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II. JUDICIAL CONTROL OF DETENTION UNDER THE EUROPEAN COURT OF HUMAN RIGHTS

Géraldine Renaudière

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Key issues

- To what extent does the ECtHR influence the RD in terms of :
 - Procedural and substantive conditions essential for a pre-removal detention to be “lawful” ;
 - Judicial review of “lawfulness” by national courts.

- In addition, does the RD go beyond the former on certain of those aspects?

- Relevance : the jurisprudence developed by the Strasbourg Court on the basis of Article 5 (1)(f) is an essential tool for interpreting the relevant provisions of the RD.



I. « Lawfulness » under Article 5 § 1 ECHR

- ❑ “Every one 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: f) The lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition. ”

- ❑ As interpreted by the Court, a detention is « lawful » when it :



- Follows “a procedure prescribed by law” in that it conforms to the substantive and procedural rules of national law;
- Is authorized by a national law which above all presents a certain “quality” in that the legislation must be accessible, precise and foreseeable to the person concerned;
- Is compatible with the purpose of Article 5 ECHR, which consists of protecting the individual from *arbitrariness*.

What is meant by « arbitrariness »?

- No global definition of the notion
- Extends beyond lack of conformity with national law (*Saadi*)
- to avoid being branded arbitrary, detention under Article 5 (1)(f) :



- 1. Must be carried out in good faith;**
- 2. Must be closely connected to the ground of detention relied on by the Government;**
- 3. 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”;**
- 4. The length of the detention should not exceed that reasonably required for the purpose pursued.**



An extensive interpretation, but...

- Detention does not have to be « necessary » or « proportional » to be lawful (*Chahal, Čonka, Batalov,...*)
- Absence of a specific-time limit within the ECHR
- Nuanced approach : totally missing aspects from the Court's reasoning?



II. « Lawfulness » review under Art. 5 § 4 ECHR

- ❑ *Habeas corpus* : provides detained persons with the right to actively seek a judicial review of their detention.

- ***What is reviewed?*** The “lawfulness” of the detention in the same meaning that Article 5 § 1 ECHR

- ***How it is reviewed?***
 - ✓ No guarantee of a scope empowering the court, on all aspects of the case including questions of pure expediency, to substitute its own discretion for that of the decision-making authority
 - ✓ But wide enough (...) to have the competence to “decide” the “lawfulness” of the detention and to order release if the detention is unlawful (see *A. and Others*).



III. General comparison with Article 15 RD

- ❑ *Article 5(1) and (4) ECHR : main source of inspiration*
- **General compliance with the Court's case-law and clear inspiration for the wording of Article 15 RD** (e.g., lawfulness review, length of detention, close connection to the ground, appropriate place and conditions...)
- **Yet, some specific aspects of « arbitrariness », embodied by the ECtHR, are not accurately reproduced** (authorities must act in accordance with a procedure prescribed by national law, the quality of the law : compatibility with the Rule of Law; predictable and accessible, pre-removal detention has to be carried out in good faith.)



- ❑ *Beyond the influence.... A stronger individual protection?*
- **Explicitness** : legal requirements vs. General concept of « Lawfulness » under the ECtHR case-law
- **Innovation** : additional legal requirements thus extending the scope of Lawfulness review under Article 5 § 4 ECHR
 1. *Initial necessity test*
 2. *Initial proportionality test*
 3. *Specific time-limits applying to the length of detention*
- **However, remaining questions...**