Immigration, Asylum and Detention

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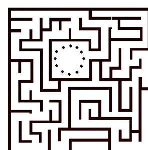

THE AIRE CENTRE

Advice on Individual Rights in Europe

Immigration, asylum and detention

A key attribute of national sovereignty is the right of States to admit or exclude aliens from their territory.[1] However, many of those who arrive on their territory or at their borders without visas or without a right to enter or remain cannot be returned. They may simply not have the documentation to facilitate this. They may be claiming international protection: asylum under the Geneva Convention on the Status of Refugees or protection under Article 3 of the European Convention on Human Rights which prohibits expulsion to face prohibited treatment. States in Central and Eastern Europe and the former Soviet Union are reluctant to permit individuals who cannot be immediately expelled to move freely around their territory for a variety of reasons, not least because they are under pressure to prevent these people from travelling further west. Their initial reaction is therefore to detain them.

This paper looks at the compatibility of imposing such restrictions on liberty and movement with the European Convention on Human Rights

Article 5 of the European Convention regulates the right to liberty and security of the person, and embodies a key element in the protection of an individual's human rights. The European Court of Human Rights has repeatedly emphasised that it is one of the fundamental principles of a democratic society that a State must strictly observe the rule of law when interfering with the right of personal liberty.[2] The underlying aim of Article 5 is to ensure that no one is deprived of his liberty in an arbitrary fashion.[3]

For detention to be lawful under Article 5 it must be; permitted by one of the situations set out in Article 5(1)a-f; lawful under national law; and accompanied by strict procedural safeguards set out in Article 5(2) – 5(5).

Another relevant provision of the European Convention is Article 2 of Protocol 4, the right to freedom of movement. It stipulates that everyone lawfully within the territory of a State shall have the right to liberty of movement, and that everyone shall be free to leave any country. This is a "qualified right" under the Convention. That means that States are allowed to interfere with this right under certain specific circumstances. The provisions of Article 2 of Protocol 4 will also be examined below.

This paper is intended to assist all those who work in this field when examining such restrictions - imposed in an immigration context – to assess

(i) whether individuals must be considered to have been deprived of their liberty so that Article 5 regulates their position or whether they have had their freedom of movement restricted under Article 2 of Protocol 4.
(ii) whether - in both cases - the rights and guarantees which must be afforded to individuals in these situations are both in place and observed , in order for the actions of the State to be compliant with the European Convention on Human Rights.

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[1] See e.g. Nasri v. France, judgement of 13 July 1995.
[2] See e.g. Brogan v. the United Kingdom, judgment of 29 November 1988.
[3] See e.g. Bozano v. France, judgment of 18 December 1986.

Deprivation of liberty [4] or restriction on freedom of movement?

Article 5 (1) of the European Convention states that:

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

a. the lawful detention of a person after conviction by a competent court;
b. the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
c. the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
d. the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
e. the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics and 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.

Deprivation of liberty is ONLY lawful if it is for one of the specified purposes. A detention which is not for an identified purpose covered by Article 5(1)a-f is automatically unlawful.

Article 2 of Protocol 4 provides in its relevant parts that:

1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

2. Everyone shall be free to leave any country, including his own.

The Article goes on to set out the permitted interferences with these rights.

The scope of the two Articles is very different. The first step is therefore to decide whether the factual situation amounts to a deprivation of liberty or a restriction on freedom of movement. That is whether Article 5 or Article 2 of Protocol 4 applies in a particular case.

Whether there has been a deprivation of liberty or a restriction on movement will depend on several aspects of the specific situation. It is not simply a question of whether or not someone has been locked in a prison cell. Account needs to be taken of a whole range of criteria: the **type, duration, effects and manner of implementation** of the measures restricting the individual's liberty.

[4] The terms "deprivation of liberty" and "detention" are used interchangeably in this paper.

The case of *Guzzardi v. Italy*[5] provides some guidance. The applicant had been arrested in connection with a criminal charge but the time for which he could lawfully be detained on remand had expired before the charges were ready to proceed. He was removed from the prison where he was being held and taken under court order to a small island off Sardinia to be kept under "special supervision". Whilst the island as a whole covered 50 sq. km., the area reserved for persons such as Mr Guzzardi in "compulsory residence" represented an area of not more than 2.5 sq. km. The applicant was able to move freely around this area during the day but unable to leave his dwelling between 22.00 and 07.00. He had to report twice daily to the authorities and could only leave the island with prior authorisation and under strict supervision. His contact with the outside world was also supervised and restricted. The applicant lived under these conditions for sixteen months. The Italian Government needed to succeed in their argument that he was not "deprived of his liberty" since they were unable to demonstrate that this could be justified under any of the provisions of Article 5(1) a-f.

The Court stated that it was not possible to establish a deprivation of liberty on the strength of any one aspect of his regime taken individually, but taken cumulatively and in combination, in the light of the factors set out above, it considered that the applicant had been deprived of his liberty and his case was to be examined under Article 5 rather than Article 2 of Protocol 4.

In contrast, in the case of *Raimondo v. Italy*, "special police supervision" meant that the applicant could not leave his own home without *informing* the police but did not require their *permission* to do so. He was under an obligation to report to the police on certain days and also to stay at his home between 21.00 and 07.00 every night. The Court held that these restrictions were not a deprivation of liberty and should only be considered as a restriction on freedom of movement. Article 5 did not therefore apply.

The Court also had to examine this issue in the case of *Amuur v. France*.[6] A group of asylum seekers from Somalia who had arrived at the Paris-Orly Airport via Syria were held for twenty days in the international transit zone and a nearby hotel specifically adapted for holding asylum seekers. In this case the Court noted in particular that

"*Holding aliens in the international zone does indeed involve a restriction upon liberty, but one which is not in every respect comparable to that which obtains in centres for the detention of aliens pending deportation. Such confinement, accompanied by suitable safeguards for the persons concerned, is acceptable only in order to enable States to prevent unlawful immigration whilst complying with their international obligations, particularly under the 1951 Geneva Convention Relating to the Status of Refugees and the European Convention on Human Rights. States' legitimate concern to foil the increasingly frequent attempts to get round immigration restrictions must not deprive asylum-seekers of the protection afforded by these Conventions*."

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[5] Guzzardi v. Italy, judgment of 2 October 1980.
[6] Amuur v. France, judgment of 25 June 1996.

The Court further stated that many Council of Europe member States were faced with an increasing flow of asylum seekers, and that it was aware of the difficulties involved in the reception of asylum seekers at most large European airports. States had the sovereign right to control aliens' entry into and residence in their territory, but in doing so the provisions of the Convention, including Article 5, had to be respected. As in the *Guzzardi* case, in deciding whether there was a deprivation of liberty or a restriction of movement the type, duration, effects and manner of the measure in question had to be examined. The Court discussed whether there had been a restriction on liberty of movement or a deprivation of liberty. It decided that this was an issue of "degree and intensity". The applicants had been held at the airport for twenty days. They were under constant police surveillance, and for most of the time not provided with any legal or social assistance.

The Government had argued before the Court that the applicants could at any time have removed themselves from the sphere of application of the measure in question, arguing that the transit zone was "closed on the French side" but "open to the outside". The Court however held that the mere fact that it was possible for asylum seekers to leave the country where they wished to seek refuge did not mean that there had not been a restriction on liberty. The possibility became theoretical if no other country offered protection comparable to that which they expected to find in the country where they were seeking asylum. In addition, in the case of *Amuur*, sending the applicants back to Syria in fact only became possible following negotiations between the French and Syrian authorities, and they had not been free to leave whenever they wanted as was alleged by the Government.

The Court therefore concluded that the applicants' detention in the transit zone amounted to a deprivation of liberty and that Article 5 was applicable.

As can be seen from this description of the Court's case law, an order that a person should reside in a particular place will not be enough to amount to a deprivation of liberty so as to attract the very stringent protection of Article 5. It is the closed and cut off nature of such a restriction coupled with its duration which might make it a deprivation of liberty.

It is common for people who are awaiting the results of their asylum or other immigration applications to be required to reside at a particular address or reside in a particular locality. In such cases, there are restrictions imposed on their freedom of movement, not deprivations of liberty and do not attract the strict requirements of Article 5. Nevertheless even these restrictions must be justified and proportionate under Article 2 of Protocol 4 (see below on Freedom of Movement).

<u>Detention under Article 5 of the Convention- the right to liberty and security of the person</u>

Article 5 of the European Convention on Human Rights is, as mentioned above, aimed at preventing arbitrary deprivation of liberty. It is the prohibition on arbitrariness which is meant by the word security in Article 5(1). It requires that every arrest or detention is lawful, both substantially and procedurally. This means that it has in fact been carried out for one of the six specified reasons in Article 5(1)a-f. This

is an *exhaustive* list of circumstances which will justify detention. If the arrest or detention has not taken place for one of the purposes set out in Article 5, it is automatically a breach of the Convention.

So, firstly, it has to be established that a certain situation constitutes a deprivation of liberty; and secondly, that it is taking place for one of the purposes authorised by Article 5(1)a-f.

In many countries in central and eastern Europe or in the former Soviet Union, it appears that aliens crossing the border are detained in a fairly arbitrary fashion for a variety of purposes. They are often not informed as to why they are arrested and detained. They are not informed of the legal rules authorising their detention. People in more or less similar circumstances who ask the reason for their detention are often given several different answers: they have not proved their identity; they have crossed the border unlawfully; or they are awaiting deportation; they are not residing at a registered address.

This paper will examine each of these reasons given and whether or not they can be considered lawful under Article 5 of the Convention. The importance of a coherent legal framework when dealing with immigration issues like these cannot be overestimated. Such a framework needs to be clear and transparent so that like legal situations are dealt with in a like manner.

As has been emphasised above, Article 5 requires that a deprivation of liberty must be for one of the purposes set out in Article 5(1)a-f. That means that the detaining authorities have clearly identified which of the situations under Article 5(1)a-f justifies the deprivation of liberty. This is crucial because if the detaining authority has not directed its mind to the genuine, specific purpose of detention, it will be less likely to have appreciated other procedural rights which such detention entails.

In addition the detainee must **always** be informed of the **purpose and justification** of his detention, as well as the applicable national law which authorises it (see further below on procedural safeguards).

We will now look at the immigration situations which might justify a deprivation of liberty under Art 5(1)a-f.

Establishing someone's identity

Article 5(1)b provides for detention in the following case:

"*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*".

The first part of this provision relates ONLY to orders of a court, not of a prosecutor or any part of the executive. Immigration detainees are rarely held for non-compliance with a lawful order of a court.

It is the second limb of this provision, which provides for detention to secure the fulfilment of an obligation prescribed by law, which may be relevant here. It concerns only cases where the law

(i) imposes an obligation to prove identity and
(ii) permits the detention of a person to compel him/her to fulfil this specific and concrete obligation.

Detention cannot be justified on the basis of a general duty of obedience to the law.

If there is a duty under domestic law to prove identity when asked by the authorities, and a person is unwilling or unable to do so, an arrest and subsequent detention may be lawful under Article 5(1)b. However, if it becomes clear that the person detained remains unable to prove his/her identity, there have to be safeguards in place to ensure the detention is not prolonged indefinitely.

It might be the case that the only way to establish identity is to approach the national authority in situations where the detainee claims this would risk his exposure, or that of family members left behind, to prohibited treatment. It is clearly **completely unacceptable** for the detaining authorities to expose the detainee, or the family members he or she has left behind, to such a risk.

It is important to remember that the provisions of Article 5(1) (b) do *not* cover situations where a person is detained as a sanction for *failure to comply*. That is only lawful when there has been a court order. It only authorises detention to *secure compliance*.

Crossing the border unlawfully

Article 5(1)c provides for detention in the following situation:

"*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*".

This provision only applies in situations where the individual is detained in connection with **criminal offences** relating to border crossings.

Under this provision deprivation of liberty may be lawful in three situations:
1) Where the person appears to have committed the offence of illegally crossing the border into the detaining State,
2) where are reasonable fears he/she will try to do so if released
3) where there are reasonable fears he/she appears to have committed the offence and will flee before criminal proceedings can be brought

Detention under this provision *must* - both initially and continuously - remain linked to one of those three factors and the relevant factor must be specified to the detainee.

If the detainee is subsequently released without charge, the arrest on reasonable suspicion of having committed an offence will not necessarily violate Article 5 provided that the arrest *had* genuinely been made for that *purpose*. However, this is only true for the initial period of the detention. The legality of continued detention depends on whether the reasonable suspicion *persists* and whether criminal proceedings are actually underway.

The detention will cease to be lawful if the link to the reason why the person was arrested is not kept alive by the diligent pursuit of the relevant criminal proceedings. In *Ciulla v. Italy*[7] the applicant was detained in order that a compulsory residence order of the kind which featured in the *Guzzardi* and *Raimondo* cases described above, could be made. The Court found there was no link with intended criminal proceedings to justify the detention.

Vagrants

Article 5(1)e allows for detention in the following cases

"*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*".

Asylum seekers and other migrants who have no visible means of support might fall into the category of "vagrants". They may even give themselves up voluntarily to the authorities because of this. The case of *De Wilde, Ooms and Versyp v. Belgium*[8] made it clear that whilst vagrancy may justify a short proportionate detention, even such voluntary surrender will not absolve states from their requirement to observe the procedural safeguards of Article 5.

Preventing unauthorised entry or pending deportation

The one immigration situation which is expressly 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*"[9].

This provision applies in two situations:

1) detention to prevent a person entering a country unlawfully and
2) detention whilst a person is awaiting the execution of a decision to deport or extradite him/her

As is clear from the text, the arrest must be lawful according to domestic law and cannot be arbitrary. The Court found a violation of this provision in the case of *Bozano v. France*[10]. An Italian citizen who had been convicted in his absence of

[7] Ciulla v. Italy, judgment of 22 February 1989.
[8] De Wilde, Ooms and Versyp v. Belgium, judgment of 18 June 1971.
[9] Article 5(1)f.
[10] Bozano v. France, judgment of 18 December 1986.

murder by an Italian court was forcibly taken at night by French police to the Swiss border. He was handed over into Swiss police custody following what transpired to be an unlawful deportation order, drawn up to circumvent the French court's ruling that extradition could not take place. The Court held the deprivation of liberty to be arbitrary in motivation and unlawful. The detention appeared to be for the purpose of deportation but was in reality a disguised illegal extradition.

Unlike Article 5(1)b and 5(1)c, Article 5(1)f does not require that the detention is reasonably considered necessary, as for example, to prevent the commission of an offence or to prevent a person fleeing. The Court held in the case of *Chahal v. the United Kingdom*[11] that all that is required is that action is being taken with a view to deportation. However detention under this provision does require deportation proceedings to be in progress and to be prosecuted with due diligence. *Chahal* concerned the proposed deportation on national security grounds of an alleged Sikh militant. The Court found no violation as a result of the extended detention as the UK were able to demonstrate that their courts had acted with due diligence in dealing with the many legal challenges which the applicant himself had raised in order to challenge his expulsion. In *Quinn v. France*[12] 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.

It is also clear that the principle of proportionality has not been observed if such detention is automatic.

The UN Human Rights Committee has recently examined complaints against Australia [13]where the relevant legislation foresees the arrest and detention of all unlawful non-citizens without further justification. The Committee emphasised that the concept of arbitrariness should not be equated with " against the law" but must also include such elements as " inappropriateness and injustice". After years of resisting the HRC's views , in April 2003 the Australian Federal Court found that detention where there was no real prospect of removal breached fundamental rights and that the Migration Act which authoritised detention had to be applied in accordance with Australia's international obligations, including under the ICCPR.

<u>Prescribed by law</u>

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(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 primarily 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:

[11] Chahal v. the United Kingdom, judgment of 15 November 1996.
[12] Quinn v. France, judgment of 22 March 1995.
[13] A v Australia No 560/1993. C v Australia No 900/199, Baban v Australia No 1014/2001, Bakhtiyari v Australia

"*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.*"

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. The Court emphasised in *Amuur v. France* that this is especially the case in respect of a vulnerable foreign asylum seeker. This, the Court said, was of fundamental importance with regard to asylum seekers at airports, particularly in view of the need to reconcile the protection of fundamental rights with the requirements of States' immigration policies. It can be assumed that the Court would consider the situation at other important ports of entry into a State in a similar manner.

In *Amuur*, the detainees were not being held under a clearly identifiable legal regime. Although there were French regulations in force at the time, these did not treat the detainees either as having entered France or as having been deprived of their liberty. None of the applicable rules allowed ordinary courts to review the conditions under which they were held or if necessary to impose a limit on the administrative authorities as regards the length of time for which they were held. In particular, the rules did not provide for legal, humanitarian and social assistance. The Court therefore found that the rules did not sufficiently guarantee the applicants' right to liberty, and there had been a violation of requirement of Article 5(1) that any deprivation of liberty must be in accordance with a procedure prescribed by law.

This requirement of lawfulness, inherent in article 5(1), is separate from the procedural requirements set out in Article 5(2) – (5) described below.

Procedural guarantees under Article 5 of the Convention

Paragraphs 2 – 5 of Article 5 set out the procedural rights that detainees must be afforded, once it has been established that they have lawfully been deprived of their liberty. This paper will very briefly outline these rights.

Article 5(2) stipulates

"*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 Court has interpreted this provision as meaning that any arrested person must be told, in simple, non-technical language that he can understand, **the essential legal and factual grounds for his arrest**, so that he/she can, if necessary, apply to a court to challenge its lawfulness.[14]

Article 5(3) states

[14] Fox, Campbell and Hartley v. the United Kingdom, judgment of 30 August 1990.

"*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 appeal for trial*."

This provision only applies to those who are detained under 5(1)c in connection with **criminal procedures**. Those detained under other procedures do not have to have their detention ordered by a judge, but they must have access to a judge to challenge the detention (see below on Article 5(4)).

The first limb of this provision requires that an accused must be brought promptly before a judge or other officer authorised by law to exercise judicial power. The question of promptness will depend on an assessment of the special features of each case. In the case of *Brogan and others v. the United Kingdom*[15], the Court found that a period of detention of four days and six hours violated Article 5(3).

The second limb of this provision establishes an entitlement to trial within a reasonable time or release pending trial. Despite the use of the word "or", the Court has found that these are not alternatives: there is a right to be released pending trial unless detention can be justified. The judicial officer should review the circumstances and arguments for and against detention, and decide whether there are reasons to justify detention. If the judge lacks the power to order release, Article 5(3) will be violated. In the case of *Caballero v. the United Kingdom*[16] the national regulations automatically refused bail to anyone charged with certain serious offences and who had previous convictions for any of those offences. As the courts had no power to release the applicant, Article 5(3) had been violated.

As has been stressed above, there must continue to be reasonable suspicion of the accused's involvement in an offence for the detention to continue. However, that will not be enough in itself to satisfy the requirements of Article 5(3). The European Court has held that after a certain lapse of time, the national court must establish whether the other grounds cited by the judicial authorities continue to justify the deprivation of liberty.[17] The grounds must be relevant and sufficient, and the courts must consider whether the national authorities showed due diligence in conducting the proceedings. The Court has held that relevant grounds can be interference with the course of justice, a danger of absconding and the prevention of crime.

Article 5(3) also stipulates that release may be conditioned by guarantees to appear for trial. Conditions which have been found to be permissible include residence requirements, an obligation to surrender travel documents and the imposition of a surety.

Article 5(4) states

[15] Brogan and others v. the United Kingdom, judgment of 29 November 1988.
[16] Caballero v. the United Kingdom, judgment of 8 February 2000.
[17] Letellier v. France, judgment of 26 June 1991.

"*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*."

The importance if this provision is that it guarantees prompt access to a **court** which will decide on the lawfulness of the detention, and which has the power to order release. Access to a prosecutor or a higher authority within the Border Guards or Ministry of the Interior to challenge detention will not suffice.

This provision allows all those deprived of their liberty to challenge the lawfulness of their detention, in terms of both national and Convention law. The extent of the remedy required will depend upon the type of detention. And, as with all Convention rights, this remedy must be available in practice, and not just in theory.

Article 5(4) also applies to situations where the relevant factors justifying detention may change over time. In such cases, there must be periodic reviews, by a court, of the need for continued detention. The decisions shall be made speedily, and the initial review should take place particularly quickly.

Article 5(5) stipulates

"*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*."

The importance which the Convention attaches to the right of liberty is demonstrated by the fact that this is the only provision in the Convention which provides a **direct right of compensation** for Convention violations in the national courts. For the Court to find a violation of Article 5(5), there must be a finding of a violation of one or more other elements of Article 5. Lawyers and NGO's working in this field should be vigilant in holding states accountable for violations of Article 5 and should insist on compensation being awarded if they have occurred.

Freedom of movement

It has been explained above that the right to freedom of movement is contained in Article 2 of Protocol 4. As can be seen from the text of this provision, freedom of movement applies only to persons **lawfully** within the territory. Those unlawfully within the territory have no such right. There appears therefore to be a lacuna in the law. Restrictions - not amounting to deprivation of liberty - appear to be able to be imposed at will on those who are not lawful. This requirement of lawfulness refers to domestic law, which may lay down certain criteria that have to be fulfilled. So an alien who has had his/her residence permit revoked, or who has not complied with certain conditions of admission, may not be able to rely on this provision. In the case of *Sulejmanovic and others v. Italy*[18], the applicants were unable to benefit from the comparable provisions relating to lawful residence found in Protocol 7 as they had not made a request for refugee status to be recognised. Since the right to seek and enjoy asylum from persecution is a right enshrined in international law it is arguable that

[18] Sulejmanovic and others v. Italy, admissibility decision of 14 March 2002.

those who have made an asylum application are lawfully on the territory until such time as that application has been definitively rejected.

Article 2 of Protocol 4 is one of the qualified rights of the Convention, and paragraph 3 and 4 of this provision reads:

3. No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security and public safety, for the maintenance of ordre public, for the prevention of crime, for the protection of health and morals, or for the protection of the rights and freedoms of others.

4. The rights set forth in paragraph 1 may also be subject, in particular areas, to restrictions imposed in accordance with law and justified by the public interest in a democratic society.

As with all qualified rights in the Convention,[19] the Court examines issues under this provision by asking a number of questions.

Firstly, the Court examines the nature of the right, i.e. if the provision is applicable to the present situation.

Secondly, whether there has been an interference with that right.

Thirdly, if there has been an interference, the Court moves on to examine whether this interference can be justified under paragraphs 3 and 4. In order for the interference to be justified, it has to be in accordance with the law. As has been discussed above under the section on Article 5, this does not only mean that there has to be national law allowing the interference, but there also has to be a certain quality to this law. The law has to be precise and ascertainable, so that an individual can regulate his/her conduct by it (if need be with legal advice).

Fourthly, the interference has to pursue a legitimate aim, i.e. has to be for one of the reasons set out in paragraphs 3 an 4. An example of this is national security.

Fifthly and finally, the interference must be necessary in a democratic society. This means it has to correspond to a pressing social need and most importantly be proportionate to the legitimate aim pursued. The concept of proportionality has been mentioned above and is one that lies at the heart of the Convention. Whether or not an interference is proportionate will depend on all the circumstances of the case. It needs to be examined if relevant and sufficient reasons have been advanced for the interference, if procedural safeguards were in place and if the interference impair the very essence of the right.

There is not much case law from the Court on Article 2 of Protocol 4. The cases that do exist concern citizens, and the restrictions imposed have generally been found to be justified. In a decision by the European Commission against Finland, it was found that the refusal by Finland to issue a passport to a Finnish citizen resident in Sweden

[19] Namely Articles 8, 9, 10 and 11 of the Convention.

was an interference with Article 2 of Protocol 4 but justified as necessary in the interests of national security and the maintenance of the ordre public. The applicant had failed to report for his military service, and the Commission noted that States were entitled to a wide margin of appreciation in organising their national defence. Further, the applicant had not invoked that he had any special need to travel.[20]

In the case of *Raimondo v. Italy*, special supervision measures were imposed on the applicant who was suspected of mafia crimes. The Court held that in view of the threat posed by the mafia to a democratic society, there were legitimate aims to maintain ordre public and prevent crime. The supervision measures were considered as necessary until they were revoked by the national courts. However, there was a violation since the authorities had not acted with due diligence in implementing the decision to revoke the measures.

Detention conditions

Article 3 of the Convention reads like this:

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

This prohibition is so fundamental that it has no limitations or exceptions, and States cannot derogate from it – it is one of the absolute rights in the Convention. For treatment to violate Article 3 it must reach the minimum threshold of severity, which will depend on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects, and, in some cases, the sex, age and state of health of the victim.

The Court has held that Article 3 applies to a number of different situations, such as the ill-treatment of prisoners by prison officials, corporal punishment, and in expulsion cases where an individual might face ill-treatment if sent back to his country or origin. However, this paper will examine the application of Article 3 on conditions of detention.

Conditions in which detainees are held may violate Article 3 depending on the particular circumstances. In the case of *Dougoz v. Greece*[21], the applicant was detained whilst awaiting expulsion to Syria. He complained to the European Court about the conditions of his detention. He alleged inter alia that he was confined in an overcrowded and dirty cell with insufficient sanitary and sleeping facilities, scarce hot water, no fresh air or natural daylight and no yard in which to exercise. It was even impossible for him to read a book because his cell was so overcrowded.

The Court noted that conditions of detention may sometimes amount to inhuman or degrading treatment. When assessing conditions of detention, account had to be taken of the cumulative effects of these conditions, as well as of specific allegations made

[20] Commission decision of 20 February 1995 against Finland, application no 19583/92.
[21] Dougoz v. Greece, judgment of 6 March 2001.

by the applicant. It was noted that the applicant's allegations were corroborated by reports from the Committee for the Prevention of Torture[22]. The Court considered that the conditions of the applicant's detention, in combination with the fact that he had been detained in these conditions for 18 months, amounted to a violation of Article 3 of the Convention.

The case of *Kalashnikov v. the Russian Federation*[23] concerned an applicant who had been held in appalling conditions for five years, mainly in pre-trial detention. His cell measured 17 square meters and contained eight bunk beds. It nearly always held 24 inmates – there were three men to every bunk and the inmates had to sleep in turn. There was a toilet in the cell, and the person using the toilet was in view of both his cellmates and the prison guard. The cell had no ventilation and was overrun with cockroaches and ants. The applicant contracted a variety of skin diseases and fungal infections, losing his toenails and some of his fingernails.

Not surprisingly, the Court found these conditions to clearly violate Article 3 of the Convention. It accepted that there was no indication that there was a positive intention of humiliating or debasing the applicant, but the absence of any such purpose could not exclude a finding of a breach of the Convention.

The Court has since on a number of occasions made similar findings in relation to conditions of detention or prison regimes.[24]

The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment

In the case of *Dougoz* and *Kalashnikov* the Court relied on reports issued by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (the CPT) when finding a violation of Article 3 of the Convention.

This article inspired the drafting, in 1987, of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment. The Convention provides for a non-judicial preventive machinery to protect detainees. It is based on a system of visits by the CPT. The CPT's members are independent and impartial experts from a variety of backgrounds for example lawyers, medical doctors and specialists in prison or police matters.

The CPT visits places of detention (e.g. prisons and juvenile detention centres, police stations, holding centres for immigration detainees and psychiatric hospitals), to see how persons deprived of their liberty are treated and, if necessary, to recommend improvements to States.

CPT delegations visit Contracting States periodically, but additional "ad hoc" visits can also be arranged if necessary. The Committee must notify the State concerned but does not have to specify the exact time of the visit.

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[22] More on the work of this Committee below.
[23] Kalashnikov v. the Russian Federation, judgment of 15 July 2002.
[24] See e.g. Peers v. Greece, judgment of 19 April 2001, and Van der Ven v. the Netherlands, judgment of 4 February 2002.

The CPT delegations must be given *unlimited access* to places of detention and the right to move inside such places *without* restriction. They interview persons deprived of their liberty in private and communicate freely with anyone who can provide information. The recommendations which the CPT draw up on the basis of the visits are included in a report which is sent to the State concerned. These reports are confidential unless the State agrees to their publication. However, if a country fails to co-operate or refuses to improve the situation in the light of the Committee's recommendations, the CPT may decide to make a public statement. In addition, the CPT draws up a general report on its activities every year, which is made public.

Over its years of activity in the field, the CPT has developed standards relating to the treatment of persons deprived of their liberty. These standards have been published and can be found on the Committee's website www.cpt.coe.int.

Individuals, lawyers, NGOs and other persons who are concerned about suspected ill-treatment or detention conditions can approach the CPT and bring their concerns to the Committee's attention. As explained above, the CPT can arrange ad hoc visits and does rely in information received from the public in planning its work.