

Alternatives to pre-trial detention in the ECHR case-law

2nd CEP Webinar on Alternatives to Pre-trial Detention

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Structure of the presentation*

- ❑ Introductory remarks: Overuse of pre-trial detention as a public policy and human rights issue
- ❑ The general European Convention on Human Rights (“the Convention”) concepts concerning detention
- ❑ The requirements of the ECHR case-law concerning pre-trial detention**

* Opinions expressed are personal

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Introductory remarks



- ▶ The counterintuitive nature of PTD
 - ▶ Person presumed innocent in detention (restriction of liberty)
 - ▶ Possible outcome – acquittal/discontinuation of the proceedings
 - ▶ Alternative measures to PTD as an appropriate compromise
- ▶ Prison overcrowding often occurs in connection with the overuse of pre-trial detention
 - ▶ At the COE level traditionally a quarter of detainees in PTD (SPACE I, 2021, Key findings p 6)
 - ▶ Globally at the COE level fall of some 30% since 2000 (WPB, World Pre-trial/Remand Imprisonment List, 4th ed) – see, however, FTI “Pre-Trial Detention Rates and the Rule of Law in the European Union” (2021)
- ▶ Imprisonment is expensive
- ▶ Overuse of pre-trial detention and the related problem of prison overcrowding capable of undermining the principles of mutual recognition and trust in the EU



- ▶ Individual effects
 - ▶ Serious (irreversible) impacts on livelihood, family, and health
 - ▶ Risk of suicide
 - ▶ School of crime
 - ▶ Associated with discrimination and prejudice against the most vulnerable groups in a society
- ▶ ECHR pilot and leading judgments:

Belgium (*Vasilescu v Belgium* 2014); Bulgaria (*Neshkov and Others v Bulgaria* 2015); France (*J.M.B. and Others v France* 2020); Hungary (*Varga and Others v Hungary* 2015); Poland (*Orchowski v Poland* and *Norbert Sikorski v Poland* 2009); Romania (*Rezmiveş and Others v Romania* 2017); Russia (*Ananyev and Others v Russia* 2012); Slovenia (*Mandić and Jović v Slovenia* 2011); Ukraine (*Sukachov v. Ukraine* 2019)

- ▶ Article 5 second most often breached provision (ECHR statistics 1959-2021 p 7)



The general Convention concepts concerning detention



- ▶ The general rule set out in Article 5 § 1 is that everyone has the right to liberty (*Saadi v. the United Kingdom* [GC] § 64)
- ▶ Detention may violate Article 5 even though the person concerned has agreed to it (*Buzadji v. the Republic of Moldova* [GC] § 107)
- ▶ Three key strands of Article 5 (*McKay v. the United Kingdom* [GC] § 30)
 - ▶ The exhaustive nature of the exceptions under Article 5 § 1, which must be interpreted strictly and which do not allow for the broad range of justifications under other provisions (Articles 8-11 ECHR)
 - ▶ The emphasis on the lawfulness of the detention, procedurally and substantively, requiring scrupulous adherence to the rule of law
 - ▶ The importance of the promptness or speediness of the requisite judicial control



- ▶ **Lawfulness under Article 5 (*Mooren v. Germany* [GC] § 72)**
 - ▶ Strict compliance with the relevant domestic law, including, where appropriate, international and EU law (*Paci v. Belgium* (2018) § 64)
 - ▶ The relevant law must be of certain quality: accessible, foreseeable and certain
 - ▶ The relevant law must be in compliance with the relevant Convention standards
- ▶ **Protection from arbitrariness (*S., V. and A. v. Denmark* [GC] § 74)**
 - ▶ An element of bad faith or deception on the part of the authorities
 - ▶ Neglect to attempt to apply the relevant legislation correctly
- ▶ **Necessity (*Ibid* § 77)**
 - ▶ The deprivation of liberty must be necessary in the circumstances
 - ▶ Detention 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



ECHR case-law on pre-trial detention



- ▶ The presumption under Article 5 is in favour of release (*Buzadji* §§ 89-91)
 - ▶ The responsibility to the national judicial authorities to ensure that, in a given case, the pre-trial detention does not exceed a reasonable time
 - ▶ They must examine all the facts arguing for or against the release and provide reasoning
- ▶ The continued detention justified only if (*Labita v. Italy* [GC] § 153)
 - ▶ There is a reasonable suspicion that an individual has committed an offence
 - ▶ There are relevant and sufficient reasons justifying the detention
 - ▶ Special diligence in the conduct of the proceedings



- ▶ Not on the individual to show why he should be released but on the domestic authorities to show that he should be detained (*Bykov v. Russia* [GC] § 64)
- ▶ Quasi-automatic prolongation of detention without specifying reasons is contrary to Article 5 § 3 (*Tase v. Romania* § 40)
- ▶ Mandatory deprivations of liberty would be per se incompatible with Article 5 § 3 (*Rokhlina v. Russia*)
- ▶ Using stereotyped formulae without addressing the specific facts is also contrary to Article 5 § 3 (*Trifković v. Croatia*)



- ▶ When considering the alternatives
 - ▶ The domestic authorities must examine the possibility of releasing the person from detention under less severe preventive measures once when his detention ceased to be reasonable as required under Article 5 § 3 (*Aleksandr Makarov v. Russia*)
 - ▶ Release under the alternative measures is not required if the domestic authorities have provided relevant and sufficient reasons for detention (*Nenad Kovačević v. Croatia*)



- ▶ The specific requirements concerning bail
 - ▶ Automatic refusal of bail would be in itself incompatible with Article 5 § 3 (*Piruzyan v. Armenia*)
 - ▶ Bail could be required only as long as the grounds for detention prevail (*Aleksandr Makarov v. Russia*)
 - ▶ The bail must be set with regard to the person concerned, his assets and his relationship with the persons who are to provide the security, in other words to the degree of confidence that is possible that the prospect of loss of the security or of action against the guarantors in case of his non-appearance at the trial will act as a sufficient deterrent to dispel any wish on his part to abscond (*Mangouras v. Spain* [GC])
 - ▶ It may be reasonable in certain circumstances, to take into account also the amount of the loss imputed to the accused (*Ibid*§ 81)
 - ▶ Failure to assess the correct amount of bail applicable in the circumstances of a case (*Georgieva v. Bulgaria*) or setting an excessive amount of bail raises an issue under Article 5 § 3 (*Piotr Osuch v. Poland*)



Thank you for your attention!

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