3 - Pretrial detention of children

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International law clearly mandates states to use pretrial detention only in exceptional circumstances, as a measure of last resort and for the shortest period of time (Article 37 CRC, the case law of the ECtHR under Article 5, Article 10 (2) Procedural Safeguards Directive). Also, children have the right to be brought promptly before a judge and have the legality of their detention reviewed by a court. Further, states are to give priority to non-custodial measures and provide concrete explanations when such non-custodial measures are not feasible.

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1. The meaning of pretrial detention

Pretrial detention - also termed detention on remand - refers to the lawful arrest or detention of a person for the purposes of bringing him/her before the competent legal authority on reasonable suspicion of having committed an offence (Article 5 (1) (c) ECHR). Pre-trial detention in the sense of Article 5(1) (c) must be lawful according to national law, devoid of arbitrariness and conducted for the purpose of bringing a child before a competent legal authority. In addition, pre-trial detention can only be imposed if there is a reasonable suspicion of having committed a criminal offence.

Children are particularly vulnerable to harm in the criminal justice process. For this reason, international law provides for additional guarantees to offset or minimize such harmful effects. Article 37 (b) of the CRC mandates states to use detention of children as a measure of last resort and for the shortest appropriate period of time.

1.1. Lawfulness and grounds of pretrial detention

Under the ECHR, first and foremost, the imposition of pretrial detention should comply with national law. Keeping a child in pretrial detention in absence of a national provision to that effect will in all cases entail a violation of Article 5 (1) ECHR (see among many others, *Gabrowski v Poland*, no. 57722/12, § 44, *Blokhin v Russia*, no. 47152/06). Compliance with national law is not sufficient and any deprivation of liberty should protect a child from arbitrariness (*Bouamar v. Belgium*, 29 February 1988, § 47). The quality of national law is also important and for the purposes of complying with the ECHR, the national law must be sufficiently accessible, precise and

foreseeable in its application, in order to avoid all risk of arbitrariness (eg. *Creang? v. Romania*, § 120).
For example, in the case of *Gabrowski v Poland*, the ECtHR found that the ‘quality of the national law’ did not meet the standard of Article 5 as a practice of extending pretrial detention beyond an initial term was not clearly prescribed by law (*Gabrowski v Poland*, § 49).

Further, on the question of ‘reasonableness of the suspicion’ the ECtHR has ruled that “facts which raise a suspicion need not be of the same level as those necessary to justify a conviction, or even the bringing of a charge which comes at the next stage of the process of criminal investigation” (*Selçuk v Turkey*, 21768/02, § 23). Nevertheless, the existence of a reasonable suspicion is a condition sine qua non for the legality of pretrial detention.

It is equally important to note that international law limits the permissible grounds for pre-trial detention. This means that national law can authorize pretrial detention only in a limited set of narrowly defined circumstances. These are the existence of a serious risk that if released the child will (i) reoffend; (ii) tamper with evidence (iii) abscond or (iv) pose a threat to public order (*Smirnova v Russia*, nos 46133/99, 48183/99, § 59). Authorities need to justify the existence of one or several of these grounds by reference to the specific circumstances of the case; stereotyped reasoning is contrary to the requirements of the Convention (*Smirnova v Russia*, §60; *Korneykova v Ukraine*, no. 39884/05, §§ 47, 48).

The **CRC Committee** recommends even more restrictive grounds for the use of pre-trial detention. The CRC Committee argues that detention pending trial should only be imposed in case there is a risk of absconding or if the child poses an immediate danger to others (CRC Committee, General Comment no. 24, § 87).

1.2. Measure of last resort

The substance of **Article 37 (b) CRC** has also been incorporated in the case-law of the ECtHR (*Selçuk v. Turkey*, no. 21768/02, §§ 35-36) and by Article 10 (2) of **Procedural Safeguards Directive**.

The ECtHR has considered that states need to elaborate on reasons which have led to the imposition of detention. For example in the case of *Korneykova v. Ukraine*, no. 39884/05, the European Court considered that despite having put forth detailed reasons for ordering the applicant’s detention, the authorities did not elaborate on why her circumstances qualified as ‘exceptional’, and given the concrete circumstances of that case they did not examine her family situation or her medical condition (§§ 45-47). The requirement to elaborate on the reasons for ordering detention has been reiterated more recently in the case of *Kovrov and Others v. Russia* (42296/09 and 4 others, 16 November 2021, §§ 92-94).

In General Comment no. 24 the **CRC Committee** has further interpreted ‘last resort’ to mean that states should deprive children of liberty only in the most serious of cases after careful consideration has been given to community placements (General Comment no. 24, §§ 85,86).

2. Shortest period of time

In absence of release pending trial pretrial detention is considered to end at the moment of conviction by the first instance court (ECtHR, *Idalov v Russia*, no. 5826/03 § 112).

The ‘reasonable time’ requirement of detention is also provided under Article 5 (3) ECHR according to which “Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be ... entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.” The ECtHR assesses the reasonableness of the pre-trial detention for children against the standards of the CRC - the shortest period of time (*Nart v Turkey*, no. 20817/04, §31). However, there is no set time frame, and the ECtHR will analyze on a case by case basis whether the reasons for extending detention adduced by the domestic authorities are relevant and sufficient and if -in cases involving children- they have taken due account of the suspect’s age. For example, periods of 48 days (*Nart v Turkey*, § 30) or 4 months (*Selçuk v. Turkey*, no. 21768/02, § 34) have been found in violation of Article 5 (3) of the Convention. Also, in cases where national law provides for a maximum period of 4 month of pre-trial detention, the ECtHR has found a violation of Article 5 when the prosecutor had attempted to circumvent national law by artificially dividing the case into three separate cases so as to detain him beyond the legally prescribed period of 4 months (*I.E. v Republic of. Moldova*, no. 45422/12, § 57).
Under Article 10 (1) of **Procedural Safeguards Directive** Member States are to ensure that deprivation of liberty at any stage of the proceedings is limited to the shortest period of time.

The **CRC Committee** (General Comment no. 24, § 90) and the **Committee of Ministers** of the Council of Europe (Rec (2003)20), adopted on 24 September 2003, § 16) have considered 6 months as the maximum duration of pre-trial detention.

3. Review of detention and release pending trial

Article 5 (3) of the ECHR provides that everyone arrested or detained on suspicion of having committed an offence shall be brought promptly before the judge and shall be entitled to release pending trial. Further, under Article 5 (4) of the **ECHR**, suspects have the right to take proceedings for the review of detention.

Thus, in addition to the requirements of a reasonable suspicion (discussed above) child suspects need to be brought promptly before a judge or an officer authorized by law to exercise judicial power to determine the lawfulness of detention. In general, the Court has considered that a four-day period meets the promptness requirement under Article 5 (3) (for eg. *MacKay v the United Kingdom*, no. 543/03, § 33. However, in a case involving children, the ECtHR found a violation of Article 5 (3) when two 16-year-old children had been brought before a judge after a detention period of 3 days and 9 hours (*Ipek v Turkey*, 25760/94, § 36). In finding this violation, the ECtHR focused on the applicants age as well as on the lack of available safeguards for them while in police custody and failure of the prosecutors to take investigative steps during this time.

When prolonging pre-trial detention, authorities need to ensure that the reasonable suspicion persists, that the grounds relied upon originally continue to justify the deprivation of liberty and that the national authorities have displayed special diligence in the conduct of the proceedings (*I.E. v Moldova*, § 73). Last but not least, extensions of pre-trial detention should avoid use of stereotyped formulae (such mere references to national law or the gravity of the offence) when imposing and extending detention (*Piruzyan v. Armenia*, no. 33376/07, §§ 97-100).

Further, under Article 5 (4) the right to review of detention entails that detained children are entitled to have the detention reviewed before it ends (*Bouamar v Belgium*, no. 9106/80 §63), by a judge. The procedure must be inter partes, held orally (*Assenov and others v Bulgaria*, 24760/94, § 163), and the applicant should be able to be assisted by a lawyer (*Bouamar v Belgium*, §60).

Failure to comply with the conditions above entitles the applicants to compensation under Article 5 (5) of the European Convention.

Recital 47 of the **Procedural Safeguards Directive** lays down additional requirements as follows: “Detention of children should be subject to periodic review by a court, which could also be a judge sitting alone. It should be possible to carry out such periodic review ex officio by the court, or at the request of the child, of the child's lawyer or of a judicial authority which is not a court, in particular a prosecutor. Member States should provide for practical arrangements in that respect, including regarding the situation where a periodic review has already been carried out ex officio by the court and the child or the child's lawyer requests that another review be carried out”

Article 37 (d) CRC also provides for the right to have the detention reviewed by a court or other competent independent and impartial authority. The guarantees envisaged by the **CRC Committee** under General Comment no. 24 appear more extensive. Under paragraph 90, the CRC Committee recommends that children are brought before a judge within 24 hours from the arrest. Further, the CRC Committee encourages the possibility of release without conditions as release on bail or under other monetary conditions has the capacity to discriminate against children from poor and marginalized communities (General Comment no. 24, § 88).

4. Alternatives to detention

The **European Court of Human Rights** has reviewed closely whether national judges have looked into other options than detention (*Agit Demir v Turkey*, no. 36475/10, § 44). If the reasoning does not indicate that detention has been used as a measure of last resort as alternatives were not possible in a concrete case, the Court may find a violation of Article 5 (1) of the ECHR. Alternatives to pretrial detention include supervision, community placement or placement with a family (General Comment no. 24, § 86); Beijing Rules (Rule 13.2).

Recital 46 of the **Procedural Safeguards Directive** provides that “such alternative measures could include a prohibition for the child to be in certain places, an obligation for the child to reside in a specific place, restrictions concerning contact with specific persons, reporting obligations to the competent authorities, participation in educational programmes, or, subject to the child's consent, participation in therapeutic or addiction programmes.” (conditions of detention of children are addressed in Factsheet no 4; sentencing of children post-trial is addressed in Factsheet no 9)

Further reading

Non-binding instruments (in addition to the instruments discussed above the following non-binding instruments cover particular aspects related to the pretrial detention of children):

United Nations Rules for the Protection of Juveniles Deprived of their Liberty Adopted by General Assembly resolution 45/113 of 14 December 1990, the ‘Havana Rules’ – in particular Chapter III – “Juveniles under arrest or awaiting trial”;

Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice, 'Child Friendly Justice Guidelines', 17 November 2010 (in particular §§ 27-33, Children at the police station)

2019 UN Global Study on children deprived of liberty, A/74/136, 11 July 2019

European Court of Human Rights, Guide on Article 5: Right to liberty and security of persons