

THE RIGHTS OF CHILDREN IN RELATION TO PRE-TRIAL DETENTION

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Abstract

The following paper concentrates on the detention of minors, especially what concerns the international legal provisions regarding pre-trial detention. It is very important to ensure that no one should be deprived of his liberty in an arbitrary fashion, this also refers to children as well. Deprivation of liberty may take numerous other forms besides arrest of conviction, these forms differ in degree or intensity, and this is why courts and domestic authorities have to have a clear view to be able to undertake an autonomous assessment of the situation.

While detention occurs in various circumstance, I would like to focus on children in contact with the criminal justice system. Article 5 para. 1 (d) provides that “No one shall be deprived of his liberty save the following cases and in accordance with a procedure prescribed by law: (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority.”

This notion of a minor encompasses persons under the age of 18 in the light of European Standards and Resolutions of the Committee of Ministers of the Council of Europe (Commission decision of 14 December 1979).

This law text excerpt is not only a provision which permits the detention of a minor, but also contains a specific, but not exhaustive, example of circumstances in which minors might be detained, namely for the purpose of their educational supervision or bringing them before a competent legal authority.

*In this present paper I would also like to include a case presentation: *Nart v. Turkey*, where the ECHR found a violation of Article 5.*

Key Words: *children’s rights, pre-trial detention, European Court of Human Rights, European Convention of Human Rights*

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1. Introduction

Over one million children under the age of 18 are estimated to be held in some sort of detention worldwide. Placing children in detention may cause long-term and probably irreversible mostly psychological but also physical damages; detention removes them from their family and community, from their education and other social opportunities, it puts a stigma on their lives and influences on a long-term basis their criminal records, and while detained, they are put at risk of torture, physical and emotional abuse.

In many criminal justice systems, children are treated as adults, although they do not have the intellectual or emotional maturity to take part in this judicial process which is clearly designed for adults.

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Pre-trial detention as per the definition, designates the holding of a defendant before trial on criminal charges because release had been denied. A child is held in pre-trial detention where he is deprived of liberty and is awaiting a final decision on his case from a competent authority. There is a general statistic that in Europe 24% of the incarcerated population has not been tried yet, but unfortunately there is no such data available regarding detained children, but it is estimated that around 14,600 children were held in detention after trial in the EU by the year 2012, while 3,380 were held in pre-trial detention.¹

In discussing pre-trial detention, we must separate two stages: the so-called pre-charge state, which refers to the time when a child has been arrested but not yet charged with an offense and is being held in custody, and the post-charge state, which designates incarceration after the investigating authority has found that there was indeed sufficient evidence to charge the child suspect with an offense and the decision had been made to keep the child in custody before and during the trial.

2. The Legal Framework

As a guiding principle in all legal proceedings, the best interest of the child has to rule over every aspect. Primary consideration has to be given to personal context, situation and needs of the child concerned and it needs to incorporate the following elements: identity, protection, safety and situation of vulnerability, due consideration of the child's views, respect for his rights, including his right to dignity, liberty and equal treatment.

The international standards which are applicable in all EU Member States that govern the rights, status and role of children involved in criminal proceedings include:

The UN Convention on the Rights of the Child (CRC)

The Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice

The 2008 European Rules for juvenile offenders subject to sanctions or measures (ERJO)

Directive 2013/0408 on procedural safeguards for children suspected or accused in criminal proceedings

The European Convention on Human Rights (ECHR), Art. 5 and applicable child-specific case-law.²

Regarding pre-trial detention of children, the following principles are presented in the CRC,

Art. 37: (b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

¹ Data on children in judicial proceedings according to: www.skydrive.live.com.

² *Children in pre-trial detention in Europe, Analysis of legislations and practices in EU 28*, Authors: Sophie Duroy, Cedric Foussard, Adelaide Vanhove, Yannick van den Brink, JUST/2014/JACC/AG/PROC/6600.

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.³

According to the UN Committee on the Rights of the Child, General Comment no. 10, Art 37 (b) CRC, which provides safeguards for the application of deprivation of liberty of children, entails that State Parties should provide for an effective package of alternatives for pre-trial detention of juveniles to safeguard the last resort-principle and should ensure that a juvenile can be released from pre-trial detention as soon as possible, and if necessary under certain conditions.⁴

In art. 37(c) CRC it is also reiterated that the needs of juveniles should be taken into account especially when it comes to different ages of the children and the contact and correspondence with family is regarded as high importance.

These principles are stated and restated in almost every international and European instrument and these are completed with a list of rights which apply in child-specific case-law.

In 2013, the European Commission has proposed a directive on procedural safeguards for children suspected or accused in criminal proceedings. Articles 10-12 of this Directive reiterate the principles presented in art. 37 CRC and also propose a list of measures that are consistent with the Guidelines on Child-Friendly-Justice of the COE. This Directive was finalised and agreed upon on 16 December 2015. This new Directive contains more child-specific provisions related to pre-trial detention next to more general provisions, such as the right to information (art. 4), the right to legal representation (art. 6) and the right to privacy in criminal proceedings (art. 14).

3. Pre-trial detention for children in the European Union

The new Directive imposes restrictions on the scope of application of pre-trial detention regarding children. Article 10(1) implements the principle of “reasonable time”, that is the principle of the shortest period, providing that all Member States must ensure that children are deprived of liberty before their conviction only as a

³ UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol.1577, p. 3, thereafter ‘CRC’, available at: <http://www.refworld.org/docid/3ae6b38f0.htm>.

⁴ UN Committee on the Rights of the Child (CRC), General comment No. 10 (2007): Children's Rights in Juvenile Justice, 25 April 2007, CRC/C/GC/10, §80-81.

measure of last resort and for the shortest possible period of time. Taking into consideration the age and the special situation of each child is a must.⁵

Article 11(1) deals with the use of alternative measures: all Member States must ensure that in the cases where the conditions for deprivation of liberty are fulfilled, the authorities take into account the application of alternative measures as well, whenever it is possible.⁶

Article 12 provides a very important provision, which is ensuring children to be detained separately from adults, in order to avoid the child being subject to violence, abuse, neglect or exploitation.⁷

A very important factor in deciding in favour of or against applying pre-trial detention is the question of age. In all Member States the common ground for applying pre-trial detention is the necessity of the child to have reached the minimum age of criminal responsibility. All States have a specified age below which a child is not considered to be capable of committing a criminal offence and due to this provision he cannot be subject to criminal procedures or sanctions.

Just to give a clearer view on how things work in different countries, here is a list of some situations in different Member States:

As per a general rule, in the majority of the States the minimum age of criminal responsibility runs from 13 to 15 years old, but five States have a lower provision, in Ireland, The Netherlands and UK-Scotland it runs from 12 years old and in the UK – England and Wales and Northern-Ireland it runs from 10 years old.

In Belgium, Ireland, Lithuania, Luxembourg and Poland children who have committed serious crimes can be prosecuted even if they have not reached the minimum age.

There is a different situation in the following countries, where the judge has to possibility to decide whether a child above the minimum age will or will not be considered criminally responsible, because of lack of sufficient discernment, or because a child above the minimum age can be held criminally responsible only for serious crimes, this is the case for Austria, Bulgaria, Czech Republic, Germany, Italy, Romania and Slovakia.

Most Member States have an upper age limit for juvenile justice, generally this is situated at the age of 17.

However, there are some countries, such as Belgium, Germany Greece, Italy, The Netherlands, Sweden, where this limit can be extended in certain situations, by decision of a judge, the extension can go up to 25 years of age, if the offence was committed while the offender was below the usual age limit, but he was tried some years later.⁸

⁵ Directive of the European Parliament and the Council on procedural safeguards for children suspected or accused in criminal proceedings, 22 May 2014, 2013/0408.

⁶ *Idem*.

⁷ *Idem*.

⁸ All statistics on national legislations and procedures are taken from the EU study ‘*Data on Children in Judicial Proceedings in EU28*’, European Commission, 2015, available at: <http://www.childreninjudicialproceedings.eu>.

3.1 *The application of pre-trial detention*

The criteria according to which pre-trial detention is applied include the following: the risk that the accused will fail to appear for trial, the risk that the accused, if released, would take action to prejudice the administration of justice, or commit further offences, or he might cause public disorder.

It is important to highlight the fact that the court always has to assess the appropriateness of the measure in the light of some special circumstances such as the child's age, as well as the seriousness of the crime of which he is suspected of. Some alternatives valid across the European Member States which may be taken into account to pre-trial detention include electronic monitoring usually applied in Finland and France, placement in an educational community, characteristic for Italy and Luxembourg, and placement in the care of a trustworthy person who undertakes to ensure the child's presence at judicial hearings, which is a usual method applied in the Czech Republic.⁹

The authorities in the Member States have developed some special facilities the establish a clear difference between children and adults, in this way children in pre-trial detention are not held together with adults, cases in which, as I have mentioned before, these may be subject to torture, physical or emotional abuse.

In Europe there are countries, which lack of appropriate infrastructure, like Cyprus, or Ireland, these countries face difficulties in complying with the obligation provided by recommendations, according to which children should be clearly separated from adults, and police station should have separate cells for children.

Other countries, like Belgium, UK-Northern Ireland have specialized closed centres, while the Czechs have so called "free zones" for children within their detention facilities, so they will not be locked in cells, Denmark applies the method of surrogate custody for young persons in some residential institutions, while the Netherlands offer custody in various spaces chosen for this purpose.

Regarding the duration of the measures, we may talk about a legal obligation to ensure that the child is subject to pre-trial detention for the shortest possible time, based on the principle of reasonable time, here we may clearly see two different groups of countries applying and "rejecting" this principle: the obligation of applying the shortest period of time is existent in Austria, Belgium, Denmark, Spain, France, Poland, Romania, while it does not apply in Bulgaria, Finland, Italy, Hungary and the Netherlands.¹⁰

As per a general rule we may discuss about pre-charge and post-charge stages of proceedings. For pre-charge pre-trial detention, that is police custody, most Member States apply the 24 hours maximum duration, but there are

⁹ *Data on Children in Judicial Proceedings in EU28*, European Commission, available at: <https://skydrive.live.com/embed?cid=EA045197000B3309&resid=EA045197000B3309%21429&authkey=AOhbW1gN6eEK8WM&em=2&ActiveCell=%27CRIM159%27!A2>.

¹⁰ All statistics on national legislations and procedures are taken from the EU study '*Data on Children in Judicial Proceedings in EU28*', European Commission, 2015, available at: <http://www.childreninjudicialproceedings.eu>.

exceptions like Hungary and Czech Republic which have a 72 hours duration for this stage. For post-charge pre-trial detention, most Member States apply a maximum time limit of between 3 and 6 months, this of course is usually extended up to 1 or 2 years for various serious crimes.

4. The rights of children in criminal proceedings

The new Directive of the European Parliament and of the Council on procedural safeguards for children suspected or accused in criminal proceedings provides children in detention with a set of rights that have to be duly respected by Member States. In the following, I would like to present the set of rights according to which in case of violation, the Member States are held responsible within proceedings at the European Court of Human Rights.

4.1 The right of the child to be informed, Article 4¹¹

Most Member States recognise the statutory right of children involved in criminal proceedings to receive information about their rights, the procedure and the entire judicial system, at a general level at every stage of the proceedings. The information generally provided has to cover the time, place and process, the decision of the court and also the child's right to a remedy and information on all available support services.

The children should be fully informed of their rights and the mechanisms they can use to exercise their rights or to defend themselves. This information should be promptly and directly provided to children in a manner which is adapted to their age and maturity, in a language he understands.

4.2 The right to information of the holder of parental responsibility, Article 5¹²

Article 5 of the European Commission Directive 2013/0408 on procedural safeguards for criminally suspected or accused children provides that "the holder of parental responsibility of the child, or [...] another appropriate adult, is provided with the information that the child receives in accordance with art. 4".

The Guidelines on Child-friendly Justice of the Council of Europe require that when a child is arrested and taken into custody, their parents [or legal representative] should be promptly and adequately informed of the reasons.

¹¹ Directive of the European Parliament and the Council on procedural safeguards for children suspected or accused in criminal proceedings, 22 May 2014, 2013/0408.

¹² Articles 4 and 6 of the Proposal for a Directive of the European Parliament and of the Council on procedural safeguards for children suspected or accused in criminal proceedings. For further information on the right of children to access a lawyer, see Article 6(3) of the European Convention on Human Rights, Articles 27 and 28 of the Charter of Fundamental Rights of the European Union, Rule 15 of The Beijing Rules and CRC Committee (2007).

4.3 The right to a lawyer, Article 6¹³

One of the most important aspects of a judicial proceeding is the access to legal counsel and representation. This too is mandatory to be applied in case of children, in particular Member States should ensure mandatory access to a lawyer for all children who are suspected or accused, and as an additional safeguard, the new Directive also adds that these children should not be able to waive their right to be assisted by a lawyer.

Children should also be provided with timely legal counsel and representation, they should have access to free legal aid and most importantly, lawyers representing children should treat them respecting their own rights.

4.4 The right to specific treatment¹⁴

This specific treatment in case of deprivation of liberty consist of the child being permitted to receive care, protection and all the necessary individual assistance, such as social, educational, vocational, psychological, medical and physical support, taking into consideration the age, sex and personality of the child.

Also, the separation of children from their parents has to be a measure of last resort, authorities have to allow the child to maintain regular and meaningful contact with parents and family.

5. Case law of the European Court of Human Rights regarding children in pre-trial detention: the case of *Nart v. Turkey* (Application no. 20817/04)

The case originated in an application against the Republic of Turkey by a Turkish national, Mr. Tolga Nart, as the applicant.

Regarding the facts of the case, the applicant was held in detention on remand in connection with an offence which was not related to this present case. While the applicant was still 17 years old he got arrested by the police on suspicion of being involved in an armed robbery, he was found while he was sleeping in an empty swimming pool near the place where the robbery happened. He was supposedly drugged and sleepy and this is why the police took him in custody. A series of interrogations followed, but his lawyer kept on repeating that his client was not in a fit state to understand the charges that are brought up against him and by taking these statements the authorities would violate the law.

The lawyer challenged the detention, referring to art. 5 and 6 of the Convention, by submitting that the applicant was incapable of understanding the

¹³ Article 3 of the Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty.

¹⁴ Directive of the European Parliament and the Council on procedural safeguards for children suspected or accused in criminal proceedings, 22 May 2014, 2013/0408.

charges against him and that he had not been given adequate time and facilities to prepare his defence and that the lawyer was unable to communicate with him. The lawyer further stated that the applicant was a minor and according to art. 37 (b) of the United Nations Convention on the Rights of Children, the detention of a minor should be a preventive measure of last resort. The lawyer further noted that applicant should be placed in a hospital or in a residential social care, instead of being detained in prison.

The relevant international law consisted of the recommendation of the Committee of Ministers, adopted in 2006 which stated that “all children under the age of 18 should not be detained in a prison for adults, but in specially designed establishments [...] they will have access to social, psychological and educational services, religious care and recreational programmes”.

Further the recommendation of the Committee of Ministers to Member States of the Council of Europe adopted in 2003 the following: “when, as a last resort, juvenile suspects are detained, this should not be for longer than six months, [...] custodial remand should never be used as a punishment or form of intimidation.”

The court further noted art. 17 from the European Social Charter, which regulates the right of mothers and children to social and economic protection. Further, art. 37 of the United Nations Convention on the Rights of the Child, dated 1989, had relevant parts, stating that “no child shall be deprived of his liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest period of time. [...] every child should be treated with humanity and dignity, in a manner which takes into account the needs of the children [...] the child shall have the right to maintain contact with his family through correspondence and visit”.

Regarding the alleged violation of art. 5 of the Convention, the applicant complained that his detention on remand exceeded the reasonable time requirement, and he also contended that he had no effective remedy to challenge the lawfulness of his detention. He invoked art. 5, para. 3 and 4, according to which he would be entitled to trial within a reasonable time or to release pending trial, further he would be entitled to be decided speedily. The Court indeed held that there had been a violation of these articles of the Convention.

Regarding the application of art. 41 of the Convention, which provides that if the Court finds that there has been a violation of the Convention or the Protocols, the Court shall, if necessary, afford just satisfaction to the injured party.

The applicant claimed 4,000 EUR in respect to non-pecuniary damages, and also 2,000 EUR for costs and expenses incurred before the Court, both claims being contested by the State. The Court held that the respondent state is to pay the applicant within three months from the date on which the judgement would become final in accordance with art. 44 para. 2 of the Convention 750 EUR plus any tax that might be chargeable, in respect of non-pecuniary damages, and dismissed the claim for just satisfaction.

6. Conclusions

A key part of the agenda of the European Union regarding juvenile justice, especially pre-trial detention is found within the Directive of the European Parliament and the Council on procedural safeguards for children suspected or accused in criminal proceedings.

Most of the standards are already present in the national law of mostly all European Union Member States, but the adoption of this Directive would give a stronger basis in law regarding some of the rights that should be applied in various special cases where children and young persons are involved.

International laws should promote child-friendly justice systems, which recognise the right of children to special protection and most importantly use detention as a measure of last resort, diverting children away from criminal justice systems wherever it is possible.

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