



## Compulsory hospitalisation of persons of unsound mind in accordance with Article 5

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#### Criteria of Lawfulness

The detention of a person of unsound mind is regulated by Art. 5 of the European Convention on Human Rights (ECHR) which stipulates that detention must be 'lawful' and 'in accordance with a procedure prescribed by law'. The case of *Winterwerp v. Netherlands* defined the term 'lawful' as meaning conformity with the requirements of national legislation and the restrictions established in Art. 5(1)(e).<sup>1</sup> *Winterwerp* also differentiated between 'procedural' and 'material' lawfulness. Procedural 'lawfulness' requires that detention be 'in accordance with a procedure prescribed by law'. Material 'lawfulness' requires that the detainee is in fact of unsound mind and that grounds exist for confining him against his will.

*Winterwerp* established a 'triple-test approach' to material 'lawfulness'. This test was developed further in *Johnson v UK*:<sup>2</sup>

1. A person must be acknowledged objectively as being of ‘unsound mind’. Although there was no easily definable definition, *Winterwerp* established that Art. 5(1)(e) ‘obviously’ cannot permit the detention of a person “simply because his views or behaviour deviate from the norms prevailing in a particular society”. Further, the only way to establish mental disorder is by “objective medical expertise”; only if there are convincing grounds, can the objectivity and reliability of medical evidence be doubted.<sup>3</sup> In exceptional cases medical expertise may not be required, but only if a medical examination was carried out immediately after detention.<sup>4</sup>

2. “Psychiatric deviations must be of such a character and such a degree as to warrant compulsory hospitalisation”. Psychological illness should not automatically lead to detention. Initially, national authorities have a discretion to evaluate the evidence in a particular case; the Court subsequently reviews those decisions under the Convention.<sup>5</sup> The Court in *Litwa v. Poland* held that detention was only justified where less severe measures had been considered, but were insufficient to safeguard the individual or public interest.<sup>6</sup> In other words, detention must be reasonable and absolutely necessary.<sup>7</sup>

3. The justification for continued detention depends on the duration of the illness. In *Johnson* the Court opined that “it does not automatically follow from a finding by an expert authority that the mental disorder which justified a patient’s compulsory confinement no longer persists, that the latter must be immediately and unconditionally released”. The Court also recognised that a responsible authority can exercise discretion to order the discharge of a person who is no longer suffering from a mental disorder. The person authorised to carry out the detention must relocate the former patient in a post-discharge hostel, if he is being released under defined conditions.<sup>8</sup>

The application of Article 5(1) is limited. The principle of lawfulness of detention applies to both the sanctioning and execution of the measures involving

deprivation of liberty.<sup>9</sup> *Ashingdane* recognised the relationship between sanctioning detention and place and conditions of detention. In principle, ‘detention’ is only ‘lawful’ if effected in a hospital, clinic or other appropriate institution authorised for that purpose.<sup>10</sup>

Procedural ‘lawfulness’ is only possible if there is compliance with the following rules. State law must be sufficiently precise.<sup>11</sup> For example, a violation was found in two Bulgarian cases because the national legislation did not contain any regulations providing public prosecutors with powers to detain people in psychiatric hospitals for psychiatric examination.<sup>12</sup> Additionally, the person responsible for the detention must comply with domestic legislation.

*Rakevich* provides one such example.<sup>13</sup>

**Supervision of detention of persons of unsound mind**

Art. 5(4) establishes that anyone subjected to arrest or detention is entitled to take proceedings to decide the lawfulness of the detention ‘speedily by a court’ and to be released if the detention is not lawful. At this stage it is important to briefly address the “incorporation rule”,<sup>14</sup> insofar as this rule exists in Russian legislation.<sup>15</sup> In Russia, supervision is already ‘incorporated’ in the compulsory hospitalisation decision, which creates a major peculiarity: “Where the decision depriving a person of his liberty is one taken by an administrative body,... Art. 5(4) obliges the Contracting States to make available to the person detained a right of recourse to a court; but there is nothing to indicate that the same applies when the decision is made by a court at the close of judicial proceedings. In the latter case the supervision required by Art. 5(4) is incorporated in the decision.”<sup>16</sup>

The incorporation rule has two legal consequences. Firstly, where a court decides to detain, the person of unsound mind does not have the right to have the lawfulness routinely reconsidered. Secondly, the rule signifies a degree of overlap between the guarantees of Article 5(4) requiring supervision, and Article 5(1)(e), in accordance with procedures

prescribed by law, which could include the court's original decision to detain. The European Court's case law answers three basic questions that arise when qualifying actions in accordance with Art. 5(4):

1. What to supervise? Art. 5(4) does not grant a right to judicial review of such a scope that the court's decision would substitute for the discretion of the decision-making body. Judicial review must, however, be sufficient to assess the observance of those guarantees that are vital for establishing lawfulness in accordance with Art. 5(1).<sup>17</sup> "The reviewing 'court' must assess the legality of the detention in the light of the *Winterwerp* criteria."<sup>18</sup> Therefore, there must be the possibility of challenging the detention on procedural and material grounds.

In exceptional circumstances, where compulsory hospitalisation is permitted before receipt of an expert medical report, the scope of the judicial review will be significantly restricted, as the person responsible for the compulsory hospitalisation must possess wider powers of discretion.<sup>19</sup>

2. Whom and how to supervise? In Art. 5(4) the term 'court' should not be understood as a judicial authority in its traditional meaning, established in the country's judicial system. Any 'court' must have the authority to decide the lawfulness of the detention; it must be independent, and guarantee appropriate judicial procedures to settle disputes.<sup>20</sup> The European Court sanctions court procedure in accordance with Art. 5(4) which does not have to have the same procedural guarantees as provided for by Art. 6(1) for criminal or civil cases. Nevertheless, "[i]t must have a judicial character and provide guarantees appropriate to the kind of deprivation of liberty in question."<sup>21</sup>

The right to initiate one's own proceedings to contest compulsory hospitalisation is a primary guarantee of Article 5(4). The right to judicial recourse, which is available only to a state authority (and not to the detainee) is not sufficient for compliance with the guarantees of judicial review.<sup>22</sup>

The principle of equality of arms<sup>23</sup> requires a number of guarantees: the applicant must have the right to participate in the court proceedings (in person or by a representative) and consequently must be properly informed of the forthcoming hearing.<sup>24</sup> Furthermore, in certain cases it will be necessary to grant the applicant the right to appear before the court at the same time as the prosecutor, so that the former has the opportunity to reply to the latter's arguments.<sup>25</sup> The lack of opportunity to argue verbally or in writing, in person or through a representative, and non-compliance with the right to full disclosure would breach Article 5(4).<sup>26</sup>

3. When to supervise? The applicant is entitled to challenge the lawfulness of detention both initially and periodically as new facts arise. Judicial review is particularly important where initial reasons for confinement cease to exist.<sup>27</sup>

The phrase "urgent examination by the court" is reflective of the general requirements of judicial proceedings conducted without undue haste, carefully considering all relevant details.<sup>28</sup> In the event of the absence of these elements it is possible to establish breaches of Art. 5(4).

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1 24/10/79 para. 39.

2 24/10/ 97 para. 60.

3 *Winterwerp v. Netherlands*, paras. 37, 39 & 42.

4 ibid; Ovey C. & White R. The European Convention on Human Rights. Oxford University Press, 2002. p. 125; *Varbanov v. Bulgaria* 5/10/00, para. 48.

5 *Winterwerp v. Netherlands* para. 40.

6 4/03/00, para. 78.

7 *Varbanov v. Bulgaria* para. 46.

8 paras. 61, 62 & 66.

9 *Winterwerp v Netherlands* para. 39.

10 *Ashingdane v. UK* 28/05/85 para. 44; *Aerts v. Belgium* 30/07/98, para. 46.

11 *Sunday Times v. UK* of 26/03/79 para. 49.

12 *Varbanov v. Bulgaria* paras. 15, 50-53; *Kepenerov v. Bulgaria* 31/07/03, para. 33.

13 *Rakevich v. Russia* 28/10/03 para. 35.

14 Harris D.J., O'Boyle M. & Warbrick C. Law of the European Convention on Human Rights. Butterworths, 1995. p. 151.

15 *Rakevich v. Russia* para. 15.

16 *De Wilde, Ooms and Versyp v. Belgium* 18/11/70 para. 76.

17 *X v. UK* 5/11/81 para. 58; *E v. Norway* 29/08/90, para. 50.

- 18 Ovey & White p.133.
- 19 *X v. UK*, para. 58.
- 20 *ibid* para. 53, and *Weeks v. UK* 2/03/87, para. 61.
- 21 *Niedbala v. Poland*, 4/07/00, para. 66. Also *Winterwerp v. Netherlands*, para. 60; *Megyeri v. Germany* 12/05/92, para. 22
- 22 *Rakevich v. Russia* para. 43.
- 23 *Nikolova v. Bulgaria* 25/03/99 para. 59; *Niedbala v. Poland*, para. 66.
- 24 *Van der Leer v. Netherlands* 21/02/90; *Winterwerp v. Netherlands*, para. 60.
- 25 *Kampanis v. Greece* 13/07/95 para. 58.
- 26 *Sanchez-Reisse v. Switzerland* 21/10/86 para. 51; *Weeks v. UK* 2/03/87, para. 66.
- 27 *Winterwerp v. Netherlands*, para. 55.
- 28 Ovey & White p. 135.