

THE RIGHT TO LIBERTY
IN THE LIGHT OF THE EUROPEAN CONVENTION OF HUMAN RIGHTS
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1. According to ECHR jurisprudence, the arrest of a suspect and the application of preventive measures in general and preventive custody and house arrest in particular are authorised only in the following cases, which make up the list in Article 5. § 1 of the European Convention on Human Rights (“the exhaustive list of permitted deprivations of liberty set out in Article 5.º § 1 must be interpreted strictly”, *Guzzardi v. Italy* decision of 6.11.1980):
2. **The lawful detention of a person after conviction by a competent court**, provided the following requirements are met:
 - a. “**conviction**”: a decision to find the accused guilty of acts of a criminal or disciplinary nature under internal law (decision *Engel and Others (Plenary)* of 8.6.1976), even though the decision has not yet been implemented (decision *Wemhoff v. Germany* of 27.6.1968)
 - b. “**competent court**”: an independent body set up under the law to exercise a jurisdictional function (decision *Engel et al (Plenary)* of 8.6.1976);
 - c. “**after**”, i.e. “detention must result from, follow and depend upon or occur by virtue of the conviction”, in the words of the decision on *Van Droogenbroeck v. Belgium (Plenary)* of 24.6.1982), meaning that all decisions determining bail, its refusal and revocation must abide by this link of dependence between the reason for the conviction and subsequent detention (see annotation to Article 485).
3. **The lawful arrest or detention of a person for non-compliance with the lawful order of a court**, provided the following requirements are met:
 - a. A judicial order for a *facere* or *non facere*, said order being legal and known to its recipient
 - b. Voluntary, unjustified non-compliance with an order
 - c. Need for detention so that the obligation can be met, with special attention to whether the duration of detention is proportional

(decision Harkmann v. Estonia, 11.7.2006, on the detention of the accused for to appear before a court).

4. **Lawful arrest or detention of a person in order to secure the fulfilment of any obligation prescribed by law**, provided the following requirements are met:

- a. A specific, concrete, legal obligation that is know to the person
- b. Voluntary, unjustified non-compliance with the obligation
- c. The need for detention to secure the fulfilment of the obligation, with special attention to the nature of the obligation, the circumstances of the on-compliance and the duration of the detention. This detention must not be of a punitive nature (decision Nowicka v. Poland of 3.12.2002 on a case of detention to ensure compliance with the obligation to undergo a psychiatric examination of decision Vasileva v. Denmark of 25.9.2003 on a case of detention for identification and decision Epple v. Germany of 24.3.2005 on a case of detention due to refusal to leave a place)

5. **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, provided the following requirements are met:

- a. **“bringing him before the competent legal authority”**: a detention controlled by an administrative or political body breaches the right to security (decision Lawless v. Ireland of 1.7.1961)
- b. **“reasonable suspicion”** is the minimum requirement for detention, which is not identified with a mere bona fide suspicion, but rather assumes the existence of facts or information which would satisfy an objective observer that the person concerned might have committed the offence of decision Fox, Campbell and Hartley v. United Kingdom of 30.8.1990, (on the probative value of a conviction of a person suspected seven years before), though these reasons do not need to have the same force as those justifying the conviction or indictment of said person (decision Murray v. United Kingdom of 28.10.1994, on the probative value of contact with family members

recently convicted of crimes, and *O'Hara v. United Kingdom* of 16.10.2001, on the probative value of information given to the police by an informant from the criminal world)

6. **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, provided the following requirements are met:
 - a. “**minor**”: it is up to national legislation to define the ages of juvenile offenders
 - b. “**educational supervision**”: educational regime in a setting (open or closed) designed and with sufficient resources for the purpose of decision *Bouamar v. Belgium* of 29.2.1988)
 - c. “**for the purpose of**”: the detention of a minor does not necessarily mean a regime of “educational supervision” and there may be an intermediate period of detention of the minor at an ordinary prison facility, though the “educational supervision” must follow rapidly (decision *Bouamar v. Belgium* of 29.2.1988 and decision *D.G. v. Ireland* of 16.5.2002)

7. **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**, provided the following requirements are met:
 - a. The common grounds for the detention of these persons is either in order to be given medical treatment or because of considerations dictated by social policy, or on both medical and social grounds (decision *Enhorn v. Sweden* of 25.1.2005), i.e. the justification for the detention is not only that they are a danger to public safety but also that their own interests may necessitate their detention (said decision *Enhorn v. Sweden*). So the lawfulness of a detention depends on the existence of a danger to public health and safety and detention is a last resort for preventing this danger after less severe measures have proved insufficient for the purpose.
 - b. The first type of case brought before the ECHR was that of the detention of a “**person of unsound mind**” and set a precedent for other types of cases. There are three requirements for the detention of these people: 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 depends upon the persistence of such a disorder (decision *Winterwerp v. Netherlands* of 24.10.1979), although an expert medical examination may also be conducted after detention (decision *X. v. United Kingdom* of 5.11.1981).

- c. In the case of the detention of alcoholics, the concept of “**alcoholics**” includes not only people diagnosed as such by a physician but also people whose conduct under the influence of alcohol poses a threat to the public and themselves (decision *Witold Litwa v. Poland* of 4.4.2000 and decision *Hilda Hafsteinsdóttir v. Iceland* of 8.6.2004).

8. **The lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country**, for which no risk of flight or commission of a crime is required, only that the detention should be a genuine part of the process to determine whether the individual should be granted immigration clearance and/or asylum, and that it should not otherwise be arbitrary, for example on account of its length (decision *Saadi v. United Kingdom* of 11.7.2006).
9. **The lawful arrest or detention of a person against whom action is being taken with a view to deportation or extradition**, for which no risk of flight or commission of a crime is required, only that the detention should be part of an ongoing process in which the decision was made to deport or extradite him but not yet enforced (decision *Mohd v. Greece* of 27.4.2006) and that the process is pursued with due diligence (decision *Chahal v. United Kingdom* of 15.11.1996).
10. In conclusion, deprivation of liberty set out in subparagraphs b), c), d) and e) of § 1 of Article 5 of the European Convention on Human Rights is subject to the principles of the necessity test, but not that set forth in f), which is satisfied by the prohibition of arbitrariness (aforementioned decision *Saadi v. United Kingdom*). It could also be claimed that any deprivation of liberty for some days in light of Article 5 § 1, including f), should be brought before a court (decision *Shamsa v. Poland* of 27.11.2003).

11. Therefore, any deprivation of liberty that has not been subject to a “**lawful procedure**” breaches Article 5 of the European Convention on Human Rights and the ECHR has already established these four model cases:

- a. **Deprivation of liberty exceeding the limits of the law**, i.e. deprivation of liberty exceeding the maximum time limits established by law for detention or arrest (decision Engel and Others (Plenary) of 8.6.1976, decision K.-F. v. Germany of 27.11.1997, decision Tkáčik v. Slovakia of 14.10.2003); a delay of around 20 hours in releasing an detainee due to the absence of a prison officer (decision Labita v. Italy (GC) of 6.4.2000); a three-day delay in replacing preventive custody by house arrest ordered by the court (decision Mancini v. Italy of 2.8.2001); a seven-day delay in replacing preventive custody by parental supervision due to difficulties in finding the detainee’s mother (decision Nikolov v. Bulgaria of 30.1.2003); a six-month delay in commuting preventive custody to hospitalisation in a prison clinic (decision Brand v. Netherlands of 11.5.2004); a delay in release after a condition established for ending preventive custody had been met (decision Bojinov v. Bulgaria of 28.10.2004); preventive custody with a discount of the time it took the defence to gain access to the investigation file (Svipsta v. Latvia of 9.3.2006); retroactive validation of a period of preventive custody served (decision Khudoyorov v. Russia of 8.11.2005).
- b. **Deprivation of liberty without a law**, i.e. deprivation of liberty based on an unpublished law, without judicial control, time limit or legal or humanitarian assistance (decision Amuur v. France of 25.6.1996); deprivation of liberty due to conduct not punishable under criminal law (decision Lukanov v. Bulgaria of 20.3.1997, which is different from decision Wloch v. Poland of 19.10.2000, where the punishability of the conduct was discussed and there was no jurisprudential precedent); deprivation of liberty not documented or recognised by the state (decision Kurt v. Turkey of 25.5.1998); informal 24-hour detention “for observation” (decision Çiçek v. Turkey of 27.2.2001); informal detention during the execution of a home search warrant (decision Berktaş v. Turkey of 1.3.2001);

deprivation of liberty on the basis of analogous application of the detention regime (decision *Dougoz v. Greece* of 6.3.2001); continued deprivation of liberty after final acquittal (decision *Assenidze v. Georgia (GC)* of 8.4.2004); deprivation of liberty for a crime subject to a pardon or based on a legal concept with no judicial precedent (ECHR decision, *Gusinskiy v. Russia* of 19.5.2004); deprivation of liberty based on custom (decision *H.L v. United Kingdom* of 5.10.2004, though see decision *Steel and Others v. United Kingdom* of 23.9.1998, allowing deprivation of liberty based on doctrine long accepted by jurisprudence).

- c. **Deprivation of liberty *in fraudem legis***, in which the state authorities are guilty of abuse of power or flagrant denial of justice, such as special supervision with mandatory residence after expiry of the maximum period of preventive custody (decision *Guzzardi v. Italy (plenary)* of 6.11.1980); deprivation of liberty for the purpose of indirect extradition forbidden by the court (decision *Bozano v. France* of 18.12.1986, which is different from *Stocké v. Germany* of 12.10.1989, as the ruse used by the national authorities to detain him did not, in itself, result in deprivation of liberty); nine consecutive short detentions of a juvenile delinquent as there was no available closed institution (decision *Bouamar v. Belgium* of 9.2.1988); deprivation of liberty following discriminatory conviction (decision *Tsirlis and Koulompas v. Greece* of 29.5.1997); deprivation of liberty for disobedience with no reasonable suspicion of any danger (decision *Steel and Others v. United Kingdom* of 23.9.1998); deprivation of liberty based on misleading information given deliberately to the people in question by the authorities to facilitate their detention and collective repatriation (decision *Conka v. Belgium* of 5.2.2002).
- d. **Deprivation of liberty without control**, resulting from the removal of control from national courts, such as detention in an inappropriate place (decision *Aerts v. Belgium* of 30.7.1998 and decision *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium* of 12.10.2006); the deprivation of liberty based on a charge by the public prosecution

(decision Baranowski v. Poland of 28.3.2000); deprivation of liberty based on the mere transfer of a case to court (decision Jėčius v. Lithuania of 31.7.2000); unclear detention documentation with no date, place, grounds for detention or names of arresting officers (decision Yasin Ateş v. Turkey of 31.5.2005); detention with no express formal warrant in a case (decision I.I. v. Bulgaria of 9.6.2005); detention based on an outdated list of wanted people (decision Fedotov v. Russia of 25.10.2005); mandatory preventive custody (decision Boicenco v. Moldavia of 11.7.2006); disciplinary house arrest the impugnation of which does not suspend it (decision Dacosta Silva v. Spain of 2.11.2006).

12. The deprivation of liberty set forth in Article 5, § 1 of the European Convention on Human Rights does not merely demand objective confinement to a limited space for a considerable period of time, it also presupposes **lack of consent** of the person deprived of liberty. Article 5 is therefore not applicable in the event of deprivation of liberty at a state hospital of a 12-year-old minor with a nervous disorder at his mother's request (decision Nielsen v. Denmark (plenary) of 28.11.1988) or a sick, elderly victim of severe negligence, in which the person in question has protested against the assistance provided (decision H.M. v. Switzerland of 26.2.2002), though people do not forfeit conventional guarantees just because they have presented themselves for detention (decision De Wilde, Ooms and Versyp v. Belgium (plenary) of 18.6.1971).
13. The prohibition of deprivation of liberty in 5, § 1 of the European Convention on Human Rights also includes **detention by private citizens**, as in the detention at a private clinic at his family's request of an adult who is of unsound mind but has not been declared incompetent (decision Storck v. Germany of 16.6.2005). In this case, the state's liability is the result of lack of due action to control interference with the right to safety caused by private citizens, as Article 5 of the European Convention on Human Rights imposes a **positive duty to act**.
14. Article 5 of the European Convention on Human Rights imposes the **burden of proof** on its signatories, which consists of the **duty to account for** the location of any person detained by the public authorities (decision Kurt v.

Turkey of 25.5.1998). Failure of comply with this burden results in a violation of Article 5 or even Article 2 of the European Convention on Human Rights (decision Çakici v. Turkey (GC) of 8.7.1999).

15. Article 5 of the European Convention on Human Rights imposes **due process** on signatory governments. This consists of taking effective measures against the risk of disappearance of any detainee and conducting a speedy, effective **investigation** into any complaint that a person has been detained and never seen again (decisions Kurt v. Turkey and Çakici v. Turkey (GC) and decision Imakayeva v. Russia of 9.11.2006).
16. Detainees have the following guarantees:
17. **The right to be informed of reasons for arrest:** anyone deprived of their liberty under Article 5 of the European Convention on Human Rights must be told, in simple, non-technical language that he can understand, the essential legal and factual grounds for his arrest (ECHR decisions Fox, Campbell and Hartley v. United Kingdom of 3.8.1990 and Murray v. United Kingdom of 28.10.1994). This guarantee applies to any kind of deprivation of liberty set forth in Article 5. § 1 of the European Convention on Human Rights. He may be informed orally or in writing by the police officer making the arrest and by the judge before whom he is brought even seven hours after detention (decision Lamy v. Belgium of 30.3.1989 and decision Fox, Campbell and Hartley v. United Kingdom), but not 10 hours after the detention of a person of unsound mind (decision Van der Leer v. Netherlands of 21.2.1990), or four days after detention in a case pending deportation (decision Chamaiev and Others v. Georgia and Russia of 12.4.2005) or even 76 hours after detention of a person to prevent his effecting an unauthorized entry into the country (decision Saadi v. United Kingdom of 11.7.2006). The information does not have to include an exhaustive list of all offences of which he is accused and may even be less comprehensive in the case of detention for deportation (decision Saadi v. United Kingdom).
18. **The right to be brought promptly before a judge or other officer authorized by law to exercise judicial power:**
 - a. **“To be brought”:** there is an unspoken obligation to bring before a judge any person arrested under Article 5 § 3 (decision Schiesser v. Switzerland of 4.12.1979) irrespective of the detainee’s wishes

(decision De Jong, Baljet and Van den Brink v. Netherlands of 22.5.1984). The judge has the corresponding duty to hear the person arrested before making a decision on his continued detention, even if it was ordered by the judge himself (decision Harkmann v. Estonia of 11.7.2006).

- b. **“Promptly”**: postponement of presentation before a judge for a period of four days and six hours breaches the Convention (decision Brogan and Others v. United Kingdom of 29.11.1988), but three days do not (decision Ikincisoy v. Turkey of 15.12.2004). Therefore, police or administrative detention may only last for less than four days and six hours.
- c. **“Officer authorised by law to exercise judicial power”**: the officer to whom the accused is presented may not be a judge, but he must have the **executive independence and impartiality in relation to the parties**. He may be subordinate to other officers of the court if they, in turn, enjoy similar independence. Added to this is a requirement of **due process**, i.e. he is obliged to hear the detainee, and a **substantive requirement**, i.e. he is obliged to review the circumstances for and against the detention, decide on the basis of legal criteria and order his release if there are no reasons justifying detention (decision Schiesser v. Switzerland of 4.12.1979 ruling on the competence of the public prosecutor; decision De Jong, Baljet and van den Brink v. Netherlands of 22.5.1984, ruling on the competence of the auditeur-militair; decision Pauwels v. Belgium of 26.5.1988, ruling on the competence of a commission chaired by the auditeur-militair; decision Huber v. Switzerland (plenary) of 23.10.1990 reviewing the conclusion of the Schiesser decision; decision Assenov and Others v. Bulgaria of 28.10.1998, ruling on the competence of an investigator working for a public prosecutor; decision Hood v. United Kingdom (GC) of 18.2.1999, ruling on the competence of a commanding officer; decision H.B. v. Switzerland of 5.4.2001, ruling on the competence of the examining magistrate).
- d. Due process also means that the following are in breach of the Convention: incompetence of the public prosecutor to control

reasonable suspicion (decision Aquilina v. Malta (GC) of 29.4.1999, and Pantea v. Romania of 3.6.2003), legal exclusion of a non-custodial measure for serious crimes (decision S.B.C. v. United Kingdom of 19.6.2001) and legal presumption of danger based on the severity of the charges, with the burden on the defence to reverse this presumption and prove non-existence of danger (decision Ilijkov v. Bulgaria of 26.7.2001).

19. The right to trial within a reasonable time or to release pending trial:

- a. Anyone arrested under the terms of Article 5 § 1c) must be brought to trial within a reasonable time. In spite of the alternative in Article 5 § 3 (“or”), the court cannot choose between trying the person within a reasonable time and releasing the accused. He should be released as soon as the detention ceases to be justified (decision Neumeister v. Austria of 27.6.1968). Persistence of reasonable suspicion is a *sine qua non* condition for continued detention but, after a certain period of time has elapsed, it is no longer sufficient and the court must clarify whether there are **other relevant reasons** for maintaining deprivation of liberty and whether the public authorities have shown **special diligence** in the conduct of the prosecution (decision Wemhoff v. Austria of 27.6.1968 and decision Stögmüller v. Austria of 10.11.1969). If these relevant reasons do not exist or the authorities do not conduct the prosecution with special diligence, deprivation of liberty should cease.
- b. Deprivation of liberty (preventive custody and house arrest) cannot last beyond a reasonable time. This “**reasonable time**” begins on the day of arrest, even if it is for the purpose of preventing a crime, which is not included in Article 5 § 1 (decision Jėčius v. Lithuania of 31.7.2001) and ceases on the **day of the verdict given by the court of the first instance**, even if it is not confirmed, because a person convicted at first instance, whether or not he has been detained up to this moment, is in the position provided for by Article 5 (1) (a) (art. 5-1-a) which authorises deprivation of liberty "after conviction" (decision Wemhoff v. Germany of 27.6.1968). A person who has cause to complain of the continuation of his detention after

conviction because of delay in determining his appeal, cannot avail himself of Article 5 (3) (art. 5-3) of the European Convention on Human Rights but could possibly allege a disregard of the "reasonable time" provided for by Article 6 (1) (same decision *Wemhoff v. Germany*), which lays down that the case (i.e. the whole case until the verdict is confirmed) must be heard within a "reasonable time".

20. **The right to appeal to a court**, whenever a decision to deprive someone of their liberty has been taken by a non-judicial body since, when it has been taken by a judicial body, the decision incorporates the right to appeal to a court, in accordance with the **incorporation theory** of Wild, Ooms and Versyp v. Belgium (plenary) of 18.6.1971):

- a. A person who has been deprived of liberty has a right, **unconditioned** by third parties, to access to a court (decision *Rakevich v. Russia* of 28.10.2003 on a case of conditioning by hospital personnel of access to a court by a person being held for a mental disorder, and decision *Kolanis v. United Kingdom* of 21.6.2005 on a case of conditioning by a secretary of state of access to a court of a person being held for mental disorder).
- b. The court has the competence to hear about the **substantive** and **procedural aspects** of deprivation of liberty with no restrictions (decision *Kadem v. Malta* of 9.1.2003 regarding detention during extradition proceedings), to examine the **evidence** supporting the detention and **to decide** to release the detainee (decision *Chahal v. United Kingdom* of 15.11.1996 on deportation proceedings). The court cannot take decisions based only on abstract considerations unconnected with the facts of the concrete case and the appellant's reasons (decision *Jėčius v. Lithuania* of 31.7.2000 and decision *I.I v. Bulgaria* of 9.6.2005 regarding decisions on preventive custody). Under no circumstances does a detainee have the burden of proving the illegality of his detention (decision *Nikolova v. Bulgaria (GC)* of 25.3.1999, with a case of the burden on a person in preventive custody, and decision *Hutchison Reid v. United Kingdom* of 20.2.2003, with a case of the burden on a person detained due to a

psychiatric disorder). The court must give an opinion even if the detainee has already been released (decision *Bouamar v. Belgium* of 29.2.1988 and decision *Picaro v. Italy* of 9.6.2005, regarding preventive custody and decision *Tám v. Slovakia* of 22.6.2004, regarding the detention of a person with a psychiatric disorder) or has left the place of detention (decision *Herz v. Germany* of 12.6.2003, regarding detention of a person with a psychiatric disorder).

- c. In the case of **deprivation of liberty after conviction**, the offender has the right to be heard personally and periodically by the court, the right to legal counsel, the right to be informed of and contest the evidence in parole procedures and the right to give evidence, in order to give an opinion on the time, refusal or revocation of his parole (decisions *Van Droogenbroeck v. Belgium* (plenary) of 24.6.1982, *Weeks v. United Kingdom* (plenary) of 2.3.1987, *Tynne, Wilson and Gunnell v. United Kingdom* (plenary) of 25.10.1990, *Wynne v. United Kingdom* (No. 2) of 16.10.2003 and *Singh v. United Kingdom* of 25.1.2005).
- d. In the case of **preventive custody or house arrest**, the person in question has the right to be heard personally and periodically by the court, the right to legal counsel, the right to be informed of and contest the elements of the case relevant to his detention and the right to give evidence in order to give an opinion on continued deprivation of liberty (decision *Assenov and Others* of 28.10.1998, decision *Nikolova v. Bulgaria* (GC) of 25.3.1999 and decision *Svipsta v. Latvia* of 9.3.2006, which extended the *Singh* jurisprudence to paragraph c), and decision *Lamy v. Belgium* of 30.3.1989, which extended the *Weeks* jurisprudence to paragraph c).
- e. In the case of **deprivation of liberty of a minor**, the person in question has the right to be heard personally and periodically by the court and the right to legal counsel (decision *Bouamar v. Belgium* of 29.2.1988).
- f. In the case of **deprivation of liberty of persons liable to spread infectious diseases, of persons of unsound mind, alcoholics or drug addicts, or vagrants**, the person in question has the right to be

heard personally and periodically by the court or, when necessary, through a representative, the right to be informed of and contest the grounds for his deprivation of liberty (decision Winterwerp v. Netherlands of 24.10.1979 and X. v. United Kingdom of 5.11.1981) and the right to legal counsel during the whole proceedings on the maintenance, suspension or discontinuation of detention, save in exceptional circumstances (decision Megyeri v. Germany of 12.5.1992).

- g. In the case of **deprivation of liberty of a person to prevent his effecting an unauthorised entry into the country against whom action is being taken with a view to deportation or extradition**, the person in question has the right to be heard personally by the court, the right to be informed of and contest the government's arguments and evidence and the right to legal counsel (decision Sanchez-Reisse v. Switzerland of 21.10.1986, decision Chahal v. United Kingdom of 15.11.1996 and decision Al-Nashif v. Bulgaria of 20.6.2002).
- h. Proceedings for judicial control of deprivation of liberty under Article 5. § 4 must take place **speedily**, including the pronouncements and notification of the court's decision (decision E. v. Norway of 29.8.1990 on an eight-week delay to check the legality of the detention of a person with a psychiatric disorder, decision Rehbock v. Slovenia of 28.11.2000 and decision Mamedova v. Russia of 1.6.2006, regarding a delay of 23 and 26 days, respectively, in checking the legality of preventive custody). Moreover, all requests to check deprivation of liberty merit the same attention from the court, and the court has no discretion to choose the requests subject to speedy treatment (decision Ilowiecki v. Poland of 4.10.2001 on a prosecutor's proceeding to prolong deprivation of liberty going faster than the defendant's proceeding for his release and decision Picaro v. Italy of 9.6.2005, on an appeal lodged by the detainee that was prejudiced by a decision in favour of another petition submitted by him to the court to which he had appealed).

- i. The right of a person deprived of his liberty to be heard in court under Article 5 § 4 of the European Convention on Human Rights does not necessarily mean a **public hearing** (decision Reinprecht v. Austria of 15.11.2005).
- j. A person deprived of liberty does not have the right of access to a **higher** court, though if national law enshrines the right to appeal to a higher court, he must be granted the same guarantees there as in the court of first instance (decision Toth v. Austria of 12.12.1991), particularly the guarantee of a decision by the higher court taken with regard to adversarial proceedings (decision Nikolova v. Bulgaria (GC) of 25.3.1999) and a rapid decision in both instances (decision Singh v. Czech Republic of 25.1.2005, regarding an appeal lodged by a detainee with a pending deportation order, and decision Hutchison Reid v. United Kingdom of 20.2.2003, regarding an appeal lodged by a detainee with a psychiatric disorder). In certain circumstances, the detainee has the same right to attend the higher court (decisions Grauzinis v. Lithuania of 10.10.2000 and Mamedova v. Russia of 1.6.2006).

21. Right to compensation for arrest or detention contrary to the Convention:

- a. When the legality of detention is in question, a compensation lawsuit against the state is not a remedy that must be ignored, according to the rule of prior exhaustion of national means (decision Wloch v. Poland of 19.10.2000).
- b. Article 5.5 of the European Convention on Human Rights presupposes the violation of one of the previous paragraphs of Article 5 by a national court or the ECHR, though the signatories of the European Convention on Human Rights may subject the payment of compensation to proof of loss resulting from the violation (decision Wassink v. Netherlands of 27.9.1990). A detainee is entitled to compensation even if the arrest or detention is legal under national law (decision Brogan and Others v. United Kingdom (plenary) of 29.11.1988).

- c. The imputation of arrest or detention contrary to the Convention in a prison sentence given to a detainee by a national court does not rule out his status as a victim of a breach of the Convention, though it may affect the amount of compensation fixed in Article 41 of the European Convention on Human Rights (decision *Stögmüller v. Austria* of 10.11.1969).
- d. Absence of a breach of Article 5.5 of the European Convention on Human Rights does not prevent the award of compensation by the ECHR under Article 41 of the European Convention on Human Rights (aforementioned decision *Brogan and Others v. United Kingdom* (plenary)).