United Kingdom[24]. The Court finds sufficient connection, as required by the notion of lawfulness in Article 5.1.A of the Convention, between the recall and the original sentence for murder in 1981.

In Weeks v U.K.[25] The Courts found that the discretionary life sentence imposed was an indeterminate sentence expressly based on considerations of his dangerousness to society, factors which were susceptible by their nature to change with the passage of time. On that basis, his recall, in light of concerns about his unstable, disturbed and aggressive behaviour, could not be regarded as arbitrary or unreasonable in terms of the

[21] Case of M. v. Germany § 30, 96, 99, 101, 102, 104, and 105.
[22] Case of Van Droogenbroeck v. Belgium § 40, 41, and 42. Mr. Droogenbroeck was sentenced to two years of imprisonment for theft. The Tribunal also ordered that he has to be placed at Government's disposal for ten years.
[23] Case of Kafkaris v. Cyprus § 119, 120 and 121.
[24] Case of Waite v. United Kingdom § 9, 62, 64, 65, 68 and 69. Convicted of murder. He was sentenced to detention at Her Majesty's Pleasure.
[25] Case of Weeks v. United Kingdom § 36, 38 and 51 . Mr. Weeks was sentenced to life imprisonment.

objectives of the sentence imposed on him and there was sufficient connection for the purposes of Article 5.1.A between his conviction and recall to prison.

Once the punishment element of the sentence (as reflected in the tariff) has been satisfied, the grounds for the continued detention, as in discretionary life and juvenile murderer cases, must be considerations of risk and dangerousness[26]. The continued detention of the applicant, after his fraud offence sentence expired in 1997, was not justified, because there was no causal connection between a possible commission of other, future, non-violent offences and the original sentence for murder in 1967. The Court found a breach of Article 5.1 where the detention after recall of an adult mandatory life prisoner was based on the risk of non-violent offending unconnected with the basis of his original detention of murder many years before.

ALIENS: DEPRIVATION OF LIBERTY UNDER ARTICLE 5-1-F OF THE ECHR.

Every person, by virtue of his inherent humanity, should entitle and enjoy Human Rights as a whole, unless exceptional distinctions, such as the difference between citizens and non-citizens, responds to a state´s legitimate aim in a proportional way.

A non-citizen is a person to whom effective bonds with the state where he is have not been recognized yet. There are different groups of non-citizens, including permanent residents, migrants, refugees, asylum seekers, foreign students, stateless persons, amongst others. Should each group have their righst established by different set of rules, nevertheless they all share similar problems. These common concerns affect 175 million people, which is to say 3% of global population. We will examine the requirements that must be fulfilled in a lawful detention within Article 5 ECHR, but we should as well remark that detention of migrants, falling within the current trend to criminalise migration, is now a common practice in almost all Council of Europe member states. Without having committed any crimes, migrants are locked up in detention, at times in appalling conditions. Children, including unaccompanied migrant minors, are frequently among them.

The use of detention as pre-expulsion mechanism has blossomed across Europe over the past ten years, and it is increasing the number of countries which have established

[26] Case of Stafford v. United Kingdom § 62, 80, 81, 82 and 83.

criminal penalties against illegal entering or staying third country nationals such as Germany, Ireland, Luxembourg, Sweden, United Kingdom, amongst others.

In the European Union context, the so called "Return Directive" of 16th December 2008, allows Member States to maintain the detention of a third-country national for the purpose of the removal till a maximum of 18 months, (article 15 , paragraphs 5 and 6). This poses the question of whether the time-limit of 18 months for detention prior to expulsion meets Article 5 requirements for a lawful detention or not. Prima facie this provision seems excessive as return procedures can usually be completed in a much shorter period of time.

EUROPEAN COURT OF HUMAN RIGHTS´ CASE LAW.

Since the European Court of Human Rights was set up in 1959, till present days, it has drawn the content and the limits of article 5 throughout its case law. With regards to aliens´deprivation of liberty,we shall review the leading cases concerned by answering some key questions in this matter:

1.In the context of article 5 of the ECHR, Is it possible to detain an alien ?

Detention shall be ordered only for the specific purpose of preventing an unauthorised entry or with a view to deportation or extradition.

The one immigration situation which is expresely provided for in Article 5 is that of "*the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition" .*

The Court has always held that compliance with Article 5 requires not only that the detention should be for the specified purpose but an individual assessment of the necessity of the detention must be made, and the necessity demonstrated.

However, in the case of **Chahal v. United Kingdom,** the Court held that the test of necessity does not have to be applied to those detained after a decision to refuse the entry or to deport them has been taken. Nevertheless, detention under this provision requires expulsion proceedings to be in progress and to be prosecuted with due diligence. Chahal concerned the proposed deportation on national security grounds of a Sikh activist. The Court found no violation as a result of the extended detention as the United Kingdom was able to demonstrate that its courts had acted with due diligence in

dealing with the many proceedings which the applicant himself had initiated to challenge his expulsion.

In **Quinn v. France**, on the other hand, the Court found Article 5 to have been violated because the detention lacked proportionality and the state had not conducted the relevant proceedings with due diligence. In **Singh v. Czech Republic** the detention was held to violate Article 5, paragraph 1(f), because the Czech authorities had failed to exercise due diligence in pursuing the necessary documentation from the Indian authorities to effect the return to that country. (See as well Nashri v. France, Bouchelkia v. France).

2. When could an irregular migrant be deprived of his liberty?

Detention of irregular migrants shall be exceptional and only used after first reviewing all other alternatives and finding that there is no effective alternative**.** In the case **Saadi v. United Kingdom**, the applicant was refused an extension of his residence permit, was ordered to leave the country and was warned that his failure to leave would result in his expulsion. As he failed to leave within the time-limit and his immediate expulsion was impossible because of lack of travel documents, an administrative court authorised his placement in the deportation centre on the basis of the Obligation to Leave and Prohibition of Entry Act. According to the European Court´s assessment *" As the Court has remarked before, subject to their obligations under the Convention, States enjoy an "undeniable sovereign right to control aliens' entry into and residence in their territory".* After having stated the above affirmation, the Court declares that *"The detention of an individual is such a serious measure that it is justified only as a last resort where other, less severe measures have been considered and found to be insufficient to safeguard the individual or public interest which might require that the person concerned be detaine ."*[27]. Detention should be used only if less intrusive measures have been tried and found insufficient. Consequently, priority should be given to alternatives to detention for the individuals in question (although they may also have human rights implications). Alternatives to detention are financially more attractive for the states concerned and have found to be effective. Unfortunately, in some states, alternatives to detention are rarely used or they do not even find expression in national law.

[27] Case of Saadi v United Kingdom § 64 ,70 (see, inter alia, Rusu v. Austria, Vasileva v. Denmark § 37, Witold Litwa v. Poland §.78).

3. What requirements must be fulfilled in order to comply with the notion of a " lawful detention" under article 5.1 letter f?

As can be seen from the first sentence of Article 5, any deprivation of liberty must not only be for a purpose authorised by article 5, paragraph 1 (a)-(f). It must also **be in accordance with a procedure prescribed by law** in order to be lawful under the Convention. As the Court stated in the case of ***Amuur v. France,*** this primarly requires any arrest or detention to have a legal basis in domestic law. However, the domestic law must meet Convention standards. The Court went on to state *"...However, these words do not merely refer back to domestic law; like the expressions "in accordance with the law" and " prescribed by law" in the second paragraphs of Articles 8 to 11, they also relate to the quality of the law, requiring it to be compatible with the rule of law, a concept inherent in all the Articles of the Convention."*[28]. Quality of law, in this context, means that a law which authorises deprivation of liberty must be sufficiently precise and accessible to avoid all risk of arbitrariness[29].

Detention shall not be arbitrary. The notion of arbitrariness is clearly set up in Saadi v. United Kingdom, and is closely attached to that of "procedure prescribed by law". In Saadi, the Court reiterates that "*Compliance with national law is not, however, sufficient: Article 5 § 1 requires in addition that any deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness",* and later on "*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".*

However, The Court does not establish a global definition as to what types of conduct on the part of the authorities might constitute arbitrariness, it is a matter to be determined case by case.

In Saadi, the Court highlights some key principles obtained from case law: " *To avoid being branded as arbitrary, therefore, such detention must be carried out in good faith (see also Bozano v. France, Conka v. Belgium); it must be closely connected to the purpose of preventing unauthorised entry of the person to the country; the place and conditions of detention should be appropriate, bearing in mind that "the measure is applicable not to those who have committed criminal offences but to aliens who, often*

[28] Case of Amuur v France § 50

[29] Case of Soldatenko v. Ukraine § 110, Bozano v France § 58

fearing for their lives, have fled from their own country"[30]*; and the length of the detention should not exceed that reasonably required for the purpose pursued)"*

Particularly, with regards to the subparagraph here concerned (Article 5, paragraph 1 (f)), the Court specifies that *" With regard to the foregoing, the Court considers that the principle that detention should not be arbitrary must apply to detention under the first limb of Article 5 § 1(f) in the same manner as it applies to detention under the second limb. Since States enjoy the right to control equally an alien's entry into and residence in their country , it would be artificial to apply a different proportionality test to cases of detention at the point of entry than that which applies to deportation, extradition or expulsion of a person already in the country."*[31]

ALIENS HELD IN "TRANSIT ZONES". *AMUUR V. FRANCE*.

A transit zone is a legal fiction that allows a state to treat a person physically in the country as if he or she is still on the outside. Although transit zones are located at border points or airports where a person would first enter the country, the concept has been broadly defined to allow a person held in the transit zone to go to places such as hotels and hospitals without ever legally entering the country, similar to a floating bubble.

Usually, state´s governments mantain that persons held in the transit zone are subject to different laws because they have not entered the country. In reality, this means they have fewer rights. The european court of human rights had the chance to examine the problem under the scope of Article 5 of the ECHR in **Amuur v. France.** In this case, the facts concerned four somalian people who arrived at Paris-Orly Airport from Damascus on 9 March 1992. As their passports had been falsified, the airport and border police refused them leave to enter french territory. They were then held in the airport´s transitzone (and its extension, the floor of the Hôtel Arcade adapted for the purpose) for twenty days, that is to say till 29 March, when the Minister of the Interior refused them leave to enter as asylum seekers. The detainees were not being held under a clearly identifiable legal regime. The Court´s assesment states that "*even though the applicants were not in France, within the meaning of the Ordinance of 2 November 1945, holding them in the international zone of Paris-Orly Airport made them subject to French law. Despite its name, the international zone does not have extraterritorial*

[30] Case of Amuur v France § 43
[31] Case of Saadi v United Kingdom § 73

status"[32]

However, What would it happen if national law does not foresee specific safeguards for these detainees? In Spain, given the lack of rules on this particular point, the Constitutional Court judgment 174/1999 pointed out that the remedy of Habeas Corpus should be applied to all kind of deprivation of liberty including those not ordered by a Court.[33]

A VIEW TO COMPARATIVE LAW IN PROCEDURES OF CONTROL OF ADMINISTRATIVE DETENTION.

Each state has different approaches when it comes to detention of aliens, and we will now have a quick view over the respective roles of the administrative and judicial authorities in detention of illegal foreigners in several countries.

For this purpose, we will refer to each state´s answer to the following questions:

1. What judge is in charge of the control of administrative detention of illegal foreigners? Is he an administrative or a judicial judge? Do you make this distinction? Is the detention judge different from the judge in charge of deportation measures (formally, functionally, and organically)?

2. Does the judge authorize a detention placing measure or does he supervise a detention placing that was decided by the administration?

3. If the need arises, what role does the public prosecutor play?

FRANCE.

1. In France, there are two court orders concerning these issues:

An administrative judge who makes judgements on deportation measures.

A judicial judge who is in charge of detention .

2. Initially, the prefectural authority who is in charge of the execution of deportation measures decides if a foreigner has to be placed in detention. After a delay of 48 hours, the period of detention can only be extended by the judicial judge for a maximum duration of 15 days. An additional extension of 5 or 15 days can be given according to

[32] Case of Amuur v France § 52

[33] See also Constitutional Court judgment 31/1985 par.6, 341/1993 par.6, 21/1997 par.6).

circumstances, based on a judicial decision, which leads to a total duration of the period of detention of maximum 32 days (Entry and Residence in France and Right of Asylum Code)

4. In France, the public prosecutor does not play any role in this field since the judicial judge is in charge of making a judgement on administrative detention.

GERMANY.

1.The decision to order detention for the purpose of deportation is taken by a judge of the local court, i.e. it falls in the jurisdiction of the ordinary court system which is responsible for all civil and penal cases. The decision on the injunction and enforcement of deportation by the administrative authorities is taken by a judge of the administrative court which is responsible for public cases of non-constitutional character.

2. The detention prior to deportation is taken by a judge; it is the responsibility of the administrative authority to apply to a local court for a detention order. (Section 62(4) of the German Residence Act).

4. The prosecutor has no competence in the procedure before the local court regarding an order of detention prior to deportation.

PORTUGAL.

1. The foreign citizen who illegally enters or stays in national territory is detained and presented (within forty eight-hours at the most) to the judge of primary criminal jurisdiction under his/her jurisdiction or the district courts in other areas of the country, in order to its validation and application of coercion measures. The removal decision based on illegally staying is an administrative one, taken by administrative authorities.

2. Detention placing measures are authorized by a judicial judge. The detention in a temporary lodging centre cannot exceed more than the necessary period to allow the execution of the removal decision, which is of 60 days.

4. Public prosecutor does not play a relevant role in this very point.

SPAIN.

1. In accordance with Spanish legislation, the governmental (in other words, administrative in nature) authority responsible for processing files in which removal from Spain (and within this category, only in those cases specifically set forth by law) may be proposed, may request of the magistrate that the foreigner be interned in a non-

penitentiary confinement centre. Thus, in Spain, the competent body for authorising internment in a foreigner confinement centre is always a judicial body.

2. According to the aforementioned, the examining magistrate has the competencies to authorize the internment of a foreigner in a foreigner confinement centre for as long as necessary and, in any case, for a period not to exceed 60 days.

4.In Spain, the Prosecution Service does play an important role in that (along with the foreigner) this body is heard by the examining magistrate prior to deciding (by means of a reasoned order) on the confinement. Thus, the examining magistrate, by virtue of the principle of proportionality, considers the concurrent circumstances and, in particular, the risk of default given the lack of residence or identity documents, the actions of the foreigner for the purpose of impeding or avoiding removal, as well as the existence of prior sentencing or administrative penalties and other pending criminal or disciplinary administrative procedures. Likewise, in the event the foreigner is seriously ill, the magistrate must evaluate the risk confinement may pose to public health or the health of the foreigner. Likewise, when the abovementioned conditions are no longer in effect, the Prosecution Service may request of the magistrate that confinement be terminated and that the foreigner be immediately released.

CONCLUSIONS

1. Any type of deprivation of liberty not linked to a criminal procedure should be taken by a court or other competent body. The procedures prescribed by national law should be followed.
2. A person should only be deprived of his/her liberty if no proportionate and less restrictive means are available, thus deprivation of liberty might be considered the last resort.
3. The involuntary placement of persons of unsound mind or considered as an alcoholic or a drug addict should require medical evidences of such circumstances.
4. The person confined should have the right to appeal against the decision of the confinement, the right to be heard in person or through an advocate or a representative, and the right to have the lawfulness of the measure or its continuing reviewed by a court .

5. When the reasons for the placement disappear or it was considered that this measure is not necessary, or the detention time-limit set out by law expires, the confinement should come to an end.

Finally, we would like to reflect on the role of the Prosecutors to strengthen the safeguards in the scope of human rights. From our point of view, it would be desirable that prosecutors took an active part in any proceedings concerning human rights, specially the right to liberty. The Prosecutor should be previously heard by the court when the measure related to liberty is going to be taken

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