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## **Article 6**

### **Right to Liberty and Security**

Everyone has the right to liberty and security of the person.

#### **Text of Explanatory Note on Article 6**

The rights in Article 6 are the rights guaranteed by Article 5 of the ECHR, and in accordance with Article 52(3) of the Charter, they have the same meaning and scope. Consequently, the limitations which may legitimately be imposed on them may not exceed those permitted by the ECHR, in the wording of Article 5:

“1. Everyone has the right to liberty and security of person.

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

- (a) the lawful detention of a person after conviction by a competent court;
- (b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
- (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority of 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 or drug addicts, or vagrants;
- (f) the lawful arrest or detention of a person to prevent his effecting an unauthorized entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and the charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1(c) of this article shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this article shall have an enforceable right to compensation.”

The rights enshrined in Article 6 must be respected particularly when the European Parliament and the Council adopt legislative acts in the area of judicial cooperation in criminal matters, on the basis of Articles 82, 83 and 85 of the Treaty on the Functioning of the European Union, notably to define common minimum provisions as regards the categorisation of offences and punishments and certain aspects of procedural law.

### **Selected Bibliography**

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M. Mancovei, *The right to liberty and security of the person: a Guide to the implementation of Article 5 of the European Convention on Human Rights*, Human Rights Handbooks, No.5 (Council of Europe Publishing, Strasbourg, 2004)

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### **A. Field of Application of Article 6**

Under Article 51 of the Charter, Article 6 is addressed to the institutions of the EU but binds the Member States only when they are implementing Union law. For a long period following its inception, neither the law of the European Union nor its institutions had much relevance to the issue of liberty of the person. The fields covered by EU law were remote from the exercise of sovereign power in policing, security and immigration. Even when some competence in these fields was acquired, the Union proceeded outside the legal mainstream under the second pillar of the Maastricht Treaty. After successively, the Amsterdam, Nice and Lisbon treaties however, immigration, asylum and aspects of criminal justice have come to fall under both the ordinary legislative procedure and the jurisdiction of the Court of Justice. With the growing integration of these functions provided by the creation of the Area of Freedom, Security and Justice there are now significant fields where the scope of Union law extends to matters that potentially engage Article 6. The Union itself has a number of institutions, which, whilst not physically engaged in arrest or detention, nevertheless direct policies and actions that may lead to such measures, particularly in relation to cross-border crime and the execution of the European Arrest Warrant. These include Eurojust, European Police Office (Europol), European Judicial Network, the putative European Public Prosecutor and the External Borders Agency (Frontex).

Most importantly, Member States also now act to arrest and detain persons pursuant to provisions of Union law, most obviously in the field of migration and asylum, but also during co-operation in criminal proceedings. The facilitation of the return of persons to other Member States to serve terms of imprisonment or to face potential holding under immigration powers depends upon mutual respect for detention regulations and practices. Whilst initiatives relating to arrest and detention at Council of Europe level have been long-standing, the EU has itself increased policies to harmonize such standards as cross-border cooperation

has proceeded. Following adoption by the Council of the EU of a ‘Roadmap’<sup>1</sup> for strengthening the rights of suspects, the European Council’s Stockholm programme in justice and home affairs made this an important goal of policy.<sup>2</sup> The Commission is also consulting on what further detention measures are needed to harmonise standards and facilitate prisoner returns.<sup>3</sup> Finally, there has always been scope for the fundamental rights protection, now embodied in the Charter, to apply to migrant EU citizens and their family members who find themselves subject to detention in another Member State under the principle set out in *Rutilli*.<sup>4</sup> This principle should extend to long-term resident non-EU citizens, who are increasingly integrated with Union citizens pursuant to EU secondary-legislation.

The specific instruments where Member States implement Union law pertinent to Article 6 are increasingly numerous. In the criminal field, the most important measure is the Framework Decision on the European Arrest Warrant<sup>5</sup> authorises arrest and detention pending return of criminal suspects and those convicted of crimes to other Member States. Although not determined by the Court of Justice specifically in relation to detention yet, domestic proceedings regarding the European Arrest Warrant do engage the Charter.<sup>6</sup> The Framework Decision on Mutual Recognition of Criminal Convictions requires that the Member State of residence take back and imprison those persons convicted and deprived of their liberty in other Member States.<sup>7</sup> The Framework Decision on Supervision Orders<sup>8</sup> provides a mechanism for mutual recognition of alternatives to custodial orders made in respect of non-residents who are prosecuted or convicted in other Member States. Pursuant to the Roadmap for strengthening procedural rights of suspects, two Directives have been passed which create harmonised standards in relation to access to interpreting services and information for persons arrested pursuant to criminal proceedings and under the European Arrest Warrant.<sup>9</sup> Finally, under the *ne bis in idem* provisions of the Schengen Implementing Convention (Articles 54-6), when a Member State proposes to sentence a defendant who has

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<sup>1</sup> Council of the EU, Resolution on a Roadmap for strengthening procedural rights of suspected or accused persons in criminal proceedings, OJ C 295/1, 4.12.2009.

<sup>2</sup> European Council, The Stockholm Programme – an open and secure Europe serving and protecting citizens, OJ C 115, 4.4.2010, at 3.2.6 which stated that ‘efforts should be undertaken to strengthen mutual trust and render more efficient the principle of mutual recognition in the area of detention.’

<sup>3</sup> European Commission, Strengthening mutual trust in the European judicial area – a Green Paper on the application of EU criminal justice legislation in the field of detention, COM(2011) 327 final.

<sup>4</sup> Case C-36/75 *Rutilli v Minstre de l’Intérieur* [1975] ECR 1219

<sup>5</sup> Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA)

<sup>6</sup> Case C-261/09 *Gaetano Mantello* ECR [2010] I-11477 and Case C-396/11 *Ciprian Vasile Radu*, judgment of the Grand Chamber of 29 January 2013.

<sup>7</sup> Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of enforcement in the European Union, OJ L 327, 5.12.2008, p.27.

<sup>8</sup> Council Framework Decision 2009/829/JHA of 23 October 2009 on the application between Member States of the European Union, of the principle of mutual recognition to decisions on supervision as an alternative to provisional detention, (OJ 2009 L 294, p. 20

<sup>9</sup> Directive 2010/64 of the European Parliament and of the Council on the right to interpretation and translation in criminal proceedings, OJ L 280, 26.10.2010; Directive 2012/13 of the European Parliament and of the Council on the right to information in criminal proceedings, OJ L 142/1, 1.6.2012. A further Directive has been proposed on access to a lawyer for suspects and those subject to the EAW: COM (2011) 326(3) proposal for a Directive on the right of access to a lawyer in criminal proceedings and the right to communicate upon arrest.

already been convicted for the same acts in another Member State, they must reduce the sentence to take account of time already served.

In the field of migration there are also a great number of measures impinging upon personal liberty. For Union citizens and their families of any nationality, the Citizens Directive<sup>10</sup> impliedly authorises detention pursuant to deportation or removal. In the field of asylum there are four measures pursuant to the Common European Asylum policy which bear upon personal liberty. The Asylum Reception Conditions Directive<sup>11</sup> partially regulates freedom of movement and detention during the asylum procedure. The Dublin II Regulation<sup>12</sup> determines the criteria for returning asylum seekers to other Member States to consider their asylum claims and indirectly bears upon their rights pending such return. The Refugee Status Directive<sup>13</sup> determines aspects of the recognition process for asylum seekers and therefore impinges on their potential liability to detention during the procedure. This Directive also grants a right of free movement to those recognized as refugees or given subsidiary protection. Finally, the Asylum Procedures Directive governs appeal rights in refugee status determination but also mentions detention.<sup>14</sup> The asylum measures have been the subject of negotiation to amend them and important new provisions on detention have been inserted into the final drafts of the new Directive on Reception Conditions and the Dublin II Regulation.<sup>15</sup>

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<sup>10</sup> Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States, amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC (OJ 2004 L 158, p. 77, and corrigenda OJ 2004 L 229, p. 35, and OJ 2005 L 197, p. 34),

<sup>11</sup> Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers (OJ 2003 L 31, p. 18);

<sup>12</sup> Council Regulation (EC) 343/2001 of 18 February 2003 establishing the criteria and mechanisms for determining the Member States responsible for examining an asylum application lodged in one Member State by a third-country national (OJ 2003 L 50, p. 1)

<sup>13</sup> Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons who eligible for subsidiary protection and for the content of the protection granted (OJ 2011 L 337, p. 9). In relation to the UK and Ireland, which did not opt-in to the newer version, the old version applies: Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (OJ 2004 L 304, p. 12, and corrigendum, OJ 2005 L 204, p. 24);

<sup>14</sup> Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (OJ 2005 L 326, p. 13, and corrigendum, OJ 2006 L 236, p. 36).

<sup>15</sup> Position of the Council at first reading with a view to the adoption of a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast), 2008/0244 (COD), 14 December 2012. Position of the Council at first reading with a view to the adoption of a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), 2008/0243 (COD), 14 December 2012. The Procedure Directive is also being renegotiated but the proposals in relation to detention are limited to cross-referencing the grounds of detention to those in the proposed Reception Conditions. See European Commission, Amended proposal for a Directive of the European Parliament and of the Council on common procedures for granting and withdrawing international protection status, COM(2011) 319 final, 1.6.2011, Article 28.

In relation to non-asylum migration measures, the most significant measure authorizing detention is that in relation to irregular migrants under the Returns Directive<sup>16</sup> which creates a detailed legal code to ensure the removal of migrants in respect of whom a removal order has been made. There is also an implied power to use force in the Common Borders Code.<sup>17</sup> The Long-residents Directive confers powers of expulsion and/or withdrawal of residence permits on public policy grounds and therefore impliedly authorises detention.<sup>18</sup> Similar considerations apply to the Family Reunification Directive<sup>19</sup> which gives powers to expel third-country national family members.

## **B. Interrelationship of Article 6 with other provisions of the Charter**

The most obvious general point of contacts between Article 6 and other parts of the Charter are in relation to Article 1, the obligation to respect and protect human dignity, and Article 4, the prohibition on torture and inhuman or degrading treatment or punishment. This is because, according to the jurisprudence of the European Court of Human Rights as explained below, the conditions of detention themselves affect the legality of detention. The distinction between a restriction on liberty and a deprivation of liberty has yet to be explored in Union law. There are Charter provisions which are pertinent to this issue. Specifically for Union citizens, Article 45(1) grants the right to move and reside freely within the Member States. This provision must however be read in light of the Treaty restrictions on the free movement rights of EU citizens which do permit exclusion or deportation in certain cases. Ancillary detention is permitted in such cases. For non-EU citizens, Article 45(2) says that freedom of movement and residence may be granted, in accordance with the treaties, to such persons who are legally resident in a Member State. The Charter also acknowledges the right of asylum in Art 18 and this engages those aspects of refugee law which impinge upon detention. The prohibition on collective expulsion of aliens in Art 19(1) means that detention cannot be used for this purpose. The right of children to have their best interests made a primary consideration and to maintain contact with their parents, both of which are acknowledged in Art 24(2)(3), are relevant to detention practice.

The common connection between arrest, detention and the rule of law, particularly in the context of criminal prosecutions, means that the Charter provisions under the 'Justice' Chapter are also particularly relevant. Article 47 requires that persons whose rights are violated must have an effective remedy and a fair hearing within a reasonable time. Article 48 affirms the presumption of innocence for detainees who have been charged. Article 49 requires that no one should be punished without law. Article 50 prohibits double jeopardy. In applying this prohibition, regard must be had to the more detailed *ne bis in idem* rules of the Schengen Implementing Convention (Articles 54-6) which require time served already to be taken into account. Detainees may seek to invoke any of these Charter provisions to

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<sup>16</sup> Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals (OJ 2008 L 348, p. 98).

<sup>17</sup> Regulation 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a community Code on the rules governing the movement of persons across borders (Schengen Borders Code).

<sup>18</sup> Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (OJ 2004 L 16, p. 44) Articles 6, 12, 17 and 22 set out substantive and procedural protection against expulsion or deportation that mirrors some of the concepts found in relation to EU citizens. For a detailed analysis see S. Peers, 'Implementing Equality? The Directive on Long Term Resident Third Country Nationals', [2004] 29(4) ELRev, 437.

<sup>19</sup> Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ 2003 L 251, p. 1).

challenge aspects of their prosecution and thereby, in an ancillary manner, their detention. However, in general terms, detention is not unlawful retrospectively simply because the prosecution or conviction which led to it is subsequently withdrawn or quashed.

### **C. Sources of Article 6 Rights**

#### **I. European Convention on Human Rights**

Art. 6 corresponds to Art. 5 ECHR and Art 52(3) Charter states that it must be read in a manner consistent with Art 5 ECHR. This means that only the specific justifications for detention listed are permitted under Article 6 not the broader public policy justifications implicit in Art 52 (see the explanations to the Charter). Art 3 - the prohibition on torture and inhuman or degrading treatment also informs the regulation of detention; conditions of detention that fall below appropriate standards for the detainee may also generate an infringement of Art 5. Art 2 to Protocol No.4 to the ECHR provides that ‘everyone lawfully’ within the territory of a State has the right to liberty of movement and choice of residence subject only to necessary and proportionate restrictions. Thus alternative measures restrictive of liberty falling short of detention, such as reporting and residence requirements, are also subject to legal regulation under the Protocol. All Member States (except Greece and the United Kingdom) have ratified this Protocol, however, Art 45(1) of the Charter confers this right only upon all Union citizens. By contrast, under Art 45(2), third country nationals must be legally *resident* and Member States are given a discretion as whether to grant such lawful residents this right. There is thus some scope for conflict between the Charter and the Protocol despite the obvious common heritage. Art 4 Protocol No. 4 provides a prohibition on the collective expulsion of aliens. This implicitly means that detention to effect collective deportation is also not permitted. Art 19(1) of the Charter clearly embodies this prohibition. The case law of the ECtHR on Art 5 ECHR is particularly pertinent. It is notable that the Strasbourg court has, in respect of immigration and extradition cases at least, adopted a different approach to that followed by the Human Rights Committee in relation to Art 9 ICCPR.

#### **II. United Nations Treaties and Standard-setting**

The embodiment of this most fundamental right is found in Art 9 Universal Declaration of Human Rights (‘UDHR’): ‘No one shall be subjected to arbitrary arrest, detention or exile’. This is complemented by UDHR Art 13(1) which confirms that ‘Everyone has the right to freedom of movement and residence with the borders of each State.’ These basic ideas were developed in Art. 9 International Covenant on Civil and Political Rights (‘ICCPR’) and in particular Art 9(1): ‘Everyone has the rights to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.’ The interconnection with conditions of detention is made clear in Art.10 ICCPR - the right of all detained persons to be treated with humanity and respect for the inherent dignity of the human person and the obligation to separate accused from convicted prisoners. Art 12 ICCPR confirms the right of all persons lawfully within the territory to freedom of movement. The jurisprudence of the Human Rights Committee on the ICCPR, arising in

relation to individual complaints under Art. 9, has been extensive and influential globally, if not in Europe.<sup>20</sup>

The mechanism to combat torture and inhuman and degrading treatment in the Convention Against Torture (CAT) are very pertinent to detention. The monitoring procedure set up by the Optional Protocol to the CAT provides for more detailed visits to detention centres. The Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, 1988 provides a comprehensive code covering the due process rights of detainees whilst the conditions of detention are regulated by the Basic Principles for the Treatment of Prisoners, 1990. Also important have been the monitoring reports and standard-setting by the UN Working Group on Arbitrary Detention whose remit covers all the appropriate international instruments relating to liberty of the person.<sup>21</sup>

As regards the specific position of children, Art 3 Convention on the Rights of the Child ('CRC') confirms that in all actions concerning children, the best interests of the child shall be a primary consideration. This is given specific expression in Art 37 CRC which sets out a prohibition on arbitrary detention of children but also that detention to be used only as measure of last resort and for the shortest appropriate period of time.

### III Council of Europe Treaties

Pursuant to Arts 1 and 2 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment there is an obligation on States to allow visits by monitors to all persons deprived of their liberty by a public authority. The monitoring reports of the European Committee for the Prevention of Torture are important indicators of evolving standards both as regards due process and conditions of detention. They have been summarized into general standards.<sup>22</sup> In relation to the development of human rights standards amongst Council of Europe members, both the Committee of Ministers and Parliamentary Assembly have issued important guidance in relation to detention. Most importantly, for those convicted of crimes or on remand pending trial, the European Prison Rules provide a very detailed set of standards of treatment and due process rights.<sup>23</sup> For immigration and asylum detainees, there have also been important guidelines issued.<sup>24</sup>

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<sup>20</sup> See A Conte and R Burchill, *Defining Civil and Political Rights: the Jurisprudence of the United Nations Human Rights Committee*, 2<sup>nd</sup> ed., (2009), Ashgate, London. The crucial decision arise in *A v. Australia*, Communication No. 560/1993, U.N. Doc. CCPR/C/59/D/560/1993 (30 April 1997) in which the Human Rights Committee concluded that immigration detention must be necessary and proportionate to meeting the needs of immigration control or public order.

<sup>21</sup> For a summary of WGAD's approach to the detention of immigrants and asylum-seekers see Deliberation No.5, Report of WGAD, Commission on Human Rights, 56<sup>th</sup> Session, E/CN.4/2000.4.

<sup>22</sup> Committee for the Prevention of Torture, *The CPT Standards* [CPT/Inf/E (2002) 1 – Rev.2006].

<sup>23</sup> Council of Europe, Recommendation Rec (2006)2 of the Committee of Ministers to member states on the European Prison Rules. For a detailed history see D van Zyl Smit and A Snacken, *Principles of European Prison Law and Policy: Penology and Human Rights* (2009) Oxford University Press.

<sup>24</sup> Council of Europe, Recommendation Rec (2003)5 of the Committee of Ministers to member states on measures of detention of asylum seekers. Committee of Ministers, Twenty guidelines on force return (2005). Parliamentary Assembly Recommendation 1547 (2002) Expulsion procedures in conformity with human rights and enforced with respect for safety and dignity. Parliamentary Assembly Resolution 1707 (2010) on detention

Similarly the European Commissioner for Human Rights has produced a number of important monitoring reports on individual countries' detention practices.

#### IV Other Sources

National constitutions all contain a prohibition on arbitrary detention in various forms as this is one of the most well-established fundamental rights. The Convention Relating to the Status of Refugees ('CSR') contains a number of important references to liberty of the person which pertinent to both asylum-seekers and those with full refugee status. Thus Art 9 confirms that States may take 'provisional measures' (including detention) essential to national security pending recognition of refugees. Under Art 26 CSR there is a right to freedom of movement for refugees lawfully in the territory of a State. Under Art 31(1) CSR no penalties may be imposed on refugees unlawfully in the country of refuge coming directly on account of illegal entry and (2) restrictions on movement of such refugees must be necessary. There have been guidelines on detention of asylum-seekers produced by the Executive Committee that oversees the CSR and by the United Nations High Commissioner for Refugees.<sup>25</sup>

#### D. Analysis

##### I. General Remarks

A right to liberty is one of the oldest and most well-established within liberal societies. It has close links with the establishment of the rule of law in relation to the exercise of governmental power over civil society. As such, the right to liberty is better viewed as a right not to be detained arbitrarily. Originally this was conceived of solely in procedural terms: detention must follow due process of law. In modern human rights law, however, the right increasingly comprises both procedural and substantive components. The state is obliged to detain only according to transparent and clear legal authority whilst the grounds of detention should generally be linked to sufficiently pressing goals of public policy to support removal of liberty. Furthermore, the conditions of detention themselves and their effects upon particular detainees have increasingly come to be evaluated against the nature of the state's public policy goals using proportionality analysis.

The Union has increasingly itself come to adopt public policy goals which impinge upon personal liberty for their fulfilment. The most direct of these is in relation to asylum and border policy where the Union's goal of preventing unlawful migration and secondary movements, particularly of asylum-seekers, within Europe has led to the imposition of common obligations, including detention powers. The Union has also expressed its own shared public policy in relation to the creation of criminal offences for conduct that has a trans-border element or impinges upon the fulfilment of Union policy goals. The final main area of Union activity is more about facilitation of Member States' criminal justice policies through co-operation to render more rapid returns of suspected and convicted criminals in other Member States.

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of asylum-seekers and irregular migrants in Europe. Recommendation Rec (2003)5 was cited by the Court of Justice in *El Dridi* (C-61/11 PPU) [2011] 3 C.M.L.R. 6 at para 43.

<sup>25</sup> Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention, (2012) UNHCR, Geneva. UNHCR Executive Committee Conclusion No.44 (1986) Detention of Refugees and Asylum Seekers.

Neither Advocates-General nor the Court of Justice has yet to render any direct opinion in which Article 6 was directly relied upon, despite giving several rulings in cases in which detention was in issue since the Charter's ratification. These cases have all concerned non-EU citizens subject to migration control and the Court of Justice has adopted an approach looking at the overall legislative scheme governing expulsion and detention rather than follow an explicitly fundamental rights approach.<sup>26</sup>

## II. Scope of Application

### II.1 Relationship with Free Movement Law and Purely Internal Situations

The right of EU citizens to move and reside freely within the Union pursuant to Articles 20 and 21 TFEU necessarily entails respect for the right to liberty and security of the person. This right is embodied in Article 45 of the Charter. The Court of Justice has often ruled against obstacles to such movement when imposed by Member States. In *Oulane*<sup>27</sup> an EU citizen was present in another Member State with a temporary right of residence as a recipient of services.<sup>28</sup> The European Court of Justice held that, whilst Member States could impose a penalty for failure to hold an identity document [d]etention and deportation based solely on the failure of the person concerned to comply with legal formalities concerning the monitoring of aliens *impair the very substance* of the right of residence conferred directly by Community law and are manifestly disproportionate to the seriousness of the infringement.<sup>29</sup> [italics added] The failure to comply with such rules did not constitute a threat to public policy or security.<sup>30</sup> There had to be a core security justification for detention such as that the migrant would commit criminal acts.<sup>31</sup> Detention orders, like deportation, can be justified but only based on the express deportation grounds of public policy, security or health set out in TFEU.<sup>32</sup>

For non-EU citizens, only those who are long-residents acquire free movement rights under Union law for those who have stayed for a qualifying period in a Member State. Whilst it confers powers of expulsion and/or withdrawal of residence permits on narrow public policy grounds, there is no mention of detention.<sup>33</sup> There is only an oblique reference in that each Member States expelling a non-EU citizen 'shall take all the appropriate measure to effectively implement it.'<sup>34</sup> Similar considerations apply to the Family Reunification

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<sup>26</sup> C-357/09 PPU, *Kadzoev* [2009] E.C.R. I-11189,

<sup>27</sup> C-215/03 *Oulane* Judgment of 17 February 2005.

<sup>28</sup> Specifically, at the relevant time he had a right to stay up to three months in order to receive services under Article 56 TFEU in addition to any rights derived from EU citizenship. The modalities of exercising this right, including the right to enter based upon presentation of an identity card or passport, were set out in Directive 73/148/EC on the removal of restrictions on the movement and stay of nationals of the Member States in relation to the establishment and receiving services. They now fall within Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States.

<sup>29</sup> *Ibid.*, para 40.

<sup>30</sup> *Ibid.*, para 41.

<sup>31</sup> *Ibid.*, paras 9 and 11 state the facts in terms which indicate that a fear of absconding was the ground for detention but the referring court did not put its questions on that basis. The Court says 'the questions referred are, however, based on the assumption that there was no genuine and serious threat to public policy' (para 42). Any preventive detention would have to relate to crime serious enough to justify deportation under EU law.

<sup>32</sup> Para 41.

<sup>33</sup> Articles 6, 12, 17 and 22 set out substantive and procedural protection against expulsion or deportation that mirrors some of the concepts found in relation to EU citizens. For a detailed analysis see S. Peers, 'Implementing Equality? The Directive on Long Term Resident Third Country Nationals', [2004] 29(4) *ELRev*, 437.

<sup>34</sup> Article 22(3).

Directive.<sup>35</sup> This gives rights to non-EU citizens to join and reside with their non-EU resident families in the Union.<sup>36</sup> There are public policy exclusion and expulsion powers<sup>37</sup> but again there is no requirement to implement these orders by arrest and detention.<sup>38</sup>

The concept of obstacles to free movement may also have relevance for detention pursuant to criminal offences under Article 5(1)(a) ECHR. The Court of Justice has been willing to rule that penalties which are disproportionate in their impact on the ability of EU citizens to exercise their freedom of movement may be in breach of EU law.<sup>39</sup> Therefore any detention pursuant to such a sentence would have to cease although it seems unlikely that such detention would breach Article 5(1)(a) until the national criminal law had been declared in breach of EU law.<sup>40</sup> For EU citizens imprisoned in their own Member State who have never crossed a border however, the orthodox position is that they are caught by the 'purely internal situation' rule and cannot rely upon free movement rights to challenge their criminal conviction.<sup>41</sup>

## II.2 Personal and Territorial Scope

The right to liberty is one possessed by all natural persons, regardless of nationality or immigration status. The geographical scope of the right may extend beyond the territorial waters of the Member States; to the extent that Union agencies and/or Member States engage in actions outside the borders of the Union which affect personal liberty, they may be bound by Article 6.<sup>42</sup> The use of naval or coast guard operations against migrant smuggling vessels, which forms part of Union policy to combat illegal migration, may therefore engage Article 6 to the extent that physical restraint is exercised over individuals.<sup>43</sup> Detentions that are conducted by the authorities of non-EU countries which border the Union would not ordinarily lead the Member States or the EU institutions to incur Article 6 obligations, even though the Union increasingly provides funds and training for border control operations to its neighbours.

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<sup>35</sup> 2003/86 22 September 2003 L251 12.

<sup>36</sup> Article 6.

<sup>37</sup> Recital 14 speaks of 'public policy may cover a conviction for committing a serious crime' also public security and policy include someone who 'belongs to an association that supports terrorism, supports such an association or has extremist aspirations.'

<sup>38</sup> We can also mention the Students Directive which provides common standards for admission of students from outside the Union but no express discussion of detention powers in the Directive. Council Directive 2004/114/EC of 13 December 2004 OJ L 375/12 23.12.2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service.

<sup>39</sup> C-193/94 *Sknavi and Chryssanthakopoulos* [1996] ECR I-929.

<sup>40</sup> See the principle in *Benham v UK* (App.19380/92), judgment of 10 June 1996 that conviction and detention by courts of competent jurisdiction are valid in terms of Article 5(1)(a) (even though later quashed) in the absence of proof of acting ultra vires in terms of national law or bad faith or other failure to attempt to apply the relevant national legal framework.

<sup>41</sup> C-299/95, *Kremzow v Austria* [1997] ECR I-2629. It must be questioned now whether this principle has been altered by the case-law on EU citizenship conferring rights to reside and move even upon those who have not left their own Member State. See Zambrano

<sup>42</sup> See Council Decision of 26 April 2010 (2010/252/EU) supplementing the Schengen Borders Code as regards the surveillance of the sea external borders in the context of operational cooperation coordinated by the European Agency for the Management of Operational Cooperation at the External Borders of the Member States of the European Union, OJ L 111/20 4.5.2010. Annex Rule 1.1 states that measures taken shall be conducted in accordance with fundamental rights.

<sup>43</sup> *Hirsi Jamaa v Italy* (Appn. No. 27765/09), 23 February 2012, which ruled that taking immigrants in naval vessels back to a third country constituted collective expulsion in breach of Art 4 Protocol 4 ECHR.

### III. Specific Provisions

The explanatory notes on the Charter state that the rights in Article 6 have the same meaning and scope as Article 5 ECHR. This extends therefore to both the meaning of ‘liberty and security of the person’ but also to the legitimate limitations that may be placed thereupon which are exhaustive and set out in Articles 5(1)(a)-(f) ECHR.<sup>44</sup> The one area of doubt is imprisonment for debt which is prohibited by Art 1 Protocol No. 4 to the ECHR but which is not referred to in the Charter or the explanatory text. It is assumed that this is an oversight and that this does limit further the scope of imprisonment in compliance with Art 6 of the Charter. The Court of Justice has not yet provided any interpretation of Article 5 ECHR either as part of the general principles of EU law, nor through the Charter.<sup>45</sup> Because of this, the extensive Article 5 ECHR case-law of the Strasbourg court will remain the principal source of guidance on the meaning of Article 6 of the Charter. This section will not seek to reproduce all the Strasbourg case-law but rather to focus upon those areas that are of particular relevance as falling within the scope of Union law.

#### Definition of Deprivation of Liberty

The reference to ‘liberty’ does not denote any broader concept of freedom in general but is merely a right not to be subject to arbitrary bodily restraint. Furthermore, the primary focus of Article 5 ECHR is upon regulating deprivation of liberty; ‘security’ of the person does not raise distinct considerations.<sup>46</sup> The Strasbourg court has distinguished restrictions on liberty, such as residence requirements, from deprivations of liberty amounting to an infringement of Article 5.<sup>47</sup> The distinction is however one of fact and degree and not kind, with the duration, conditions, effects and manner of detention being relevant along with the particular type of detainee held. Thus confining soldiers to barracks was not a deprivation of liberty whilst keeping them in locked cells was.<sup>48</sup> The holding of asylum-seekers in airport transit facilities was examined in *Amuur v France*.<sup>49</sup> The Court said that ‘such holding should not be prolonged excessively, otherwise there would be a risk of it turning a mere restriction on liberty – inevitable with a view to organising the practical details of the aliens’ repatriation or where he has requested asylum while his application for leave to enter the territory for that purpose is considered - into a deprivation of liberty.’<sup>50</sup> In that case, holding the applicants in locked hotel rooms for several weeks was a deprivation of liberty. In *Saadi v UK*, asylum-seekers were held in closed facilities permitting some degree of movement inside a perimeter

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<sup>44</sup> The exhaustive nature of Article 5(1) has been confirmed in *Ireland v UK* (App. No. 5310/71) judgment of 18 January 1978, Rep. 1978-25. This is confirmed by Art 52(3) of the Charter which expressly states that rights guaranteed by the Convention are to have the same meaning and scope when they appear in the Charter.

<sup>45</sup> There is however a reference to the judgments of the ECtHR and other guidelines in relation to Article 5 from the Council of Europe institutions in *El Dridi* (C-61/11 PPU) [2011] 3 C.M.L.R. 6 at paras. 42-43.

<sup>46</sup> *Bozano v France*, 18 December 1986, Series A No. 111, (1987) 9 EHRR 297. Contrast with the broader approach of the Human Rights Committee in relation to Article 9 ICCPR in Communication No. 195/1985, *Delgado Paez v Colombia*, 23 August 1990 (CCPR/C/39/D/195/1985) where it was held that the State was under an obligation to protect individuals threatened by death and other threats to personal security.

<sup>47</sup> See *Guzzardi v Italy* (1980) 3 EHRR 333 and *Engel v Netherlands* (1976) 1 EHRR 647 in which the Court distinguished between a deprivation of liberty and a mere restriction on liberty which is now regulated by Article 2 Protocol No. 4.

<sup>48</sup> *Engel v Netherlands* (1976) 1 EHRR 647

<sup>49</sup> (1996) 22 EHRR 533

<sup>50</sup> *Amuur v France* (1996) 22 EHRR 533, para 43.

for seven days to process their claims. This was also held to be a deprivation of liberty for Article 5(1) purposes.<sup>51</sup>

#### IV. Limitations and Derogations

##### Detention must be both legal and non-arbitrary

The concept of preventing arbitrariness in detention decisions is crucial to Article 5.<sup>52</sup> This comprises both complying with national law regarding the substantive and procedural grounds for detention but also complying with constraints imposed by Article 5 and its jurisprudence. The list of grounds permitting detention under Article 5(1) is thus exhaustive.<sup>53</sup> It is vital to note however that there is no general requirement that detention must be ordered by a court. Whilst Article 5(4) requires that detainees have access to judicial review in all cases, only criminal suspects must be brought by the government before a court under Article 5(3). The main safeguard against arbitrariness therefore lies in ensuring that national laws and practices are sufficiently clear and transparent that courts can assess the character and legality of detention rather than in judicial pre-authorisation.<sup>54</sup> There is a positive obligation upon States to protect individuals against arbitrary detention where they are aware or ought to be aware that it is occurring.<sup>55</sup> This is designed to ensure protection for those held by private actors such as hospitals and security firms which increasingly supplement state actors in management of prisons and detention centres.

##### Detention must be in accordance with the law

The most basic requirement here is that detention be in ‘accordance with a procedure prescribed by law.’ This means firstly that substantial national rules governing the detention must be complied with.<sup>56</sup> There is an unresolved question at present as regards which ‘law’ must be complied with; should it national or European Union law? Where there are two sets of standards there is scope for confusion. This is particularly so with EU Directives which, according to Article 288 TFEU, should be implemented in national law but are sometimes incorrectly transposed or neglected altogether. It is thus not clear which norms should bind national officials for the purpose of Article 5. The principle of legal certainty suggests that detainees should be able to easily know the sources of law relied upon for their detention and the limitations upon this power. Nevertheless, it is submitted that, given the importance of the right in question, the rules most favourable to the preservation of liberty should be the ones

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<sup>51</sup> See *Saadi and Others v United Kingdom* (Appn. 13229/03), 11 July 2006 where detention in a military barracks which allowed movement within it but not beyond it was held to be caught by Article 5(1). See also Executive Committee of UNHCR, Standing Committee, ‘Detention of Asylum seekers and Refugees: the Framework, the Problem and Recommended Practice’ (15th meeting, 4 June 1999, EC/49/SC/CRP13) which confirms airport transit zones are places of detention.

<sup>52</sup> *Bazorkina v Russia* (App.69481/01), 27 July 2006, (2008) 46 EHRR 261, para 146.

<sup>53</sup> *Ireland v UK* (App. No. 5310/71) judgment of 18 January 1978, Rep. 1978-25.

<sup>54</sup> *Bazorkina v Russia* (App.69481/01), 27 July 2006, (2008) 46 EHRR 261, para 146.

<sup>55</sup> *Storck v Germany* (App.61603/00), 16 June 2005, (2006) 43 EHRR 96.

<sup>56</sup> *Benham v UK* (App. 19380/92), 10 June 1996, (1996) EHRR 293. *Riad and Idias v Belgium* (App. No. 29787/03 and 29810/03) in which the authorities continued to detain after judicial orders to release had been made.

that are binding on officials. This is increasingly important because EU law now imposes time-limits upon detention under the Framework Directive on the European Arrest Warrant, the Returns Directive and the recast Dublin II Regulation. Depending upon the precise circumstances, it might be that a combination of domestic and EU norms should therefore be considered binding. Certainly, in relation to Article 3 ECHR at least, the European Court of Human Rights has found that breach of a Directive can contribute to creating liability.<sup>57</sup>

If the applicable law states that the detention power may only be exercised when strictly necessary, failure to show how this was met renders the decision not in accordance with the law.<sup>58</sup> The laws must be operated in good faith and not involve, for example, the use of deception to induce persons to surrender themselves.<sup>59</sup> Merely procedural errors will however not infringe the principle.<sup>60</sup> More importantly, even if the national rules are complied with, the Convention requires these to meet minimum standards of clarity and accessibility. Thus when in *Amuur v France*<sup>61</sup> the detention procedures were contained in an unpublished circular which was not available to lawyers or detainees and did not state clearly the limits upon detention nor the available judicial remedies, this was a breach. The detainee should have the reasons for detention and remedies explained to them in their own language, be afforded access to an interpreter and given the possibility to contact a lawyer.<sup>62</sup> There must be a reasoned decision which shows how the detention is justified in terms of the national legal framework.<sup>63</sup> Overall, the rules governing detention must enable the detainee to understand the basis for detention, the conditions upon its prolongation and provide predictable guidelines as to its exercise.<sup>64</sup>

#### Imprisonment after conviction by a court

In its case-law on Art 5(1)(a) the ECtHR has found that the crucial issue is that imprisonment follows conviction by an independent court, with power under domestic law to order the detention in question, which is separate from both the executive branch of government and the parties.<sup>65</sup> The imprisonment may commence immediately upon conviction whilst an appeal is pending.<sup>66</sup> The merits of the conviction are not examined by the ECtHR under Article 5.<sup>67</sup> Indeed, time spent in detention is not rendered unlawful by the subsequent quashing of the conviction upon which it was based.<sup>68</sup> The returning of convicted prisoners to detention after their release on license falls within Article 5(1)(a) so long as there is a sufficient connection between the original conviction and any new risk posed by the prisoner.<sup>69</sup> The Strasbourg Court has approved preventive detention, following conviction by a court, where the sentencing court later rules that the prisoner's release would be a danger to

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<sup>57</sup> *M.S.S. v Belgium and Greece* (App. No. 30696/09), 21 January 2011, para.263.

<sup>58</sup> *Rusu v Austria*, (App. No. 34082/02), 2 October 2008.

<sup>59</sup> *Conka v Belgium* (App. 51564/99), 5 February 2002, (2002) 34 EHRR 1298

<sup>60</sup> *Mooren v Germany* (App.11364/03), 9 July 2009.

<sup>61</sup> *Chahal v UK* (1996) 22 EHRR 533

<sup>62</sup> *Conka v Belgium* (App. No. 51564/99) 5 February 2002, (2002) 34 EHRR 1298

<sup>63</sup> *Lokpo v Hungary* (App. No. 10816/10) , 20 September 2011.

<sup>64</sup> *Baranowski v Poland* (App. 28358/95), Judgment of 28 March 2000

<sup>65</sup> *De Wilde, Ooms and Versyp* ('Vagrancy') v Belgium (App. Nos. 2832/66, 2835/66 and 2899/66) judgment of 18 June 1971 Ser. A, No.12.

<sup>66</sup> *Wemhoff v Germany* (App. No. 2122/64), Judgment of 27 June 1968, Ser A, No.7.

<sup>67</sup> *Weeks v UK* (App. No. 9787/82) Judgment of 2 March 1987, Ser A 114.

<sup>68</sup> *X v Austria* (App. No. 3245/67), Judgment of 4 February 1969.

<sup>69</sup> *Stafford v UK* (App. No 46295/9), Judgment of 28 May 2002.

public security so long as the power is not one that was created to apply retrospectively to persons already convicted.<sup>70</sup>

Where a prisoner has been detained based upon a criminal conviction that breaches EU law, the position under Article 5(1)(a) is unresolved. Whilst subsequent quashing by a higher court does not normally render detention out-with Article 5(1)(a), different considerations may apply when a conviction breaches well-established EU law principles and therefore, arguably, a national court lacks jurisdiction to impose liability.<sup>71</sup> The most important limits in general terms are those relating to Directives. Because these instruments normally require national implementation, there is a risk of legal uncertainty. The Court of Justice has therefore held that national courts must not use a Directive as the basis for imposing or worsening criminal liability that did not clearly arise under national law.<sup>72</sup> Furthermore, EU measures must not found the basis for criminal liability which is imposed retrospectively.<sup>73</sup>

More specifically, recent decisions by the Court of Justice in relation to unlawful migration have limited the ability of Member States to impose criminal sanctions for immigration offences. The Court found that the administrative provisions in the Returns Directive must be complied with to secure speedy expulsions of non-EU citizens.<sup>74</sup> Member States were not allowed to impose detention following criminal conviction for illegal stay before the administrative measures had been applied. This means that imposing liability for offences of failing to leave after a removal order had been served or illegal entry were in breach of Union law.<sup>75</sup> Member States have the power to impose “penal sanctions” under national law on irregular migrants only after the administrative measures have been applied and failed. A fine for illegal stay may be imposed but not detention in lieu of payment unless removal is not possible at that time.<sup>76</sup>

It is EU policy to ensure mutual recognition of criminal convictions and sentences by the Member States to allow migrant prisoners convicted in one State to be returned to complete their sentences in their home states. This is facilitated by a Council Framework Decision.<sup>77</sup> The compatibility of this with Article 5 ECHR is however unclear because Member States adopt different approaches to early release. If the ‘competent court’ sentencing in the first Member State would have released a prisoner earlier than occurs in the home Member State, this would arguably render their continued detention unlawful. Finally, the existence of mutual recognition of Supervision Orders under the Framework Decision means that EU criminal courts should not impose a custodial sentence on a non-resident where a non-custodial sentence would be given to a resident. To do so would be discriminatory on grounds of nationality/residence and would arguably breach Article 5 ECHR combined with Article 14 ECHR. It would also breach more general EU standards relating to free movement

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<sup>70</sup> *Schmitz v Germany* (App. No. 30493/04), judgment of 9 June 2011.

<sup>71</sup> *Benham v UK* (App.19380/92), judgment of 10 June 1996 held that apart from lack of bona fides, conviction by a court of competent jurisdiction generally justifies detention under Article 5(1)(a).

<sup>72</sup> Case C-80/86 *Kopinghuis Nijmegen* [1987] ECR 3969.

<sup>73</sup> Case C-63/83 *Regina v Kent Kirk* [1984] ECR 2689.

<sup>74</sup> *El Dridi* (C-61/11 PPU) [2011] 3 C.M.L.R. 6.

<sup>75</sup> *Achughbabian* (C-329/11) [2012] 1 C.M.L.R. 52.

<sup>76</sup> Case C-430/11 *Md Sagor*, Judgment of 6 December 2012.

<sup>77</sup> Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments imposing sentences or measures involving deprivation of liberty (OJ L 327, 5.12.2008, p.27)

and the equal treatment of Union citizens under Article 18 and 20 of the TFEU. This is because to imprison a person because they are non-resident indirectly discriminates on grounds of nationality. Whilst formerly the absence of a system of mutual recognition of non-custodial orders might have justified such discrimination, the new legislative framework means this can no longer be the case.<sup>78</sup>

Detention for non-compliance with a lawful court order or to secure compliance with a legal obligation

The first part of Art 5(1)(b) ECHR pertains to the process by which a court seeks to secure the attendance of a witness at trial or that a witness undergo a medical examination. Wilful failure to pay a tax could also support detention.<sup>79</sup> Whilst Art 5(1)(b) on its face authorises detention to compel repayment of a contractual debt, Article 1 of the Fourth Protocol to the Convention says that ‘No one shall be deprived of his liberty merely on the ground of inability to fulfil a contractual obligation.’ The second part of Art 5(1)(b) is more controversial because it allows a non-judicial body to detain a person to secure compliance with administrative or security operations. The classic example would be enforcing attendance for military service. The ECtHR has held that legal obligations entailing the risk of detention must be specific and should clearly state that liability to detention arises in such cases.<sup>80</sup> Art 5(1)(b) does not entail a more general power to detain to prevent crime or threats to public order or safety. All such detention must conform to the principle of proportionality and thereby strike a reasonable balance between the fulfilling the legal obligation and the deprivation of liberty. This requires an examination of the object of the legal obligation, the characteristics of the person detained and the duration of detention.<sup>81</sup>

Detention pending trial: the arrest period and the remand period

Article 5(1)(c) authorizes and regulates detention pursuant to criminal proceedings from arrest through to trial and acquittal or conviction. It must be read with Article 5(3) which governs the arrest period and any remand in custody. The literal text of Article 5(1)(c) contemplates detention in three cases; (1) where there are reasonable grounds for suspecting that an offence has been committed but also (2) when it is reasonably considered necessary to prevent the commission of an offence or (3) to prevent someone fleeing having done so. Although this apparently permits preventive detention, case-law has determined that the power to detain under Art 5(1)(c) generally arises only where there are reasonable grounds for suspecting that a specific offence has been committed. Only a concrete and specific threat can support preventive detention.<sup>82</sup> Because most acts preparatory to the commission of serious crimes are themselves crimes, there is rarely a need to rely upon the preventive detention justification. Furthermore, in any event, the purpose of detention must be to bring the suspect to trial before the competent authority.<sup>83</sup>

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<sup>78</sup> Case C-224/00 *Commission v Italian Republic*, judgment of 19 March 2002 which confirmed that the absence of mutual recognition meant that non-residents could be subject to different measures relating to criminal penalties.

<sup>79</sup> *Benham v UK* (App.19380/92), judgment of 10 June 1996, (1996) 22 EHRR 293.

<sup>80</sup> *Lawless v Ireland* (App. No. 332/57) judgment of 1 July 1961, Ser A, No.3; *Engel v Netherlands* (App. No.s 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72) judgment of 8 June 1976, Ser. A, No.22

<sup>81</sup> *Vasileva v Denmark*, (App. 52792/99), judgment of 25 September 2003.

<sup>82</sup> *Guzzardi v Italy* (App. 7367/76), judgment 6 November 1980, Series A, No.39. It is still not finally settled as to whether the competent authority itself may order preventive detention instead of trial.

<sup>83</sup> *Lawless v Ireland* (App. No. 332/57) judgment of 1 July 1961, Ser A, No.3.

Although Art 5(1)(c) does not itself impose a duty to use arrest as a last resort, national law often *will* require proof that arrest is necessary in order to investigate the suspected crime because of a risk of absconding. The arrest of a person should be effected on the basis of a warrant issued by a competent court but in urgent cases police may arrest without a warrant. The standard of proof is that of ‘reasonable suspicion’ that an offence has been committed, which entails facts or information that would satisfy an objective observer.<sup>84</sup> The appraisal of whether evidence meets this standard is generally for the national court to decide subject only to oversight by the European Court of Human Rights. In combating terrorism, a lighter evidential burden is imposed, but there must still be objective evidence of the commission of an offence.<sup>85</sup>

Whilst the initial grounds for arrest must conform to Article 5(1)(c), thereafter continued detention must comply with Article 5(3) which requires both that a suspect be brought promptly before a judicial officer following arrest and thereafter tried within a reasonable time or released on bail pending trial. ‘Promptly’ does not mean a set period in all cases but in ordinary criminal cases, not involving national security, several days is the limit.<sup>86</sup> Detention beyond this period is unlawful unless a derogation under Article 15 has been validly entered.<sup>87</sup> Even in cases involving a derogation however a period of two weeks in incommunicado detention was a breach of Article 5(3).<sup>88</sup> The officer before whom the detainee is brought must be sufficiently independent of the prosecution process.<sup>89</sup>

Once the detainee has been brought before a judicial officer, there is a presumption that they must be released on bail<sup>90</sup> unless their detention pending trial is necessary. The case-law goes beyond the text of Article 5(3) which appears to permit detention which is not necessary so long as the trial takes place within a reasonable time. Even where there is strong evidence the accused has committed a serious offence, this does not in itself justify remand beyond a short period.<sup>91</sup> Mandatory pre-trial detention is unlawful as each case must be assessed individually.<sup>92</sup> The Strasbourg court has not given an exhaustive list of the grounds for remanding in custody but has thus far endorsed the use of pre-trial detention to prevent absconding, the commission of offences or interference with the trial processes.<sup>93</sup> The national court must consider whether a risk of absconding can be avoided by bail or other restrictions<sup>94</sup> and these must be tailored to the individual detainee’s financial situation rather

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<sup>84</sup> *Erdagoz v Turkey* (App. 21890/93), Judgment of 22 October 1997.

<sup>85</sup> *Fox, Campbell and Hartley v UK* (App. 37555/97), judgment of 16 October 2001.

<sup>86</sup> *Brogan v United Kingdom*, 29 November 1988, Series A No.145-B, (1989) 11 EHRR 117.

<sup>87</sup> *Brannigan and McBride v United Kingdom*, 26 May 1993, Series A No.258-B, (1994) 17 EHRR 539.

<sup>88</sup> *Aksoy v Turkey* (App.21987/93), 18 December 1996, (1997) 23 EHRR 553.

<sup>89</sup> *Assenov v Bulgaria* (App.24760/94), 28 October 1998, (1998) 28 EHRR652.

<sup>90</sup> *McKay v United Kingdom* (App.543/03), 3 October 2006 [GC], (2007) 44 EHRR 827.

<sup>91</sup> *Tomasi v France*, 27 August 1992, Series A No. 241-A, (1993) 15 EHRR 1.

<sup>92</sup> *Caballero v United Kingdom* (App. 32819/96), 8 February 2000. (2000) 30 EHRR 643.

<sup>93</sup> *Barfuss v Czech Republic* (App.35848/97), 31 July 2000, (2002) 34 EHRR 948. *Assenov v Bulgaria* (App.24760/94), 28 October 1998, (1998) 28 EHRR652. *Wemhoff v Germany*, 27 June 1968, Series A No.7, (1979-80) 1 EHRR 455.

<sup>94</sup> *Wemhoff v Germany*, 27 June 1968, Series A No.7, (1979-80) 1 EHRR 455.

than set at an excessive or fixed level.<sup>95</sup> In the case of non-resident defendants, the possibility of imposing an EU Supervision Order must be considered as an alternative to custody where concerns about absconding to another Member State exist.

The substantive grounds for remand must be reviewed and justified on an ongoing basis, even if the initial remand in custody was justified.<sup>96</sup> Even where the substantive grounds for remand are adequate, the period of detention itself must also be reasonable which is assessed in view of all the circumstances of the case. The starting point is that detention infringes a fundamental right of a person presumed to be innocent and the authorities therefore have to show that they acted with special diligence in bringing the case to trial.<sup>97</sup> Where there have been significant periods of inactivity in the prosecution lasting months (sometimes resulting in pre-trial detention for several years) a violation of Article 5(3) has been found.<sup>98</sup>

In the EU context, there are wide variations in the rules and processes in the different Member States regarding pre-trial detention. These divergences are significant in the context of the European Arrest Warrant for two reasons. First, the possibility that a person surrendered will be subject to a long period of pre-trial detention may raise an issue of fundamental rights for the surrendering court. The European Council identified this as an obstacle to judicial cooperation in the Stockholm programme. Second, the availability of the European Arrest Warrant procedures means that there is an alternative to pre-trial detention in cases where a suspect lives in another Member State. Previously, criminal courts might choose to detain pending trial (or impose a custodial sentence) simply because they feared that a person would abscond back to their home country and that ensuring their return to face trial (or their completion of a non-custodial sentence) would be difficult. Compliance with Article 5(3) ECHR would require that a court consider these less restrictive measures as an alternative to remand in custody.

#### Detention of minors

Art 5(1)(d) permits detention of minors for the purpose of educational supervision or to bring them before a competent legal authority (usually the juvenile courts seized of non-criminal cases). It does however preclude detention under any other heading of Article 5 such as pursuant to criminal proceedings. The official age of majority varies between States. The concept of a 'minor' however has an autonomous meaning for Art 5(1)(d) purposes which is distinct from national law and is presently eighteen.<sup>99</sup> Under the first limb, the detention must have genuine educational aspects in order to be lawful. Where a boy was detained in an adult prison, prior to placement, because no suitable juvenile institution would accept him immediately, there was a violation.<sup>100</sup> This said, the concept of 'educational supervision' is flexible and not to be equated with traditional classroom teaching; the crucial issue is that a caring regime, including education elements, is provided.

#### Detention for the purpose of health or social protection

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<sup>95</sup> *Punzelt v Czech Republic* (App.31315/96), 25 April 2000, (2001) 33 EHRR 1159.

<sup>96</sup> *McKay v United Kingdom* (App.543/03), 3 October 2006 [GC], (2007) 44 EHRR 827.

<sup>97</sup> *Wemhoff v Germany*, 27 June 1968, Series A No.7, (1979-80) 1 EHRR 455.

<sup>98</sup> *Kauczor v Poland* (App.45219/06), 3 February 2009. *Pilla v Italy* (App.64088/00), 2 March 2006.

<sup>99</sup> *Koniarska v UK* (App. 33670/96), admissibility decision of 12 October 2000.

<sup>100</sup> *Bouamar v Belgium*, judgment of 29 February 1988, Series A, No.129.

On a literal reading, Art 5(1)(e) permits detention of a wide group of persons without court order including drug addicts, alcoholics, the mentally ill and those with infectious diseases. In practice, the ECtHR has limited this wide power in several respects. First, it requires that detention be used only to protect the safety of either the detainee or the public.<sup>101</sup> Second, such detention must only be used when necessary and no alternative means for protecting the public less draconian than detention will suffice.<sup>102</sup> Finally, the detention must strike a reasonable balance between the public interest and the liberty of the detainee. In the special case of person with mental illness, the Court has imposed more detailed guidance in the case of *Winterwerp v Netherlands*<sup>103</sup> where it said that mental illness must be established by objective medical evidence, that the condition must make detention necessary, that the detention must be justified on an ongoing basis and, later, that the place and conditions of detention must be suitable – a hospital or clinic not a prison.<sup>104</sup>

### Detention for immigration control and extradition purposes

The most important areas of Union competence and law-making impinging on liberty relate to immigration powers over non-EU citizens and the extradition of suspects and convicted criminals. Both these restrictions on liberty fall under the justification in Article 5(1)(f) and there is extensive Strasbourg case-law interpreting this provision that will be set out below

### No Requirement that Detention be Necessary in Immigration Cases

The Strasbourg court has consistently contrasted Article 5(1)(f) with detention under the other headings of Article 5(1) by ruling that detention need not be necessary and proportionate to secure the deportation or extradition of a detainee nor to prevent their illegal entry.<sup>105</sup> This also contrasts with remand pending prosecution which requires a specific public policy reason, such as a risk of absconding, for continuing detention pursuant to Article 5(3).<sup>106</sup> The basis for this distinction is that sovereign states have the right to control their borders and that aliens without permission to remain do not have the same general right to liberty as citizens. Instead of the usual proportionality test, the Strasbourg court has therefore applied a test of arbitrariness to Article 5(1)(f) comprising four factors:

‘to avoid being branded as arbitrary...such detention must be carried out in good faith; 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 fearing for their lives, have fled from their own country”...and the length of the detention should not exceed that reasonably required for the purpose pursued’<sup>107</sup>

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<sup>101</sup> *Litwa v Poland* (App.26629/95), judgment of 4 April 2000; (2011) 33 EHRR 1267.

<sup>102</sup> *Enhorn v Sweden*, (App. 56529/00), judgment of 25 January 2005; (2005) 41 EHRR 633.

<sup>103</sup> Judgment of 24 October 1979, Series A, No.33; (1979-80) 2 EHRR 387.

<sup>104</sup> *Aerts v Belgium* (App.25357/94) Judgment of 30 July 1998; (1999) 29 EHRR 50.

<sup>105</sup> *Chahal v UK*, (App. No. 22414/93), 23 EHRR 413 (1997), Para 112.

<sup>106</sup> See *Scott v Spain* (1997) 24 EHRR 391; *Caballero v United Kingdom* (App. 32819/96), Judgment of 8 February 2000; *Barfuss v Czech Republic* (2002) 34 EHRR 948.

<sup>107</sup> *Saadi and Others v United Kingdom* (Appn. 13229/03) Judgment of 11th July 2006

Thus in *Saadi*<sup>108</sup> the applicant, who had entered illegally and then sought asylum, was not considered a flight risk but was held for seven days in a closed reception centre as part of the processing of his asylum claim. The Grand Chamber accepted that this period of detention in relatively relaxed conditions with access to lawyers and interpreters did not breach Article 5(1)(f). It ruled that until a detainee had been given permission to enter or stay, such detention was sufficiently closely linked to the prevention of unauthorized entry even when a detainee had presented himself voluntarily to make an asylum claim. Detention of asylum seekers for processing their claims, whilst not formally subject to different principles to those governing detention of immigrants generally, is likely to infringe Article 5(1)(f) if the conditions or the duration are significantly more restrictive of liberty than those in *Saadi*, in the absence of other special factors, such as a flight risk.<sup>109</sup>

Whilst enforcing European Union legislation relating to irregular migrants, the Court of Justice has held that Member States must have a brief but reasonable time<sup>110</sup> to verify whether a third country national is an irregular migrant. During this time they must act with diligence and may detain the person concerned under the conditions provided for in national law. Once it has been established that the migrant has no right to remain on their territory they must issue a return order and proceed to enforce it. The object of that procedure is the physical transportation of the person concerned outside the Member State concerned<sup>111</sup> and it should take place as soon as possible.<sup>112</sup>

In keeping with the factors set out in *Saadi*, the conditions of detention for minors and other vulnerable groups raise particular issues and may breach Article 5 (as a distinct ground to any breach under Article 3 ECHR). In *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*,<sup>113</sup> a five year old unaccompanied minor was detained for two months in a centre designed for adults. She was not assigned any specialist care, counseling or education. The Court found a breach of Article 3 and referred to the obligation of the State to enable effective protection to be provided, particularly to children and other vulnerable members of society which should include reasonable measures to prevent ill-treatment of which the authorities have or ought to have knowledge.<sup>114</sup> In the case of *Muskhadziyeva v Belgium*<sup>115</sup> a family including four children aged between seven months and seven years were held together for one month in a closed detention centre designed for adults. In this case, the Court found a violation of Article 3 in respect of the children, despite the presence of their parents, because of the duration of detention, the age of the children, the medical evidence of psychological damage to one of them caused by ongoing detention and because of persistent adverse reports on the centre by independent monitors.<sup>116</sup> The court also found a violation of Article 5(1)(f) in the case of the children because the means used, including the place and

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<sup>108</sup> *Saadi and Others v United Kingdom* (Grand Chamber) (Appn. 13229/03). Judgment of 29 January 2008.

<sup>109</sup> See Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-seekers and Alternatives to Detention, UNHCR (2012), Geneva.

<sup>110</sup> *Achughbabian* (C-329/11), [2012] 1 C.M.L.R. 52. Judgment at [31]

<sup>111</sup> *Achughbabian* (C-329/11) at [37].

<sup>112</sup> *Achughbabian* (C-329/11) at [45].

<sup>113</sup> *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*, (App. No. 13178/03), 12<sup>th</sup> October 2006

<sup>114</sup> Para.53.

<sup>115</sup> (Appn. 41442/07), 19<sup>th</sup> January 2010.

<sup>116</sup> Para 57-63.

conditions of detention, were not closely linked to the objective of processing their cases.<sup>117</sup>  
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### Duration of Detention in Immigration Cases

The Strasbourg court has recognized that detention could be indefinite under Article 5(1)(f) if a state were able to justify detention merely by showing that immigration or extradition proceedings remained ongoing. Instead a state must show that such proceedings are being pursued with ‘due diligence.’<sup>120</sup> This requires a fact-specific examination of the steps taken by the authorities to process the proceedings, the complexity of the case and responsibility of the detainee for prolonging their detention. Long periods of detention has sometimes been found to be compliant with Article 5(1)(f). For example in *Chahal*, detention for six years in total, including periods of six and seven months waiting for initial and fresh decisions from the immigration authorities were held not to be a violation because of the serious nature of the case and the complexity. By contrast, in another, extradition, case the Court ruled that delays of three and ten months violated Article 5(1)(f).<sup>121</sup> In *Singh v Czech Republic*,<sup>122</sup> immigration detention of two and half years was criticised because it contained long periods of inactivity by the authorities when faced with practical obstacles to removal. Such obstacles to removal may require the detaining State to act ‘vigorously’ to secure travel documents or to negotiate with foreign States to satisfy the test.<sup>123</sup>

Expulsion must be a realistic prospect to justify continued detention. Where a State accepts that it cannot deport a person due to a legal or other obstacle that is not likely to be removed within a foreseeable period, then there is no justification for detention under Article 5(1)(f).<sup>124</sup> In *Mikolenko v Estonia*<sup>125</sup> the detainee had said at the outset he would not cooperate with documentation procedures and there was no readmission agreement with his country of nationality. The Court said that it must have become clear quite soon that expulsion attempts were bound to fail.<sup>126</sup> Strasbourg court found a breach due to the lack of a realistic prospect of his expulsion *and* the domestic authorities’ failure to conduct the

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<sup>117</sup> Para 73-75.

<sup>118</sup> These cases reflect consideration of Article 37 UN Convention on the Rights of the Child which requires that any detention ‘shall be used only as a measure of last resort and for the shortest appropriate period of time’ and Article 3 which requires that ‘the best interests of the child’ be the guiding standard for States parties. The Committee on the Rights of the Child said that unaccompanied children should not in general be detained but where this was exceptionally necessary the underlying approach to such a programme should be “care” and not “detention.” General Comment No.6, Treatment of Unaccompanied and Separated Children Outside their Country of Origin, 1<sup>st</sup> September 2005, CRC/GC/2005/6 para.63.

<sup>119</sup> This has been extended by the UN Special Rapporteur on the Human Rights of Migrants who said in 2009 that children should not be deprived of liberty as a sole consequence of their migratory status and that unaccompanied migrant children should not be detained at all. Annual report of the Special Rapporteur for the Human Rights of Migrants, Jorge Bustamante, 14 May 2009 A/HRC/11/7 at para.106.

<sup>120</sup> *Kolompar v Belgium* (1993) 16 EHRR 197. This can be seen as derived from the more general principle of effectiveness which is used by the Court in relation to all articles of the Convention. See for example *Airey v Ireland* (1979) 2 EHRR 305.

<sup>121</sup> *Quinn v France* (1995) 21 EHRR 529.

<sup>122</sup> (App. 60538/00), Judgment of 25 January 2005.

<sup>123</sup> *Raza v Bulgaria* (App. no. 31465/08) 11 February 2010.

<sup>124</sup> *A and others v United Kingdom* (App.3455/05), 19 February 2009 [GC], (2009) 49 EHRR 29.

<sup>125</sup> (App. no. 10664/05), Judgment of 8 October 2009.

<sup>126</sup> Para. 64.

proceedings with due diligence.<sup>127</sup> The Court also noted that he had been released on bail eventually without incident and therefore the authorities had at their disposal measures other than the applicant's protracted detention in the absence of any immediate prospect of his expulsion. This case suggests that the longer detention is prolonged, the more obligation there is to consider using alternative means such as release on bail, even if this was not required at the outset.

## Discussion of EU immigration and asylum measures pertinent to Article 5(1)(f) ECHR

Measures taken by the European Union and their application by the Member States must comply with Article 6 of the Charter and the principles set out above in relation to Article 5(1)(f) ECHR. The following discussion considers some of the main EU measures in this context.

### Immigration Measures

The common code<sup>128</sup> on border movements which sets out the rules governing non-EU citizens seeking to enter the Union at the border of any Member State.<sup>129</sup> Persons not fulfilling the requirements for entry 'shall be refused entry to the territories of the Member States.'<sup>130</sup> Where this occurs 'border guards *shall ensure* that a third-country national refused entry does not enter the territory of the Member State concerned.'<sup>131</sup> [italics added] This authorizes physical restraint in cases of resistance but 'any measures taken in the performance of [border guards] duties shall be proportionate to the objectives pursued by such measures.'<sup>132</sup> Guards must also not discriminate on specified grounds and must 'fully respect human dignity.'<sup>133</sup> These provisions permit detention. They may be consistent with Article 5(1)(f) ECHR in that they seek to prevent unlawful entry into the Union but they must be operated in accordance with the principles discussed above.

### Detention of Resident Third Country Nationals

The Long-resident Directive confers powers of expulsion and/or withdrawal of residence permits on public policy grounds and therefore impliedly authorises detention.<sup>134</sup> Member States expelling a non-EU citizen 'shall take all the appropriate measure to effectively implement it.'<sup>135</sup> Similar considerations apply to the Family Reunification Directive<sup>136</sup> which gives rights to non-EU citizens to join and reside with their non-EU resident families in the

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<sup>127</sup> Para.68.

<sup>128</sup> Regulation 562/2006 of the European Parliament and of the Council of 15 March 2006 establishing a community Code on the rules governing the movement of persons across borders (Schengen Borders Code).

<sup>129</sup> The exceptions are refugees, asylum seekers and those non-EU citizens benefiting from third-country agreements (Article 3).

<sup>130</sup> Article 13(1).

<sup>131</sup> Article 13(4).

<sup>132</sup> Article 6(1).

<sup>133</sup> Article 6(1)(2).

<sup>134</sup> Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (OJ 2004 L 16, p. 44) Articles 6, 12, 17 and 22 set out substantive and procedural protection against expulsion or deportation that mirrors some of the concepts found in relation to EU citizens. For a detailed analysis see S. Peers, 'Implementing Equality? The Directive on Long Term Resident Third Country Nationals', [2004] 29(4) ELRev, 437.

<sup>135</sup> Article 22(3).

<sup>136</sup> Council Directive 2003/86/EC of 22 September 2003 on the right to family reunification (OJ 2003 L 251, p. 1).

Union.<sup>137</sup> There are public policy exclusion and expulsion powers<sup>138</sup> but again there is no requirement to implement these orders by arrest and detention.<sup>139</sup> These implied powers of detention must be operated in a manner consistent with the principles discussed above.

### Detention in Asylum Claims

The EU measures bearing on the detention of asylum-seekers are not found in a single instrument. The most important source is however the Reception Conditions Directive which governs the treatment of all asylum-seekers from outside the EU during the processing of their claims and any appeals against refusal of asylum. It also covers fresh claims made subsequent to earlier claims being rejected.<sup>140</sup> Whilst an asylum application or appeal against refusal of asylum are on-going, this Directive applies, even where deportation or removal orders are in place. The Court of Justice has held that only when no such asylum application or appeal is on foot will the Returns Directive apply to regulate, inter alia, detention of irregular migrants.<sup>141</sup> This unfortunately means that a detainee may fall in and out of the two detention regimes – pertaining to asylum and irregular migration - depending whether they have an ongoing asylum claim. The present Reception Conditions Directive does not provide a clear and detailed code on detention of asylum-seekers but the basic elements are discernible. Article 7(1) of the Directive (based on Article 31 of the Refugee Convention) confirms that asylum-seekers may move freely within the territory of the host Member State or within an area assigned to them. Their place of residence may be assigned on the basis of public interest, public order or the need for swift and efficient processing of claims. Under Article 7(3) detention is permissible where it proves necessary for ‘legal reasons or reasons of public order.’<sup>142</sup> These reasons are not further defined but must be read in conformity with Article 6 of the Charter. Therefore, detention must only be imposed to prevent an immediate threat of the commission of a specific criminal offence or to prevent the effecting of an unlawful entry into the country in accordance with the principles in *Saadi*. In both cases, any detention must conform to the principles set out above regarding Articles 5(1)(b) and 5(1)(f) ECHR.

Under Article 18 of the Procedures Directive no one may be detained solely because they have made an asylum claim. Detention purely for administrative reasons in order to process a claim is not expressly authorised by the Reception Conditions Directive but such a practice is compatible with Article 6 if the period is brief in accordance with the *Saadi* decision. *Saadi* also held that the conditions of detention must take into account the vulnerable position of

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<sup>137</sup> Article 6.

<sup>138</sup> Recital 14 speaks of ‘public policy may cover a conviction for committing a serious crime’ also public security and policy include someone who ‘belongs to an association that supports terrorism, supports such an association or has extremist aspirations.’

<sup>139</sup> We can also mention the Students Directive which provides common standards for admission of students from outside the Union but no express discussion of detention powers in the Directive. Council Directive 2004/114/EC of 13 December 2004 OJ L 375/12 23.12.2004 on the conditions of admission of third-country nationals for the purposes of studies, pupil exchange, unremunerated training or voluntary service.

<sup>140</sup> See *R(on the application of ZO(Somalia) and others) (Respondents) v Secretary of State for the Home Department (Appellants)* [2010] UKSC 36 for a decision by the Supreme Court in the United Kingdom which was acte clair and not referred to the Court of Justice.

<sup>141</sup> *Kadzoev* (C-357/09 PPU) [2009] E.C.R. I-11189.

<sup>142</sup> The Union legislature did not even use the term ‘detention’ and it only appears in the definitions section where ‘detention’ is referred to as including confinement to a particular place (Article 2(k)). ‘Detention’ is thus a label applied to ‘confinement to a particular place’ which is authorised by Article 7 rather than, more logically, the other way around.

asylum-seekers. The Reception Conditions Directive requires that accommodation be specifically-provided for this purpose (Article 14) unless exceptional circumstances apply (Article 14(8)) justifying a short period in non-suitable accommodation. Unaccompanied minors must be housed with relatives, foster carers or in accommodation centres that have special provision for minors (Art 19). For minors generally, there is an obligation to provide education (Art 10) but this may occur within an accommodation centre. Whilst there is no general obligation not to detain minors their best interests must be a primary consideration (Art 18). To comply with the case-law on Article 5 ECHR, minors should not be detained for long and only in facilities that are caring and educational in nature.

The agreed revised Reception Conditions Directive goes much further in setting out and regulating conditions for detention.<sup>143</sup> It confirms the basic right to free movement within the territory.<sup>144</sup> Detention must therefore be shown to be necessary, after an individual assessment has been made and when less coercive measures cannot be applied effectively, in order to: (a) verify identity or nationality (b) determine an asylum claim where this would not otherwise be possible because of, in particular, a risk of absconding; (c) decide on a applicant's right to enter the territory (d) effect removal under the Returns Directive where there are reasonable grounds to believe that the application for international protection was made merely to delay or frustrate the return decision (e) when national security or public order requires it and (f) to fulfil the procedure for returns to another Member State under the Dublin II Convention. Even the revised Directive does not contain a maximum period of detention for all asylum-seekers but must be as short as possible and accompanied by due diligence in procedures.<sup>145</sup> It is arguable that where detention is purely administrative, as under headings (a) and (c) it must not exceed the short period of seven days that formed the benchmark in *Saadi*. Detention under (f) must be justified separately under the specific rules (and follow the time-limits) set out in the Dublin II Regulation (see below for discussion of the revised Regulation) which must be considered as *lex specialis*. It is not clear if detention under heading (d) must be viewed as occurring under the Reception Conditions Directive during the period when a protection claim made by a detainee is under consideration.<sup>146</sup> In

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<sup>143</sup> Position of the Council at first reading with a view to the adoption of a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast), 2008/0244 (COD), 14 December 2012. Arts. 8-11. These provisions somewhat reflect elements of UNHCR Executive Committee Conclusion No.44 (1986) Detention of Refugees and Asylum Seekers.

<sup>144</sup> Article 7.

<sup>145</sup> Art 9 (1).

<sup>146</sup> The issues of uncertainty in relation to heading (d) arise because a basic right to freedom of movement attaches to all persons making a protection claim under both the old and revised Directives. A person who is validly detained under the Returns Directive when they make their protection claim is, in principle, entitled to be released whilst their claim is on-going as their status is then governed by the Reception Conditions Directive. Certainly a fresh decision on the necessity of detention must be made. Time stops running for the purposes of the Returns Directive too. These matters were confirmed by the CJEU in *Kadzoev* in relation to the old Directive which did not contain ground (d). One ground for detention under the Returns Directive is the existence of a risk of absconding, which can also support on-going detention of persons with protection claims outstanding (see ground (b) above). The revised Reception Conditions Directive however goes further and authorises on-going detention where the intention of the detainee in making the protection claim is believed to be to frustrate removal. This raises difficulties because it is difficult to judge why a protection claim is made; particularly until it has been considered on the merits, the motive for such a claim remains a matter of speculation. A risk of absconding forms a more legally certain basis for detention. A further uncertainty is that such a finding indicates that the protection claim is believed to be fraudulent. The implication is that ongoing

general terms, detention may be ordered by judicial or administrative authorities. If authorised by an administrative body it must however be reviewed speedily *ex officio* and/or at the request of the detainee. This provision appears to permit Member States to choose not to require automatic judicial review so long as detainees can themselves initiate speedy proceedings. There must be reviews of detention at reasonable intervals, particularly when it is prolonged or new information bearing on its justification arises.

The current Dublin II Regulation is silent on detention itself, as opposed to removal to another EU Member State for processing, for which there is a detailed time-table. This contemplates removal occurring within six months in most cases. The Court of Justice has ruled that Member States are required to adhere to the obligation under the Reception Conditions even for persons whom they believe are the responsibility of another Member State.<sup>147</sup> This should therefore regulate their detention. The lack of a code to regulate detention during this period led the European Commission to propose detailed amendments to the Regulation.<sup>148</sup> The principle has been accepted by the legislature now which has endorsed a much more comprehensive system. The new rules permit detention only when there is a significant risk of absconding, based upon an individual assessment. Detention must be proportional and used only when other non-custodial alternatives cannot be effectively applied.<sup>149</sup> The duration of detention must be for as short as possible and due diligence must be shown in processing the return application. Most importantly, there are now time-limits on detention.<sup>150</sup> Thus a take charge or take back request must be made within one month of the asylum application. The detainee must be released if this is exceeded. A reply should be issued within two weeks by the requested Member State. Failure to do so means the request is deemed accepted. The transfer must occur within six weeks of this implied acceptance (or of the date of an express acceptance if earlier). The detainee must be released if this time-limit (in effect a maximum of twelve weeks) is breached.

#### Detention pursuant to Expulsion under the Returns Directive

The most important Union law authorising detention is the Returns Directive. It provides a comprehensive system for regulating detention in all cases when a third-country national is found to be illegally present in the EU. This Directive also applies to asylum-seekers whose claims have been rejected if they have no valid permission to stay and no asylum appeal ongoing.<sup>151</sup> The Directive does contain elements that go beyond the obligations set out by the

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detention following such a finding is then authorised by the Returns Directive (not the Reception Conditions Directive) even whilst the allegedly fraudulent claim is processed. This means that the time-limits under the Returns Directive will apply even whilst the asylum claim is ongoing. The 'clock' will only stop between the making of the protection claim and a finding that ground (d) applies.

<sup>147</sup> Case C-179/11, *Cimade v Ministere de L'Interieur*, judgment of 27 September 2012.

<sup>148</sup> Proposal for a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or stateless person COM (2008) 820 final, 3 December 2008. Article 27.

<sup>149</sup> Position of the Council at first reading with a view to the adoption of a Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), 2008/0243 (COD), 14 December 2012, Article 28.

<sup>150</sup> Art 28(3).

<sup>151</sup> *Kadzoev* (C-357/09 PPU) [2009] E.C.R. I-11.

Strasbourg court under Article 5(1)(f). Thus a period allowing voluntary return must be considered before detention and expulsion are ordered unless there is a risk of absconding, the migrant's stay was fraudulent or there is a risk to public policy or security (Article 7). Detention is only possible where there is a risk of absconding or the immigrant hampers the removal process (Article 15(1)). Detention must therefore be necessary to prepare or carry out the removal process. Detention must be for as short a period as possible and only maintained whilst removal arrangements are in progress and executive with due diligence. Detention must cease immediately when it appears that there is no longer a reasonable prospect of removal. Most importantly, the periods of detention are regulated explicitly limited under Article 15 which imposes time-limits of six months (Article 15(5) (extendable by a further twelve months in cases of non-cooperation by the detainee or third countries (Article 15(6)). The Court of Justice considered these provisions in *Kadzoev*.<sup>152</sup> The Court held that there is a reasonable prospect of removal only where it appears that the migrant will be admitted to a third country within the 18-month period provided for in article 15(5) and (6).<sup>153</sup> Thus, that period performs a double function: it is the limit on pre-removal detention and the benchmark for assessing whether there is a reasonable prospect of removal.<sup>154</sup> This is however potentially inconsistent with the judgement in *Mikolenko*<sup>155</sup> which held that where a detainee refuses from the outset to co-operate then there can be no realistic prospect of removal and the further detention is a breach of Article 5(1)(f). The judgment in *Kadzoev* however makes clear that detention under the Returns Directive cannot exceed the 18-month limit set in article 15(6); where this is reached, the detained migrant must be released immediately, regardless of public order concerns, because the removal process is then at an end.

#### Detention Pursuant to the European Arrest Warrant<sup>156</sup>

The expedited procedures under the Framework Decision on the European Arrest Warrant must be viewed as a type of extradition proceedings and therefore subject to the same principles as set out above for Article 5(1)(f) ECHR. The issuing judicial authority in one Member State directs an arrest warrant at an executing judicial authority in another Member State with a view to securing the arrest and surrender of a requested person for the purpose of conducting a criminal prosecution or executing a custodial sentence or detention order.<sup>157</sup> Recital 12 states that the Framework Decision 'respects fundamental rights and observes the principles...reflected in the Charter of Fundamental Rights of the European Union'. The Framework Decision itself does not however contain a detailed regulatory code on arrest and detention as distinct from the main proceedings. The main Article authorising arrest refers only to national law:

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<sup>152</sup> *Kadzoev* (C-357/09 PPU) [2009] E.C.R. I-1189, noted by G. Cornelisse (2011) 48 C.M.L.Rev. 925.

<sup>153</sup> *Kadzoev* (C-357/09 PPU) at [64]-[66].

<sup>154</sup> This contrasted with the approach of the Advocate General Mazák who emphasised that the Directive's provisions on maximum limits of detention were an expression of the principle of proportionality, which is referred to in Recital 16. Finally, he took the view that "reasonable prospect of removal" in article 15(4) means "realistic prospect" of carrying out the removal within a "reasonable time". No such realistic prospect exists where it is unlikely that a third country will agree to admit the detained migrant in the "reasonably near future" or where removal on the basis of a readmission agreement is not possible within a "reasonable period"

<sup>155</sup> (App. no. 10664/05), Judgment of 8 October 2009.

<sup>156</sup> Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States (2002/584/JHA)

<sup>157</sup> Framework Decision, Article 1(1).

‘When a person is arrested on the basis of a European arrest warrant, the executing judicial authority shall take a decision on whether the requested person should remain in detention, in accordance with the law of the executing Member State. The person may be released promptly at any time in conformity with the domestic law of the executing Member State, provided that the competent authority of the said Member State takes all the measures it deems necessary to prevent the person absconding.’ (Article 12)

Article 12 assumes that a person will be arrested at the outset and that only thereafter will release be considered. This is not inconsistent with Article 5(1)(f) ECHR in so far as the arrest relates to a person ‘against whom action is being taken with a view to deportation or extradition’. Article 12 goes further than Article 5(1)(f) in suggesting that release may occur so long as measures to prevent absconding are taken. Other provisions in the Framework Decision relating to the main proceedings also provide procedural guarantees pertinent to Article 5 ECHR. Thus Article 11 provides the detainee with the right to know the about the warrant and its contents and to be assisted by a lawyer and interpreter in accordance with national law. Compliance with Article 5(1)(f) would also require a separate reasoned decision on the reason for detention. The detainee ‘shall be heard by a judicial authority’ pending a decision on the execution of a European Arrest Warrant (Article 19). This provision does not however explicitly state that the detainee may challenge the legality of the detention itself as required by Article 5(4) ECHR. Where the real concern relates to issues of criminal procedure, rather than any specific complaint about the detention itself, the Court of Justice has held that the relevant right is not Article 5 ECHR (and Article 6 Charter) but rather the right to a fair trial (Charter Articles 47 and 48).<sup>158</sup>

The strict legal time-limits regarding the execution of European Arrest Warrants, if complied with, meet the ‘due diligence’ test. Thus Article 17(3) requires a final decision on execution of the warrant to be made within 60 days after the arrest in most cases or 10 days if the detainee consents to their surrender. This may be extended by 30 days only. Surrender must take place as soon as possible and in any event within 10 days of the final decision (Article 23(2)). This may only be extended by 10 days due to circumstances beyond the control of any of the Member States (Article 23(3)). Surrender may be suspended for serious humanitarian reasons but once these cease to exist a new date must be agreed and the surrender follow within 10 days of this date (23(4)). Importantly, upon expiry of these time limits ‘if the person is still being held in custody he shall be released’ (Article 23(5)). Finally, the period of detention served in the executing Member States must be deducted from the sentence to be served in the issuing State (Article 26).

When a Member State has substantial grounds for believing that a person whom it returns to another Member State under the EAW may face detention which is in flagrant violation of Article 6 then arguably it should decline to surrender the suspect. There is no definitive ruling on this from either the Court of Justice or the European Court of Human Rights but it may be inferred from other decisions regarding fundamental rights and transfer of detainees.<sup>159</sup>

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<sup>158</sup> Case C-396/11, *Ciprian Vasile Radu*, judgment of 29 January 2013.

<sup>159</sup> Case C-411/10 *N.S. v Secretary of State for the Home Department*, Judgment of 21 December 2011 in which the Court of Justice ruled it breached the Charter to order removal to a Member State where a breach of Article 4. *Mamatkulov and Askarov v Turkey*, (Apps. 46827/99 and 46951/99), Judgment of 4 February 2005, 41 EHRR 494 discussion in Joint Partly Dissenting Opinion of Judges Bratza, Bonello and Hedigan and *Othman v UK* (App. 8139/09), Judgment of 17 January 2012 which both conclude that expulsion to face a criminal trial which would be in flagrant violation of Article 6 ECHR is impermissible. See also as regards Article 5 ECHR itself, *Drozdz and Janousek v France and Belgium* (App. 12747/87), judgment of 26 June 1992 where a previous

### The right to be informed of the reasons for one's arrest

Under Article 5 (2) everyone, not just criminal suspects, has the right to be told promptly in simple, non-technical language that he understands the essential legal and factual reasons for his arrest.<sup>160</sup> The obligation is imposed so that a person may then seek to challenge their detention under Article 5(4). The information need not be as detailed as that required to be provided to a person facing a criminal charge under Article 6(3)(a) ECHR. The requirement that it be provided promptly does not mean it must all be given at the moment of arrest. What is required depends upon the specific features of each case. Thus an interrogation a few hours after arrest which revealed the reasons to the detainee was held to be compliant.<sup>161</sup>

Sometimes the reasons may be obvious to the detainee without her needing to be told as in the case of a person who presented forged identity papers to the police and was arrested upon the discovery of the forgery.<sup>162</sup> For detainees who do not speak the language of their place of arrest, interpreters must be provided promptly to enable the reasons to be given. These obligations now find some expression, at least in criminal cases, in Union law through the Directive on the Right to Information in Criminal Proceedings.<sup>163</sup>

### The right to test the legality of detention

The basic right of habeas corpus is protected by Article 5(4) ECHR and this applies to all types of detainee, not simply criminal suspects. In principle however this is not a right to challenge all elements of fact and discretion supporting the detention. Rather it is the right to have a court review those elements that are essential to the detention being 'lawful'.<sup>164</sup> This is in contrast to the case of criminal suspects, where the court acting under Article 5(3) must be empowered to review whether there is sufficient evidence to give rise to a reasonable suspect that an offence has been committed. For those detained following conviction by a court under Article 5(1)(a) the original trial usually provides adequate safeguards with respect to Article 5(4).<sup>165</sup> The main importance of Article 5(4) therefore lies in cases of administrative detention under Articles 5(1) (b)(d) (e) and (f). In fact, the European Court of Human Rights has decided that in the case of mental health patients detained, the reviewing court must

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conviction in a third country in flagrant denial of justice would render detention pursuant to international cooperation arrangements unlawful.

<sup>160</sup> *Kerr v UK* (App.40451/98), admissibility decision of 7 December 1999.

<sup>161</sup> *Murray v UK*, Judgment of 28 October 1994, Series A, No. 300-A; (1995) 19 EHRR 193.

<sup>162</sup> *Dikme v Turkey* (App.20869/92), Judgment of 11 July 2000.

<sup>163</sup> Directive 2012/13 of the European Parliament and of the Council on the right to information in criminal proceedings, OJ L 142/1, 1.6.2012.

<sup>164</sup> *E v Norway*, Judgment of 29 August 1990, Series A, No.181;(1990) 17 EHRR 30.

<sup>165</sup> But see *Hussain v UK* (App. Nov.21928/93), Judgment of 21 February 1996 for an exception when the parole board had the power to recall into detention a prisoner released on license after the alleged commission of further offences. Its findings were reached unfairly and in breach of Article 5(4) because no oral hearing was held and the applicant did not have access to the file. Similar considerations arose when convicted juvenile prisoners were held at Her Majesty's pleasure, *Singh v UK* (App.23389/93), Judgment of 21 February 1996 or adults following completion of the punitive element of a life sentence, *Stafford v UK* (App. 46295/99), Judgment of the Grand Chamber of 28 May; (2002) 35 EHRR 1121. Here, where continued detention depended upon assessment of dangerousness, the parole board must hold procedurally fair hearings enabling the detainees to see the file and challenge witnesses.

ensure that the *Winterwerp* criteria (see above) are met and so its review power must be wider than just legality.<sup>166</sup> The position of immigration detainees was left uncertain by the decision *Chahal* which found that the domestic court had been unable to comply with Article 5(4) because it could not see and assess for itself the national security evidence relied upon by the government to support detention. This may be explained on the basis that when the State justifies immigration detention based upon a substantive reason, such as public security or absconding risk, the reviewing court should have the power to enquire into the factual basis for the decision and not simply conduct a review of legality.<sup>167</sup>

The court must be independent and offer adequate procedural guarantees but it need not be part of the standard judicial machinery.<sup>168</sup> The procedural requirements will vary according to the type of detention under challenge but equality of arms and the right to be heard are essential.<sup>169</sup> An adversarial oral hearing is required in cases involving criminal suspects or where detention depends upon an assessment of the detainee's dangerousness or likely conduct.<sup>170</sup> Reviews must be available speedily both after the initial arrest and at reasonable intervals thereafter if the circumstances supporting detention vary over time. The proceedings must also be conducted with due diligence. In a simple case, an initial review should not have taken three weeks to hear, whilst in more complex cases where medical evidence must be gathered a longer period might be acceptable.<sup>171</sup> Article 5 only requires automatic judicial review of detention in cases where a suspect is detained pursuant to criminal proceedings (see Article 5(1)(c) and Article 5(3)). However in *Shamsa v Poland*<sup>172</sup> the Strasbourg court said in an immigration case, strictly obiter, that 'detention that goes beyond several days which has not been ordered by a court or judge or other person authorised to exercise judicial power cannot be considered 'lawful' within the meaning of Article 5(1).' The Court argued that this was implicit from a review of Article 5 and in particular Articles 5(4), 5(3) and 5(1)(c).

## V. Remedies

Neither Article 6 nor other provisions of the Charter directly provide for remedies in relation to any breach of the right to liberty. The most obvious remedy for unlawful detention would be an order declaring the detention to be unlawful and ordering it to cease. Interpreting Article 6 in conformity with Article 5 ECHR would mean applying Article 5(4) which requires a court to order release in such circumstances. Beyond the remedy of release, Article 5(5) ECHR imposes an obligation to provide everyone who has been a victim of a breach of Articles 5(1)-(4) with compensation. This goes beyond the standard right to an effective remedy for the other Convention rights which is given by Article 13. This provision has not been the subject of extensive development through jurisprudence by the Strasbourg court. The cases suggest that where national law rules prevent compensation being awarded where a

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<sup>166</sup> *H.L. v UK* (App. 45508/99), Judgment of 5 October 2004; (2005) 40 EHRR 761.

<sup>167</sup> *Chahal v UK*, (App. No. 22414/93), 23 EHRR 413 (1997)

<sup>168</sup> *Weeks v UK*, Judgment of 2 March 1987, Series A, No.254; (1988) 10 EHRR 293. *Assenov v Bulgaria* (App. 24760/94), Judgment of 28 October 1998; (1998) 28 EHRR 652.

<sup>169</sup> *Niedbala v Poland*, (app.27915/95), Judgment of 4 July 2000.

<sup>170</sup> *Wloch v Poland*, Judgment of 19 October 2000; (2002) 34 EHRR 229.

<sup>171</sup> *Baranowski v Poland* (App.28358/95), Judgment of 28 March 2000. Over two months to obtain medical reports was however unacceptable.

<sup>172</sup> (App nos. 45355/99 and 45357/99), Judgment of 27 November 2003.

breach of Article 5(1)-(4) ECHR has occurred, this amounts to a breach of Article 5(5).<sup>173</sup> This rejection of a virtual immunity from suit does not amount to strict liability. Indeed the approach taken to damages for breaches of European Union law normally requires a breach to be sufficiently serious.<sup>174</sup> It is therefore an open question as to how far the Court of Justice may adopt a test of strict or fault-based liability for unlawful detention or other breaches of Article 6.

## **E. Evaluation**

The inclusion of the right to liberty in the Charter reflects its status as one of the most historically significant and well-established rights recognised by liberal democracies. Until recently however, it might have been considered of doubtful relevance to the practice of European Union law because its core concerns were far removed from those of EU policy-making. This has begun to change in important ways with the expansion of Union competence and law-making into the areas of criminal justice and immigration. Given the trend towards the EU promoting cross-border co-operation between Member States in returning individuals to face detention, the diversity of national standards and processes will come under greater scrutiny. The scope of European Union law increasingly covers the physical restraint of convicts, suspects and immigrants with a view to their extradition to other Member States or expulsion from the Union. Despite this wide range of EU legislation that now bears upon detention of individuals, Article 6 has yet to be the subject of any interpretation by the Court of Justice. There remains a tension between protecting the liberty of individuals and promoting the Union's policies of mutual recognition in criminal justice and control of the external border in asylum and immigration. Whilst the jurisprudence of the Strasbourg court is quite extensive in this field and, as interpreted by the Court of Justice, will have to form the basis for the protection of Article 6, the EU political institutions too have acknowledged that further legislation may be needed to ensure that personal liberty is adequately safeguarded within the Member States. The continuation of divergent prison and detention centre conditions, arrest and remand procedures and police conduct all pose obstacles to achieving that close co-operation that the Union seeks in this field.

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<sup>173</sup> *Fox, Campbell and Hartley v United Kingdom* (Apps.12244/86, 12245/86 and 12383/86), 30 August 1990, Series ANo. 182. *Hood v United Kingdom*, (App. 27267/95), 18 February 1999, (2000) 29 EHRR 365.

<sup>174</sup> C-46/93 *Brasserie du Pêcheur SA v Germany* [1996] ECR I-1029.