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**Dossiê**

*“Liberdade pessoal do imputado e medidas cautelares restritivas à liberdade individual no processo penal”*



IBRASPP


# Preventive arrest in criminal procedure and police law in light of Article 5 of the ECHR

*Prisão preventiva no processo penal e no direito policial diante do artigo 5 da CEDH*

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**ABSTRACT:** Preventive arrest is a controversial instrument of crime prevention that is commonly regulated in police law and in some criminal procedures. Its conformity with Article 5 of the European Convention on Human Rights (ECHR) has been the subject of many decisions and judgments of the European Court on Human Rights. Since its judgment in the Ciulla case in 1989, the Court has been of the opinion that § 1 (b) of Article 5 is applicable to preventive deprivation of liberty, which requires that detention be applied to secure the fulfilment of any obligation prescribed by law, if the obligation is specific enough. On the contrary, in the Court's opinion, § 1 (c) of Article 5 is inapplicable outside the framework of criminal procedure. In the judgment of 22 October 2018 in the case of *S., V., and A. v. Denmark*, the Grand Chamber took the opposite view, which calls for an analysis of how far preventive arrest is allowed under the ECHR. The analysis and European standards may also be of interest to researchers from non-European countries, as the problem of the use of preventive arrests is discussed worldwide.

**KEYWORDS:** preventive arrest; criminal procedure; right to liberty; prevention; European Convention on Human Rights

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**RESUMO:** *A prisão preventiva é um instrumento controverso de prevenção à criminalidade, regulada normalmente no direito policial e em alguns sistemas processuais penais. Em conformidade com o artigo 5 da CEDH, tal tema foi objeto de diversas decisões de debates no TEDH. Desde o caso Ciulla em 1989, o Tribunal adotou a posição de que o § 1 (b) do artigo 5 é aplicável na segregação preventiva da liberdade, requerendo que a prisão seja decretada em atenção aos requisitos determinados na legislação, se eles forem suficientemente específicos. Por outro lado, na visão do TEDH, o § 1 (b) do artigo 5 é inaplicável a ramos distintos do direito processual penal. Contudo, no julgamento de 22 de outubro de 2018, no caso S., V. e A. v. Dinamarca, o Tribunal Pleno adotou posição oposta, o que impõe a análise dos limites de aplicação da prisão preventiva.*

**PALAVRAS-CHAVE:** *prisão preventiva; processo penal; direito à liberdade; prevenção; Convenção Europeia de Direitos Humanos.*

## 1. INTRODUCTION

The right to personal liberty is without a doubt one of the core human rights guaranteed by national constitutions and international instruments. Therefore, every legislative attempt to create legal grounds for limiting the right must be given due attention, and any regulation must comply with the requirements of Article 5 of the European Convention on Human Rights (ECHR)<sup>2</sup>. This is also very important in the case of deprivation of liberty for preventive purposes. More or less distant history shows that preventive detention could be used for political reasons, persecution of certain members or groups of society, or their discrimination<sup>3</sup>. There is also a danger that the personal freedom of

<sup>2</sup> COUNCIL OF EUROPE, Convention on the Protection of Human Rights and Fundamental Freedoms, adopted on 4 November 1950. Hereafter referred to as “the Convention” or “ECHR”.

<sup>3</sup> See for example STASCHEIT, Ulrich; HART, Dieter, *Vorbeugehaft für Demonstranten?*, *Kritische Justiz*, v. 2, n. 1, 1969, p. 88-92 on the use of preventive detention as an instrument of repression in Nazi Germany. In Poland, after introduction of martial law by the communist regime, several thousands of opposition activists were interned on the base of decree of 12 December

individuals, perceived rightly or not as posing a risk, could be easily sacrificed for the sake of the security of society.

The issue of the preventive deprivation of liberty has long been discussed in different contexts (pretrial-detention, post-conviction detention of sexual offenders, internment of persons suspected of terrorism, detention of persons with mental disorders, etc.)<sup>4</sup>. One aspect is its application in cases when there is an imminent and concrete risk of commission of a crime. In a line of cases, which will be presented below, the European Court of Human Rights (ECtHR)<sup>5</sup> for many years distinguished situations where a person is already a suspect from those where there are no grounds to suspect a person of any previous crime. This approach was changed by the judgment of the Grand Chamber in the case *S., V., and A. v. Denmark* of 22 October 2018<sup>6</sup>, where the Court expressed the opinion that preventive arrest may be based on Article 5 § 1 (c) of the ECHR, irrespective of whether the person is suspected of having committed a crime. This paper will explore the consequences of the ECtHR's judgment for crime prevention policies and the legal regulations of the parties to the Convention, discussing the need and possibilities to change the existing regulations relating to

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1981. See INSTITUTE OF NATIONAL REMEMBRANCE, The IPN on the 25th anniversary of introducing of the Martial Law in Poland, <https://ipn.gov.pl/en/news/221,The-IPN-on-the-25th-anniversary-of-introducing-of-the-Martial-Law-in-Poland.html>.

<sup>4</sup> See for example ANGEL Arthur R. et al., Preventive Detention: An Empirical Analysis, *Harvard Civil Rights - Civil Liberties Law Review*, v. 6, n. 2, 1971, p. 300; CORRADO Michael L., Punishment and the Wild Beast of Prey: The Problem of Preventive Detention, *Journal of Criminal Law and Criminology*, v. 86, n. 3, 1996, p. 778; MONTAGUE Phillip, Justifying Preventive Detention, *Law and Philosophy*, v. 18, n. 2, 1999, p. 173; COLE David, Out of the Shadows: Preventive Detention, Suspected Terrorists and War, *California Law Review*, v. 97, 2009, p. 693; ASHWORTH Andrew, ZEDNER Lucia, *Preventive justice*, Oxford: Oxford University Press, 2014; KEYZER Patrick (ed.), *Preventive Detention: Asking the Fundamental Questions*, Cambridge, Cambridge University Press, 2013; LUDSIN Hallie, *Preventive Detention and the Democratic State*, Cambridge: Cambridge University Press, 2016.

<sup>5</sup> Hereafter referred to as “ECtHR” or “the Court”.

<sup>6</sup> Judgment of the ECtHR in case *S., V., and A. v Denmark* of 22 October 2018, applications n. 35553/12, 36678/12 and 36711/12.

arrest. The European standards may also be of interest to researchers from other legal systems, as the issue of preventive detention is debated in many states.

## 2. ARREST FOR PREVENTIVE PURPOSES IN CRIMINAL PROCEDURE AND POLICE LAW

First, it is necessary to define the term “arrest”, as there are differences in perception of the term. In this paper, the term “arrest” is understood as a short-term deprivation of liberty, usually not exceeding a few days, effected by police forces for reasons other than penalty retribution<sup>7</sup>. Such arrest may be transformed later into pre-trial detention, which may last for a longer period if there is sufficient evidence to charge the person and if bail or other measures (police supervision, electronic monitoring, or house arrest) are not adequate. Arrest is usually made in individual cases, which distinguishes it from general internment.

Preventive purpose in the context of arrest generally mean excluding or at least lowering the risk of commission of crime in the future. Therefore, the purpose of preventive arrest is protection of society or certain persons (especially victims) against the acts of the persons arrested. However, in some countries, there is also a legal base for deprivation of liberty to protect a suspect against harm from society, certain persons, or even himself or herself<sup>8</sup>, which is recognised as compatible with the ECHR<sup>9</sup>. Despite some similarities between the former

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<sup>7</sup> In some legal systems (for example in Poland), the term arrest is used also in relation to penalty. This kind of arrest has, however, completely different character (reaction – mainly retributive - on a criminal act done in the past).

<sup>8</sup> See sections 38(1)(a)(vi) and (b)(ii) of the Police and Criminal Evidence Act 1984 in England and Wales, available at <https://www.legislation.gov.uk/ukpga/1984/60/contents> and article 144 (2) of the French Code of Criminal Procedure (Code de procédure pénale) 1957. Available at [https://www.legislationline.org/download/id/8539/file/France\\_CPC\\_am022020\\_fr.pdf](https://www.legislationline.org/download/id/8539/file/France_CPC_am022020_fr.pdf).

<sup>9</sup> See judgment of the ECtHR of 23 September 1998 in case *I. A. v France*, 1/1998/904/1116 and the English case *Archer v The Commissioner of Police of the Metropolis*, [2020] EWHC 1567 (QB).

and the latter purposes of arrest, I opt for calling the latter as “protective”, not “preventive” arrest, as they have different purposes.

As mentioned, arrests for preventive purposes may be applied in different legal frameworks. The main frameworks are criminal procedures and police law. To illustrate this difference, examples of Danish and Polish regulations will be used.

The first framework is criminal procedure. Preventive arrest may take place when, during the proceedings, it is established that the person suspected of committing a crime may commit another crime in the future. According to article 755 (1) of the Danish Administration of Justice Act (Retsplejeloven) 1916 (which is the Danish code of criminal and civil procedure)<sup>10</sup>: “The police may arrest any person who is reasonably suspected of a criminal offence subject to public prosecution, if arrest is deemed necessary to prevent further criminal offences, to secure the person’s presence for the time being, or to prevent his association with others”. In Poland, Article 244 § 1a of the Code of Criminal Procedure (Kodeks postępowania karnego) 1997<sup>11</sup> provides that “A person may be arrested by the Police if there are justified grounds to suspect that this person committed an offence with the use of violence against a member of his household and it is feared that such an offence may be repeated, especially if the suspected person is threatening to do so” and Article 244 § 1b of the Code of Criminal Procedure 1997 makes such arrest mandatory “if the offence referred to in § 1a was committed with the use of a firearm, a knife, or any other dangerous item and there is a fear that an offence with the use of violence against a member of the suspected person’s household may be repeated, especially if the suspected person is threatening to do so”. As might be observed, in Polish criminal procedures, preventive arrest is possible only in cases of domestic violence, while in Denmark, there is no such limitation. This kind of arrest may be called criminal preventive arrest, as it is applied within criminal procedures in a criminal case.

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<sup>10</sup> Available at <https://danskelove.dk/retsplejeloven>.

<sup>11</sup> Available at <http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU19970890555/U/D19970555Lj.pdf>.

The second framework is police (administrative) law. Regulations concerning police activities oriented at preserving public order and the prevention of crime allow for short deprivation of liberty if a certain behaviour of person indicates that it is likely that the person may commit a crime because, for example, the person intends to take part in riots or brawling between football hooligans, which is foreseeable from his or her behaviour and from objects found in the possession of the person. As this kind of deprivation of liberty is not connected with criminal procedure, it may be described as a non-criminal preventive arrest. Examples of this may be found in both countries mentioned above.

In Denmark, § 5 (3) of the Danish Law on Police Activities (Lov om politiets virksomhed) 2015<sup>12</sup> provides that where the less intrusive measures set out in subsection 2 are found to be inadequate to avert a danger, the police may, if necessary, detain the person or persons causing the danger. Such detention must be as short and moderate as possible and should not extend beyond 6 hours where possible. In the case of danger related to riots, the detention should not extend beyond 12 hours where possible (§ 9 (3) of the Danish Law on Police Activities).

In Poland, non-criminal preventive arrest is regulated generally in Article 15 (3) of the Police Act (Ustawa o Policji) 1990<sup>13</sup>, according to which the police have the power to arrest persons, obviously causing imminent danger to life or health and to property. Separate grounds of arrest are provided for persons using violence in family if they cause direct danger to human life or health (Article 15a (1) of the Police Act 1990).

The comparison between criminal and non-criminal preventive arrest leads to the observation that in the first case, it is necessary to have a reasonable suspicion that a crime has already been committed (which usually warrants the possibility of initiating criminal proceedings) and that there is a threat of another criminal act, while in the case of police law, there is no reasonable suspicion of past offence required, only the threat of future offence. In other words, in the first case, investigation

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<sup>12</sup> Available at <https://www.retsinformation.dk/eli/lta/2019/1270>.

<sup>13</sup> Available at [http://www.policja.pl/ftp/pliki/police\\_act.pdf](http://www.policja.pl/ftp/pliki/police_act.pdf).

takes place (on the base of criminal procedure law), and in the second case, non-criminal police operations/activities (on the base of police law). The distinction between criminal procedure and police law is very important because there might be different competent authorities, guarantees, periods of detention, etc. It is also possible that preventive arrest is regulated only as a non-criminal measure by police law. In some countries, the distinction between preventive arrest in criminal procedure and police law is not so sharp. This is particularly visible in the case of common law countries, where the police act on the basis of police law during investigations of past criminal acts or purely preventive operations/activities<sup>14</sup>. For example, section 24 of the English Police and Criminal Evidence Act 1984 regulates both situations: (1) A constable may arrest without a warrant—(a) anyone who is about to commit an offence; (b) anyone who is in the act of committing an offence; (c) anyone whom he has reasonable grounds for suspecting to be about to commit an offence; (d) anyone whom he has reasonable grounds for suspecting to be committing an offence. (2) If a constable has reasonable grounds for suspecting that an offence has been committed, he may arrest without a warrant anyone whom he has reasonable grounds to suspect of being guilty of.

The aim of non-criminal preventive arrest is the interruption of antisocial activity before it fulfils elements of crime rather than the initiation of criminal proceedings.

The above presents a wide possibility of the use of preventive arrest on the basis of domestic law in many European states and raises a question as to which forms of preventive detention are presently allowed under the ECHR.

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<sup>14</sup> Therefore, it is very difficult for a common law lawyer to understand the civil law concept of criminal procedure and police law. For more on the issue in the context of German regulations, see ENGELHART, Marc, Countering Terrorism at the Limits of Criminal Liability in Germany in: DYSON Matthew, VOGEL Benjamin (eds.), *The Limits of Criminal Law. Anglo-German Concepts and Principles*. Cambridge-Antwerp-Chicago, Intersentia, 2018, p. 457–461.



### 3. POSITION OF THE ECtHR IN OSTENDORF V. GERMANY AND EARLIER CASES

In some cases, the ECtHR analysed the problem of preventive arrest. The first important issue was which ground listed in Article 5 (1) is applicable. For decades, the Court took the view that point c is inapplicable to pure preventive detention<sup>15</sup>. Recapitulation of the position may be found in the case of *Ostendorf v. Germany*<sup>16</sup>. In that case, before a match, a group of football fans from Bremen, known to the police as troublemakers, was told by the police in Frankfurt am Main not to leave the police escort and not to try to engage in any confrontation with the football fans of the opposite side. The applicant ignored that and left the escort. Besides, when the mobile found in his possession rang in the presence of the police officers, it displayed the name of a person from Frankfurt am Main. This the police interpreted as setting up a brawl. Ostendorf was arrested at 2:30 pm and detained at the police station until 6:30 pm to prevent him from committing an offence. It was not contested in the case that, although it was only for a short time, he was deprived of his liberty. The question was, therefore, whether any ground in Article 5 (1) was applicable to justify the detention.

By first examining Article 5 § 1 (c), the Court observed that the applicant had not yet committed a criminal offence, and therefore the first part of the paragraph was inapplicable. In the alternative in sub-paragraph c (“when it is reasonably considered necessary to prevent his committing an offence”), the Court expressed the opinion “that under paragraphs 1 (c) and 3 of Article 5, detention to prevent a person from committing an offence must, in addition, be <<effected for the purpose of bringing him before the competent legal authority>> and that that person is <<entitled to trial within a reasonable time>>. Under its long-established case-law, the second alternative of Article 5 § 1 (c) therefore only governs pre-trial detention and not custody for preventive purposes without the person

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<sup>15</sup> See cases *Ječius v Lithuania*, judgment of the ECtHR of 31 July 2000, application n. 34578/97 and *Schwabe and M. G. v Germany*, judgment of the ECtHR of 1 December 2011 r., applications n. 8080/08 and 8577/08.

<sup>16</sup> Judgment of the ECtHR of 7 March 2013 in case *Ostendorf v Germany*, application n. 15598/08.

concerned being suspected of having already committed a criminal offence”<sup>17</sup>. In this case, the arrest was aimed at preventing crime and not at prosecuting the crime committed. Sub-paragraph c was therefore declared inapplicable. Regarding the suggestion of the German government to revise the case law concerning the issue, the Court answered that “that interpretation could neither be reconciled with the entire wording of sub-paragraph (c) of Article 5 § 1 nor with the system of protection set up by Article 5 as a whole. (...) In particular, contrary to the Government’s submission, the term <<trial>> does not refer to a judicial decision on the lawfulness of the preventive police custody. Those proceedings are addressed in paragraph 4 of Article 5”<sup>18</sup>. Further, the Court did not agree with the argument of the German government, that accepting this interpretation means that the second alternative of Article 5 § 1 (c) can be considered as superfluous in addition to the first alternative of that provision because the second alternative may refer to cases of criminal preparation of an offence<sup>19</sup>. Referring to the subsequent argument, that interpretation of Article 5 must take into account the positive obligations of the states under Articles 2 and 3, the Court observed that “The State’s positive obligations under different Convention Articles do not, therefore, as such warrant a different or wider interpretation of the permissible grounds for a deprivation of liberty exhaustively listed in Article 5 § 1”<sup>20</sup>.

Rejecting the possibility of applying sub-paragraph c, the Court pointed out the second part of sub-paragraph b (“in order to secure the fulfilment of an obligation prescribed by law”) as an adequate ground for preventive arrest. The Court observed that the “obligation here at issue, namely, to keep the peace by not committing a criminal offence can only be considered as <<specific and concrete>> for the purposes of that provision if the place and time of the imminent commission of the offence and its potential victim(s) have been sufficiently specified. The Court is satisfied that this was the case here. The applicant was to be prevented from arranging a brawl between Bremen and Frankfurt

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<sup>17</sup> *Ostendorf v Germany*, § 82.

<sup>18</sup> *Ostendorf v Germany*, § 85.

<sup>19</sup> *Ostendorf v Germany*, § 86.

<sup>20</sup> *Ostendorf v Germany*, § 87.

am Main hooligans in the hours before, during or in the hours after the football match on 10 April 2004 in the city of Frankfurt or its vicinity and from committing offences including bodily assaults and breaches of the peace during such a brawl”<sup>21</sup>. The Court underlined that the applicant was ordered by the police to stay with the group, with a clear indication that any person leaving the group would be arrested<sup>22</sup>.

Moreover, in the Court’s opinion, by taking the preparatory acts, the applicant showed that he was going to disobey his obligation to keep the peace, and the arrest was not of a punitive nature, but intended only to ensure fulfilment of the obligation. The nature of the obligation, whose fulfilment was sought, was itself compatible with the Convention. It was also underlined that the arrest was lifted as soon as the obligation was “fulfilled” for the purposes of Article 5 (1) (b). Lastly, the Court noted that a due balance has been struck between the importance of securing the immediate fulfilment of the obligation in question in a democratic society and the importance of the right to liberty<sup>23</sup>.

Based on these arguments, the Court decided that the applicant’s arrest was justified under Article 5 § 1 (b).

A concurring opinion was given to the judgment by judges Lemmens and Jäderblom. Accepting the view of the majority that there was no breach of Article 5 in the case, they argued, however, that the proper ground of deprivation of liberty in the case was Article 5 § 1 (c), because in fact the applicant was arrested to prevent commission of a crime or regulatory offence, not to enforce any police order, or for the mere fact of leaving the group being escorted to the stadium. The obligation not to commit criminal acts or regulatory offences was, in the opinion of the two judges, too general for the purpose of Article 5 § 1 (b) of the Convention. Indicating that Article 5 § 1 (c) was applicable, they expressed the view that “in situations where there is a vital public interest in preventing someone from committing an offence a limited possibility does exist for the law enforcing authorities to detain that person for a short period, even if he has not yet committed a crime and therefore

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<sup>21</sup> *Ostendorf v Germany*, § 93.

<sup>22</sup> *Ostendorf v Germany*, § 95.

<sup>23</sup> *Ostendorf v Germany*, § 101 – 102.

without the possibility that criminal proceedings will be opened against him”<sup>24</sup>. The authors of the concurring opinion referred to the early case of *Lawless*, pointing out that the subsequent judgments of the Court inappropriately restricted the purpose of bringing the detainee before a judge, as required in Article 5 § 3 to “deciding on the merits”, while the other possibility is examination of the question of deprivation of liberty.

#### 4. POSITION OF THE ECtHR IN *S., V., AND A. v. DENMARK*

The view expressed in the *Ostendorf* case and other cases that were decided afterwards has been criticised. In the commentary on the judgment, it was pointed out that the view leads to arbitrariness, whereas the *ratio legis* of Article 5 (1) is to prevent arbitrary deprivation of liberty<sup>25</sup>. Further, in the judgment of 15 February 2017<sup>26</sup>, the Supreme Court of the United Kingdom expressed the opinion that Article 5 § 1 (b) was inapplicable to preventive arrest and followed the opinion of the minority in the *Ostendorf* judgment, declaring that 5 § 1 (c) was an adequate ground for detention. In the opinion of the Supreme Court, an obligation mentioned in Article 5 § 1 (b) must be more specific than a general obligation not to commit a crime, and from a practical point of view, there are sometimes situations when the police must act immediately without time to give a warning. Therefore the police who use preventive arrest must rely on Article 5 § 1 (c), and in the case of a short arrest, the police is not obliged to take the persons arrested before magistrates to be bound over to keep the peace, as this would be an unnecessary prolongation of their detention.

The criticism and the increasing role of preventive arrest in the legal systems of the parties to the Convention persuaded the Court to reconsider its position. The occasion for that was the case of *S., V., and A. v. Denmark*, which was referred for judgment to the Grand Chamber.

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<sup>24</sup> *Ostendorf v Germany*, dissenting opinion, § 4.

<sup>25</sup> Detention: football hooliganism – preventive detention – *Ostendorf v Germany* (15598/08), *European Human Rights Law Review*, v. 4, 2013, p. 428 – 432.

<sup>26</sup> *R (on the application of Hicks and others) v The Commissioner of Police for the Metropolis*, [2017] UKSC 9.

In this case, the applicants were Danish football hooligans who came to Copenhagen for a football match with Sweden. As the Danish police received intelligence that brawls between the hooligans from both sides were planned, they sent police officers to identify known troublemakers. The applicants were known to the police for being members of groups of hooligans, and there were also some signs that they were going towards a place where a fight between hooligans of both nationalities had already begun. Therefore, they were stopped by the police and kept in detention for 6–7 hours, until the last group of football fans was arrested for breaching public order.

In its analysis, the Court pointed out that the case “reveals a need for the Court to revisit and further clarify its case-law, not only with a view to ensuring greater consistency and coherence but also in order to address more appropriately modern societal problems of the kind at issue in the case”<sup>27</sup>. It was underlined that many countries are facing problems with preventing offences and the breaching of public order during football matches and other mass events. It also quoted a passage from the Report of the Conference of Senior Officials on Human Rights to the Committee of Ministers, who, during discussions on the project of the Convention, expressed the opinion that “where authorised arrest or detention is effected on reasonable suspicion of preventing the commission of a crime, it should not lead to the introduction of a régime of a Police State. It may, however, be necessary in certain circumstances to arrest an individual to prevent his committing a crime, even if the facts which show his intention to commit the crime do not of themselves constitute a penal offence”<sup>28</sup>.

For the above-mentioned reasons, the Grand Chamber adopted a different view from the view, which was expressed in earlier cases concerning sub-paragraphs b and c of Article 5 § 1 of the ECHR. From sub-paragraph b, the Court observed that “prior to their detention, the applicants were not given any specific orders, for example to remain with one group or another or to leave a specific place, and were not given a

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<sup>27</sup> *S., V., and A. v Denmark*, § 103.

<sup>28</sup> COUNCIL OF EUROPE, Preparatory Work on Article 5 of the European Convention on Human Rights, DH 56 (10), Strasbourg, 8 August 1956, p. 19.

clear warning of the consequences of their failure to comply with such an order. Nor were they told by the police which specific act they were to refrain from committing. It also does not appear that anyone in the group had been found in possession of instruments typically used in hooligan brawls”<sup>29</sup>. The mere existence of criminal law provisions forbidding breaching public order, damage to property, or causing injuries was regarded as insufficient. The Court recalled its position in *Schwabe* that the “duty not to commit a criminal offence in the imminent future cannot be considered sufficiently concrete and specific to fall under Article 5 § 1 (b), at least as long as no specific measures have been ordered which have not been complied with”<sup>30</sup>. The Court also rejected the Danish government’s argument that a large police presence was sufficient to make the applicants aware that they should refrain from instigating hooligan fights at the place and time of the match, because the presence is usual during mass sport events and cannot be compared to the measures taken in *Ostendorf*. Such a wide interpretation of sub-paragraph (b) of Article 5 § 1 would be incompatible with a notion of the rule of law. Therefore the circumstances of the case were different from those in *Ostendorf*, and the applicants’ detention was not covered by sub-paragraph (b) of Article 5 § 1<sup>31</sup>.

Turning to sub-paragraph (c) of Article 5 § 1, the Court pointed out that a strict interpretation of the term “offence” used in the provision constitutes an important safeguard against arbitrariness, because it does not permit a policy of general prevention directed against an individual or a category of individuals. Also in order to avoid arbitrariness, the sub-paragraph requires that the authorities must show in a convincing manner that “the person concerned would in all likelihood have been involved in the concrete and specific offence, had its commission not been prevented by the detention”<sup>32</sup>. This is similar to the requirement of showing reasonable suspicion of having committed an offence related to past offences.

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<sup>29</sup> *S., V., and A. v Denmark*, § 84.

<sup>30</sup> *S., V., and A. v Denmark*, § 83.

<sup>31</sup> *S., V., and A. v Denmark*, § 85 – 87.

<sup>32</sup> *S., V., and A. v Denmark*, § 91.

Then the Court observed that sub-paragraph c describes three types of situations when the lawful arrest or detention of a person is possible: “on reasonable suspicion of having committed an offence”, “when it is reasonably considered necessary to prevent his committing an offence”, or when it is reasonably considered necessary to prevent fleeing after having committed an offence<sup>33</sup>. The Court referred to the *travaux préparatoires* of the Convention,<sup>34</sup> which show that the second limb was intended as a separate ground for the deprivation of liberty. That interpretation was adopted by the Court in the *Lawless* case<sup>35</sup> and some subsequent cases, including *Matznetter v. Austria*<sup>36</sup> and *Ireland v. the United Kingdom*<sup>37</sup>. Surprisingly, the Court departed from that interpretation twenty-seven years later in the *Ciulla* case<sup>38</sup> stating merely that “sub-paragraph (c) permits deprivation of liberty only in connection with criminal proceedings”. The Court did not explain the contradiction with *Lawless* in the *Ciulla* case or in any other subsequent decided case. After the analysis, “the Grand Chamber finds that it is necessary to clarify and adapt its case-law under sub-paragraph (c) of Article 5 § 1, and in particular to accept that the second limb of that provision can be seen as a distinct ground for deprivation of liberty, independently of the first limb. Although the “purpose” requirement under Article 5 § 1 (c) applies also to deprivation of liberty under the second limb of this provision, this requirement should be applied with a degree of flexibility so that the question of compliance depends on whether the detainee, as required by Article 5 § 3, is intended to be brought promptly before a judge to have the lawfulness of his or her detention reviewed, or to be released before such time. Furthermore, in the event of failure to comply with the latter

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<sup>33</sup> *S., V., and A. v Denmark*, § 98 – 99.

<sup>34</sup> COUNCIL OF EUROPE, *Preparatory...*, supra, p. 32.

<sup>35</sup> Judgment of the ECtHR of 1 July 1961 in case *Lawless v Ireland* (n. 3), application n. 332/57.

<sup>36</sup> Judgment of the ECtHR of 10 November 1969 in case *Matznetter v Austria*, application n. 2178/64.

<sup>37</sup> Judgment of the ECtHR of 13 December 1977 in case *Ireland v. the United Kingdom*, application n. 5310/71.

<sup>38</sup> Judgment of ECtHR of 22 February 1989 in case *Ciulla v Italy*, application n. 11152/84, § 38.

requirement, the person concerned should have an enforceable right to compensation in accordance with Article 5 § 5. In other words, subject to the availability under national law of the safeguards enshrined in Article 5 §§ 3 and 5, the purpose requirement ought not to constitute an obstacle to short-term detention in circumstances such as those at issue in the present case<sup>39</sup>. Having in mind the objections as to the relations between § 1 and § 3 of Article 5, the Court underlined that “when a person is released from preventive detention after a short period of time, either because the risk has passed or, for example, because a prescribed short time-limit has expired, the purpose requirement of bringing the detainee before the competent legal authority should not as such constitute an obstacle to short-term preventive detention falling under the second limb of Article 5 § 1 (c)”<sup>40</sup>.

The view expressed in the judgment of the Grand Chamber was followed in the subsequent case of *Hannah Eiseman-Renyard and others v. the United Kingdom*<sup>41</sup>. The case was taken to Strasbourg by the appellants in the case of *Hicks and others* mentioned above; it was decided by the UK Supreme Court and concerned with a deprivation of liberty to prevent a breach of the peace<sup>42</sup>. The ECtHR declared the applications inadmissible, founding that the offence of the breach of the peace is sufficiently concrete and specific in English law. In the circumstances of the case, “an objective observer would be satisfied that the applicants would in all likelihood have been involved in the concrete and specific offence had its commission not been prevented by their detention”; the applicants were released as soon as the imminent risk had passed and their deprivation of liberty was matter of hours only<sup>43</sup>.

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<sup>39</sup> *S., V., and A. v Denmark*, § 137.

<sup>40</sup> *S., V., and A. v Denmark*, § 126.

<sup>41</sup> Decision of the ECtHR of 28 March 2019, application n. 57884/17.

<sup>42</sup> According to common law „Every constable, and also every citizen, enjoys the power and is subject to a duty to seek to prevent, by arrest or other action short of arrest, any breach of the peace occurring in his presence, or any breach of the peace which (having occurred) is likely to be renewed, or any breach of the peace which is about to occur”. *R (Laporte) v Chief Constable of Gloucester* [2007] 2 AC 105.

<sup>43</sup> *Hannah Eiseman-Renyard and others v the United Kingdom*, § 41 – 43.



The judgment in *S., V., and A. v. Denmark* leads to the conclusion that the views that Article 5 § 1 (c) does not allow for any kind of pure preventive deprivation of liberty because it is not possible to detain somebody for a crime that has not yet been committed<sup>44</sup> has become outdated. Further, it rightly precludes wide interpretation of Article 5 § 1 (b). As the Court pointed out in *Schwabe and M. G. v. Germany*<sup>45</sup>, the latter provision “does not justify, for example, administrative internment meant to compel a citizen to discharge his general duty of obedience to the law”. The judgment has implications for both criminal procedure and police (administrative) law.

## 5. IMPLICATIONS FOR CRIMINAL PROCEDURE

The question arises whether today preventive arrest may be applied within criminal procedures in conformity with ECHR standards and whether there are reasons for such regulation in criminal procedures, not only in police law. In *Ostendorf*, the Court declared Article 5 § 1 (c) inapplicable to short-term deprivation of liberty because of the view that it permitted deprivation of liberty only in connection with criminal proceedings and pre-trial detention. However, in many cases, the risk disappears after a few hours or is then so low that application for pre-trial detention would not be justified. The Court tried to solve the problem in *Austin and others v. the United Kingdom*<sup>46</sup> by declaring that containing persons within a police cordon for a few hours to prevent injury or damage to property was not a deprivation of liberty; therefore, Article 5 was inapplicable. This reasoning is however vague<sup>47</sup> and risky. More convincing is the view adopted by the three dissenting judges that there was a deprivation of liberty in the case.

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<sup>44</sup> RAINEY Bernadette, WICKS Elizabeth, OVEY Clare, *The European Convention on Human Rights*, Oxford: Oxford University Press, 2017, p. 245; HARRIS David et al., *Law of the European Convention on Human Rights*, Oxford: Oxford University Press, 2018, p. 319.

<sup>45</sup> *Schwabe and M. G. v Germany*, § 73.

<sup>46</sup> Judgment of the ECtHR of 15 March 2012 in case *Austin and others v the United Kingdom*, applications n 39692/09, 40713/09 and 41008/09.

<sup>47</sup> ASHWORTH Andrew, ZEDNER Lucia. *Preventive...*, supra, p. 59 – 64.

The issue in *S., V., and A. v. Denmark* was whether sub-paragraph (c) of Article 5 § 1 is applicable to preventive detention aside from criminal proceedings. This was because of the particular circumstances of the case. This does not mean, however, that the judgment has no implications for the possibility of the use of preventive arrest within criminal procedure. Such a situation would be less problematic if the crime under investigation was criminal preparation or attempt, and arrest was applied to prevent completion of the elements of crime, as the jurisprudence of ECtHR directly indicated such a situation as an example of the application of Article 5 § 1 (c) of the ECHR<sup>48</sup>. In a situation in which the criminal act under investigation is different from the criminal act that is to be prevented, the answer is not easy.

Criminal procedure is traditionally perceived as reactive, and targets crimes already committed<sup>49</sup>. Further, the use of coercive measures within criminal procedures focuses on its main aim: making a decision on the criminal responsibility of the accused. This is done mainly by securing his presence during the proceedings and avoiding interference with evidence. Therefore, the traditional grounds for the application of such coercive measures as arrest, pre-trial detention, police supervision, or house arrest are the risks of absconding or hiding, and the risk of tampering with evidence. Prevention of crime was traditionally regarded as something distant from criminal procedure, and a matter of police work and police law. Therefore, it is argued that the values of criminal procedure militate against using its regulations for purely preventive purposes<sup>50</sup>.

However, the perception of criminal procedures is changing<sup>51</sup>. Nowadays, many authors have pointed out its role in crime

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<sup>48</sup> *Ostendorf v Germany*, § 86.

<sup>49</sup> ASHWORTH Andrew, ZEDNER Lucia. Defending the Criminal Law: Reflections on the Changing Character of Crime, Procedure and Sanctions, *Criminal Law and Philosophy*, v. 2, n. 2, 2008, p. 40.

<sup>50</sup> DUFF Anthony et al. *The Trial on Trial: Volume 3: Towards a Normative Theory of the Criminal Trial*. London: Hart Publishing, 2007, p. 294.

<sup>51</sup> VERVAELE John, A. E. Special Procedural Measures and Respect of Human Rights. General Report, *Revue Internationale de Droit Pénal*, v. 80, 2009, p. 91; KIRCHENGAST Tyrone. *The Criminal Trial in Law and Discourse*, Houndmills. Basingstoke: Palgrave Macmillan, 2010, p. 220.

prevention<sup>52</sup>. As J.A.E. Vervaele observes “The criminal justice system is increasingly used as an instrument to regulate the present and the future and not to punish for behaviour in the past”<sup>53</sup>. Further, the concept of the positive obligation of the state to prevent crime requires an effective, complex framework of crime prevention, in which criminal procedure may be one of the instruments<sup>54</sup>. This has an impact on the regulations adopted in national legislations. In some criminal procedures, the risk that a suspected person may commit a crime is a ground for arrest, while in others, it is not. Regulation of the issue therefore depends on the legal system. The first European criminal procedure that introduced preventive grounds for arrest was probably the Austrian Code of Criminal Procedure 1873<sup>55</sup>. According to § 175 (4) of the code, an investigating judge had the power to order the arrest of a person suspected of felony or misdemeanour if special circumstances justified the fear that the suspect might repeat a criminal act or complete a crime attempted or threatened. Similar regulations may be found in newer criminal procedures, for example, in the above-mentioned Danish and Polish provisions.

Nevertheless, in many criminal procedures, preventive grounds for arrest are not provided. For example, in Italy, the code of criminal procedure provides for arrest only related to a crime already committed<sup>56</sup>.

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<sup>52</sup> HIRSCH BALLIN Marianne F. H. *Anticipative Criminal Investigation*. Theory and Counterterrorism Practice in the Netherlands and in the United States. The Hague: T. M. C. Asser Press, 2012, p. 584 – 585; PRADEL Jean, *Procédure pénale*, Paris: Cujas, 2015, p. 17.

<sup>53</sup> VERVAELE John, A. E. Special..., supra, p. 91.

<sup>54</sup> Judgment of the ECtHR of 28 October 1998 in case *Osman v the United Kingdom*, application n. 23452/94. See also LAWRYSEN Laurens, *Human Rights in a Positive State*. Rethinking the Relationship between Positive and Negative Obligations under the European Convention on Human Rights. Cambridge–Antwerp–Portland: Intersentia 2016, p. 51 and LAZARUS Liora. Positive Obligations and Criminal Justice: Duties to Protect and Care? in: ZEDNER Lucia, ROBERTS Julian V. (eds.). *Principles and Values in Criminal Law and Criminal Justice: Essays in Honour of Andrew Ashworth*. Oxford: Oxford University Press, 2012, p. 147.

<sup>55</sup> Strafprozeßordnung 1873. Available at <http://www.koeblergerhard.de/Fontes/StPOOE1873.htm>.

<sup>56</sup> GALLI Francesca. *The law on terrorism: The UK, France and Italy compared*. Bruxelles: Bruylant, 2015, p. 145–146.

In Poland, prevention may be invoked in the criminal procedure as a ground for pre-trial detention, but not for arrest by the police, except in the above-mentioned domestic violence cases.

On the basis of Article 5 § 1 (c) of the ECHR, regulating the issue of preventive deprivation of liberty in criminal procedure regarding another crime other than the subject matter of a prosecution was problematic under the Ostendorf standards, as this would require the judicial control and initiation of criminal proceedings, which in the case of the prevention of crime is usually not possible, because if a criminal act has been prevented, criminal prosecution is not possible. The new approach in *S., V., and A. v. Denmark* changes the situation, opening the possibility of using short-time deprivation of liberty as a measure for preventing the continuation of criminal activity or commission of a new crime by a person who is already a suspect in criminal proceedings. In light of the judgment, it is also hard to share the opinion<sup>57</sup> that the expression “when it is reasonably considered necessary to prevent his committing an offence”, used in Article 5 § 1 (c) does not clearly refer to another offence other than the one under investigation.

In the case of criminal preventive arrest, the person arrested would be subjected to the regime of criminal procedure, not police law, which may be more protective (for example, better access to materials justifying preventive arrest and more stringent rules concerning admissibility of evidence). It also avoids mixing the two regimes: for example, criminal procedure for search of the person and police law for preventive arrest. It should also be observed that sometimes, according to criminal procedure, the authorities may arrest a person for strictly procedural reasons (for example, risk of flight or impossibility of establishing the identity of the person), and at the same time or later, the risk of committing a new crime is established. It would be easier to apply one set of rules for such a situation, instead of the application of parallel procedural and non-procedural measures.

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<sup>57</sup> MERKEL Grischa. Detention before Trial and Civil Detention of Dangerous Individuals in: BROWN Darryl K., IONTCHEVA TURNER Jenia, WEISSER Bettina (eds.). *The Oxford Handbook of Criminal Process*. Oxford: Oxford University Press, 2019, p. 506.

## 6. IMPLICATIONS FOR POLICE LAW

The new position of the ECtHR also has implications for police (administrative) law, as this was the issue in the *S., V., and A. v. Denmark* case. The need for preventive arrest may arise more often in police operations than in the framework of criminal procedure, which is connected with situations such as football hooliganism, riots, or terrorism.

According to the *S., V., and A. v. Denmark* judgment, Article 5 § 1 c may be a ground not only for preventive arrest in the framework of criminal procedure but also in the framework of law regulating police operations. Therefore, the Ostendorf requirement of showing disobedience with respect to a certain obligation, which was in many cases difficult to fulfil, as the risk was often imminent and there was a need for acting, not for giving warnings, may be replaced by identification of the risk of future crime. Of course, the crime must be identified with adequate precision in relation to the type of crime, place, and date. Therefore, general internment is not possible.

This may be seen as easing the work of the police, as no prior warning, ban, or restriction is required. The police may now arrest the person in the first contact if the risk of crime is adequately established.

## 7. REQUIREMENTS FOR PREVENTIVE ARREST

An important question is in which circumstances preventive arrest is allowed. The Court in *S., V., and A.* and in other judgments identified several requirements that must be observed so that preventive detention would not be arbitrary.

First, for an arrest to be lawful, it must have a legal base in the domestic law. Arrest is a serious interference with the right to personal liberty; therefore, procedural, and substantive requirements must be regulated in law. This requires not only that, formally, there is a legal provision allowing arrest, but that the provision must be sufficiently precise, especially concerning grounds, time, relevant authorities, and accessibility for the citizens<sup>58</sup>.

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<sup>58</sup> Judgment of the ECtHR of 23 September 1998 in case *Steel and others v the United Kingdom*, application n. 24838/94, § 52-54; judgment of the ECtHR of

Second, the term “offence”, mentioned in Article 5 § 1 (c), must be interpreted strictly. The risk of tort or antisocial behaviour not constituting an offence is not enough. However, the term has an autonomous meaning in the ECHR<sup>59</sup> and does not have to be limited to conduct that has been characterised as an offence under national law<sup>60</sup>. The elements of the offence must be sufficiently well defined. As the ECtHR indicated in *Steel and others*<sup>61</sup> “given the importance of personal liberty, it is essential that the applicable national law meet the standard of “lawfulness” set by the Convention, which requires that all law, whether written or unwritten, be sufficiently precise to allow the citizen – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail”. This requirement is particularly important today in terrorism cases, where general, vague definitions of offences significantly increase the risk of arbitrary arrest<sup>62</sup>.

Third, according to the Court case law, preventive arrest may be applied to prevent a concrete and specific offence<sup>63</sup>. This requirement is connected with the use of the singular form (“offence”) and the general requirement that arrest is not arbitrary. The offence must be concrete and specific regarding, in particular, the place and time of its commission and its victims<sup>64</sup>. It is not enough to refer to a crime generally or to a particular type of crime only. Therefore, general reference to “offences of an extremist nature” was not regarded as specific enough to satisfy the requirements of Article 5 § 1 (c).<sup>65</sup> Of course, it would be impossible to expect such details as the exact number of victims, *modus operandi* of

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12 January 2010 in case *Gillan and Quinton v the United Kingdom*, application n. 4158/05, § 76–87.

<sup>59</sup> Judgment of the ECtHR of 8 June 1976 in case *Engel and others v the Netherlands*, applications n. 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72.

<sup>60</sup> *Steel and others v the United Kingdom*, § 48-49.

<sup>61</sup> *Steel and others v the United Kingdom*, § 54.

<sup>62</sup> GALLI Francesca. *The Law...*, supra, p. 41-90.

<sup>63</sup> Judgment of the ECtHR of 21 June 2011 in case *Shimovolos v Russia*, application n. 30194/09, § 53 – 55.

<sup>64</sup> *Schwabe and M. G. v Germany*, § 70.

<sup>65</sup> *Shimovolos v Russia*, §55.

the perpetrator, description of injuries, or names of participators in the crime. It could be observed that in the Danish case, the Court declared the offence concrete and specific because, as “the second and third applicants and the first applicant respectively had been prevented from instigating or continuing to instigate a brawl between football hooligans at Amagertorv Square at 3:50 p.m. and in front of Tivoli Gardens at 4:45 p.m. on the relevant day, the place and time could be very precisely described. Likewise, the victims could be identified as the public present at those places at the times mentioned”<sup>66</sup>.

Fourth, the Court underlined that “the authorities must furnish some facts or information which would satisfy an objective observer that the person concerned would in all likelihood have been involved in the concrete and specific offence had its commission not been prevented by the detention”<sup>67</sup>. As was underlined in *Kurt v. Austria*<sup>68</sup> “a risk must be real and immediate in order to trigger a State’s positive obligation under Article 2 to take preventive operational measures for life protection”. In the same judgment, it was indicated that “the scope of the positive obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. The Court is fully conscious of the difficulties encountered by the domestic authorities when deciding, as in the instant case, whether or not to issue a barring order against a suspect or even arrest him or her, on the basis of limited information available, often under time pressure and by nonetheless carefully balancing the rights of the person who poses a threat on the one hand, and the rights of the victim(s) on the other. It is therefore most relevant to recapitulate what was known to the authorities at the time when they decided which measures to take in respect of E., taking into account the competencies accorded to them by the law and a certain discretion offered by this law”.<sup>69</sup> In recent judgments, the ECtHR also made a distinction between cases concerning protection of identified

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<sup>66</sup> *S., V., and A. v. Denmark*, § 158.

<sup>67</sup> *S., V., and A. v. Denmark*, § 127.

<sup>68</sup> Judgment of the ECtHR of 4 July 2019 in case *Kurt v. Austria*, application n. 62903/15, § 72.

<sup>69</sup> *Kurt v. Austria*, § 69.

individuals (e.g. victims in pending proceedings) and cases where general protection of society is at stake (e.g. in case of danger emanating from a mentally unstable, alcohol addicted person with a history of violence)<sup>70</sup>. In the second type of cases, the risk also could be real and imminent<sup>71</sup>. In the commentary to the judgment in *S. V., and A.*<sup>72</sup> it is argued that the Court allowed the arrest of individuals “for offences they may commit in the near future, rather than offences that were, in practice, imminent”. In the case of domestic violence, special diligence is required, which means that the authorities are obliged to carry out a due lethal risk assessment and assess the risk, taking due account of the particular context of domestic violence<sup>73</sup>. The risk assessment must refer directly to the person arrested, not to the organisation to which he or she belongs<sup>74</sup>.

Fifth, the decision authorising preventive detention must give all the reasons for detention, present the facts established, refer to legal provisions, and explain why the detention is necessary<sup>75</sup>. This means that the reasons must have adequate informative value. This is not the case when the “reasons given were extremely laconic and did not refer to any legal provision which would have permitted the applicant’s detention”<sup>76</sup>. This requirement may be difficult to observe in terrorist cases, as state authorities are usually reluctant to reveal evidence and sources of information that may impede ongoing operations or investigations. The ECtHR accepts that “Certainly Article 5 § 1 (c) (art. 5-1-c) of the Convention should not be applied in such a manner as to

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<sup>70</sup> See the judgment of ECtHR of 17 December 2020 in case *Kotilainen v Finland*, application n. 62439/12, § 65 – 73 and the judgments quoted.

<sup>71</sup> Judgment of ECtHR of 18 September 2014 in case *Bljakaj and others v Croatia*, application n. 74448/12, § 120 - 121.

<sup>72</sup> STEINBRECHER Marie, WADHAM John. S, V and A against Denmark: Grand Chamber authorises preventive detention, *European Human Rights Law Review*, n. 1, 2019, p. 88.

<sup>73</sup> Judgment of the ECtHR (Grand Chamber) of 15 June 2021 in case *Kurt v Austria*, application n. 62903/15, § 166 – 176.

<sup>74</sup> Judgment of the ECtHR of 6 April 2000 in case *Labita v Italy*, application n. 26772/95, § 162 – 163.

<sup>75</sup> *S., V., and A. v. Denmark*, § 92.

<sup>76</sup> *S., V., and A. v. Denmark*, § 92.



put disproportionate difficulties in the way of the police authorities of the Contracting States in taking effective measures to counter organised terrorism (...) It follows that the Contracting States cannot be asked to establish the reasonableness of the suspicion grounding the arrest of a suspected terrorist by disclosing the confidential sources of supporting information or even facts which would be susceptible of indicating such sources or their identity”, but at the same time underlines that “the Court must be enabled to ascertain whether the essence of the safeguard afforded by Article 5 § 1 (c) (art. 5-1-c) has been secured. Consequently the respondent Government have to furnish at least some facts or information capable of satisfying the Court that the arrested person was reasonably suspected of having committed the alleged offence”<sup>77</sup>.

Sixth, arrest and detention must be “reasonably considered necessary” in the circumstances of the case. This is a reference to the proportionality principle. In the context of that requirement, in the Court’s view “less severe measures have to be considered and found to be insufficient to safeguard the individual or public interest which might require that the person concerned be detained. Preventive detention cannot reasonably be considered necessary unless a proper balance is struck between the importance in a democratic society of preventing an imminent risk of an offence being committed and the importance of the right to liberty. In order to be proportionate to such a serious measure as deprivation of liberty, the concrete and specific “offence” referred to under the second limb of Article 5 § 1 (c) must also be of a serious nature, entailing danger to life and limb or significant material damage”.<sup>78</sup> Therefore a risk of theft, fraud or similar non-violent crime will generally not justify preventive deprivation of liberty. It follows in addition that the detention should cease as soon as the risk has passed, which requires monitoring, the duration of the detention being also a

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<sup>77</sup> Judgment of the ECtHR of 30 August 1990 in case *Campbell and Hartley v the United Kingdom*, applications n. 12244/86, 12245/86 and 12383/86, § 34. See also judgment of the ECtHR of 16 October 2001 in case *O’Hara v the United Kingdom*, application n. 37555/97, § 34–37.

<sup>78</sup> *S., V., and A. v. Denmark*, § 161.

relevant factor”<sup>79</sup>. In some situations, measures such as confiscation of objects or police supervision may be sufficient<sup>80</sup>. Fulfilment of positive obligations cannot lead to breach of Article 5 of ECHR<sup>81</sup>. Further, there must be consideration for the extent to which the measures affect interests protected by rights other than the right to personal freedom guaranteed by the Convention (for example, freedom of assembly or freedom of expression)<sup>82</sup>.

Seventh, the detainee shall be brought promptly before a judge to have the lawfulness of his or her detention reviewed, or to be released before such time (Article 5 § 3). In the case of a short-time arrest, the person concerned is usually not brought before a judge while still arrested, but after release, he or she may challenge the decision or procedure of arrest. Finding a breach of relevant regulations by a judge in such a situation may give not only satisfaction and kind of rehabilitation but also a ground for claiming damages. In the Court’s opinion “release <<at a time before prompt judicial control>> in the context of preventive detention should be a matter of hours rather than days”<sup>83</sup>. It must also be underlined that release before judicial control does not remove the question of the lawfulness of detention, as the right to judicial review must be real and effective<sup>84</sup>. Therefore, the person is still entitled to have a judicial review of the detention.

Eighth, in the case of failure to comply with the requirements, the person concerned should have an enforceable right to compensation in accordance with Article 5 § 5 of the ECHR<sup>85</sup>.

These requirements are common in criminal procedure and police law. In the case of preventive arrest within criminal procedure, presumption of innocence and rights of defence must also be observed,

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<sup>79</sup> *S., V., and A. v. Denmark*, § 161.

<sup>80</sup> *Schwabe and M. G. v. Germany*, § 75.

<sup>81</sup> *Schwabe and M. G. v. Germany*, § 85.

<sup>82</sup> *Schwabe and M. G. v. Germany*, § 119.

<sup>83</sup> *S. V., and A. v Denmark*, § 134.

<sup>84</sup> See judgment of the ECtHR of 8 April 2010 in case *Peša v Croatia*, application n. 40523/08, § 110 – 126.

<sup>85</sup> *Schwabe and M. G. v Germany*, § 136.

and the arrest shall not prejudice the case against the person arrested, for example, by suggesting to the trier the fact that he is so dangerous that he must be sent to prison even if the evidence of his guilt raises doubts.

The three legal systems presented above clearly reveal compliance with the first requirement: regulation in domestic law. The second requirement is more problematic, as the Polish and Danish regulations in police law refer to danger, not to offence. Therefore in order to comply with the requirements of Article 5 § 1 (c), the notion of danger requires narrow interpretation, limited to danger of offence. In the third requirement, the offence being concrete and specific is not directly listed in the regulations presented; therefore, the interpretation of danger of offence must be further limited to situations when the potential offence could be described precisely enough. Regarding the fourth requirement, it is required directly or indirectly in all regulations. Informing the person arrested about the grounds of arrest is required in the laws of the three states, although the issue of due justification is largely a matter of practice. The sixth requirement (proportionality) is the most problematic. It is certainly fulfilled in the Polish CCP, narrowing the preventive arrest to domestic violence. In Danish police law, it is limited to the danger of disturbing public order or danger to individuals or public order, and the subsidiarity clause is included. In Polish police law, there is reference to danger to life, health or property. The third type of danger might not fulfil the proportionality principle because the right to personal freedom is generally of higher value than property rights. The Danish criminal procedure refers to offences subject to public prosecution, which is very wide but forbids disproportionate arrests (Article 755 (4) of the Danish Administration of Justice Act). The English regulation refers to offences generally, but this is limited by Article 24 (5) (c) and (d) of the Police and Criminal Evidence Act 1984, which refers to physical injury, loss or damage to property, public decency, unlawful obstruction of the highway and protection of a child or vulnerable person. The most problematic in the context of the proportionality principle seems to be the protection of property and public decency. All three systems provide judicial control (the seventh requirement). Nothing in the jurisprudence of the ECtHR suggests that the systems generally do not provide an effective right to compensation.

## 8. CONCLUSIONS

The new approach of the ECtHR may have significant consequences for the development of preventive justice in Europe. The Court has recognised new threats to public security and extended the possibility of preventive arrest. Therefore, we can conclude that an arrest for preventive purposes can now be applied more easily. One may wonder whether that change in the Convention standards will not force the Court to further reassess its position in the near future. Important social problems and threats (e.g. domestic violence, terrorism, criminal cases related to the COVID-19 pandemic) and the development of the concept of positive obligations of states give a good occasion for that. An important aspect is the development of the concept of special diligence in relation to some risks. In *Kotilainen*,<sup>86</sup> the ECtHR accepted that the crime committed was not reasonably foreseeable, so there was no real and immediate risk to life directed at identifiable individuals whom the authorities knew or ought to have known at the relevant time. However, the Court found a breach of Article 2, indicating that in situations involving a high level of risk (such as misuse of firearms), there is a special duty of diligence on the authorities, requiring their action without any high threshold for the application of preventive measures. This approach was also taken by the Grand Chamber in *Kurt v. Austria* in the context of domestic violence. In the future, this may result in lowering the threshold for intervention in this type of cases. Further, the requirement of due risk analysis may lead to the development and wider use of risk assessment tools and procedures. Another scenario is that the wide opening of the possibility to use preventive detention in *S. V., and A. v. Denmark* will lead to such overuse of preventive measures by the parties of ECHR that the Court will be forced to restrict its position, for example by strict interpretation of the terms “concrete and specific offence” or “real and immediate risk”.

In the light of *S. V., and A.*, preventive arrest may now be regulated more widely in the framework of criminal procedure, which may increase

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<sup>86</sup> *Kotilainen and others v Denmark*, § 74 – 90.

the protection of the persons arrested and avoid the duplication of regimes of deprivation of liberty.

For now, a twofold regulation of preventive arrest could be proposed in countries that distinguish police law and criminal procedure:

- a) Preventive arrest applied in cases where there is an imminent risk of serious crime without suspicion of an already-committed crime. This should be regulated in police law. If suspicion of crime is established after the arrest, the regulations of criminal procedure be applied, which usually provides more guarantees, replacing police law instruments.
- b) Preventive arrest applied when there is suspicion that a certain crime has already been committed and there is an imminent risk of other serious crimes. This should be regulated in criminal procedure. The preventive ground for arrest may be applied with other procedural grounds (e.g. risk of absconding, collusion) or as a sole ground.

Considering the significance of personal freedom in a democratic society and the serious interference of preventive detention with freedom in both frameworks, the requirements of preventive arrest indicated above must be observed.

Finally, the analysis of the European standards and their comparison with the regulations in the three legal systems presented leads to the conclusion that the implementation of the standards could also be a matter of legal interpretation of existing regulations and practices, not necessarily changes in the law. However, precise regulations in the area decrease the possibility of overuse of preventive arrest by arbitrary decisions, and therefore should be strongly recommended. If the grounds for detention are general and vague, allowing for a wide interpretation, they might not comply with the requirements of Article 5 of the ECHR and may lead to a breach of the article. The analysis and comparison also show that the regulation of preventive arrest in domestic law in compliance with the Convention standards may take many forms.

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