

## The ECHR Practice in the Sphere of Lawful Detention of Socially Maladjusted Individuals

### A prática do Tribunal Europeu de Direitos Humanos na esfera juridicidade de detenção de indivíduos socialmente desajustados

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## Summary

The article covers the practice of the European Court of Human Rights in the sphere of lawful detention of five categories of individuals, who are referred to in Article 5(1) (e) of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950. The authors study the purposes and criteria of detention of infected persons, persons of unsound mind, alcoholics, drug addicts, and vagrants.

In addition, the authors study the opinions of Russian experts on this issue.

The conclusion is that under Article 5(1) (e) of the Convention, lawful detention implies the measures to not only isolate a person from society but also to reduce his/her danger to himself/herself or the public.

**Keywords:** Preventive detention; socially maladjusted individuals; restrictive clause.

## Resumo

O artigo aborda a prática do Tribunal Europeu de Direitos Humanos na esfera da juridicidade de detenção sobre cinco categorias de indivíduos, os quais são referidos no artigo 5 (1) (e) da Convenção Europeia para Proteção de Direitos Humanos e Liberdades Fundamentais de 1950. Os autores estudam os objetivos e os critérios para a detenção de pessoas infectadas, com deficiência mental, alcoólatras, drogados e vagabundos. Adicionalmente, os autores estudam o posicionamento de peritos russos sobre a temática. Conclui-se que sobre o artigo 5(1) (e) da convenção que é lícita a detenção dessas pessoas visto que evita perigos que possam ser causados contra terceiros e a si mesma.

**Palavras-chave:** Detenção preventiva; individual socialmente desajustados; cláusulas restritivas.

## Introduction

The European Convention for the Protection of Human Rights and Fundamental Freedoms permits “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”.<sup>1</sup> The ECHR emphasizes that “the reason why the Convention allows the latter individuals, all of whom are socially maladjusted, to be deprived of their liberty is not only that they have to be considered as occasionally dangerous for public safety but also that their own interests may necessitate their detention”.<sup>2</sup> There have been many cases where people have committed suicide, or at least tried to, under the influence of alcohol, drugs, or psychoactive substances.<sup>3</sup>

First of all, we have to clarify the purpose, which the provision of Article 5(1) (e) of the Convention implies. The restriction of the right to liberty and security of the persons in question is aimed at preventing them from causing harm to themselves or the public. That is why it is quite possible to call this type of detention a preventive one.

In one form or another, preventive detention is a common thing for most legal systems. It is one of the means of social protection.<sup>4</sup> Preventive detention is also permitted by Article 9 of the International Covenant on Civil and Political Rights.<sup>5</sup>

Of course, the concept of preventive detention includes a much larger range of grounds than those covered by Article 5(1) (e) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Thus, some authors refer to preventive detention in cases involving not only mentally ill people and vagrants but also persons awaiting trial by the court.<sup>6</sup> Other experts place special emphasis on detention on political grounds, as well as detention with the purpose to protect national security.<sup>7</sup> The main problem with Article 5(1) (e) of the Convention is as follows: on the

- 1 Article 5(1) (e) of the European Convention for the Protection of Human Rights and Fundamental Freedoms of 1950. See UNITED NATIONS. General Assembly. *The Universal Declaration of Human Rights*. New York: UN. Available from: <https://www.echr.coe.int/Documents/ConventionENG.pdf>. Access in: 27 out. 2020.
- 2 See Application ECHR. *Guzzardi v. Italy*. Application no. 7367/76. Judgment of 6 November 1980. Available from: [https://hudoc.echr.coe.int/fre#{%22itemid%22:\[%22001-57498%22\]}](https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-57498%22]}). Access in: 27 out. 2020. § 98
- 3 TEMBOTOVA, M.A. Reestr novykh potentsial'no opasnykh psikhoaktivnykh veshchestv, oborot kotorykh v Rossiiskoi Federatsii zapreshchen. *Aktual'nye problemy rossiiskogo prava*, v. 2, p. 140, 2008.
- 4 FRANKOWSKI S; SHELTON, D. *Preventive Detention: a Comparative and International Law Perspective*. Dordrecht: Martinus Nijhoff Publishers, 1992. p. 1.
- 5 See CCPR. *General Comment N° 8 of 27 July 1982: Right to liberty and security of persons* (Art. 9). United Nations Human Rights. Available from: <http://www.unhcr.ch/tbs/doc.nsf/0/f4253f9572cd4700c12563ed00483bec?Opendocument>. Access in: 27 out. 2020.
- 6 See FRANKOWSKI S; SHELTON, D. *Preventive Detention: a Comparative and International Law Perspective*. Dordrecht: Martinus Nijhoff Publishers, 1992. p. 299.
- 7 HARDING Andrew; HATCHARD, John. *Preventive Detention and Security Law: a Comparative Survey*. Dordrecht: Martinus Nijhoff Publishers, 1993. p. 4.

one hand, the restriction of personal liberty and security is a preventive measure, i.e. it is not related to an offense committed by the person. On the other hand, this preventive measure should not be perceived as a possibility to detain him/her for “future offenses”.

## **The ECHR Practice in the Sphere of Lawful Detentions of Persons of Unsound Mind, Alcoholics, Drug Addicts, and Other Socially Maladjusted Individuals**

The Convention includes a reference to five special categories of individuals whose right to personal liberty and security can be restricted only because of their potential danger to the public or themselves. The link between these categories is that they may be deprived of their liberty for medical treatment, social policy purposes, or medical and social reasons altogether.<sup>8</sup>

That is why the ECHR concludes that “a predominant reason why the Convention allows the persons mentioned in paragraph 1 (e) of Article 5 to be deprived of their liberty is not only that they are dangerous for public safety but also that their own interests may necessitate their detention”.<sup>9</sup>

That is why there are two objects, which Article 5(1) (e) is supposed to safeguard, restricting the right to personal liberty and security. One object is public safety. Another object is personal interests. At the same time, for practical reasons, it is plausible to combine the two objects into one.<sup>10</sup> Nevertheless, it may be useful to study the two objects separately to theoretically understand their content.

The first object is public safety. It is mentioned in Articles 8,9,10 and 11 of the Convention as well as in its Protocol No. 4.

The relevant paragraphs of the Articles contain restrictive clauses and present the notion of public safety in various contexts. What they have in common is the permissibility of restrictions provided by law. In a democratic society, such restrictions are necessary for certain interests and objectives. Among the objectives, there are national security, the economic well-being of the country, public safety, the prevention of disorder and crime, the protection of health and morals, the protection of the rights and freedoms of others, territorial integrity, the protection of the reputation of others,

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8 See Application ECHR. *Witold Litwa v. Poland*. Application no. 26629/95. Judgment of 4 April 2000. Available from: [https://hudoc.echr.coe.int/fre#%22itemid%22:\[%22002-6873%22\]](https://hudoc.echr.coe.int/fre#%22itemid%22:[%22002-6873%22]). Access in: 27 out. 2020.

9 See Application ECHR. *Guzzardi v. Italy*. Application no. 7367/76. Judgment of 6 November 1980. Available from: [https://hudoc.echr.coe.int/fre#%22itemid%22:\[%22001-57498%22\]](https://hudoc.echr.coe.int/fre#%22itemid%22:[%22001-57498%22]). Access in: 27 out. 2020.

10 In the majority of cases based on Article 5(1) (e) of the Convention, the ECHR does not differentiate between whether a person is dangerous to society or to himself/herself. Usually these elements are combined.

etc. At the same time, public safety, as a permissible objective of the restriction of a right, is included in all the aforementioned Articles of the Convention.

Since Article 5(1) (e) of the Convention does not contain a restrictive clause that may be applied to all the lawful grounds for restricting the right to personal liberty and security, such restrictions can be justified by referring to Article 5(1) (e), or the relevant practice of the ECHR. The ground that we are covering in this work contains no specific indication of the permissible purposes of interference with personal rights. However, as we have already noted, the ECHR practice highlights such permissible purposes as public safety and interests of the person whose rights are interfered with. There are solid reasons to believe that the notion of public safety in the context of Article 5(1) (e) should be understood in the same way as it is understood in the context of other Articles of the Convention.

Though we are not planning to consider the notion of public safety in detail, it should be noted that the ECHR has never explained what is meant by this term. This is probably because the term “public safety” can be defined differently in different jurisdictions. Legal experts, in their turn, can also interpret the notion in different ways.<sup>11</sup>

In this regard, the Convention lets countries exercise their discretion in determining what public safety means. Anyway, the Articles of the Convention should rather be understood in a narrow sense. This stems from the fact that the notion of public safety is specified in the relevant provisions of the Convention together with national security, public order, prevention of crime, etc.

Another object protected by Article 5(1) (e) is personal interests. It is necessary to emphasize that the purpose to protect personal interests can be identified only by referring to the opinions of the ECHR since it is not explicitly mentioned in the Convention. This purpose is especially reasonable with regard to those people who, for one reason or another, cannot fully realize the danger of their actions for themselves.<sup>12</sup>

The detention of persons listed in Article 5(1) (e) of the Convention for other reasons is not covered by the provision, since there are other legal grounds for restricting the right to personal liberty and security. These are cases, for example, when they are suspected of having committed an offense or after being convicted of having committed an offense by a competent court.

11 To know more about theoretical and practical approaches to the notion of public safety, see JAYAWICKRAMA, Nihal. *The Judicial Application of Human Rights Law: National, Regional and International Jurisprudence*. New York: Cambridge University Press, 2002. p. 194.

12 These are mostly persons of unsound mind, alcoholics, drug addicts, and minors. Infected people or vagrants covered by Article 5(1) (e) of the Convention can also be detained to protect their interests. Very often they completely realize that it is necessary to voluntarily sacrifice their freedom for their own sake. See, for example, Applications ECHR. *De Wilde, Ooms and Versyp v. Belgium*. Applications nos. 2832/66; 2835/66; 2899/66. Judgment of 18 June 1971. Available from: <https://hudoc.echr.coe.int/fr/e#%22itemid%22:%22001-57606%22>}. Access in: 27 out. 2020.

Before we start considering the grounds for detention under Article 5(1) (e), it should be noted that the relevant measures are lawful when there is a certain relationship between the purpose of interfering with the rights and the means used to achieve it. This is rather important. By itself, detention cannot fully ensure public safety or protect the interests of a detained person. That is why the restriction of the right to liberty and security in cases covered by the provision of the Convention should not become the only measure applied to the categories of individuals in question. The practice of the ECHR indicates that the legality of detention under Article 5(1) (e) implies not only social isolation but also additional measures aimed at reducing risks to the person himself/herself and the public. Mainly, this refers to medical treatment. However, there may be other rehabilitation measures, for example, regarding vagrants.

While studying the categories of individuals listed in Article 5(1) (e), it is necessary to note that special legal status of marginalized groups can also be found in Russian legal theory. Such people as prostitutes, homeless and neglected minors, vagrants, beggars, homeless adults, and drug addicts are thought to be marginalized and referred to as an “antisocial class” or “antisocial group”.<sup>13</sup>

Noting the peculiarities of the way these “social outcasts” behave, Russian experts emphasize that their behavior is likely to be on the verge of legal, illegal,<sup>14</sup> or close to illegal.<sup>15</sup>

If we compare marginalized groups in the Russian doctrine to the categories of individuals listed in Article 5(1) (e) of the Convention, it becomes clear that both classifications are quite similar. The similarity stems from the fact that in both approaches, if a person behaves illegally, his/her behavior is not a ground for the imposed sanctions. This means that Article 5(1) (e) does not cover cases where the person concerned is detained on suspicion of having committed an offense. On top of it, the detention under the provision can never be a punishment for the offense committed. Such cases are covered by Article 5(1) (c) and (a) respectively. In other words, the idea is that to fall under Article 5(1) (e), the behavior must be almost antisocial, getting the person close to an offense without turning him/her into an offender.<sup>16</sup>

If we look at the restriction of the right to liberty and security under Article 5(1) (e) through the prism of the Russian legal doctrine, there is a doubt that it is fair to include infected persons and persons of unsound mind into a marginalized group. Partially, this approach can still be adopted. Later in this work, we will show that the behavior of infected and mentally ill individuals is crucial for finding out whether interference with their right to liberty and security is lawful.

13 NIKITIN, A.A. Spetsial’nyi pravovoi status marginal’nykh grupp. In *Vestnik Saratovskoy gosudarstvennoy yuridicheskoy akademii. Saratov State Law Academy Bulletin*, v. 2, 2005. p. 43.

14 MATUZOV, N.I. *Teoriia gosudarstva i prava*: Uchebnik. Moscow: Yurist, 2003. p. 431-432.

15 OKSAMYTNYI, V.V. *Pravomernoe povedenie lichnosti*. Kiev: Naukova Dumka, 1985. p. 99.

16 OKSAMYTNYI, V.V. *Pravomernoe povedenie lichnosti*. Kiev: Naukova Dumka, 1985. p. 99-100.



The studies of Russian experts on the legal issues of marginalized persons' behavior prove that the government has special responsibility for all social outcasts in society. Moreover, this responsibility is associated with the need to help an individual get out of the situation, prevent him/her from getting into the trouble, etc.<sup>17</sup> Thus, the government is obliged to restrict the right to personal liberty and security according to Article 5(1) (e) of the Convention, observing all the necessary requirements.

Article 5(1) (e) provides countries with considerable discretion in legislation and law enforcement related to the legal status of the listed categories of individuals. This is primarily due to the fact that neither the Convention nor the ECHR practice gives any detailed definitions of the terms "infectious disease", "person of unsound mind", "alcoholic", "drug addict", or "vagrant".<sup>18</sup>

However, this discretion is not unlimited. Regarding the interpretation of Article 5(1) (e), the ECHR practice puts forward a number of important legal opinions, which make it possible to identify common standards for the application of Article 5(1) (e). In addition, the wording in itself provides countries with great discretion in the interpretation of the provision. This fact poses a significant risk of abuse. The ECHR has repeatedly drawn attention to the need for a restrictive interpretation of the provision in question.<sup>19</sup>

Before analyzing the content of Article 5(1) (e) in detail, we should stress that the ECHR practice is disproportionate from the point of tried cases and categories of individuals involved. The ECHR has heard a lot of cases over persons of unsound mind and vagrants but not so many cases, involving alcoholics, drug addicts, and infectious diseases. Moreover, legal opinions on the detention of mentally ill people are rather elaborated. That is why they can be used as guidelines for the application of Article 5(1) (e) when people from other categories are parties to a case.<sup>20</sup>

For example, in *Ilmseher v. Germany*, the applicant alleged that his retrospective preventive detention, ordered by the Regensburg Regional Court, had violated his right to liberty guaranteed by Article 5(1) of the Convention. The ECHR, sitting as a

17 SENIAKIN, I.N; NIKITIN, A.A. *Problemy otvetstvennosti gosudarstvennoi vlasti za marginal'noe polozhenie lichnosti v obshchestve*. In *Vestnik Saratovskoy gosudarstvennoy yuridicheskoy akademii. Saratov State Law Academy Bulletin*, v. 6, 2008. P.15.

18 STARMER, Keir. *European Human Rights Law*. The Human Rights Act 1998 and the European Convention on Human Rights. London: Legal Action Group, 1999. p. 108-110.

19 Application ECHR. *X. v. the United Kingdom*. Application no. 6998/75. Report of 16 July 1980. Available from: <http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-74270&filename=001-74270.pdf>. Access in: 27 out. 2020. p. 31-32; Application ECHR. *B. v. the United Kingdom*. Application no. 6870/75. Report of 7 October 1981. Available from: [https://hudoc.echr.coe.int/fre#%22itemid%22:\[%22002-3739%22\]](https://hudoc.echr.coe.int/fre#%22itemid%22:[%22002-3739%22]). Access in: 27 out. 2020. § 208; Application ECHR. *Guzzardi v. Italy*. Application no. 7367/76. Judgment of 6 November 1980. Available from: [https://hudoc.echr.coe.int/fre#%22itemid%22:\[%22001-57498%22\]](https://hudoc.echr.coe.int/fre#%22itemid%22:[%22001-57498%22]). Access in: 27 out. 2020. p. 36-37.

20 STARMER, Keir. *European Human Rights Law*. The Human Rights Act 1998 and the European Convention on Human Rights. London: Legal Action Group, 1999.p 108-110.

Chamber, found that the preventive detention had been justified under Article 5(1) (e) of the Convention. On the basis of objective medical expertise, the Court observed that the applicant was suffering from sexual sadism, i.e. a true mental disorder for the purposes of Article 5(1) (e). Thus, there were reasons to believe that the applicant would again commit another serious offense similar to the one he had been found guilty of, if released. The Court also found that the applicant's preventive detention in Straubing Prison was lawful because he was a person "of unsound mind".<sup>21</sup>

Detention of alcoholics and drug addicts under Article 5(1) (e) is done according to the same criteria that are applied to the mentally ill. Though the ECHR does not confirm this idea directly, it comes out of its practice.

## Legality: One of Five ECHR Criteria of Lawful Detention

It is necessary to note that a restriction on the right to liberty and security consists of the measures aimed to restrict the physical freedom of a person and detain him/her according to the purposes of Article 5(1) (e). The legality of the restriction is determined according to the following criteria: the presence of legal grounds for the restriction, compliance with its permissible purposes, its legality, reasonableness, and proportionality.

One of the criteria, which shows that a restriction is lawful, is its legality. This is a condition under which the right in question can be restricted only by law. This is a guarantee common to the major international agreements and constitutions of the world.

The criterion of the reasonableness of interference with the right means that there must be factual circumstances, which have made it necessary to restrict a person's liberty and security. That is the existence of relevant factual grounds for a restriction. The criterion of reasonableness is a common requirement for all the permissible restrictions of other rights provided for under the Convention.<sup>22</sup> The legal grounds described in Article 5(1) of the Convention need factual grounds. The requirements for factual grounds are various and totally dependable on the legal grounds for restrictions.

21 Application ECHR. *Ilseher against Germany*. Application No. 10211/12 и 27505/14, Judgment of 4 December. Available from : [https://hudoc.echr.coe.int/fre#%22itemid%22:\[%22001-187540%22](https://hudoc.echr.coe.int/fre#%22itemid%22:[%22001-187540%22). Access in: 27 out. 2020.

22 For example, in its opinion on the legality of detention after conviction by a competent court under Article 5(1) (a), the ECHR emphasizes that a detention will be illegal without justifiable grounds for interference with the right to personal liberty and security. At the same time, it is necessary to have proved that the person in question has committed an offense punishable by imprisonment under the legislation of his/her country. For example, Application ECHR. *Weeks v. The United Kingdom*. Application no. 9787/82. Judgment of 2 March 1987. Available from: [https://hudoc.echr.coe.int/fre#%22itemid%22:\[%22001-57594%22](https://hudoc.echr.coe.int/fre#%22itemid%22:[%22001-57594%22)}. Access in: 27 out. 2020.



The requirement for proportionality implies a reasonable balance between the public (sometimes private) interest and the importance of the right to personal liberty and security. When there is such a balance, it means that a person detained fits the purpose of the detention and so do the circumstances of his/her case. For example, in *Vasileva v. Denmark*, the applicant, aged 67, had a dispute with a ticket inspector, who accused her of having traveled without a valid ticket. When he was about to issue a penalty fare she refused to disclose her identity and the police were consequently called. They requested that the applicant give her name and address, and since she refused, she was arrested in accordance with Danish law. The woman was kept in detention for 13 hours. In the end, she revealed her identity and was released. The Court found that the applicant's detention for 13 hours, given her age, was a measure disproportionate to the purpose of establishing her identity.<sup>23</sup>

A similar violation was found by the Court in *Nowicka v. Poland*.<sup>24</sup>

Another example is the ECHR opinion expressed in *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*. In this case, a minor who entered the country illegally was detained in a transit center for illegal immigrants under the same conditions as adults. In the Court's view, the conditions were not appropriate to the extremely vulnerable situation, involving the child unaccompanied by her family.<sup>25</sup>

It is important that the ECHR assessment of restriction proportionality is limited by the provisions of Article 5 of the Convention. For example, under Article 5, the Court is not supposed to assess the severity of punishment. Accordingly, it does not have to consider whether the punishment is just from the point of the length of detention prescribed by a competent court.<sup>26</sup> In the Court's opinion, the issues of this

23 Application ECHR. *Vasileva v. Denmark*. Application no. 52792/99, ECHR Judgment of 25 September 2003. Available from: [https://hudoc.echr.coe.int/fre#%7B%22display%22:\[2\],%22itemid%22:\[%22002-4699%22\]%7D](https://hudoc.echr.coe.int/fre#%7B%22display%22:[2],%22itemid%22:[%22002-4699%22]%7D). Access in: 27 out. 2020. § 36 - 37. See also Application ECHR. *McVeigh and Others v. United Kingdom*. Application nos. 8022/77, 8025/77, 8027/77. Decision of 18 March 1981. Available from: <http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-95663&filename=001-95663.pdf>. Access in: 27 out. 2020.

24 Application ECHR. *Nowicka v. Poland*. Application no. 30218/96. Judgment of 3 December 2002. Available from: <http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-60791&filename=001-60791.pdf>. Access in: 27 out. 2020.

25 Application ECHR. *Mubilanzila Mayeka and Kaniki Mitunga v. Belgium*. Application no. 13178/03, Judgment of 12 October 2006. Available from: [https://hudoc.echr.coe.int/FRE#%7B%22itemid%22:\[%22001-77447%22\]%7D](https://hudoc.echr.coe.int/FRE#%7B%22itemid%22:[%22001-77447%22]%7D). Access in: 27 out. 2020.

26 Application ECHR. *Léger v. France*. Application no. 19324/02. Judgment of 11 April 2006. Available from: [https://hudoc.echr.coe.int/fre#%7B%22itemid%22:\[%22003-1636723-1714833%22\]%7D](https://hudoc.echr.coe.int/fre#%7B%22itemid%22:[%22003-1636723-1714833%22]%7D). Access in: 27 out. 2020. § 72; Application ECHR. *Weeks v. The United Kingdom*. Application no. 9787/82. Judgment of 2 March 1987. Available from: [https://hudoc.echr.coe.int/fre#%7B%22itemid%22:\[%22001-57594%22\]%7D](https://hudoc.echr.coe.int/fre#%7B%22itemid%22:[%22001-57594%22]%7D). Access in: 27 out. 2020. § 50; Application ECHR. *T. v. the United Kingdom*. Application no. 24724/94. Judgment of 16 December 1999. Available from: [https://hudoc.echr.coe.int/fre#%7B%22itemid%22:\[%22001-5105%22\]%7D](https://hudoc.echr.coe.int/fre#%7B%22itemid%22:[%22001-5105%22]%7D). Access in: 27 out. 2020.; Application ECHR. *V. v. the United Kingdom*. Application no. 24888/94. Report of 4 December 1998. Available from: [https://hudoc.echr.coe.int/fre#%7B%22itemid%22:\[%22001-58035%22\]%7D](https://hudoc.echr.coe.int/fre#%7B%22itemid%22:[%22001-58035%22]%7D). Access in: 27 out. 2020.

type are out of the remit of the Convention.<sup>27</sup>

It was also reported that the system of rights and freedoms guaranteed by the Convention does not include the right to appropriate punishment. The issues of this type should be resolved according to the domestic legislation of each country. Accordingly, the ECHR does not have a valid jurisdiction to pass judgments on whether a punishment in the respondent State has been appropriate.<sup>28</sup>

One of the important points of the criterion of proportionality is that the measures taken should correspond to the goals which are supposed to be achieved. The criterion of proportionality the context of personal liberty and security is best revealed by answering the question of whether the place and conditions of detention correspond to its purpose. The notion of proportionality is especially significant in the context of Article 5(1) (d) and (f) of the Convention since the grounds for the deprivation of personal liberty assume that the restriction in itself is not sufficient to achieve the relevant objectives.

The starting point is the ECHR opinion that under the Convention, the issue of detention legality is a prerogative of national legislations. Moreover, this requires compliance with both substantive and procedural rules of law of the country concerned.<sup>29</sup>

The words like “prescribed by law” and “lawful” are the indicators of legality requirements. They also reflect the necessity of compliance with domestic substantive and procedural rules.

However, the analysis of ECHR practice indicates that considering the issue of detention legality, the Court usually makes no clear distinction between domestic and international guarantees. The Court either refers to them simultaneously, while interpreting them, or puts them forward as a single concept of legality.

In *Witold Litwa v. Poland*, the ECHR, first, considered whether the applicant had been fairly classified as an alcoholic, and, secondly, the Court assessed if there had been a threat to public safety. Another question was if it had been necessary to detain the applicant, taking into account his health and personal qualities. In fact, the Court

27 Application ECHR. *Sawoniuk v. the United Kingdom* Application no. 36716/00. Decision of 29 May 2001. Available from: <http://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-5878&filename=001-5878.pdf>. Access in: 27 out. 2020.

28 Application ECHR. *X. v. Austria*. Application no. 4280/69. Decision of 13 July 1970. Available from: <https://hudoc.echr.coe.int/fre?i=001-3166>. Access in: 27 out. 2020.

29 For example, *Federal'nyi zakon ot 18 iyunia 2001 gNo.77-FZ “O preduprezhdenii rasprostraneniia tuberkuleza v Rossiiskoi Federatsii”* [The Federal Law On Preventing the Spread of Tuberculosis in the Russian Federation of 18 June 2001] states that the breach of the Russian tuberculosis prevention legislation entails criminal liability. See <http://ivo.garant.ru/#/document/12123352/paragraph/141:0> (accessed on 27 October 2020) [in Russian].

applied the first two criteria of the five, i.e. the existence of a legal ground under the Convention and compliance with the permissible purposes of restriction. The same criteria are used with respect to the detention of persons of unsound mind.<sup>30</sup>

As for the legality criterion, the ECHR did not apply it to alcoholics and drug addicts. The Court agreed to the theoretical legal idea that all five criteria together should be applied to this category of persons.<sup>31</sup> It can be assumed that in case a question about the legality of prolonged detention of alcoholics or drug addicts arises, the Court will apply an assessment similar to the one used in relation to persons of unsound mind.

At the same time, the aforementioned five criteria test has certain specifics in the context of alcoholics and drug addicts. First of all, it is necessary to focus on the question of who can be considered an alcoholic or a drug addict. For mentally ill people, it is enough to have a medical assessment report but it should be noted that not all mental disorders are associated with a mental illness. The requirements for categorizing a person as an alcoholic were first considered in the aforementioned case *Witold Litwa v. Poland*. The applicant was detained as an alcoholic though he had no corresponding medical diagnosis. The man did not have alcohol addiction; he was just under the influence. The applicant argued that “intoxicated persons” could not be identified with “alcoholics” since the latter term – both in its scientific and lay usage – denoted persons addicted to and dependent on alcohol, not temporarily under its influence. The applicant claimed he had been deprived of his liberty unlawfully and that the respondent State (Poland) had been in breach of Article 5(1) of the Convention.

The ECHR raised the question of the interpretation of the term “alcoholics” used in Article 5(1) (e) of the Convention. And based on another Convention (the Vienna Convention on the Law of Treaties of 1969),<sup>32</sup> it was decided that the term “alcoholics” should be understood as covering not only persons with a defined psychiatric condition of alcohol dependency but also those occasionally intoxicated. Intoxicated persons can be dangerous to the public and themselves. That is why it is considered lawful to detain them under Article 5(1) (e).

Thus, the object and purpose of this provision cannot be interpreted as only allowing the detention of “alcoholics” in the limited sense of persons in a clinical state of “alcoholism”. The Court noted that, under Article 5 (1) (e), persons who are

30 Application ECHR. *Witold Litwa v. Poland*. Application no. 26629/95. Judgment of 4 April 2000. Available from: [https://hudoc.echr.coe.int/fre#{%22itemid%22:\[%22002-6873%22\]}](https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22002-6873%22]}). Access in: 27 out. 2020. § 77-80.

31 MURDOCH, Jim. *Article 5 of the European Convention on Human Rights: The Protection of Liberty and Security of Person*. Strasbourg: Council of Europe, 2002.p. 63.

32 These are Articles 31–33 of the VIENNA. *Convention on the Law of Treaties*. 22 maio 1969. Available from: [https://www.trans-lex.org/500600/\\_/vienna-convention-on-the-law-of-treaties-of-1969](https://www.trans-lex.org/500600/_/vienna-convention-on-the-law-of-treaties-of-1969). Access in: 27 de out. de 2020.

not medically diagnosed as “alcoholics”, but whose conduct and behavior under the influence of alcohol pose a threat to public order or themselves, can be taken into custody for the protection of the public or their own interests, such as their health or personal safety.<sup>33</sup> Similar conclusions can be observed in other cases.<sup>34</sup>

The Court’s position “does not mean that Article 5(1) (e) of the Convention can be interpreted as permitting the detention of an individual merely because of his alcohol intake. However, the Court considers that in the text of Article 5 there is nothing to suggest that this provision prevents that measure from being applied by the State to an individual abusing alcohol, in order to limit the harm caused by alcohol to himself and the public, or to prevent dangerous behavior after drinking”.<sup>35</sup>

To find out if there was a necessity to detain a drunken person, the ECHR checks up if the person posed a threat to the public or to himself/herself. The threat should be serious enough. The Court takes into consideration all the relevant circumstances, including personal qualities. The ECHR stresses that “the detention of an individual is such a serious measure that it is only justified where other, less severe measures have been considered and found to be insufficient to safeguard the individual or public interest which might require that the person concerned be detained”.<sup>36</sup>

## Conclusion

Thus, Article 5(1) (e) of the European Convention for the Protection of Human Rights and Fundamental Freedoms permits the detention of infected persons, persons of unsound mind, alcoholics, drug addicts, and vagrants. Detentions are aimed to protect public interests and/or the interests of the detained. Any restriction of personal liberty

33 Application ECHR. *Witold Litwa v. Poland*. Application no. 26629/95. Judgment of 4 April 2000. Available from: [https://hudoc.echr.coe.int/fre#{%22itemid%22:\[%22002-6873%22\]}](https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22002-6873%22]}). Access in: 27 out. 2020. § 60-61.

34 Application ECHR. *Hilda Hafsteinsdóttir v. Iceland*. Application no. 40905/98. Judgment of 8 June 2004. Available from: [https://hudoc.echr.coe.int/fre#{%22itemid%22:\[%22001-61813%22\]}](https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22001-61813%22]}). Access in: 27 out. 2020.

35 The Court finds that this meaning of the term “alcoholics” is confirmed by the preparatory work on the Convention. In that regard, the Court observes that in the commentary on the preliminary draft Convention it is recorded that the text of the relevant Article covered the right of the signatory States to take measures to combat drunkenness. See ECHR. *Witold Litwa v. Poland*. Application no. 26629/95. Judgment of 4 April 2000. Available from: [https://hudoc.echr.coe.int/fre#{%22itemid%22:\[%22002-6873%22\]}](https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22002-6873%22]}). Access in: 27 out. 2020.

36 For example, in *Witold Litwa v. Poland*, the Court found that there had been other appropriate measures to be applied to the applicant (for example, to take him to his place of residence). Unfortunately, this possibility, officially fixed by Polish domestic law, had been ignored. See ECHR. *Witold Litwa v. Poland*. Application no. 26629/95. Judgment of 4 April 2000. Available from: [https://hudoc.echr.coe.int/fre#{%22itemid%22:\[%22002-6873%22\]}](https://hudoc.echr.coe.int/fre#{%22itemid%22:[%22002-6873%22]}). Access in: 27 out. 2020.

and security must be governed by law. This means that a person detained should suffer from an infectious disease or be in such a condition that makes detention necessary.

In addition, the practice of the ECHR shows that not only “true alcoholics”, i.e. persons addicted to and dependent on alcohol, can be detained but also those who, being intoxicated, pose a threat to public order or themselves.

We believe that the ECHR practice confirms the legality of detentions under Article 5(1) (e) of the Convention and implies the measures to not only isolate a person from society but also to reduce his/her danger to himself/herself or the public.

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