

The Right to Liberty and Security of Person

David Sukalinski

PhD Student in Criminal Proceedings in the Faculty of Law and History

South-West University “Neofit Rilski”, Bulgaria

The right to liberty and security is one of the fundamental rights of the individual in a democratic society. Personal freedom as a universally recognized value is at the core of this right. Guarantees related to the exercise of its aim to protect the physical liberty of the individual against arbitrary action of the authorities, resulting in illegal or unjustified deprivation of liberty¹. Precisely in the light of personal liberty, the right to security is seen as a right of any individual human being to be protected from the arbitrariness of the authority.

1. Legal Framework

Without underestimating the importance of other international legal regulations which guarantee the right to liberty and security, in the exhibited further, leading position will have the European Convention on Human Rights² (ECHR, Convention).

According to Art. 5 of the ECHR:

“1. Everyone has the right to liberty and security. Nobody can be deprived of liberty except in the following cases and only in accordance with procedures prescribed by law:

- a) lawful detention of a person after conviction by a competent court;*
- b) lawful arrest or detention of a person for breach of court order or to ensure the execution of any obligations prescribed by law;*
- c) lawful arrest or detention of a person for the purpose of bringing him/her before the competent legal authority on reasonable suspicion of committing a crime or when it is reasonably considered necessary to prevent a crime to be committed or fleeing after having committed an offense;*
- d) detention of a minor by lawful judgment in order to provide educational supervision or lawful detention of such person in order to ensure his/her appearance before the competent legal authority*
- e) lawful detention of a person in order to prevent the spreading of infectious diseases as well as mentally ill individuals, alcoholics or drug addicts or vagrants;*

¹ But not against the *partial restriction* of the personal freedom. Such protection is provided by other provisions of the Convention and its protocols.

² The full title is:- Convention for Protection of the Human Rights and Fundamental Freedoms. Established by the Council of Europe in Rome on 4-th of November 1950, effective from 3-th of September 1953. Effective for Republic of Bulgaria since 7-th of September 1992. The basic text was published in the Law Gazette №80/1992, Am. №137 since 1998.

1. *lawful arrest or detention of a person in order to prevent his illegal entry into the country or a person against whom action is taken for his deportation or extradition.*

2. *Any individual arrested must be informed promptly, in language which he/she understands, of the accusations against him/her, reasons for his/hers arrest and any charges against him/her.*

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 a trial within a reasonable time or released pending his court case. Release may be conditional based on guarantees to appear in court.*

4. *Everyone who is arrested or detained has the right to appeal the legality of his detention in court, which is required within a short time to reach a verdict, and if it's decided that the detention is unlawful, the court shall order the immediate release of the detainee.*

5. *Everyone arrested or detained in violation of the provisions of this Article shall have an enforceable right of compensation.”.*

The right to liberty and security has been enshrined in Art. 9 of the Universal Declaration of Human Rights of the UN since 1948 and has no binding, but becomes a foundation of subsequent international treaties for the protection of human rights. The Convention itself, according to its preamble, is prepared to take "the first steps for collective enforcement of certain rights proclaimed in the Universal Declaration." In 1966, the International Covenant on Civil and Political Rights of the UN also provided the right to liberty and security (Article 9). The wording was very similar to the postulates of art. 5 of the Convention, which had already been an applicable law for the previous 16 years.

In the legal system of the European Union the protection of personal liberty is guaranteed by Art. 6 of the Charter of Fundamental Rights, which states that everyone has the right to liberty and security.

The specified international law acts proclaiming the right to liberty and security confirm the conclusion that the Convention (in particular Art. 5) has a key place among them.

The Constitution of the Republic of Bulgaria, in Article 30, also guarantees the right to personal freedom and privacy.

2. Restrictions on the Right to Liberty and Security. Standards and Principles

According to art. 5 of the Convention the right to liberty and security is not an absolute right. Interference with the personal liberty of an individual is allowed only in cases listed in Art. 5, paragraph 1 and in the presence of the required in Art. 5, para. 2 and Art. 5, para. 4 - procedural guarantees and means of protection against arbitrary attacks and abuse.

A. The allowable interference must be "established by law"

Art. 5, para. 1 lists those cases of interference in the exercise of personal freedom that would correspond to the letter and spirit of the Convention if they are provided in national law. It must state the grounds for imprisonment, but also provides "the procedures", i.e. the way to impose this restriction.

As to the term "law" the European Court of Human Rights (ECHR, the Court) has accepted the following³: "*The law must be adequately accessible –the citizens should be given sufficient guidance to the specific circumstances about which legal rules are applicable to a case.*" One rule, whether it is a part of the written or unwritten law of a country, can not be considered a law if it is not clearly formulated and it is not predictable. It should enable the individual to conform his behavior according to it and to consider what will be the consequences of his particular actions or omissions under the law, even if it is necessary to refer to the qualified assistance of a lawyer. From the above mentioned follows that any deprivation of liberty would be in violation of Art. 5 of the Convention, if the grounds and procedures for its imposition are not based on a "law" with the following characteristics.

The basic meaning of Art. 5 of the ECHR is to provide guarantees against arbitrariness. In the case of *Akdeniz and Others vs. Turkey*⁴ the court reiterated that any deprivation of liberty must not only be made in accordance with the substantive and procedural provisions of national law, but also to match the very purpose of art. 5, namely to provide protection of the individual from arbitrary detention. However, in order to have effective protection against possible abuses by the authorities, there must be adequate procedural guarantees enshrined in the Convention itself. They are formulated in Art. 5, para. 2 and Art. 5, para. 4 of the ECHR as requirements to which the national procedural rules must comply with and which are related to the enforcement of all eligible forms of imprisonment referred to in Art. 5, para. 1, points (a) to (f) of the Convention.

B. Procedural guarantees of protection to the right of liberty and security of art. 5, para. 2 and Art. 5, para. 4 of the Convention

1) *Any arrested individual must be informed promptly, in language which he/she understands, of the accusations against him/her reasons for his/hers arrest and of any charges against him/her (art. 5, para. 2).*

This requirement establishes a principle of openness and clarity, without which any of the other provisions in defense of personal liberty would be ineffective. When someone is arrested, they should be informed as to the reasons why. It is believed that the requirement "*immediately to be communicated to him/her, in language which he/she understands, the reasons for his/hers detention*" is in his/her best interest in this difficult situation and it may be necessary for the exercise of his/her other rights.

The text of Art. 5, para. 2 of the Convention requires information on all charges which are brought in detention in terms of art. 5, para. 1 (c). When a person is informed that he/she would only be questioned in relation to a crime, without concrete suspicion against him/her, detention for this hearing would be in violation of Art. 5, para. 1 and it is important for the detainee to know that. Police must either disclose the suspicion and accuse him/her, or not detain him/her. If there is no charge pressed, the combination of art. 5, para. 1 of the Convention and art. 5, para. 2 provides very effective protection for someone who knows their rights.

The right to prompt and adequate information in regards to the cause of the deprivation of liberty is a prerequisite for effective prosecution as provided in Art. 5, para. 4 of the Convention.

³ *Sunday Times v/s The United Kingdom, Appeals №№ 6538/74 and 13166/87 u Malone v/s The United Kingdom, App. № 8691/79*

⁴ *Akdeniz and others v/s Turkey, Appeal № 23954/94*

2) *The right of everyone who is arrested or detained to appeal the legality of his/her detention in court, which is required within a short time to reach a verdict, and if it's decided that the detention is unlawful, the court shall order the immediate release of the detainee.*

a) *General obligation*

The obligation of the authorities to make this procedural guarantee against arbitrary detention is of a general nature and does not depend on the reason for his/her arrest. This means that every individual affected by such restrictions shall in all cases possess a procedure for judicial review and assessment of the legality of the restriction.

b) *Extent of the control*

It is apparent from the wording of the norm that in order to avoid unlawful or arbitrary deprivation of liberty, or abuse in cases where the detention is legally permissible, effective judicial control should be available to the affected individuals not only during the initial imposition of the restriction, but also while the imprisonment continues over time.

The Court has not only considered complaints about prolonged pretrial detention, but also complaints from people with mental disorders. The reasons for the detention of a mentally ill individual under Art. 5, paragraph 1 (e) of the Convention are changing and become meaningless if the patient had overcome his/her illness, and then the requirements of Art. 5, para. 4 may not be limited to the control of the initial decision on involuntary treatment. "The very nature of this kind of imprisonment clearly requires the ability to review the lawfulness at reasonable time intervals"⁵.

The extent of judicial control not only entitles the detainee to initiate proceedings, but also extends to procedural and substantive prerequisites in regards to the imposition of the measure, which are essential for its "lawfulness"⁶. This means that the competent local court must examine not only *the compliance with the procedural requirements of domestic law*, but also *the legitimacy of the aim pursued* - whether and how much is still justified to continue the implementation of the measure.

c) *The procedure*

By its nature, the procedure resembles art. 6, para. 1 of the Convention, because art. 5, para. 4 also ensures a fair trial, but with a specific matter for consideration - liberty itself. Despite this difference, many of the principles of judicial control under Art. 5, para. 4 are analogous to the requirements of a fair trial under Art. 6. The applicable standard is established in the judgment *Winterwerp vs. Netherlands*, where the ECHR accepted that "... it is not necessary the legal proceedings under Art. 5, para. 4 to be always accompanied by safeguards required by Art. 6, para. 1 of the civil or criminal proceedings ..." However, it is essential that the affected person has access to a court and the prospect of a hearing - either in person or, where necessary, through some form of representation, without which he/she will not be provided with "*the major procedural guarantees applicable during imprisonment.*"⁷

- "Court"

⁵ *X. v/s The United Kingdom*, App. № 7215/75

⁶ *Butkevicius v/s Lithuania*, App. N9 48297/99

⁷ *Winterwerp v/s The Netherlands*, App. № 6301/73

In all cases, the authority that implements the control of art. 5, para. 4 of the Convention on the national level should meet the requirements for 'court': it must be independent from the executive jurisdiction and be able to exercise full control, including the power to order the release of the detainee.

- *Equality of the parties*

Another important principle of art. 5, para. 4 is the principle of equality of the parties. In the case of *Kampanis vs. Greece*⁸ the local court heard the arguments of the public prosecutor against the release of the detainee, but he himself was not allowed to appear personally. For this reason, the ECHR found a violation of Art. 5, para. 4 of the ECHR because of a disregard of the principle of equality of the parties and has accepted that if necessary, the detainee is entitled to some form of representation under art. 5, para. 4. This is important because the affected individual may not possess any legal training to defend his/her interests effectively.

C. Detention of accused individuals in criminal proceedings - the most common and most problematic form of interference with individual liberty; the standards of the Strasbourg Court under Art. 5, para. 1 (c) and Art. 5, para. 3 of the Convention

One of the most common forms of the deprivation of liberty, which is also the source of most problems, is the detention of accused persons in criminal proceedings. The texts of Art. 5, para. 1 (c) and Art. 5, paragraph 3 of the Convention, together with the guarantees of Art. 5, para. 2 and Art. 5, para. 4, determine the standards of protection to the right of personal freedom of those individuals.

- 1) *Prerequisites*

In the hypothesis of Art. 5, para. 1 (c) there is a reasonable suspicion requirement, without which the detention is illegal, although from the wording it appears that this requirement is just one of several alternative conditions listed. In the case of *Lukanov vs. Bulgaria*⁹ ECHR ruled that the restriction of personal liberty was in conflict with the requirements listed in Art. 5, para. 1 (c) of the Convention, as there can not be "reasonable suspicion" when the act, for which the measure was imposed, is not considered a crime. In its further practice in the Bulgarian cases the ECHR draws attention to the risk posed by the possibility of the prosecution to singlehandedly classify the offenses, in connection with which it requires detention.

Although it is not explicitly mentioned, in addition to the prerequisites of Art. 5, para. 1 (c) and as a part of the concept of "to secure appearance before a court", there is also included a restriction of personal liberty at the risk of destruction of evidence, which may constitute a risk to commit "another crime". Retention according to art. 5, para. 1 (c) may be ordered under the following circumstances: there is a reasonable suspicion that the person has committed an offense, and in addition to that, there is a real danger that the individual may commit another crime or may escape, and there is a need to prevent it. These circumstances, which are required in addition to "the reasonable suspicion", are not cumulative and it is enough for only one of them to exist, but detention only because there is a reasonable suspicion, without any of the other two circumstances, would be in violation of Art. 5, para. 1 (c) of the Convention. Therefore, in terms of those criteria, totally unacceptable detention is to be justified only by the burden of the allegations, which in practice had and seems to still exist in some Bulgarian courts due to the ambiguous wording in the PPC (Penal Procedure Code). This practice has

⁸ *Kampanis v/s Greece*, App. N9 17977/91

⁹ *Lukanov v/s Bulgaria*, App.№ 21915/93

been subject to criticism by the Court in Strasbourg on number of Bulgarian cases¹⁰. In the case of *Atanassov vs. Bulgaria*¹¹, the ECHR had noted: "*The court finds that when have been decided to continue the detention of the appellant, the authorities have failed to identify any reasons and to consider the specific facts and evidence about that, if he may abscond, commit another offense or to obstruct the investigation. It is evident that in this case the authorities have implemented the vicious approach, under which detention is imposed and is automatically extended whenever the allegations are of serious crime, but without a specific analysis, which makes this appealsimilar to others in previous cases against Bulgaria, in which were detected violations (see for example the case Ilijkov)...*".

2) *Additional steps*

Detention in criminal proceedings should lead to the additional step "immediate notification" regarding the reasons, according to Art. 5, para. 2, "immediately brought before court in regards to the actual detention" (Article 5 para. 3) and, ultimately, to the steps outlined in Art. 6 of the Convention - indictment and criminal trial. Otherwise, the person should be released. The Convention does not allow group arrests or detentions.

The provision for imprisonment in regards to criminal proceedings under art. 5, para. 1 (c) of the ECHR must be read together with art. 5, para. 3 and is invariably associated with the guarantees of art. 5, para. 4. Art. 5, para. 3 is a fundamental procedural rule designed to balance the need to react against crime (*even if there is only suspicion*) and the protection of personal freedom, which everyone is entitled to and has to be guaranteed against arbitrariness and abuse. Although the presumption of innocence has considerable weight against detention, it must yield to the need to take action - for example, because of the danger of the perpetrators to escape or to commit other crimes. On the other hand, such detention is subject to sanction by the court (art. 5, para. 3) and must be followed by trial pursuant to Art. 6 of the Convention. Detention before sentencing is not imprisonment in terms of punishment "*under sentence*" pursuant to Art. 5, para. 1 (a). At any stage prior to sentencing proceedings in criminal detention is temporary and procedural. Since detention is often used to put pressure on the defendants to confess, it inevitably gives advantages to the police, which can lead to abuse.

3.) *Guarantees of art. 5, para. 3*

a) "*promptly*" bringing to "*judge or other officer authorized by law to exercise judicial power*"

The first of the guarantees of Art. 5, para. 3 is the right of the detainee to be brought promptly before a judge or other officer authorized by law to exercise judicial functions.

- "*promptly*"

Many countries have established precise time limits within which the detainee must be brought before a competent court. Although 24 to 48 hours is the period provided for in the national laws of many European countries, the ECHR has not established strict time limits in regards to art. 5, para. 3 of the Convention. The nature of the crimes for which the individual is a suspect and the circumstances determine whether or not the requirement of "promptness" is met¹².

¹⁰ *Ilijkov v/s Bulgaria*, App. № 33977/96

¹¹ *Atanasov v/s Bulgaria*, App. № 19315/04

¹² According to the Bulgarian Law, the prosecutors may order detention of the accused within 72 hours with the aim of bringing him before a court to determine whether the remand measure to be - custody. In the absence of

- *“purpose”*

The purpose of *"bringing in front of a judge"* is to make an objective and independent assessment of whether there is reasonable suspicion and therefore - if there is a need for detention.

The fact that a person has made a confession or that their guilt may seem obvious, is not relevant to the application of Art. 5, para. 3 - the judge must deliver his/hers decision in view of the conditions listed in the provision. The decision of arrest according to art. 5 para. 3 of the ECHR does not depend on any implied or obvious finding of guilt. Although usually at this stage there is already a specific charge, this is not the determining factor when deciding on a measure. Under consideration is whether there is reasonable suspicion, and whether detention is necessary in order to prevent the individual to escape justice, to destroy evidence or to commit other crimes.

- *"judge or other officer authorized by law to exercise judicial power"*

Further, Art. 5, para. 3 requires the decision in regards to detention to be done by "a judge or other officer authorized by law to exercise judicial power." According to the Court in Strasbourg "officials" performing judicial functions should meet three criteria: a) to be independent from the executive power and from the parties, as it is permissible to be in a position of subordination to other judges or officials; b) to have the power to fulfill procedural requirements to personally hear the individual brought in and c) to be empowered to take into account the circumstances testifying for and against detention, to determine the legal right of the detention and to order release in the absence of such grounds.

By January 2000 Bulgarian law was clearly in conflict with the requirement in regards to the person who has the power to order detention. The court has found violations of the law under Art. 5, para. 3 of the ECHR, as the public prosecutor, who until then had such power, can not be considered independent of the accusatory party to the proceedings so far as he/she is performing the accusatory function (e.g. judgment *Nikolova vs. Bulgaria*¹³).

b) *Reasonable period of detention*

The requirement for a reasonable period of detention under art. 5, para. 3 of the Convention aims to put pressure on the authorities to act with *"due diligence"* in favor of the personal liberty of the individual. The permissible *"reasonable period"* of detention is shorter than the reasonable time allowed for the process of art. 6, para. 1 of the Convention, since the aim is to limit the duration of the detention of the individual rather than to achieve speedy production. The time required to adequately prepare the case for a lawsuit is unrelated to the time required to justify the detention. At the same time the wording of Art. 5, para. 3 of the Convention provides an opportunity for *"release pending trial in court"*.

Obviously, when *"the reasonable suspicion"* is eliminated, the detention becomes illegal. If this suspicion continues for some time, it is a condition of the legality of continued detention, but after a certain period it is no longer enough. Then it will be necessary to establish

explicitly provided in the PPC (Penal Procedure Code) can be appealed in court the legality of so-called "prosecutor's arrest," many of the Bulgarian courts does not allow this appeal. After the decision of the ECHR in the case of *Zvezdev v/s Bulgaria*, App. № 47719/07, this practice should be discontinued as it is in conflict with the procedural requirements of Art. 5 para. 4 of the Convention.

¹³ *Nikolova v/s Bulgaria*, App. № 31195/96

again whether the other preconditions of Art. 5, para. 1 (c) of the ECHR are still available, in order to justify the continued imprisonment.

The need for continued detention under Art. 5, para. 3 of the Convention shall be assessed considering all circumstances, and not in view of the charges against the detainee.

Therefore, in most cases the ECHR considered whether the authorities have taken due diligence to quickly move the case, and whether there were particular difficulties for it. In this sense, the very accusation has no bearing on the necessity of detention.

The text of Art. 5, para. 3 allows the release of the arrested individual in return for certain guarantees that he/she will appear at the trial. This does not mean an absolute right to bail. However, the ECHR has consistently emphasized that if the only reason for detention is the danger of concealment of the detainee, then the bail is a judicial tool to reduce the length of detention pending trial.

D. Given the right of compensation for unlawful infringement of personal liberty (Article 5 para. 5 of the Convention)

Article 5 para. 5 of the Convention ensures that every person arrested or detained in violation of the requirements of Art. 5 of the ECHR benefits from an enforceable right to compensation.

The jurisprudence of the ECHR has clarified when the article. 5, para. 5 of the Convention, is applicable. The text requires the possibility for any individual to claim compensation before a local court in connection with restrictions of personal freedom, committed in violation of Art. 5 of the Convention at a national level. On the other hand, the ECHR will not consider a claim under art. 5, para. 5 for disallowing the right to compensation, if it has not found a violation of one or more of the substantive provisions of the article¹⁴. *In other words, according to the Convention there is no independent right to compensation for detention.*

Decisions in the cases *Hamanov vs. Bulgaria*¹⁵ and *Belchev vs. Bulgaria*¹⁶ the ECHR noted that "according to Art. 2, para. 1 of the Law of responsibility of the Country¹⁷ an individual, who has been in custody may claim compensation only if the arrest was cancelled *"due to lack of legal grounds."* The quoted text from Bulgarian law apparently applies to cancellation due to the illegality of detention under national law, without necessarily considering whether during the intervention of the personal freedom were met all the requirements of Art. 5 of the Convention. In these cases the Bulgarian court has accepted detention of the applicants as completely legal according to the requirements of the internal law, but has not examined whether this imprisonment is consistent with all substantive and procedural guarantees provided by Art. 5 of the Convention.

Obviously in these cases, the applicants are not entitled to claim damages/compensation under Art. 2, para. 1 of LLDCC /the Law of Liability of the Country for Damages, Caused to the Citizens/, because their detention was not cancelled *"due to the lack of legal grounds."* Therefore, the ECHR accepted that Bulgarian law did not provide the applicants the right to

¹⁴ *Murray v/s The United Kingdom*, App. № 14310/88

¹⁵ *Hamnanov v/s Bulgaria*, App. № 44062/98

¹⁶ *Belchev v/s Bulgaria*, App. № 39270/98

¹⁷ Then it was the Bulgarian Law of the Liability of the Country for Damages, Caused to the Citizens (LLDCC), which is currently titled " Law of the Liability of the Country and Municipality for Damages" (LLCMD).

seek retribution in all cases of violations of the requirements of Art. 5 of the Convention, and therefore art. 5, para. 5 of the Convention had been breached.

According to the practical implementation of LLDC, illegal detention does not imply automatic compensation, but it is also necessary to demonstrate whether and how much the affected individual actually suffered as a result of the detention. This makes problematic any claim for damages caused by violations of privacy of personal freedom under the Convention, which are "legal" under the national law - an issue that affects completely the conformity of the national law with the requirements of ECHR¹⁸. It is necessary to conclude the need to change not only the Bulgarian legislation, but also the practice on its implementation, so that the right of compensation to be fully protected.

Summary

The right to liberty and security is one of the fundamental rights of the individual in a democratic society. Personal freedom as a universally recognized value is at the core of this right. Guarantees related to the exercise of its aim to protect the physical liberty of the individual against arbitrary action of the authorities, resulting in illegal or unjustified deprivation of liberty. Precisely in the light of personal liberty the right to security is seen as a right of any individual human being to be protected from the arbitrariness of the authority.

The right to liberty and security enshrined in Art. 9 of the Universal Declaration of Human Rights of the UN since 1948 has no binding, but becomes a foundation of subsequent international treaties for protection of human rights.

According to the practical implementation of Law of the Liability of the Country for Damages, Caused to the Citizens, illegal detention does not imply automatic compensation, but it is also necessary to demonstrate whether and how much the affected individual actually suffered as a result of the detention. This makes problematic any claim for damages, caused by violations of privacy of personal freedom under the Convention, that are "legal" under the national law - an issue that affects completely the conformity of the national law with the requirements of European Convention on Human Rights. It is necessary to conclude the need to change not only the Bulgarian legislation, but also the practice on its implementation, so that the right of compensation to be fully protected.

David Sukalinski was born in 1980. He has a Master in Law degree. He is a PhD Student in Criminal Proceedings in the Faculty of Law and History of the South-West University "Neofit Rilski". The subject of his PhD work is "Deprivation as a procedural coercive measure of and European Convention on Human Rights". He is teaching as an Assistant Professor in Criminal Proceedings at Law and History Faculty at South-West University "Neofit Rilski" – Blagoevgrad. He is also a legal adviser at the Legal Bar Association in Blagoevgrad, Bulgaria.

¹⁸ Last example for such a violation of Art. 5, para. 5 can be seen in the decision *Danev vs. Bulgaria*, App. № 9411/05.