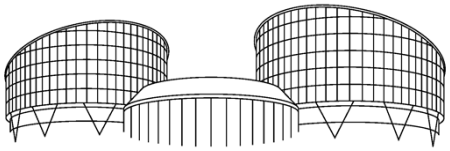

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF S., V. AND A. v. DENMARK

(Applications nos. 35553/12, 36678/12 and 36711/12)

JUDGMENT

STRASBOURG

22 October 2018

This judgment is final but it may be subject to editorial revision.

In the case of S., V. and A. v. Denmark,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Guido Raimondi, *President,*
Angelika Nußberger,
Linos-Alexandre Sicilianos,
Ganna Yudkivska,
Helena Jäderblom,
Robert Spano,
Ledi Bianku,
Nebojša Vučinić,
Vincent A. De Gaetano,
Erik Møse,
Paul Lemmens,
Krzysztof Wojtyczek,
Dmitry Dedov,
Jon Fridrik Kjølbro,
Carlo Ranzoni,
Stéphanie Mourou-Vikström,
Lətif Hüseynov, *judges,*

and Søren Prebensen, *Deputy to the Registrar,*

Having deliberated in private on 17 January and 11 July 2018,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in three applications (nos. 35553/12, 36678/12 and 36711/12) against the Kingdom of Denmark lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by three Danish nationals, Mr S., Mr V. and Mr A. ("the applicants"), on 8 June 2012. The President of the Grand Chamber acceded to the applicants' request not to have their names disclosed (Rule 47 § 4 of the Rules of Court).

2. The applicants were represented by Mr C. Bonnez, a lawyer practising in Aarhus, and Mr T. Stadarfeld Jensen and Mrs H. Ziebe, advisers. The Danish Government ("the Government") were represented by their Agent, Mr T. Elling Rehfeld, counsel, and Mrs N. Holst-Christensen, Mr C. Wegener and Mr J. van Deurs, advisers.

3. The applicants alleged in particular that their preventive detention had been in breach of Article 5 § 1 of the Convention.

4. On 7 January 2014 the applicants' complaint under Article 5 was communicated to the Government, and their complaints under Articles 7 and 11 of the Convention were declared inadmissible, pursuant to Rule 54 § 3.

5. On 11 July 2017 a Chamber of the Second Section, composed of Robert Spano, President, Julia Laffranque, Ledi Bianku, Nebojša Vučinić, Paul Lemmens, Jon Fridrik Kjølbro, Stéphanie Mourou-Vikström, judges, and Stanley Naismith, Section Registrar, relinquished jurisdiction in favour of the Grand Chamber, neither of the parties having objected to such relinquishment (Article 30 of the Convention and Rule 72).

6. The composition of the Grand Chamber was determined according to the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24.

7. The applicants and the Government filed observations on the admissibility and merits of the applications.

8. A hearing took place in public in the Human Rights Building, Strasbourg, on 17 January 2018.

There appeared before the Court:

(a) *for the Government*

Mr T. ELLING REHFELD, Ministry of Foreign Affairs, *Agent*,
Mrs N. HOLST-CHRISTENSEN, Ministry of Justice, *Co-Agent,*
Mr C. WEGENER, Head of Secretariat, Ministry of Foreign Affairs,
Mr J. VAN DEURS, Head of Department, Ministry of Justice, *Advisers*;

(b) *for the applicants*

Mr C. BONNEZ, lawyer, Advokaterne Bonnez & Ziebe, *Counsel*,
Mr T. STADARFELD JENSEN, lawyer,
Mrs H. ZIEBE, lawyer, *Advisers*.

The Court heard addresses by Mr Elling Rehfeld and Mr Bonnez and the replies given by them to the questions put by the judges.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The first applicant, Mr S., was born in 1989. The second applicant, Mr V., and the third applicant, Mr A., were both born in 1982.

10. On Saturday 10 October 2009 from 8 to 10 p.m. a football match between Denmark and Sweden was held in Copenhagen. The stadium had a capacity of 38,000 spectators. Beforehand the police had received

intelligence reports of intentions among various club factions from Denmark and Sweden to instigate hooligan brawls. Consequently, in addition to the Copenhagen Police, which was in operation as usual, an extra 186 police officers were called on duty. Most of them wore uniforms throughout the day. They were familiar with members of local football factions.

11. The three applicants went to Copenhagen to watch the match. They were detained during the day by virtue of section 5(3) of the Police Act (*Politiloven*) (see paragraph 29 below).

12. Altogether 138 spectators/hooligans were detained, approximately half of them under section 755 of the Administration of Justice Act (*Retsplejeloven*) (see paragraph 35 below), being charged with various criminal offences, while the other half were detained under section 5(3) of the Police Act outside the context of criminal proceedings.

13. The first applicant was detained from 4.45 p.m. to 12.06 a.m., a total of seven hours and twenty-one minutes.

14. The second applicant was detained from 3.50 p.m. to 11.27 p.m., a total of seven hours and thirty-seven minutes.

15. The third applicant was detained from 3.50 p.m. to 11.34 p.m., a total of seven hours and forty-four minutes.

16. The last disturbances in the city centre of Copenhagen resulting in detentions took place at 10.51 p.m. and 11.21 p.m., at which time it was recorded that a police transport wagon was holding thirty-five detainees (those detained at 10.51 p.m.).

17. On 15 October 2009, on behalf of the applicants, their representative requested that the police bring the cases before the courts in order to examine the lawfulness of the detention under chapter 43a of the Administration of Justice Act. She also sought compensation under section 469, subsection 6, of the same Act.

18. On 4 November 2009, the parties having agreed on a common venue, the cases were brought before the Aarhus City Court (*Retten i Aarhus*). The applicants, three witnesses on their behalf, the leader of the police operation and four other representatives of the police were heard. The case was tried over three days, on 11 March, 6 September and 28 October 2010.

19. The applicants explained that they had been part of a group of approximately twenty-five people from Aarhus, who had arrived in Copenhagen well before the match was due to begin. They had met between five and ten friends from Copenhagen and entered a pub. A group of forty or fifty people had afterwards left the pub to find a bigger pub on the Strøget pedestrian shopping street but the police had led them down a side street and detained the second and third applicants and four others. Subsequently, the first applicant had gone with some friends to another pub. Later on he had gone to a square opposite Tivoli Gardens to meet a friend

from Aarhus. While standing outside with this friend, and talking on the phone with another friend from Copenhagen, he had been detained. The applicants argued that they had not been involved in any altercations; nor had they had any such intention. They confirmed that on a couple of previous occasions, they had been held in police custody in connection with other football matches.

20. A "Memorandum on detentions in connection with the international match between Denmark and Sweden on 10 October 2009", prepared by Chief Inspector B.O., the strategic commander for the event, was submitted to the City Court. It stated that the police had received intelligence reports that hooligan groups from both countries were set on fighting each other on the match day. The risk of fighting was increased by the fact that the match would not start until 8 p.m., leaving considerable time for each group to consume alcoholic beverages beforehand. In order to prevent such clashes, the plan was to start engaging in proactive dialogue from 12 noon, when the first fans/spectators appeared, and in the event of clashes, first to arrest the instigators under section 755 of the Administration of Justice Act and charge them or, if that was not possible, to detain the instigators by virtue of section 5(3) of the Police Act. Since detention under the latter provision, as far as possible, should not exceed six hours, the memorandum specifically stated that it was preferable to avoid detaining anyone too early during the day, since they would then have to be released during or after the game, with the possibility that they would head for the city centre again and resume their involvement in brawls. At 3.41 p.m. the first big fight started between Danish and Swedish supporters at Amagertorv Square, on Strøget in the centre of Copenhagen, resulting in five or six individuals being detained, including the second and third applicants. Subsequently, elsewhere, other supporters were detained, including the first applicant. Up until the start of the match, further individuals who instigated and directed fights were detained, but the manoeuvre tactics continued to be a dialogue to ensure that the large number of supporters behaved and made their way to the stadium to watch the match. After the match, another large brawl started in the city centre, resulting in further detentions of a large group of Swedish and Danish supporters/hooligans.

21. Before the City Court, Chief Inspector B.O. stated, *inter alia*:

> "... that he was the strategic commander for the event and located in the control room in connection with the international football match between Denmark and Sweden on 10 October 2009. The police had received intelligence reports of intentions among various club factions from Denmark and Sweden to initiate hooligan brawls in connection with the match. The police were therefore prepared for it not to be the usual audience of festive Danish and Swedish supporters. This information had come from police 'spotters' in different networks of football fans. They had received information that Danish and Swedish groups had planned to collaborate ... Police preparations had targeted different locations in Copenhagen. It was the intention to locate the various groups, talk to them to calm them down and accordingly dampen

tempers before they reached the national stadium. The police had already deployed forces and divided them into groups at around 2 p.m. on the basis of intelligence that the spectators would arrive early to go partying. They had managed to locate the groups of fans by means of their spotters, and it had turned out that the fans were divided into a Swedish and a Danish group. They had seen the first large fight between Danish and Swedish hooligans at around 3.40 p.m. The fight had occurred in the central part of Strøget, the pedestrian shopping street, outside bar D, where the Swedish group had settled down. Prior to the fight, they had located the Danish groups in the central courtyard of Boltens Gård. According to the intelligence, the Danish people involved were supporters of the football clubs of Brøndby, Lyngby [Copenhagen] and AGF [Aarhus]. This intelligence had been collected by police officers in the home towns of these clubs. Those police officers had come to Copenhagen to assist, and they had recognised supporters.

The fight had taken the police somewhat by surprise, but they had managed to segregate the Swedish supporters at the bar D, and guide the Danish participants down Valkendorffsgade, a small side street off the pedestrian shopping street. It was a group of about fifty to sixty Danish fans altogether. He did not know the number of persons involved directly in the fight, but had understood from local reports that there were about fifty or sixty persons on either side. A fight of this kind causes a lot of uncertainty.

He himself had been in the control room, but had had regular contact with people at the scene of the incident. He was the one who had made the decision to detain persons who could not be charged with an offence, that is, detention pursuant to the Police Act. It had been planned that only the instigators should be detained. To the extent possible, they had also intended to avoid detaining many people early in the day because those people would then have to be released during or right after the match and would then be able to head for the city centre again and resume fighting. He had made use of local [police] spotters to identify six leading members, who had then been detained. They had been identified on the basis of police officers' prior knowledge of them, combined with their ongoing observations. The crucial factor had naturally been the individuals' actual behaviour. They would not have been detained if they had not been acting as instigators ...

The detainees had been released following an assessment of the situation in central Copenhagen. The police had started releasing the detainees after midnight, when the situation in central Copenhagen had calmed down and it had been assessed that there was no one with whom the newly released persons could start a fight. He was, of course, aware of the six-hour rule laid down in the Police Act, but it might be necessary to exceed this maximum period. They had done so deliberately that particular evening. Had there been no violence after the expiry of the six-hour period, there would have been no justification for not releasing the detainees. The purpose had definitely been to avoid confrontations and fights and situations causing uncertainty. They had made a continuous assessment during the period of detention.

Normally there were no problems in relation to the six-hour rule in connection with matches played earlier in the day/on weekdays when people did not arrive so early. The control room team had included an investigator who had had regular contact with the Bellahøj police station regarding the detentions. The detainees who had been charged with an offence had been released after the match. As regards the persons detained under the Police Act, a comprehensive, general assessment had been made and then those persons had been released one by one when the danger had passed. He had been involved in the general assessment of the length of the detention periods, but not in the assessment of the individual cases. The control room had been closed down

shortly after midnight, when the observers around the city had reported that things were quiet and that people were on their way home/back to their hotels. As already mentioned, it had been decided to release detainees on the basis of a general assessment made in the control room, but the actual releases had been effected at the Bellahøj police station. The police's assessment had been that the detainees would meet up again and start new fights if released before the streets of the city centre had become quiet ..."

22. Police Constable P.W. stated:

"... that he had participated as a member of a special patrol in the police action in Copenhagen on 10 October 2009 in connection with the international match. They had received intelligence that hooligans from Aarhus would meet with other hooligans from Denmark to fight Swedish football fans. The Copenhagen Police had asked for help from the police of other districts in Denmark who were familiar with members of local factions. He and his colleagues had met at around 11 a.m. for a briefing. He and a colleague of his from the Police of Eastern Jutland had then moved around the city to look for any hooligans from Aarhus whom they might recognise. They had been told that people from Brøndby had gathered at a particular bar, and they had gone there. Among the people they had seen were [the first and second applicants]. [The second applicant] had been sitting together with A, the leader of South Side United (SSU), which is a local faction from Brøndby. There had been a good atmosphere, and no violence. The witness had remained standing outside for a short while and had talked to people from Aarhus. It had probably been around 1 p.m. He and his colleague and some other officers had then posted themselves opposite the bar to keep an eye on what was going on. They had received reports that Swedes and Danes were to meet and fight. At some point the Danish hooligans had started leaving the bar, walking down the pedestrian shopping street towards Amagertorv Square [around 700 metres from the bar].

[The witness] had worked in the special patrol for four years and had met [the first and second applicants] several times at previous fights in connection with football matches. He had seen them take part in fights and heard them shout 'White Pride Hooligan'. He and his colleagues had followed the group and reported back to the control room. When they had come closer to Amagertorv Square, police personnel carriers had been parked crosswise to prevent the group from colliding with the Swedish football fans. The Danish hooligans had then been turned around and taken down a side street, where they had been registered and searched.

They had been told by the control room to select two leading hooligans from Aarhus. He and his colleague had agreed on selecting [the second and third applicants]. It had happened in a calm manner. The reason why [the second applicant] had been taken to the police station was that they had indeed seen him talking to A, combined with their prior knowledge of him. [The third applicant] had also been taken to the police station because of their knowledge of him. [The witness] had written a report on the detentions a couple of hours later.

When questioned about Exhibit 46 at the bottom and its continuation on Exhibit 47 at the top [the police reports written by him], according to which both [the second and third applicants] had issued several orders to the other hooligans from Aarhus, the witness stated that he could no longer recall the details, but if this was what he had written, then that was how it had been. The purpose of detaining those two persons had been to create calm and prevent clashes. This had apparently succeeded because he had been present during the international match himself, and it had been obvious that the hooligans from Aarhus had been missing someone to take control. When the

group from the bar was being guided into the side street, a couple of people might have tried to disappear into the crowd, but the group had followed directions from the police.

White Pride supporters were characterised by being highly structured. It was very clear that someone was in control. Directions were issued by the leaders, and the directions were obeyed. The three factions present at the bar had come from Aarhus, Brøndby and Lyngby and were not usually friends. They had come out together and walked in a group towards Amagertorv Square, where the Swedish hooligans were supposed to be."

23. Police Constable M.W. stated:

"... that he had participated in the police action in Copenhagen on 10 October 2009 as a dog handler. He had been involved in the administrative detention of a person [the first applicant] at Axeltorv Square. He did not recall the name of this person, but it was the only person whom he had been involved in detaining. He and a colleague of his had been sitting observing in a car at Axeltorv Square, when a citizen, a man aged 40 to 45, holding his son of about five by the hand, had contacted them saying that three people, whom he had pointed out from a very short distance, were planning a fight as they had been calling various mates, telling them to meet up at the entrance to Tivoli Gardens and try to start a fight with some Swedish supporters. This citizen had overheard the calls just before he had contacted the police, and he had pointed out one of the three persons in particular. The person in question was still talking on his mobile phone at that time. The witness and his colleague considered the person making the report to be highly credible. The person making the report did not look like a typical football supporter.

The witness had continued to keep an eye on the person standing with his telephone to his ear. When the three men noticed that the witness and his colleague had caught sight of them, they had started to walk in different directions. The witness had then detained the person who had the telephone to his ear. Some colleagues driving in the police personnel carrier which had arrived in the meantime had detained the other two people ..."

24. Chief Inspector P.J. stated:

"... that he had been involved in placing detainees in cells, upholding the detentions and releasing the detainees. When the Copenhagen Police planned comprehensive police actions and expected to detain many people, he was usually selected as the person responsible for verifying that standard procedures were observed when the detainees were placed in a cell at Bellahøj police station.

On the relevant evening he had been assisted by two leaders, each of whom had assistance from two colleagues in carrying out body searches, and making photo recordings, of the detainees. Ten additional police officers were there to help. One of his tasks had been to make sure that the six-hour rule was observed. They had been faced with the issue that the six-hour period applicable to two of the persons detained under the Police Act expired at 9.50 p.m. He had contacted the control-room supervisor before the expiry of this period. Concurrently, clashes had been starting in the streets, and the control-room supervisor had decided not to let the relevant persons out. They had not wanted to add fuel to the fire. This decision had been made by the supervisors because he himself did not have the power to make such a decision. He had talked to the control room many times during that evening from 9.30 p.m. onwards. Very many detainees had been brought to the police station up until around 11 p.m., reaching a total of 136 detainees. Half of them had been detained under the

Police Act. He had regularly asked when they should start releasing the detainees. He had not called and asked about specific names, but a general assessment had been made on an ongoing basis for all detainees from the time when the statutory six-hour periods started to expire. The radio communication had made it possible for him to keep updated about when things started calming down after the arrests of people in the Boltens Gård courtyard, and finally it had been confirmed that he could start releasing the persons detained under the Police Act. He did not keep a log of all telephone calls and was therefore unable to give the exact time. As far as he recalled, there had probably been one detainee under 18 years old who had been fetched by his parents before the end of the six-hour period, but otherwise no one else had been let out before the two initial detainees. It could very well have happened that some of his colleagues had started taking people out of the cells before the end of the six-hour period when they had received the information from the control room, because everybody was highly aware of the six-hour rule. If the persons concerned had subsequently been returned to their cells, the reason was an order from the control room saying that they should continue to be detained."

25. By a judgment of 25 November 2010 the City Court found against the applicants for the following reasons:

"The Copenhagen Police ought to have brought the matters before the court within five days of receipt, as set out in section 469(2) of the Administration of Justice Act. The court finds, however, that the non-submission does not as such give rise to liability making the plaintiffs eligible for compensation.

Based on the evidence, the court accepts as fact that the Copenhagen Police had received intelligence prior to the international football match between Denmark and Sweden on 10 October 2009 that Danish and Swedish hooligan groups had arranged to meet in connection with the match and that the police had seen the first large fight between Danish and Swedish football fans at Amagertorv Square at 3.41 p.m. This implied a concrete and imminent risk of disturbance of public order, and the police were under a duty to attempt to prevent such disturbance; see section 5(1) of the Police Act.

According to the evidence given by Police Constable P.W., compared with the police report prepared by the same witness on 11 October 2009 (Exhibits 47 and 48), the court accepts as fact that [the second and third applicants] were detained after the witness had specifically seen the persons concerned talking with an activist from the local Brøndby faction of South Side United on 10 October 2009 and issuing orders to others, in combination with the fact that the persons concerned were known to the police for having been detained several times previously in connection with similar football events.

The court also accepts as fact, based on the evidence given by Police Constable M.W., compared with the evidence given by Chief Inspector B.O., that [the first applicant], who had also been detained several times previously in connection with similar events, was detained because a person, whom M.W. and his colleague had deemed to be highly credible, had spontaneously contacted him stating that he had just overheard a person, whom he had simultaneously pointed out as being [the first applicant], calling other people by phone and inciting them to start a fight with Swedish football fans at Tivoli Gardens together with him.

Less radical measures could not be deemed sufficient to avert the risk of additional unrest in those circumstances, and the court finds that the Copenhagen Police did not

exceed their powers by detaining [the applicants] under section 5(3) of the Police Act on that basis.

Based on the evidence, the court accepts as fact that during the afternoon and evening, about 138 persons were detained, half of them being detained pursuant to the Police Act; that the unrest continued for the rest of the afternoon and all evening; and that the detention of the plaintiffs was ended as soon as the city centre had become quiet, in the assessment of the police, after a group comprising thirty-five Danes was arrested towards midnight. The court finds, in the circumstances of the present case, that there is no basis for invalidating the assessment made by the police, according to which the release of the detainees before the city centre had become quiet would have entailed a concrete and imminent risk of further unrest, including clashes with spectators who had been let out of the national stadium after the end of the match and who were still in the streets in large numbers.

It is stated in the second sentence of section 5(3) of the Police Act that detention must be as brief as possible and should not extend beyond six hours where possible. According to the preparatory notes on this provision, as described in the second column on page 32 of Bill no. 159 of 2 April 2004, the purpose of the detention must be taken into account in this assessment and any person so detained must be released when the circumstances giving rise to the detention no longer exist. It also appears from the preparatory notes on the same provision that normally the six-hour period can only be exceeded in connection with actions involving the detention of a considerable number of people, in which situations the time spent on transfer to the police station and registration and identification of detainees would render it impossible, in practice, to observe the six-hour rule.

Whilst the legislative intent of the provision is to extend detention to more than six hours only in exceptional situations, if an extension is not justified by practical issues related to the detention of a large number of people that render it impossible to observe the maximum period, the court finds on the above grounds, in view of the purpose of the detentions compared with the organised nature, scope and duration of the unrest, as well as the length of the specific periods by which the maximum periods had been exceeded, that the conditions for detaining [the applicants] pursuant to section 5(3) of the Police Act for more than six hours were met. Accordingly, there is no basis for awarding compensation to [the applicants]."

26. On appeal, for the reasons stated by the City Court, on 6 September 2011 the High Court of Western Denmark (*Vestre Landsret*) upheld the judgment.

27. On 12 December 2011, finding that the case raised no issue of principle, the Appeals Permission Board (*Procesbevillingsnævnet)* refused leave to appeal to the Supreme Court (*Højesteret*).

28. It appears that forty-nine persons (not including the applicants) were charged with criminal offences on the day of the match, notably for breaching the Executive Order on Police Measures to Maintain Public Order and Protect the Safety of Individuals and the Public, etc., and the Right of the Police to Launch Temporary Measures (*bekendtgørelse om politiets sikring af den offentlige orden og beskyttelse af enkeltpersoners og den offentlige sikkerhed mv., samt politiets adgang til at iværksætte midlertidige foranstaltninger*) (see paragraph 33 below). However, those charges were later withdrawn because it was deemed impossible to obtain sufficient

evidence to prove that every single one of the persons charged had committed one or more criminal offences. One person was convicted under section 119 of the Penal Code for having thrown a glass item at a police officer's head, and another person was convicted under section 121 for having verbally insulted a police officer on duty.

II. RELEVANT DOMESTIC LAW AND PRACTICE

29. The relevant provisions of the Police Act (Act no. 444 of 9 September 2004) concerning order and security read as follows:

Section 4

"1. It is the task of the police to prevent any risk of disturbance of public order and any danger to the safety of individuals and public security.

2. In so far as it is considered necessary to prevent danger as mentioned in subsection 1, the police may clear, close off, and establish access control to certain areas."

Section 5

"1. The police shall avert any risk of disturbance of public order and any danger to the safety of individuals and public security.

2. To avert a risk or danger referred to in subsection 1, the police may take measures against any person causing such danger. To this end, the police may

(i) issue orders,

(ii) conduct rub-down searches of persons and examine their clothing and other items, including vehicles, in their possession, where they are presumed to be in possession of items intended to disturb public order or intended to endanger the safety of individuals or public security; and

(iii) take items away from persons.

3. Where the less intrusive measures set out in subsection 2 are found to be inadequate to avert a risk or danger, the police may, if necessary, detain the person(s) causing the risk or danger. Such detention must be as short and moderate (*skånsom*) as possible and should not extend beyond six hours where possible.

4. The police may enter otherwise inaccessible areas without a court order, when it is necessary to avert danger as mentioned in subsection 1."

30. A detention based on section 5(3) of the Police Act is outside the context of criminal proceedings (as opposed to an arrest under section 755 of the Administration of Justice Act, see paragraph 35 below). The purpose of a detention under section 5(3) is not to bring the person before a judge, neither to assess the lawfulness of a continued detention. The lawfulness may, however, subsequently be subject to judicial review. According to the preparatory notes on the Police Act, detention based on section 5(3) of the Police Act may not take place for the purpose of investigating or initiating criminal measures. The condition that the person must be causing a "risk or

danger" implies that a concrete and imminent risk of disturbance of public order or of danger to the safety of individuals or public security must have been ascertained. What is crucial is the probability that the risk or danger will occur if the police do not intervene. The fact that a person is a well-known troublemaker does not as such justify such measures. Prior knowledge of a person or a group of persons may, however, be taken into account, together with the current circumstances. Whether the risk or danger is sufficient to justify a measure depends on an assessment made by the police of the individual situation. As to the wording "should not extend beyond six hours where possible", the preparatory notes point out that the period should be reckoned from the time when the detention is effected. Any time spent on transfer to a police station must therefore be included in the calculation of the detention period. The six-hour period would normally only be exceeded in connection with actions involving the detention of a large number of persons, when the time spent on transfer to the police station and registration and identification of detainees would render it impossible, in practice, to observe the six-hour rule.

31. Section 469 of the Administration of Justice Act concerns the judicial review of detentions outside the criminal justice field. The request for judicial review is submitted to the authority which gave the decision on detention, whereupon the authority must bring the matter before the district court within five weekdays after the request was made.

32. Danish law contains a number of provisions which may be relevant in connection with hooligan brawls and disturbance of public order, and which can result in a sentence of a fine and/or imprisonment if violated. These provisions originate from both the Executive Order on Police Measures to Maintain Public Order and Protect the Safety of Individuals and the Public, etc., and the Right of the Police to Launch Temporary Measures (hereinafter "the Executive Order on Police Measures to Maintain Law and Public Order") and the Danish Penal Code (*Straffeloven*).

33. The relevant sections of the Executive Order on Police Measures to Maintain Law and Order read as follows:

Section 3

"1. No fighting, screaming, shouting or other loud, violent, insulting or similar behaviour likely to disturb public order shall be allowed.

..."

Section 18

"(1) The penalty for breach of sections 3 ... is a fine. When determining a sentence, regard for the maintenance of public order and the protection of the safety of individuals and the public shall be accorded substantial weight. When determining a sentence for a breach of sections 3(1) ..., it shall additionally be considered an aggravating circumstance if the act was committed during or directly after a serious breach of the peace in a public place in the area. However, the third sentence hereof shall only apply if it was the intention of the person concerned that the peace in a public place should be seriously breached.

..."

34. The relevant articles of the Penal Code read as follows:

Article 134a

"Participants in affray or persons involved in any other serious breach of the peace in a public place shall be sentenced to imprisonment for a term not exceeding one year and six months if they have acted by mutual consent or several persons have acted together."

Article 244

"Any person who commits an act of violence against or otherwise assaults the person of another shall be sentenced to a fine or imprisonment for a term not exceeding three years."

Article 245

"(1) Any person who commits an assault on the person of another in a particularly offensive, brutal or dangerous manner, or is guilty of mistreatment, shall be sentenced to imprisonment for a term not exceeding six years. It shall be considered a particularly aggravating circumstance if such assault causes serious harm to the body or health of another person.

(2) Any person who harms the body or health of another person in cases other than those referred to in subsection (1) shall be sentenced to imprisonment for a term not exceeding six years."

Article 291

"(1) Any person who destroys, damages or removes any property belonging to another person shall be sentenced to a fine or imprisonment for a term not exceeding one year and six months.

(2) In the case of serious criminal damage or criminal damage carried out in a systematic or organised manner, or if the offender has previously been convicted under Article 291 ..., the sentence may be increased to imprisonment for six years.

(3) ...

(4) When determining a sentence under subsections (1) and (2), it shall be considered an aggravating circumstance if the act was committed during or directly after a serious breach of the peace in a public place in the area."

35. An arrest within criminal proceedings is regulated by the following sections of the Administration of Justice Act:

Section 755

"(1) The police may arrest any person who is reasonably suspected of a criminal offence subject to public prosecution, if arrest must be deemed necessary to prevent further criminal offences, to secure the person's presence for the time being or to prevent his association with others.

...

(4) No arrest may be made if, in the nature of the case or the circumstances in general, deprivation of liberty would be a disproportionate measure.

..."

Section 760

"(1) Any person who is taken into custody shall be released as soon as the reason for the arrest is no longer present. The time of his release shall appear in the report.

(2) Where the person taken into custody has not been released at an earlier stage he shall be brought before a judge within twenty-four hours after his arrest. The time of the arrest and of his appearance in court shall appear in the court transcript.

..."

III. COUNCIL OF EUROPE MATERIALS

A. Preparatory work on Article 5 § 1 of the Convention

36. The Court observes that the draft Convention and Report prepared by the Consultative Assembly and the Working Papers of the Secretariat of the Council of Europe were submitted to the Committee of Experts, composed of government lawyers, legislators, judges and law professors from the twelve member States at the time. They met from 2 February to 10 March 1950. The Report by the Committee of Experts was submitted to the Conference of Senior Officials for the purpose of preparing the decision ultimately taken by the Committee of Ministers as to the final draft to be submitted to the Consultative Assembly.

37. The original basis for the text of Article 5 § 1 (c) (inspired by Article 9 of the draft International Covenant on Human Rights) read as follows (see Preparatory Work on Article 5 of the Convention, bilingual version, CDH (67) 10, p. 14):

"1. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

...

(c) the arrest of a person effected for the purpose of bringing him before the competent legal authority on a reasonable suspicion of having committed an offence or which is reasonably considered to be necessary to prevent his committing a crime or fleeing after having done so; ..."

38. The text was amended as follows during the second session of the Committee of Experts (Article 7 § 1 of the "preliminary draft" of the Convention; ibid., pp. 22-23):

> "(c) the lawful arrest and detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or which is reasonably considered to be necessary to prevent his committing a crime, or fleeing after having done so; ..."

39. The text of Article 7 § 3 of the said draft (corresponding to the present Article 5 § 3) was amended as follows:

> "Anyone arrested or detained on the charge of having committed a crime or to prevent his committing a crime shall be brought promptly before a judge or ..."

40. The "first draft" of the Convention of the Conference of Senior Officials (ibid., p. 29) reproduced the text of the above provisions as amended, renumbering them as Article 5 § 2 (c) and Article 5 § 4 respectively (ibid., p. 30).

41. In the "second draft" of the Convention (ibid., pp. 30-31), Article 5 § 2 was merged into Article 5 § 1 and paragraph 4 became paragraph 3, with the following change:

> "3. Anyone arrested or detained on the charge of having committed a crime [**deleted: or to prevent his committing a crime**] in accordance with the provisions of para. 1 (c) shall be brought promptly before a judge or ..."

42. Subsequently, the Report of the Conference of Senior Officials on Human Rights to the Committee of Ministers on Article 5 §§ 1 (c) and 3 of the second draft (ibid., p. 32) stated:

> "The Conference considered it useful to point out 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 in order 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. In order to avoid any possible abuses of the right thus conferred on public authorities, Article 13, para. 2 [the provision which foreshadowed Article 18], will have to be applied strictly."

The following comments on these provisions were made by the United Kingdom delegation (ibid., p. 33):

> "... The phrase 'reasonable suspicion of preventing the commission of a crime' is meaningless. The wording of Article 5 (1) (c) of the Convention should be followed, i.e. 'on grounds which are reasonably considered to be necessary to prevent'."

43. After the Fifth Session of the Committee of Ministers from 3 to 9 August 1950, the text of Article 5 § 3 was changed as follows (ibid., p. 35):

> "3. Everyone arrested or detained [**deleted: on the charge of having committed a crime**] in accordance with the provisions of para. 1 (c) of this Article shall be brought promptly before a judge or ..."

44. On 3 November 1950, the day before the signature of the Convention (ibid., p. 36-37), the Committee of Experts took the opportunity to make slight amendments in the English version and changed "or which is reasonably considered to be necessary" to "or when it is reasonably considered necessary". Since there is no explanation given for this change, it appears motivated solely by linguistic reasons. There is no indication of an intention to change substantively the content of the provision in question or to limit its scope.

B. Council of Europe Convention on Integrated Safety, Security and Service Approach at Football Matches and Other Sports Events

45. Building upon the content of the European Convention on Spectator Violence and Misbehaviour at Sports Events and in particular at Football Matches of August 1985 (ETS No. 120), drawn up in the wake of the Heysel tragedy of 1985, the Council of Europe drafted the Convention on Integrated Safety, Security and Service Approach at Football Matches and Other Sports Events, which was opened for signature on 3 July 2016 and entered into force on 1 November 2017 (CETS No. 218). In so far as relevant, the provisions of this Convention read as follows:

Article 2 – Aim

"The aim of this Convention is to provide a safe, secure and welcoming environment at football matches and other sports events. To that end, the Parties shall:

(a) adopt an integrated, multi-agency and balanced approach towards safety, security and service, based upon an ethos of effective local, national and international partnerships and co-operation;

(b) ensure that all public and private agencies, and other stakeholders, recognise that safety, security and service provision cannot be considered in isolation, and can have a direct influence on delivery of the other two components;

(c) take account of good practices in developing an integrated approach to safety, security and service."

Article 3 – Definitions

"For the purposes of this Convention, the terms:

...

(b) 'security measures' shall mean any measure designed and implemented with the primary aim of preventing, reducing the risk and/or responding to any violence or other criminal activity or disorder committed in connection with a football or other sports event, inside or outside of a stadium;

..."

Article 5 – Safety, security and service in sports stadiums

"1. The Parties shall ensure that national legal, regulatory or administrative frameworks require event organisers, in consultation with all partner agencies, to provide a safe and secure environment for all participants and spectators.

..."

Article 6 – Safety, security and service in public places

"1. The Parties shall encourage all agencies and stakeholders involved in organising football matches and other sports events in public spaces, including the municipal authorities, police, local communities and businesses, supporter representatives, football clubs and national associations, to work together, notably in respect of:

(a) assessing risk and preparing appropriate preventative measures designed to minimise disruption and provide reassurances to the local community and businesses, in particular those located in the vicinity of where the event is taking place or public viewing areas;

(b) creating a safe, secure and welcoming environment in public spaces that are designated for supporters to gather before and after the event, or locations in which supporters can be expected to frequent of their own volition, and along transit routes to and from the city and/or to and from the stadium.

2. The Parties shall ensure that risk assessment and safety and security measures take account of the journey to and from the stadium."

Article 9 – Police strategies and operations

"1. The Parties shall ensure that policing strategies are developed, regularly evaluated and refined in the light of national and international experience and good practices, and are consistent with the wider, integrated approach to safety, security and service.

2. The Parties shall ensure that policing strategies take account of good practices including, in particular: intelligence gathering, continuous risk assessment, risk-based deployment, proportionate intervention to prevent the escalation of risk or disorder, effective dialogue with supporters and the wider community, and evidence gathering of criminal activity as well as the sharing of such evidence with the competent authorities responsible for prosecution.

3. The Parties shall ensure that the police work in partnership with organisers, supporters, local communities and other stakeholders in making football matches and other sports events safe, secure and welcoming for all concerned."

Article 10 – Prevention and sanctioning of offending behaviour

"1. The Parties shall take all possible measures to reduce the risk of individuals or groups participating in, or organising incidents of violence or disorder.

..."

IV. COMPARATIVE NATIONAL CASE-LAW

46. For the purposes of its examination of the present case, the Court deems it useful to refer to the judgment of 15 February 2017 of the Supreme

Court of the United Kingdom in *R v The Commissioner of Police for the Metropolis*, in which the Court's case-law on Article 5 § 1 (b) was found to be inconclusive. The four applicants in that case had been detained for up to five and a half hours to prevent an imminent breach of the peace during the wedding of the Duke and Duchess of Cambridge on 29 April 2011. The police had argued that the detention was justified under both Article 5 § 1 (b) and Article 5 § 1 (c).

The Administrative Court found that the detention had complied with Article 5 § 1 (c).

The Court of Appeal agreed, but for other reasons. It concluded that the purpose of the applicants' detention had been to bring them before the competent legal authority if that were to become necessary, so as to prolong their detention on a lawful basis. It declined to follow the majority view in *Ostendorf v. Germany* (no. 15598/08, 7 March 2013) that Article 5 § 1 (c) was incapable of authorising purely preventive detention, notwithstanding the existence of good grounds to believe an offence to be imminent, and that the person concerned must be suspected of having already committed a criminal offence.

Finally, the Supreme Court, having analysed the Court's case-law, and notably the divergent views expressed in the concurring opinion in *Ostendorf* (cited above), concluded that the detention was lawful under Article 5 § 1 (c). Lord Toulson (with whom Lord Mance, Lord Dyson, Lord Reed and Lord Carnwath agreed) stated, in particular:

> "31. In this case there was nothing arbitrary about the decisions to arrest, detain and release the appellants. They were taken in good faith and were proportionate to the situation. If the police cannot lawfully arrest and detain a person for a relatively short time (too short for it to be practical to take the person before a court) in circumstances where this is reasonably considered to be necessary for the purpose of preventing imminent violence, the practical consequence would be to hamper severely their ability to carry out the difficult task of maintaining public order and safety at mass public events. This would run counter to the fundamental principles previously identified.
>
> 32. There is, however, a difficult question of law as to how such preventive power can be accommodated within article 5. The Strasbourg case law on the point is not clear and settled, as is evident from the division of opinions within the Fifth Section in *Ostendorf.* Moreover, while this court must take into account the Strasbourg case law, in the final analysis it has a judicial choice to make.
>
> 33. The view of the minority in *Ostendorf,* that article 5.1(c) is capable of applying in a case of detention for preventive purposes followed by early release (that is, before the person could practicably be brought before a court), is in my opinion correct for a number of reasons.
>
> 34. In the first place I agree with the Administrative Court that the situation fits more naturally within the language of article 5.1(c) than 5.1(b). On its plain wording article 5.1(c) covers three types of case, the second being when the arrest or detention of a person 'is reasonably considered necessary to prevent his committing an offence.'

35. There is force in the argument that the interpretation adopted by the majority in *Ostendorf* collapses the second into the first ('reasonable suspicion of having committed an offence') and is inconsistent with *Lawless* [*Lawless v. Ireland (no. 3)*, 1 July 1961, Series A no. 3].

36. It is accepted by the police that English courts should treat *Lawless* as authoritative, but in that case the court was not concerned with a situation in which the police had every reason to anticipate that the risk necessitating the person's arrest would pass in a relatively short time and there was every likelihood of it ending before the person could as a matter of practicality be brought before a court. It would be perverse if it were the law that in such circumstances, in order to be lawfully able to detain the person so as to prevent their imminently committing an offence, the police must harbour a purpose of continuing the detention, after the risk had passed, until such time as the person could be brought before a court with a view to being bound over to keep the peace in future. This would lengthen the period of detention and place an unnecessary burden on court time and police resources.

37. Some analogy may be drawn with *Brogan*, in which the court rejected the argument that at the time of the arrest the police must intend to take the arrested person before the court willy nilly, regardless of whether on investigation there was cause to do so.

38. In order to make coherent sense and achieve the fundamental purpose of article 5, I would read the qualification on the power of arrest or detention under article 5.1(c), contained in the words 'for the purpose of bringing him before the competent legal authority', as implicitly dependent on the cause for detention continuing long enough for the person to be brought before the court. I agree therefore with Judges Lemmens and Jäderblom in para 5 of their judgment in *Ostendorf* (cited at para 25 above) that in the case of an early release from detention for preventive purposes, it is enough for guaranteeing the rights inherent in article 5 if the lawfulness of the detention can subsequently be challenged and decided by a court.

39. I prefer to put the matter that way, rather than as the Court of Appeal did by inferring the existence of a conditional purpose ab initio to take the appellants before the court, although it makes no difference to the result. I have no disagreement with the Court of Appeal that the appellants would have been brought before a court to determine the legality of their continued detention, if it had been considered necessary to detain them long enough for this to happen. The case would then have been materially similar to *Nicol and Selvanayagam*, where the applicants' initial detention was preventive and they were later kept in custody and brought before the court to be bound over. It would be contrary to the spirit and underlying objective of article 5 if the appellants' early release placed them in a stronger position to complain of a breach of article 5 than if it had been decided to detain them for longer in order to take them before magistrates to be bound over.

40. As to article 5.1(b), I am inclined to the same view as the minority in *Ostendorf* that the obligation has to be much more specific than a general obligation not to commit a criminal offence (or, in this case, a breach of the peace), and that such a general obligation does not acquire the necessary degree of specificity by focusing narrowly on the particular facts or by the person concerned being given a reminder of it in specific circumstances. There are also practical considerations. The police may find it necessary to take action to prevent an imminent breach of the peace in circumstances where there is not sufficient time to give a warning. An example might be a football match where two unruly groups collide and the police see no alternative but to detain them, or the ringleaders on both sides, immediately for what may be

quite a short time. In summary, I would be concerned that in stretching article 5.1(b) beyond its previously recognised ambit the majority found it necessary to impose limitations which in another case might leave the police effectively powerless to step in for the protection of the public."

THE LAW

I. JOINDER OF THE APPLICATIONS

47. The Court considers that the three applications should be joined in accordance with Rule 42 § 1 of the Rules of Court, given their common factual and legal background. It will thus examine them jointly in a single judgment.

II. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

48. The applicants complained that they had been deprived of their liberty in breach of Article 5 of the Convention, which reads as follows:

"1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(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;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within

a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

49. The Government contested that argument.

A. Admissibility

50. In the Court's view, the application raises complex issues of fact and Convention law, such that it cannot be rejected on the ground of being manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. Neither is it inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The Government

51. The Government did not dispute that the impugned detention had amounted to a deprivation of liberty, but submitted that it had been justified under both sub-paragraphs (b) and (c) of Article 5 § 1 and had been in accordance with a procedure prescribed by law.

(i) Article 5 § 1 (b)

52. The Government submitted that, as in *Ostendorf* (cited above), the applicants' detention was covered by Article 5 § 1 (b), as it had been intended to prevent them from organising and taking part in brawls between hooligans. The applicants had been subject to an obligation to refrain from committing criminal offences, including the obligation not to instigate fights or exhibit any other form of violent behaviour likely to disturb public order. This obligation followed from a number of provisions on punishable acts, including section 3 of the Executive Order on Police Measures to Maintain Law and Order (which is considered to define a criminal offence), and sections 134a, 244, 245 and 291 of the Penal Code. The obligation was specific and concrete, and the time and place of the imminent commission of the offence had been sufficiently specified, as well as its potential victims. The applicants had been aware of the large police presence in the city and it must have been clear to them that the police were there to prevent violence and disturbance in connection with the football match, notably as

all three applicants had previously been detained in connection with similar events. In the Government's view, it would have been futile for the police to have given the applicants explicit orders to disperse and refrain from arranging/taking part in brawls, as the applicants could simply have walked away from the police and engaged in hooligan brawls elsewhere. Likewise, it would have made little sense to escort them to the stadium and warn them of detention if they left the groups of hooligans, as the police had done in *Ostendorf* (cited above), since many of them, including the third applicant, had not even had a ticket for the match.

53. In addition, the applicants had taken clear steps indicating that they would not fulfil this obligation. Thus, the first applicant had been detained because a citizen, deemed highly credible by the police, had spontaneously contacted the police stating that he had just overheard a person, whom he simultaneously pointed out as being the first applicant, calling other people by phone and inciting them, together with him, to start a fight with Swedish football fans. The second and third applicants had been detained after the police had specifically seen them talking to an activist from the local faction of "South Side United" and issuing orders to others.

54. The applicants had been released as soon as there was no more hooligan violence in the city. The last disturbances resulting in detentions had taken place at 10.51 p.m. and 11.21 p.m., at which time it was recorded that a police transport wagon was holding thirty-five detainees (those detained at 10.51 p.m.). The applicants had been released at 11.27 p.m., 11.34 p.m., and 12.06 a.m. respectively, as quickly as was practicably possible.

(ii) Article 5 § 1 (c)

55. The Government also submitted that the applicants' detention could be justified under Article 5 § 1 (c).

56. They emphasised that the applicants had been detained because it had been "reasonably considered necessary to prevent their committing an offence", or more specifically, they had been detained under section 5(3) of the Police Act to avert the risk of disturbance of public order and the danger to the safety of individuals and public security. The police had been in possession of sufficient facts and information to satisfy an objective observer that the applicants were planning to organise and participate in hooligan brawls, during which concrete and specific criminal offences would be committed (for example, those provided for in section 3 of the Executive Order on Police Measures to Maintain Law and Order and sections 134a, 244, 245 and 291 of the Penal Code).

57. The applicants had not been detained in order to initiate criminal proceedings against them. However, referring, *inter alia*, to *Lawless* (cited above, § 14) and the concurring opinion in *Ostendorf* (cited above), the Government maintained that the fact that a detained person was not

subsequently charged or brought before a court did not in itself amount to a violation of the first limb of Article 5 § 3. There was no breach of Article 5 § 3 if the detainee was released "promptly" before any judicial review of the detention would have been feasible. In such a situation there was no risk of arbitrary detention for an unlimited amount of time.

58. In the present case, the applicants had been released promptly, namely as soon as the risk had been removed, after a period of seven hours. It would be unfortunate if the legislation in such a situation required the police to continue the detention and bring the detainee before a court in order for administrative detention for preventive purposes to be lawful, and it would be contrary to the spirit and underlying objective of Article 5 if the applicants' early release placed them in a stronger position to complain of a breach of Article 5 than if it had been decided to detain them for longer in order to bring them before a court.

59. Furthermore, under section 469 of the Administration of Justice Act, the applicants could have, and had, initiated proceedings before the courts concerning the lawfulness of the decision by the police on their administrative detention. The legislation thus guaranteed the right to demand an examination of the deprivation of liberty and eliminated the risk of arbitrary detention.

(iii) In accordance with a procedure prescribed by law

60. Lastly, the Government maintained that the applicants' detention had been in accordance with a procedure prescribed by law. Referring to the wording of section 5(3) of the Police Act and the relevant preparatory notes, the Government found that the Act provided sufficient authority to exceed the six-hour rule in special situations. In the present case, the purpose of the detention would have been defeated if the applicants had been released by the end of the six-hour period. They pointed out that the domestic courts had found, in view of the purpose of the detention compared with the organised nature, scope and duration of the unrest, as well as the length of the specific periods by which the maximum periods had been exceeded, that the conditions for detaining the three applicants under section 5(3) of the Police Act for more than six hours had been met.

(b) The applicants

61. The applicants submitted that their detention did not fall under Article 5 § 1 (b) or (c) or any of the other sub-paragraphs of Article 5 § 1. They also contended that the detention had not been in accordance with a procedure prescribed by law.

(i) Article 5 § 1 (b)

62. The applicants agreed that if a specific duty or obligation could be identified in the present case, it had to be the same as in *Ostendorf* (cited

above), namely to prevent them from organising and participating in brawls. They pointed out, however, that in *Ostendorf* the Court had underlined that "... it is necessary, prior to concluding that a person has failed to satisfy his obligation at issue, that the person concerned was made aware of the specific act which he or she was to refrain from committing and that the person showed himself or herself not to be willing to refrain from so doing" (ibid., § 94). The Court had further emphasised that the person concerned had to have taken positive steps indicating that he would not fulfil the above-mentioned obligation. In *Ostendorf* the applicant had been classified as a "gang leader" and had received a specific and precise order from the police to stay with the group of supporters with whom he had travelled to a football match, and the group had even been informed of the consequences of not obeying such an order. The order had been given after the police had registered and searched all individuals in the group, finding and seizing items in their possession used in hooligan brawls.

63. The facts of the present case, however, were clearly different from those dealt with in *Ostendorf*. All three applicants had followed the instructions of the police at all times; they had not at any time been warned that they should refrain from taking any particular action; they had not been in possession of any instruments that could indicate that they intended to take part in a brawl; and they had not instigated or taken part in any fights.

64. The applicants submitted that the fact that there had been a large police presence in the city could not as a general rule be said to entail any special duties for citizens. It was normal that large-scale events should require police assistance, for a number of reasons. Moreover, in the applicants' view the large police presence suggested that the police could have averted the alleged danger by resorting to much less radical means such as those listed in section 5(2) of the Police Act, instead of resorting to the most radical measure available to them, namely deprivation of liberty; however, the police had obviously already decided before the event to implement the most radical means straight away.

65. Referring to the preparatory notes on the Police Act, the applicants also pointed out that the fact that they might have been known to the police could not justify measures under section 5 of the Police Act; nor could such a fact, in the context of an obligation to refrain from taking particular action, exempt the authorities from making all the individuals concerned aware of the specific and concrete obligation incumbent on them.

66. Having regard to the above, the first applicant maintained that even if the Court found it established, on account of an unknown witness, that he could reasonably be said to have failed to comply with a specific duty or obligation, at no point had he been made aware of such an obligation prior to his detention. Moreover, he submitted that the detention had served more of a punitive purpose, which was not covered by Article 5 § 1 (b) of the Convention. In the first applicant's view, it should therefore be concluded

that his detention had not been covered by sub-paragraph (b) of Article 5 § 1 of the Convention.

67. The second and third applicants submitted that even if there could be said to have been a concrete and specific obligation, there was no indication that they had been made aware of it or that they had taken any positive steps that could indicate that they would not fulfil such an obligation.

(ii) Article 5 § 1 (c)

68. The applicants pointed to long-established case-law according to which sub-paragraph (c) of Article 5 § 1 governed only pre-trial detention within criminal proceedings.

69. In the present case, however, the applicants had been detained under section 5(3) of the Police Act in order to prevent them from committing an offence, and not under section 755 of the Administration of Justice Act, which concerned the arrest of a person who was suspected of having committed an offence. Should the Court find that this line of case-law should be abandoned, it should nonetheless be taken into account that the Danish authorities in this particular case had relied exclusively on the Police Act.

70. Moreover, it should not be forgotten that Article 5 § 3 required that everyone who had been arrested should be brought promptly before a judge and be entitled to a trial within a reasonable time or to release pending trial. In the present case, the applicants had not been brought promptly before a judge or offered any such remedy. Instead, they had had to take proceedings themselves.

71. Finally, in the applicants' opinion, the existing case-law under sub-paragraph (b) of Article 5 § 1 gave the national authorities sufficient opportunities to detain individuals in a situation where the police for reasons of public order or safety ordered them to act or refrain from acting in a certain way and the individuals did not comply with that order. It would be disproportionate to allow the authorities to also rely on Article 5 § 1 (c) in such situations.

(iii) In accordance with a procedure prescribed by law

72. The applicants further maintained that their deprivation of liberty had not followed a procedure prescribed by law and had therefore not been "lawful" within the meaning of Article 5 of the Convention. More specifically, referring to the preparatory notes on the Police Act, the applicants submitted that section 5(3) of the Act did not authorise administrative detention for a period exceeding six hours, unless the period was exceeded in connection with police actions involving the detention of a large number of individuals, when the time spent on transfer to the police station and registration and identification of detainees rendered it impossible, in practice, to observe the six-hour rule. In the present case,

however, the first applicant had been the only one detained from a large group, and the second and third applicants had been detained together with three or four others from a large group; thus, their situation had not involved the detention of a considerable number of persons. Lastly, the applicants maintained that it would have been possible, in practice, to release them within the six-hour limit, as verified by the testimony of Chief Inspector P.J. (see paragraph 24 above).

2. The Court's assessment

(a) General principles relating to Article 5 § 1

73. Article 5 of the Convention is, together with Articles 2, 3 and 4, in the first rank of the fundamental rights that protect the physical security of the individual, and as such its importance is paramount. Its key purpose is to prevent arbitrary or unjustified deprivations of liberty. Three strands of reasoning in particular may be identified as running through the Court's case-law: the exhaustive nature of the exceptions, which must be interpreted strictly, and which do not allow for the broad range of justifications under other provisions (Articles 8 to 11 of the Convention in particular); the repeated emphasis on the lawfulness of the detention, both procedural and substantive, requiring scrupulous adherence to the rule of law; and the importance of the promptness or speediness of the requisite judicial controls (see *Buzadji v. the Republic of Moldova* [GC], no. 23755/07, § 84, ECHR 2016 (extracts), with further references).

(i) Lawfulness

74. Where the "lawfulness" of detention is in issue, including the question whether "a procedure prescribed by law" has been followed, the Convention refers essentially to national law and lays down the obligation to conform to the substantive and procedural rules thereof. Compliance with national law is not, however, sufficient: Article 5 § 1 requires in addition that any deprivation of liberty should be in keeping with the purpose of protecting the individual from arbitrariness (see, among many other authorities, *Winterwerp v. the Netherlands*, 24 October 1979, § 37, Series A no. 33); *Amuur v. France*, 25 June 1996, § 50, Reports of Judgments and Decisions 1996-III; *Chahal v. the United Kingdom*, 15 November 1996, § 118, Reports 1996-V; *Witold Litwa v. Poland*, no. 26629/95, §§ 72-73, ECHR 2000-III; and *Vasileva v. Denmark*, no. 52792/99, § 32, 25 September 2003.

(ii) Absence of arbitrariness

75. While the Court has not previously formulated a global definition as to what types of conduct on the part of the authorities might constitute "arbitrariness" for the purposes of Article 5 § 1, key principles have been

developed on a case-by-case basis. It is, moreover, clear from the case-law that the notion of arbitrariness in the context of Article 5 varies to a certain extent depending on the type of detention involved (see, for example, *Saadi v. the United Kingdom* [GC], no. 13329/03, § 68, ECHR 2008).

76. One general principle established in the case-law is that detention will be "arbitrary" where, despite complying with the letter of national law, there has been an element of bad faith or deception on the part of the authorities (see, for example, *Bozano v. France*, 18 December 1986, § 59, Series A no. 111; *Saadi*, cited above, § 69; and *Mooren v. Germany* [GC], no. 11364/03, §§ 77-79, 9 July 2009) or where the domestic authorities neglected to attempt to apply the relevant legislation correctly (see *Benham v. the United Kingdom*, 10 June 1996, § 47, *Reports* 1996-III; *Liu v. Russia*, no. 42086/05, § 82, 6 December 2007; and *Marturana v. Italy*, no. 63154/00, § 80, 4 March 2008).

(iii) Necessity

77. In the context of the first limb of sub-paragraph (c) of paragraph 1 (reasonable suspicion of having committed an offence) of Article 5, the Court has held that "[i]n order for deprivation of liberty to be considered free from arbitrariness, it does not suffice that this measure is executed in conformity with national law; it must also be necessary in the circumstances" (see, among other authorities, *Ladent v. Poland*, no. 11036/03, § 55, 18 March 2008; *Khayredinov v. Ukraine*, no. 38717/04, § 27, 14 October 2010; *Korneykova v. Ukraine*, no. 39884/05, §§ 34 and 43, 19 January 2012; and *Strogan v. Ukraine*, no. 30198/11, § 86, 6 October 2016). As regards the requirement to justify pre-trial detention under paragraph 3 of Article 5 in such cases, the Court has held that there must be relevant and sufficient reasons, and that the national authorities must display "special diligence" in the conduct of the proceedings. The Court has also held that justification for any period of detention, no matter how short, must be convincingly demonstrated by the authorities. When deciding whether a person should be released or detained, the authorities are obliged to consider alternative means of ensuring his or her appearance at trial (ibid.). The pre-trial detention must be necessary (see *Buzadji*, cited above, §§ 87, 102, 122 and 123).

Similarly, in the contexts of sub-paragraphs (b), (d) and (e), the Court has affirmed that the notion of arbitrariness also includes an assessment of whether detention was necessary to achieve the stated aim. The detention of an individual is such a serious measure that it is justified only as a last resort where other, less severe measures have been considered and found to be insufficient to safeguard the individual or public interest which might require that the person concerned be detained (see *Saadi*, cited above, § 70, with further references; for the different approach adopted in relation to sub-paragraphs (a) and (f), see §§ 71 and 72 of the same judgment).

(b) Issues to be determined in the present case

78. It is not in dispute that the applicants in the present case were deprived of their liberty within the meaning of Article 5 § 1 of the Convention. The crux of the matter is whether their detention was justified under sub-paragraphs (b) or (c) of Article 5 § 1, or both as argued by the Government.

(c) Whether the applicants' preventive detention was covered by sub-paragraph (b) of Article 5 § 1

(i) Principles relating to sub-paragraph (b)

79. Detention may be authorised under the second limb of Article 5 § 1 (b) in order to "secure the fulfilment of any obligation prescribed by law".

80. This concerns cases where the law permits the detention of a person to compel him or her to fulfil a specific and concrete obligation already incumbent on him or her, and which he or she has until then failed to satisfy. In order to be covered by Article 5 § 1 (b), an arrest and detention must also be aimed at or directly contribute to securing the fulfilment of that obligation and not be punitive in character (see *Johansen v. Norway*, no. 10600/83, Commission decision of 14 October 1985, Decisions and Reports (DR) 44, p. 162; *Vasileva*, cited above, § 363; *Gatt v. Malta*, no. 28221/08, § 46, ECHR 2010; *Osypenko v. Ukraine*, no. 4634/04, § 57, 9 November 2010; *Soare and Others v. Romania*, no. 24329/02, § 236, 22 February 2011; and *Göthlin v. Sweden*, no. 8307/11, § 57, 16 October 2014). If sub-paragraph (b) could be extended to cover punishments, such punishments would be deprived of the fundamental guarantees of sub-paragraph (a) (see *Engel and Others v. the Netherlands*, 8 June 1976, § 69, Series A no. 22, and *Johansen*, cited above, p. 162).

81. A further requirement is that the nature of the obligation within the meaning of Article 5 § 1 (b) whose fulfilment is sought must itself be compatible with the Convention (see *McVeigh and Others v. the United Kingdom*, nos. 8022/77, 8025/77 and 8027/77, Commission's report of 18 March 1981, DR 25, § 176, and *Johansen*, cited above, p. 162). As soon as the relevant obligation has been fulfilled, the basis for detention under Article 5 § 1 (b) ceases to exist (see *Vasileva*, cited above, § 36; *Epple v. Germany*, no. 77909/01, § 37, 24 March 2005; *Osypenko*, cited above, § 57; *Sarigiannis v. Italy*, no. 14569/05, § 43, 5 April 2011; and *Lolova-Karadzhova v. Bulgaria*, no. 17835/07, § 29, 27 March 2012).

82. Finally, a balance must be struck between the importance in a democratic society of securing the immediate fulfilment of the obligation in question and the importance of the right to liberty (see *Vasileva*, cited above, § 37; *Epple*, cited above, § 37; and *Gatt*, cited above, § 46). The nature of the obligation arising from the relevant legislation, including its

underlying object and purpose, the person being detained and the particular circumstances leading to the detention, as well as its duration, are relevant factors in striking such a balance (see *Vasileva*, cited above, §§ 37-38 with further references; *Iliya Stefanov v. Bulgaria*, no. 65755/01, § 72; 22 May 2008, *Gatt*, cited above, § 46; and *Soare and Others*, cited above, § 236).

83. A wide interpretation of sub-paragraph (b) of Article 5 § 1 would entail consequences incompatible with the notion of the rule of law, from which the whole Convention draws its inspiration (see *Engel and Others*, cited above, § 69; *Iliya Stefanov*, cited above, § 72; and *Schwabe and M.G. v. Germany.*, nos. 8080/08 and 8577/08, § 82, ECHR 2011-VI (extracts)), and entail the risk of arbitrary deprivation of liberty (see, for example, *Shimovolos v. Russia*, no. 30194/09, § 51, 21 June 2011). Article 5 § 1 (b) therefore does not justify, for example, administrative internment meant to compel a citizen to discharge his or her general duty of obedience to the law (ibid.). The obligation not to commit a criminal offence may only be considered sufficiently "specific and concrete" for the purposes of sub-paragraph (b) if the place and time of the imminent commission of the offence and its potential victim(s) have been sufficiently specified, if the person concerned was made aware of the specific act which he or she was to refrain from committing, and if that person showed himself or herself not to be willing to refrain from committing that act (see *Schwabe and M.G.*, cited above, §§ 73 and 82 and *Ostendorf*, cited above, §§ 69-73, 93-94, 97, 99 and 101). 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 (see *Schwabe and M.G.*, cited above, § 82).

In this connection it should be reiterated that in the case of *Schwabe and M.G.* (ibid., § 81) the fact that the police had given no such order was an important consideration for the Court to conclude that the matter fell outside the scope of paragraph 1 (b), whereas the fact that the police had given such an order was decisive for the Court to reach the opposite conclusion in *Ostendorf* (cited above, § 95). In the latter case, the police had specifically ordered the applicant, prior to his arrest, to stay with a group of football supporters, and had warned him in a clear manner of the consequences of his failure to comply with that order. Moreover, his group had already been searched and found to be in possession of instruments typically used in hooligan brawls.

(ii) Application of these principles to the present case

84. In the present case it is undisputed 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 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.

85. The Government have argued that the fact that the applicants were confronted with a large police presence just before, during or after a football match sufficed, by implication, for them to have been "made aware of the specific act which they were to refrain from committing", namely instigating hooligan fights at the place and time of the match.

86. The Court is not convinced by this line of reasoning. In particular, it finds that a large police presence, which is normal at any mass event, cannot be compared to the very specific measures enumerated in *Ostendorf* (cited above, § 95) for ensuring that an individual has been made aware of the specific act which he or she must refrain from committing. Such a wide interpretation of sub-paragraph (b) of Article 5 § 1 would entail consequences incompatible with the notion of the rule of law, from which the whole Convention draws its inspiration (see paragraph 83 above).

87. Accordingly, in the circumstances of the present case, the applicants' detention was not covered by sub-paragraph (b) of Article 5 § 1.

(d) Whether sub-paragraph (c) of Article 5 § 1 is applicable to preventive detention outside criminal proceedings

88. Article 5 § 1 (c) provides for deprivation of liberty in the case of:

> "the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so".

(i) Principles relating to sub-paragraph (c)

89. In the context of sub-paragraph (c) of Article 5 § 1, a strict interpretation of the term "offence" constitutes an important safeguard against arbitrariness. It will be recalled that this provision does not, according to the Court's established case-law, permit a policy of general prevention directed against an individual or a category of individuals who are perceived by the authorities, rightly or wrongly, as being dangerous or having the propensity to commit unlawful acts. This ground of detention does no more than afford the Contracting States a means of preventing a concrete and specific offence (see, for example, *Guzzardi v. Italy*, 6 November 1980, § 102, Series A no. 39; *Ciulla v. Italy*, 22 February 1989, § 40, Series A no. 148; and *Shimovolos*, cited above, § 54) as regards, in particular, the place and time of its commission and its victim(s) (see *M. v. Germany*, no. 19359/04, §§ 89 and 102, ECHR 2009). This can be seen both from the use of the singular ("an offence") and from the object of Article 5, namely to ensure that no one should be dispossessed of his or

her liberty in an arbitrary fashion (see *Guzzardi*, cited above, § 102, and *M. v. Germany*, cited above, § 89).

90. According to the Court's case-law, however, the "offence" does not have to be limited to conduct that has been characterised as an offence under national law. In *Steel and Others v. the United Kingdom* (23 September 1998, §§ 46-49 and 55, *Reports* 1998-VII), the Court found, as was undisputed by the parties, that the concept "breach of the peace" ought to be regarded as "an offence" within the meaning of Article 5 § 1 (c), despite not being classified as an offence under English law. It bore in mind (ibid., § 49) the nature of the proceedings in question and the penalty at stake. Moreover, it observed (ibid., § 55):

> "the concept of breach of the peace has been clarified by the English courts over the last two decades, to the extent that it is now sufficiently established that a breach of the peace is committed only when an individual causes harm, or appears likely to cause harm, to persons or property or acts in a manner the natural consequence of which would be to provoke others to violence ... It is also clear that a person may be arrested for causing a breach of the peace or where it is reasonably apprehended that he or she is likely to cause a breach of the peace...
>
> Accordingly, the Court considers that the relevant legal rules provided sufficient guidance and were formulated with the degree of precision required by the Convention (see, for example, the *Larissis and Others v. Greece* judgment of 24 February 1998, *Reports* 1998-I, p. 377, § 34)".

91. The condition that there should be no arbitrariness also demands that both the order to detain and the execution of the detention genuinely conform to the purpose of the restrictions permitted by the relevant sub-paragraph of Article 5 § 1 (see *Saadi*, cited above, § 69). Where, for example, detention is sought to be justified by reference to the first limb of Article 5 § 1 (c) in order to bring a person before the competent legal authority on reasonable suspicion of having committed an offence, the Court has insisted upon the need for the authorities to furnish some facts or information which would satisfy an objective observer that the person concerned may have committed the offence in question (see *James, Wells and Lee v. the United Kingdom*, nos. 25119/09 and 2 others, § 193, 18 September 2012, and *O'Hara v. the United Kingdom*, no. 37555/97, §§ 34-35, ECHR 2001-X). Similarly, the Court is of the view that in order for a detention to be justified under the second limb of Article 5 § 1 (c), the authorities must show convincingly 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.

92. Finally, in the context of sub-paragraph (c) of Article 5 § 1, the reasoning of the decision ordering a person's detention is a relevant factor in determining whether the detention must be deemed arbitrary. In respect of the first limb of sub-paragraph (c) the Court has found that the absence of any grounds in the judicial authorities' decisions authorising detention for a prolonged period of time was incompatible with the principle of protection

from arbitrariness enshrined in Article 5 § 1 (see *Urtāns v. Latvia*, no. 16858/11, § 28, 28 October 2014). Conversely, it has found that an applicant's detention on remand could not be said to have been arbitrary if the domestic court gave certain grounds justifying the continued detention, unless the reasons given were extremely laconic and did not refer to any legal provision which would have permitted the applicant's detention (ibid.; see also *Mooren*, cited above, § 79, with further references).

(ii) The specific issue before the Court

93. The Court has already been called upon in *Ostendorf* (cited above, § 83) to examine whether a detention "which only served the (preventive) purpose of ensuring that [the applicant] would not commit offences in an imminent hooligan altercation" could be covered by the second limb of Article 5 § 1 (c), that is, "when it is reasonably considered necessary to prevent his committing an offence". The Court answered the question in the negative (ibid., §§ 77-89), whilst expressing its awareness of the importance, in the German legal system, of preventive police custody in order to avert dangers to the life and limb of potential victims or significant material damage, in particular in situations involving the policing of large groups of people during mass events (ibid., § 88).

94. Having regard to the numerous occurrences in Europe within the last few decades of football and other sports hooliganism and mass events turning violent, the Court finds it safe to add that most member States are faced with such challenges.

95. Endeavouring to interpret and apply the Convention in a manner taking proper account of the challenges identified, while maintaining the effective protection of human rights, the Court will take this opportunity to examine whether there is a need for clarification of its case-law under sub-paragraph (c) of Article 5 § 1.

96. The crucial question to answer in this respect is whether the words "when it is reasonably considered necessary to prevent his committing an offence" (the second limb of Article 5 § 1 (c)) ought to be seen as a distinct ground for deprivation of liberty, independently of the existence of a "reasonable suspicion of his having committed an offence" (the first limb of this provision).

97. Firstly, the Court will review how the second limb has been interpreted and applied in relation to the first limb in previous cases.

Secondly, it will consider whether the "purpose" requirement in Article 5 § 1 (c) ("for the purpose of bringing him before the competent legal authority") entails any particular obstacles to applying the second limb of Article 5 § 1 (c) to preventive detention.

Thirdly, provided that preventive detention can fall under the second limb of paragraph 1 (c), the Court will assess how the additional safeguards

contained in paragraphs 3 and 5 should apply to ensure that such detention is not arbitrary or disproportionate.

(iii) Extent to which the second limb of Article 5 § 1 (c) has been considered a distinct ground, separate from the first limb

98. It is first to be noted that Article 5 § 1 (c) contemplates the lawful arrest or detention of a person in three distinct types of circumstances, namely (1) "on reasonable suspicion of having committed an offence", (2) "when it is reasonably considered necessary to prevent his committing an offence", or (3) when it is reasonably considered necessary to prevent his "fleeing after having [committed an offence]".

99. That the second limb was intended to constitute a separate ground for detention is reflected in the Report of the Conference of Senior Officials on Human Rights to the Committee of Ministers on Article 5 §§ 1 (c) and 3 of the second draft Convention (see the Preparatory Work on Article 5 of the Convention, cited above, p. 32). The report stated (see paragraph 42 above; emphasis added):

> "The Conference considered it useful to point out 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 in order 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**."

However, the case-law is less clear in this respect.

(α) The *Ostendorf* judgment

100. The *Ostendorf* judgment (cited above), the most recent judgment on this issue, was also at the centre of the parties' arguments on whether the applicants' detention in the present case was covered by Article 5 § 1 (c) (see paragraph 93 above).

101. From the *Ostendorf* judgment it appears that a decisive consideration for finding sub-paragraph (c) inapplicable was that it permitted deprivation of liberty only in connection with criminal proceedings and governed pre-trial detention (ibid., §§ 66-68). This interpretation was restated in different ways in the judgment, for instance in paragraph 82: "the second alternative of Article 5 § 1 (c) ... only governs pre-trial detention and not custody for preventive purposes without the person concerned being suspected of having already committed a criminal offence". In paragraph 86 the Court held that "detention under sub-paragraph (c) of Article 5 § 1 may be ordered, in particular, against a person having carried out punishable preparatory acts to an offence in order to prevent his committing that latter offence". This interpretation was given with reference to the requirements under paragraphs 1 (c) and 3 respectively that the person's detention was to be effected "for the purpose of bringing

him before the competent legal authority" and that the person was to "be brought promptly before a judge" and was "entitled to a trial within a reasonable time" under paragraph 3 (ibid., §§ 68, 82, 85 and 86), and also with reference to previous case-law (ibid., §§ 67-69) to the effect that sub-paragraph (c) permitted deprivation of liberty only in connection with criminal proceedings. This line of case-law can be traced back to *Ciulla* (cited above) and was reaffirmed in *Jėčius v. Lithuania* (no. 34578/97, ECHR 2000-IX), *Epple* (cited above, § 35), and *Schwabe and M.G.* (cited above, § 72). A similar statement to this effect can also be found in *Hassan v. the United Kingdom* [GC] (no. 29750/09, § 97, ECHR 2014).

102. The Court further takes note of the separate (concurring) opinion of Judges Lemmens and Jäderblom appended to the *Ostendorf* judgment disagreeing with the above interpretation while praying in aid the interpretation given in *Lawless* (cited above) at an early stage of the Convention case-law. More recently, that separate opinion also received support in the Supreme Court of the United Kingdom, which in its judgment of 15 February 2017 in *R v The Commissioner of Police for the Metropolis* (see paragraph 46 above) expressed a firm preference for the *Lawless* line of case-law.

103. The present 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.

(β) The *Lawless* judgment and the case-law deriving from it

104. In the first place, starting with the aforementioned *Lawless* case, the first to come before the Court raising questions of interpretation of the provisions at issue, this concerned the Irish authorities' internment of IRA members without trial. The applicant was detained for five months, without being brought before a judge, under legislation which gave ministers special powers of detention without trial, whenever the government published a proclamation that such powers were necessary to secure the preservation of peace and order. The Government argued that the applicant's detention could be justified as being "necessary to prevent his committing an offence", which did not also require "the purpose of bringing him before the competent legal authority". The Court, however, rejected this argument, on the following grounds (emphasis added):

> "13. Whereas, in this connection, the question referred to the judgment of the Court is whether or not the provisions of Article 5, paragraphs 1 (c) and 3, prescribe that a person arrested or detained 'when it is reasonably considered necessary to prevent his committing an offence' shall be brought before a judge, in other words whether, in Article 5, paragraph 1 (c), the expression 'effected for the purpose of bringing him before the competent judicial (sic) authority [*devant l'autorité judiciaire compétente*]' qualifies only the words 'on reasonable suspicion of having committed an offence' or

also the words ‘when it is reasonably considered necessary to prevent his committing an offence’;

14. **Whereas the wording of Article 5, paragraph 1 (c), is sufficiently clear** to give an answer to this question; whereas it is evident that the expression ‘effected for the purpose of bringing him before the competent legal authority’ qualifies every category of cases of arrest or detention referred to in that sub-paragraph; whereas it follows that the said clause permits deprivation of liberty only when such deprivation is effected for the purpose of bringing the person arrested or detained before the competent judicial authority, **irrespective of whether such person is a person who is reasonably suspected of having committed an offence, or a person whom it is reasonably considered necessary to restrain from committing an offence**, or a person whom it reasonably considered necessary to restrain from absconding after having committed an offence;

Whereas, further, paragraph 1 (c) of Article 5 can be construed only if read in conjunction with paragraph 3 of the same Article, with which it forms a whole; whereas paragraph 3 stipulates categorically that ‘everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge ...’ and ‘shall be entitled to trial within a reasonable time’; whereas it plainly entails the obligation to bring everyone arrested or detained **in any of** the circumstances contemplated by the provisions of paragraph 1 (c) before a judge **for the purpose of examining the question of deprivation of liberty or for the purpose of deciding on the merits**; whereas such is the **plain and natural meaning of the wording** of both paragraph 1 (c) and paragraph 3 of Article 5;

Whereas the meaning thus arrived at by **grammatical analysis** is fully in harmony with the purpose of the Convention which is to protect the freedom and security of the individual against arbitrary detention or arrest; whereas it must be pointed out in this connexion that, if the construction placed by the Court on the aforementioned provisions were not correct, anyone suspected of harbouring an intent to commit an offence could be arrested and detained for an unlimited period on the strength merely of an executive decision without its being possible to regard his arrest or detention as a breach of the Convention; whereas such an assumption, with all its implications of arbitrary power, would lead to conclusions repugnant to the fundamental principles of the Convention;

...”

105. Thus, as can be seen from the above, the Court, relying on what it described as an interpretation based on the wording of the text (“the wording ... is sufficiently clear”; “grammatical analysis”; “plain and natural meaning of the wording”), considered each of the three limbs in paragraph 1 (c) to refer to distinct grounds for detention. Moreover, the requirement that the detention “be effected for the purpose of bringing [the person] before the competent [judicial] authority” applied in respect of each ground, as did the obligation to bring the person before a judge either for the purpose of examining the question of deprivation of liberty or for the purpose of deciding on the merits of a criminal charge, under paragraphs 1 (c) and 3 of Article 5.

106. It may also be instructive to reiterate the former European Commission of Human Rights’ interpretation of Article 5 §§ 1 (c) and 3,

made in the light of the preparatory work (see the Court's summary in *Lawless*, cited above, § 11; emphasis added):

> "... **all the evidence goes to show that the changes made in the English version**, particularly in that of Article 5, paragraph 1 (c), during the preparatory work at the Council of Europe **were intended to bring it into line with the French text**, which, apart from a few drafting alterations of no importance to the present case, was essentially the same as that finally adopted for Article 5 of the Convention; that this is true even of the **comma after the words '*autorité judiciaire compétente*', which strictly bears out the construction placed by the Commission on Article 5, paragraph 1 (c); that the preparatory work on Article 5, paragraph 3, leaves no room for doubt about the intention of the authors of the Convention to require that everyone arrested or detained in one or other of the circumstances mentioned in paragraph 1 (c) of the same Article should be brought promptly before a judge ...**"

107. Furthermore, the *Lawless* line of case-law, to the effect that preventive detention, even if effected outside the context of criminal proceedings, could be permissible under sub-paragraph (c) appears to have been acknowledged implicitly in several subsequent judgments and decisions. Thus, in *Ireland v. the United Kingdom* (18 January 1978, § 196, Series A no. 25) the Court may be understood to have had both alternative grounds in mind when holding as follows (emphasis added):

> "Irrespective of whether extrajudicial deprivation of liberty **was or was not** founded in the majority of cases on suspicions of a kind that would render detention on remand justifiable under the Convention, such detention is permissible under Article 5 para. 1 (c) only if it is 'effected for the purpose of bringing [the detainee] before the competent legal authority'."

Later, in *Guzzardi* (cited above, § 102), the Court carried out a separate examination under the second alternative, since the decisions ordering the applicant's deprivation of liberty "had no connection in law with the investigations being pursued in ... respect" of the offences he was suspected of and charged with and was based on acts which were applicable "irrespective of whether or not there ha[d] been a charge".

108. However, in spite of the clarity and firmness of its interpretations in *Lawless*, no explanation or acknowledgment was given when the Court departed from that approach some twenty-seven years later in *Ciulla* (cited above, § 38) by simply stating "that sub-paragraph (c) permits deprivation of liberty only in connection with criminal proceedings" and adding that this interpretation was "apparent from its wording". The Court neither explained the contradiction with *Lawless*, nor was any inconsistency hinted at, let alone rectified, in any of the follow-up rulings thereafter. On the contrary, for example in *Jėčius* (cited above, § 50) the Court held that a person could be detained within the meaning of Article 5 § 1 (c) "only in the context of criminal proceedings", referring *inter alia* to the *Lawless* judgment, even though no such statement can be found, even implicitly, in that judgment.

(γ) *Steel and Others* and follow-up decisions

109. It is also significant that, partly in parallel with the *Ciulla* line of case-law, the Court has dealt with several cases concerning complaints under Article 5 § 1 (c) in relation to measures taken in the context of "breach of the peace" under English law.

110. In the first of these cases, *Steel and Others* (cited above), the Court examined the matter under the first and second limbs of Article 5 § 1 (c) jointly, and was satisfied that each of the applicants had been arrested and detained with the purpose of bringing him or her before the competent legal authority on suspicion of having committed an "offence" **or** because it was considered necessary to prevent the commission of an "offence", without specifying which parts of the measures fell under the respective limbs. As regards the first two applicants, the Court noted that the national courts which had dealt with their cases had been satisfied that each of them had caused **or** had been likely to cause a breach of the peace. Thus, the Court recognised that the measures were at least in part permissible under the second limb.

111. Equally revealing is the follow-up decision taken three years later in *Nicol and Selvanayagam v. the United Kingdom* ((dec.), no. 32213/96, 11 January 2001) concerning two applicants who had participated in an anti-fishing protest, in the course of which they had thrown sticks at the anglers' lines, creating the risk of damage to property. It is particularly noteworthy that the Court, relying heavily on the approach adopted in *Steel and Others* (cited above), examined the matter under both limbs of Article 5 § 1 (c) and, in doing so, reached separate partial conclusions in respect of each of those limbs (emphasis added):

> "**The initial detention was to prevent the applicants from committing an offence**; **as regards the period of detention after** the fishing match on the following day - or throughout the period subsequent to the initial fishing competition if there was none on the second day - **the applicants were clearly being detained for the purpose of bringing them before the competent legal authority on suspicion of having committed an 'offence'.**
>
> It follows that the applicants' initial arrest and detention were compatible with Article 5 § 1 (c) of the Convention, that this part of the application is manifestly ill-founded within the meaning of Article 35 § 3 of the Convention, and that it must be rejected within the meaning of Article 35 § 4."

112. An approach entailing the sort of "global" examination under the two limbs of Article 5 § 1 (c) which had been carried out in line with *Steel and Others* (cited above) was also followed the same year in *McBride v. the United Kingdom* ((dec.), no. 27786/95, 5 July 2001), ending in the conclusion that the complaint was manifestly ill-founded.

113. What transpires from the above is that the Court's approach in *Steel and Others* in 1998 (cited above) and the two follow-up decisions from 2001 (*Nicol and Selvanayagam* and *McBride*, both cited above) does not

seem consistent with the *Ciulla* dictum from 1989, later repeated in several cases from *Jėčius* from 2000 to *Ostendorf* from 2013, to the effect that Article 5 § 1 (c) only covers deprivation of liberty in connection with criminal proceedings. Nor does it seem consistent with the additional statement in *Ostendorf* (cited above, § 82) that "the second alternative of Article 5 § 1 (c) ... only governs pre-trial detention and not custody for preventive purposes without the person concerned being suspected of having already committed a criminal offence". On the contrary, in the first and third of the above-mentioned British cases, the Court left open what part of the measures fell under the one or the other ground, and in the second case it clearly distinguished between them, specifying that the initial detention fell under the preventive ground. On the basis of this analysis, the line taken in the three British cases is in a sense reminiscent of that taken in *Ireland v. the United Kingdom* and *Guzzardi* (both cited above). The former left open to what extent the respective limbs applied to the case before the Court, whereas the latter identified more clearly the application of the second limb (see paragraph 107 above) in a manner that can be traced back to the clear distinction made between the two limbs in *Lawless*, consistent with the Report of the Conference of Senior Officials on Human Rights to the Committee of Ministers in relation to Article 5 §§ 1 (c) and 3 of the second draft Convention (see paragraph 42 above).

(δ) Partial conclusion

114. Against this background, the Court considers that there are weighty arguments in favour of espousing the interpretation adopted in *Lawless* and reflected in a number of rulings thereafter to the effect that Article 5 § 1 (c) contemplates the lawful arrest or detention of a person in distinct circumstances, including, under the second limb, "when it is reasonably considered necessary to prevent his committing an offence". Not only the unequivocal wording of the second limb but also the preparatory work related thereto clearly indicate that the second limb of Article 5 § 1 (c) is to be considered to refer to a distinct ground, notably separate from the first limb. In *Lawless* (cited above, § 14), the guarantee to bring everyone arrested or detained before a judge was also deemed to be "fully in harmony with the purpose of the Convention to protect the freedom and security of the individual against arbitrary detention and arrest".

115. That interpretation was not adhered to in several later judgments, from *Ciulla* to *Ostendorf*, dismissing the possibility of using the second ground outside the context of criminal proceedings. However, as has been explained, that approach not only represented a stark and unacknowledged departure from *Lawless*; it is also difficult to reconcile with the textual interpretation in the latter, supported by the preparatory work, as well as with a number of rulings delivered both before and after *Ciulla*

(see *Ireland v. the United Kingdom*; *Guzzardi*; *Steel and Others* and the follow-up decisions, all cited above).

116. The Court is therefore of the general view that in order not to make it impracticable for the police to fulfil their duties of maintaining order and protecting the public, provided that they comply with the underlying principle of Article 5, which is to protect the individual from arbitrariness (see, *Austin and Others v. the United Kingdom* [GC], nos. 39692/09 and 2 others, § 56, ECHR 2012), the lawful detention of a person outside the context of criminal proceedings can, as a matter of principle be permissible under Article 5 § 1 (c) of the Convention. As regards the circumstances in which such detention is justified, this is an issue relating to compliance with Article 5 § 1 (c) and will be dealt with in paragraphs 143 to 174 below.

117. Nevertheless, the question arises whether the "purpose" requirement in Article 5 § 1 (c), namely that the detention should "be effected for the purpose of bringing [the person] before the competent [judicial] authority", may constitute an obstacle to preventive detention of the kind at issue covered by the second limb.

(iv) Whether the "purpose" requirement in Article 5 § 1 (c) may constitute an obstacle to preventive detention under the second limb

118. The Court stated in *Lawless* (see paragraph 104 above) that the purpose requirement under Article 5 § 1 (c) applies to all categories of cases referred to in this sub-paragraph. However, it should be noted that the Court has recognised in other cases that this requirement is to be interpreted and applied with a certain flexibility when the intention which once existed of "bringing the applicant before the competent legal authority" does not materialise for some reason. The fact that an arrested person was neither charged nor brought before a judge does not necessarily mean that the purpose of his or her detention was not in accordance with Article 5 § 1 (c). Thus, in *Brogan and Others v. the United Kingdom* (29 November 1988, Series A no. 145-B) the four applicants had been arrested and detained under prevention-of-terrorism legislation on suspicion of being concerned in the commission, preparation or instigation of acts of terrorism. They were released without charge after periods of between four and six days (the shortest being four days and six hours) and without having been brought before a magistrate. The Court held that in the case of each of the four applicants there had been a violation of Article 5 § 3 on account of the failure to observe the requirement of promptness, but no violation of Article 5 § 1 (only the first limb of Article 5 § 1 (c) was concerned). It stated (ibid., § 53):

> "The fact that the applicants were neither charged nor brought before a court does not necessarily mean that the purpose of their detention was not in accordance with Article 5 § 1 (c). As the Government and the Commission have stated, the existence of such a purpose must be considered independently of its achievement and sub-

paragraph (c) of Article 5 § 1 does not presuppose that the police should have obtained sufficient evidence to bring charges, either at the point of arrest or while the applicants were in custody.

Such evidence may have been unobtainable or, in view of the nature of the suspected offences, impossible to produce in court without endangering the lives of others. There is no reason to believe that the police investigation in this case was not in good faith or that the detention of the applicants was not intended to further that investigation by way of confirming or dispelling the concrete suspicions which, as the Court has found, grounded their arrest ... Had it been possible, the police would, it can be assumed, have laid charges and the applicants would have been brought before the competent legal authority."

119. Again, when applying the first limb of Article 5 § 1 (c), the Court reached similar findings in *Erdagöz v. Turkey* (22 October 1997, § 51, *Reports* 1997-VI) and *Petkov and Profirov v. Bulgaria* (nos. 50027/08 and 50781/09, § 52, 24 June 2014).

120. The Court discerns no reason why it should not also apply such flexibility to preventive detention under the second alternative of Article 5 § 1 (c). On the contrary, there are a number of arguments for doing so.

121. If it is understood that in order to fulfil the purpose requirement, a subjective intention ought to be present from the beginning of the detention, that would have the undesirable consequence of excluding any sort of short-term preventive detention, as described in *Ostendorf* or as was the situation in the present case, where the purpose was not to bring the detainees before a judge but rather to release them after a short period, as soon as the risk had passed.

122. Strict compliance with the purpose requirement in Article 5 § 1 (c) may also have consequences which are not in keeping with the spirit of Article 5, for example in the situation mentioned by the Supreme Court of the United Kingdom in *R v The Commissioner of Police for the Metropolis*, (see § 36 of the judgment quoted at paragraph 46 above), where the police had every reason to anticipate that the risk necessitating the person's arrest would pass in a relatively short time and there was every likelihood of it ending before the person could as a matter of practicality be brought before a court. A strict interpretation may unduly prolong the detention, after the risk has passed and the detainee should be released, because the authorities would need a realistic amount of time to bring the detainee before a judge to examine the question of deprivation of liberty.

123. As the Court has already held, Article 5 cannot be interpreted in such a way as to make it impracticable for the police to fulfil their duties of maintaining order and protecting the public, provided that they comply with the underlying principle of the provision, which is to protect the individual from arbitrariness (see *Ostendorf*, cited above, § 88). The police must be afforded a degree of discretion in taking operational decisions. Such decisions are almost always complicated and the police, who have access to

information and intelligence not available to the general public, will usually be in the best position to take them (see *Austin and Others*, cited above, § 56).

124. The Court is also mindful that it has gradually expanded its case-law concerning the State's obligations under Articles 2 and 3 of the Convention to protect the public from offences. Thus, for example, in other contexts, States are required under Article 3 to take measures designed to ensure that individuals within their jurisdiction are not subjected to ill-treatment, including such treatment administered by private individuals (see, *inter alia*, *A. v. the United Kingdom*, 23 September 1998, § 22, *Reports* 1998-VI; *M.C. v. Bulgaria*, no. 39272/98, §§ 149-50, ECHR 2003-XII; and *Opuz v. Turkey*, no. 33401/02, § 159, ECHR 2009). These measures should provide effective protection and include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge (see, *inter alia*, *Z and Others v. the United Kingdom* [GC], no. 29392/95, § 73, ECHR 2001-V, and *D.P. and J.C. v. the United Kingdom*, no. 38719/97, § 109, 10 October 2002; see also, in the context of Article 2, *Osman v. the United Kingdom*, 28 October 1998, § 115, *Reports* 1998-VIII and *Mastromatteo v. Italy* [GC], no. 37703/97, §§ 67-68, ECHR 2002-VIII).

125. It can therefore be argued, as the Supreme Court of the United Kingdom did (see § 38 of the judgment referred to in paragraph 46 above), that in respect of short-term preventive detention the requirement "for the purpose of bringing [the detainee] before the competent legal authority" implicitly depends on the cause of detention continuing long enough for the person to be brought before a court. In this regard, the Court considers that the question whether the purpose requirement has been complied with should depend on an objective assessment of the authorities' conduct, in particular whether the detainee, as required by Article 5 § 3, is brought promptly before a judge to have the lawfulness of his or her detention reviewed or is released before such time. Furthermore, in the event of failure to comply with the latter requirement, the person concerned should have an enforceable right to compensation in accordance with paragraph 5 of Article 5.

126. Against this background, and subject to the availability under national law of the additional safeguards in paragraphs 3 and 5 of Article 5 – to be elaborated on in greater detail below – the Court considers 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). As illustrated by the flexible approach adopted in *Brogan and Others* (described in paragraph 118 above), the Convention should be interpreted and applied in recognition of the need to deal specially

with such serious challenges as are at issue in this case (see paragraph 94 above).

127. At the same time, it should be stressed that any flexibility in this area is limited by important safeguards embodied in Article 5 § 1, notably the requirements that the deprivation of liberty be lawful (see paragraph 74 above), in keeping with the purpose of protecting the individual from arbitrariness (see paragraphs 74-76 above), that the offence be concrete and specific as regards, in particular, the place and time of its commission and its victims (see paragraph 89 above) and 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 (see paragraph 91 above). Such flexibility is further circumscribed by the requirement that the arrest and detention be "reasonably considered necessary" (see paragraph 77 above and the further elaboration of this criterion affirmed in paragraph 161 below). Moreover, in assessing the scope of that requirement, regard may be had to the extent to which the measures affect interests protected by other rights guaranteed by the Convention.

(v) Additional safeguards under Article 5 §§ 3 and 5

128. As indicated above, the safeguard in the first limb of Article 5 § 3, whereby everyone arrested or detained in accordance with the provisions of paragraph 1 (c) must be brought promptly before a judge, applies equally to preventive detention under the second limb of Article 5 § 1 (c) (see *Lawless*, cited above, § 14). Article 5 § 3 includes a procedural requirement for the "judge or other officer authorised by law" to hear the individual brought before him or her in person, and a substantive requirement for the same officer to review the circumstances militating for or against detention – that is, whether there are reasons to justify detention – and to order release if there are no such reasons (see, for example, *Buzadji*, cited above, § 98, with further references). The initial automatic review of arrest and detention must be capable of examining lawfulness issues and whether or not the reasonable suspicion that the arrested person has committed an offence persists, or in other words, ascertaining that the detention falls within the permitted exception set out in Article 5 § 1 (c) (ibid., § 99) .

129. It follows directly from the wording of Article 5 § 3 that if the person is not "arrested or detained" but has been released, there is no obligation to bring him or her promptly before a judge. This understanding is supported by the reference in *Lawless* (cited above, § 14, quoted in paragraph 104 above) to two options when bringing a person before a judge: either for the purpose of examining the question of deprivation of liberty or for the purpose of deciding on the merits of a criminal charge. Moreover, as the Court pointed out in *Brogan and Others* (cited above, § 58):

> "the fact that a detained person is not charged or brought before a court does not in itself amount to a violation of the first part of Article 5 § 3. No violation of Article 5 § 3 can arise if the arrested person is released 'promptly' before any judicial control of his detention would have been feasible (see the *de Jong, Baljet and van den Brink* judgment of 22 May 1984, Series A no. 77, p. 25, § 52). If the arrested person is not released promptly, he is entitled to a prompt appearance before a judge or judicial officer."

130. In order to determine whether release has taken place at a time before such prompt judicial control, the starting point should be the manner in which the requirement of "promptness" in Article 5 § 3 has been applied in the Court's case-law. While promptness has to be assessed according to the special features of each case (see, among other authorities, *Aquilina v. Malta* [GC], no. 25642/94, § 48, ECHR 1999-III), the strict time constraint imposed by this requirement leaves little flexibility in interpretation; otherwise there would be a serious weakening of a procedural guarantee to the detriment of the individual and a risk of impairing the very essence of the right protected by this provision (see, for example, *McKay v. the United Kingdom* [GC], no. 543/03, § 33, ECHR 2006-X).

131. While any period in excess of four days is *prima facie* too long, in certain circumstances shorter periods can also be in breach of the promptness requirement (see *inter alia*, *Magee and Others v. the United Kingdom*, nos. 26289/12 and 2 others, § 78, ECHR 2015 (extracts)). Thus, for example, in *İpek and Others v. Turkey* (nos. 17019/02 and 30070/02, §§ 36-37, 3 February 2009) and *Kandzhov v. Bulgaria* (no. 68294/01, §§ 66-67, 6 November 2008) the Court found that periods of three days and nine hours and three days and twenty-three hours respectively could not be considered "prompt".

132. It is also relevant for the assessment of "promptness" to bear in mind that when bringing a detainee before the judge under the first limb of Article 5 § 1 (c), the Court has held that the object of questioning during detention under this sub-paragraph is to further the criminal investigation by confirming or dispelling the concrete suspicion grounding the arrest (see, for example, *John Murray v. the United Kingdom*, 8 February 1996, § 55, *Reports* 1996-I). This implies that a certain period between the arrest and the prompt appearance before the judge may be necessary for the investigating authorities to obtain evidence to substantiate that there are reasons to justify the detention.

133. Such considerations do not come into play for a detainee under the second limb of Article 5 § 1 (c) where there is no criminal investigation and no suspicion to confirm or dispel. The facts constituting the risk of committing an offence must already be established at the time when the person is detained in order to prevent his or her committing this offence. It therefore appears that the period needed between a person's detention for preventive purposes and the person's prompt appearance before a judge or judicial officer should be shorter than in the case of pre-trial detention in

criminal proceedings. Whereas for a person deprived of his or her liberty "on reasonable suspicion of having committed an offence" under the first limb of Article 5 § 1 (c), any period in excess of four days is *prima facie* too long (see paragraph 131 above) a significantly shorter period might be required in order to be viewed as "prompt" in the case of a person deprived of his or her liberty outside the context of criminal proceedings "when it is reasonably considered necessary to prevent his committing an offence".

134. Having regard to these considerations, including the need to assess promptness according to the special features of each case, the Court finds that, generally speaking, release "at a time before prompt judicial control" in the context of preventive detention should be a matter of hours rather than days.

135. As to the requirement in the second limb of Article 5 § 3 that everyone arrested or detained in accordance with Article 5 § 1 (c) "shall be entitled to trial within a reasonable time or to release pending trial", it should be noted that preventive detention is characterised by the absence of a criminal charge. It does not follow from the fact of resorting to preventive detention that the authorities have any intention of charging the person in question or carrying out further investigations in order to verify whether a charge can be brought. Where no criminal proceedings are initiated and no trial is to be held, the requirement in question cannot apply to preventive detention.

136. Another safeguard which equally applies to preventive detention under the second limb of Article 5 § 1 (c) is Article 5 § 5, according to which "everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation". The Court reiterates that in order to find a violation of Article 5 § 5, it must be established that the finding of a violation of one of the other paragraphs of Article 5 could not give rise to an enforceable claim for compensation before the domestic courts (see *Stanev v. Bulgaria* [GC], no. 36760/06, § 184, ECHR 2012). In a number of cases the Court has found a violation of this provision where a victim of deprivation of liberty effected in conditions contrary to paragraphs 1, 2, 3 or 4 of Article 5 did not have an enforceable claim for compensation in the domestic courts (see, among many other examples, *Brogan and Others*, cited above, § 67; *Fox, Campbell and Hartley v. the United Kingdom*, 30 August 1990, § 46, Series A no. 182; *Stanev*, cited above, §§ 184-91). It follows from the lawfulness requirement contained in paragraph 1 of Article 5 (see paragraph 74 above) that judicial review of the lawfulness of the detention is inherent in the examination of such a claim.

(vi) Summary of the relevant principles relating to preventive detention under Article 5 § 1 (c) of the Convention

137. Having regard to the considerations above, 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 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.

(e) Application of the above principles under sub-paragraph (c)

(i) Whether the applicants' preventive detention was covered by the second limb of sub-paragraph (c) of Article 5 § 1

138. The applicants were detained under section 5(3) of the Police Act, by virtue of which the police may detain a person in order to avert any risk of disturbance of public order or any danger to the safety of individuals or public security. They were never charged, no criminal investigation or proceedings were initiated against them, and their detention was not effected for the purpose of bringing them before a judge. On the contrary, they were detained purely for preventive purposes. Under domestic law, such a detention could as a general rule last no longer than six hours and would only be justified for as long as it was necessary to avert the risk or danger in question.

139. The first applicant was released after seven hours and twenty-one minutes, the second applicant after seven hours and thirty-seven minutes, and the third applicant after seven hours and forty-four minutes. In the circumstances of the present case, notably the fact that altogether 138 persons were arrested on the same day, the Court can accept that the applicants were released at a time before it became necessary to bring them before a judge in accordance with the promptness requirement under Article 5 § 3 of the Convention as described above (see paragraphs 133-134).

140. The applicants, who were released before the paragraph 3 safeguard came into play, had the opportunity to, and did, bring the question of the lawfulness of their detention before the courts under section 469 of the Administration of Justice Act (see paragraph 17 above). Furthermore, they could have been granted compensation had an award been justified from the point of view of Article 5 of the Convention. The relevant procedure was thus consistent with Article 5 § 5.

141. Having established that the conditions for applying a flexible interpretation of the "purpose" requirement in the present case are fulfilled, the Court considers that the applicants' detention under section 5(3) of the Danish Police Act can be said to fall under the second limb of Article 5 § 1 (c).

142. It now needs to be determined whether the applicants' detention was justified under the latter provision.

(ii) Whether the applicants' detention was lawful under domestic law

143. Firstly, the Court will examine whether the detention was "lawful" in the sense of conforming to the substantive and procedural rules of national law (see, for example, *Amuur*, cited above, § 50). Section 5(1) of the Police Act obliges the police to avert any risk of disturbance of public order and any danger to the safety of individuals and public security. Section 5(3) of the Act authorises the police to detain persons causing such a risk, if necessary. The same provision specifies that the "detention must be as short and moderate as possible and should not extend beyond six hours where possible".

144. The relevant preparatory notes state that the period in question should be reckoned from the time when the detention was carried out. Any time spent on transfer to a police station must therefore be included in the calculation of the detention period. Moreover, the six-hour period should normally only be exceeded in connection with actions involving the detention of large numbers of persons when the time spent on transfer to a police station and registration and identification of detainees would render it impossible in practice to observe the six-hour rule (see paragraph 30 above).

145. The applicants maintained that their detention had been unlawful under domestic law since it had exceeded six hours and had not concerned an action involving the detention of a large number of persons. On the contrary, in their submission, the first applicant had been the only person detained from a large group, while the second and third applicants had been detained together with three or four others from another large group.

146. It appears from an examination of the domestic proceedings that the police took due account of the six-hour limit in their strategy. Thus, the memorandum prepared by the strategic commander of the events, Chief Inspector B.O., stated that the risk of fights was increased by the fact that the match would not start until 8 p.m., leaving considerable time for each

group to consume alcoholic beverages beforehand. In order to prevent hooligan clashes, the police had made a plan to engage in proactive dialogue with the spectators from 12 noon, when they started to arrive in the city centre. The police had planned that, in the event of any clashes, they would charge the instigators of fights with criminal offences and arrest them under section 755 of the Administration of Justice Act or, should that not be possible, they would detain the instigators by virtue of section 5(3) of the Police Act. In view of the time-limit, they sought to avoid resorting to detention early in the day because any person so detained would otherwise have had to be released during or immediately after the match and would then have been able to head for the city centre again and resume their involvement in brawls (see paragraph 20 above). Moreover, from Chief Inspector B.O.'s statement before the City Court it appears that in their implementation of the plan the police continuously assessed the situation. The continuing violence made it necessary to exceed the six-hour limit. The police started releasing detainees after midnight, when the situation in central Copenhagen had calmed down and the resumption of any fighting was deemed unlikely (see paragraph 21 above).

147. The domestic courts took these factors into account and found that the applicants' detention had been lawful under section 5(3) of the Police Act. In its judgment of 25 November 2010, the City Court stated that whilst the legislative intent of the provision in question had been to extend a detention measure beyond six hours only in exceptional situations, the over-running of the time-limit in the present case had been justified in view of the aim of the arrest, together with the organised nature, extent and duration of the disturbances, as well as the moderate length of the specific periods by which the maximum periods had been exceeded.

148. In this connection it should be reiterated that it is primarily for the national authorities, notably the courts, to interpret and apply domestic law, in the present instance section 5(3) of the Police Act. Save in the event of arbitrariness or manifest unreasonableness, it is not for the Court to question the interpretation of the domestic law by the national courts (see, among other authorities, *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, § 149, 20 March 2018). The Court, finding no indication that the domestic courts' assessment was arbitrary or manifestly unreasonable in this respect, accepts that the applicants' detention was "lawful" in the sense of conforming to the substantive and procedural rules of national law.

(iii) Whether the applicants' detention was not arbitrary

149. When their detention was reviewed by the City Court and the High Court, the three applicants were heard, represented by counsel, as were three witnesses on their behalf. Chief Inspector B.O. and four other representatives of the police were also heard.

150. It appears from the testimonies of Chief Inspector B.O. (see paragraph 21 above) and Police Constable P.W. (see paragraph 22 above), and to some extent from those of the applicants (see paragraph 19 above), that the three applicants had been together with a group of around fifty Danish football fans in a pub (forty-five according to the applicants, and up to sixty according to Chief Inspector B.O.). The bar was located approximately 700 metres from Amagertorv Square (see paragraph 22 above) on the Strøget pedestrian shopping street in the centre of Copenhagen, where the first big fight broke out at 3.41 p.m. The three applicants, together with the group, left the pub and went through Strøget towards Amagertorv Square. The police followed them. Close to Amagertorv Square, police personnel carriers had been parked crosswise to prevent the group from colliding with the Swedish football fans. They were all taken down a side street (*Valkendorffsgade*).

151. There, the second and third applicants were detained at 3.50 p.m., after Police Constable P.W. had specifically seen them talking with an activist from a local faction and issuing orders to other hooligans from Aarhus. Moreover, he stated that he had worked in the special patrol for four years and had met the applicants several times at previous fights in connection with football matches, where he had seen them take part in fights and heard them shout "White Pride Hooligan" (see paragraph 22 above). The City Court also observed that the applicants were known to the police for having been detained several times previously in connection with similar football events (see paragraph 25 above).

152. As can be understood from Police Constable M.W.'s testimony (see paragraph 23 above), the first applicant was detained at 4.45 p.m. at Axeltorv Square close to Tivoli Gardens, after a man had contacted M.W. saying that three people, including the first applicant, whom he had pointed out from a very short distance, were calling various friends, telling them to meet up at the entrance to Tivoli Gardens and try to start a fight with some Swedish supporters. The witness and his colleague had considered the person making the report to be highly credible. Furthermore, the City Court noted that the first applicant had been detained several times previously in connection with similar events (see paragraph 25 above).

153. Relying on these statements, and other evidence before it, the City Court and the High Court found it established that the first large fight between Danish and Swedish football fans had commenced at Amagertorv Square at 3.41 p.m., that this had entailed a concrete and imminent risk of disturbance of public order, that the police had been under a duty to attempt to prevent such a disturbance under section 5(1) of the Police Act, and that the police had not exceeded their powers by detaining the applicants under section 5(3) of the Police Act.

154. As the Court has consistently emphasised in its case-law, the national authorities are better placed than the international judge to evaluate

the evidence in a particular case (see, among other authorities, *Winterwerp*, cited above, § 40; *Weeks v. the United Kingdom*, 2 March 1987, § 50, Series A no. 114; *Sabeva v. Bulgaria*, no. 44290/07, § 58, 10 June 2010; *Witek v. Poland*, no. 13453/07, § 46, 21 December 2010; and *Reiner v. Germany*, no. 28527/08, § 78, 19 January 2012). By virtue of the subsidiarity principle, it must also be cautious in taking on the role of a first-instance tribunal of fact, where this is not rendered unavoidable by the circumstances of a particular case. Though the Court is not bound by the findings of domestic courts and remains free to make its own appreciation in the light of all the material before it, in normal circumstances it requires cogent elements to lead it to depart from the findings of fact reached by the domestic courts (see, for example, *Giuliani and Gaggio v. Italy* [GC], no. 23458/02, § 180, ECHR 2011 (extracts), and *Austin and Others*, cited above, § 61).

155. The Court sees no reason to question the above-mentioned findings of fact reached by the domestic courts to the effect that the applicants were detained because the police had sufficient reason to believe that they had incited others to start a fight with Swedish football fans in the centre of Copenhagen, and thus caused a concrete and imminent risk of disturbance of public order or of danger to the safety of individuals or public security. It discerns no evidence of bad faith or neglect on the part of the national authorities in applying the relevant legislation. On the contrary, as Chief Inspector B.O. explained before the domestic court, the police's intention was, first, to talk to the various groups in an attempt to calm them down. After the first fights, it was planned that only the instigators should be detained. The assessment in this regard was to be made on the basis of the actual behaviour of those concerned, and the premise was that no persons would be detained who did not act as instigators (see paragraph 21 above). However, all three applicants were considered instigators (see, in particular, the statements of police officers P.W. and M.W. in paragraphs 22 and 23 above). The domestic courts accepted the facts as presented by the police officers. These findings were neither arbitrary nor manifestly unreasonable, and the Court lacks any objective reasons, let alone cogent evidence, to call into question the assessment made at national level.

156. Turning next to the requirement in Article 5 § 1 (c) for the offence to be concrete and specific as regards, in particular, the place and time of its commission and its victim(s), the Court notes that section 5(1) and (3) of the Police Act did not specify any criminal acts which the applicants should refrain from committing.

157. However, as the Government pointed out in the context of hooligan brawls and the related risk of disturbance of public order and danger to the safety of individuals and public security, a number of provisions on punishable acts specified which criminal acts the applicant should refrain from committing. These included the obligation not to instigate fights or

exhibit any other form of violent behaviour likely to disturb public order, as provided in section 3 of the Executive Order on Police Measures to Maintain Law and Order, a breach of which constituted a criminal offence punishable by a fine (see section 18 of the Executive Order). Moreover, Article 134a of the Penal Code set out the obligation not to take part in fights or become involved in other serious breaches of the peace in a public place where such actions took place by mutual consent or with several persons acting together; a breach of this provision was punishable by imprisonment for a term not exceeding one year and six months. Finally, Articles 244, 245 and 291 of the Penal Code concerned, respectively, violence, aggravated violence, and the obligation to refrain from committing criminal damage.

158. The Court considers that the findings of fact reached by the domestic courts in the present case (see paragraphs 150-153 above) should be able to satisfy an objective observer that, at the time when the applicants were detained, the police had every reason to believe that they were organising a brawl between football hooligans in the centre of Copenhagen in the hours before, during or after the football match on 10 October 2009, which could have caused considerable danger to the safety of the many peaceful football supporters and uninvolved third parties present at the relevant time. Indeed, as it was considered that 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.

159. The Court is therefore satisfied that the facts established by the national courts sufficiently indicated that the "offence" could be considered "specific and concrete" for the purposes of Article 5 § 1 (c).

160. It is also satisfied that the authorities furnished evidence that the applicants would in all likelihood have been involved in that offence had its commission not been prevented by their detention.

(iv) Whether the applicants' detention was "necessary"

161. The necessity criterion that applies in respect of certain provisions of Article 5 § 1, including the first limb of sub-paragraph (c), has been mentioned in paragraph 77 above, notably the authorities' obligation to consider "alternative means". With a view to its examination of the preventive detention at issue in the present case, the Court considers it useful to elaborate on this criterion in respect of the second limb. In its 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. 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 relevant factor (on the latter point, see, for example, *Schwabe and M.G.*, cited above, § 78).

162. The Court accepts that in the case under consideration, the concrete and specific offence described above (see paragraph 158), namely instigating a hooligan brawl in the centre of Copenhagen at, respectively, Amagertorv Square at 3.50 p.m. and in front of Tivoli Gardens at 4.45 p.m., posed considerable danger to the safety of all the peaceful football supporters and uninvolved third parties present. The Court therefore considers that the offence which the authorities sought to avert was undoubtedly a serious one.

163. The Court further observes that according to the evidence given by Chief Inspector B.O., the strategic commander of the police operation, to the City Court (see paragraph 21 above) the manoeuvre tactics to prevent such clashes had been to engage in proactive dialogue with the fans/spectators from 12 noon, when they started to arrive, and in the event of any clashes, to detain only the instigators. Moreover, although there were several fights up until the start of the match, the manoeuvre tactics continued to be a dialogue to ensure that the large number of spectators behaved and made their way to the stadium to watch the match. In his statement (see paragraph 22 above) Police Constable P.W. confirmed that at the beginning there had been a good atmosphere and no violence. He and a colleague had simply "kept an eye" on the Danish football fans in the bar. When they had received reports that Swedish and Danish fans were to meet and fight and the group had started leaving the bar, walking down the pedestrian shopping street towards Amagertorv Square, approximately 700 metres away, where the first fight had broken out at 3.41 p.m., the police had followed the Danish group and had reported back to the control room. Chief Inspector B.O. stated that he did not know the number of persons involved directly in the fight, but had understood from local reports that there were about fifty to sixty persons on either side.

164. It thus appears to the Court that, before the first fight broke out at 3.41 p.m. at Amagertorv Square, the police had applied a very careful approach with lenient measures to prevent hooligan clashes.

165. Moreover, even when faced with the situation arising when a group of approximately fifty Danish football fans left the pub and went directly towards the fight at Amagertorv Square, the police initially attempted to

apply less stringent measures to avoid a confrontation. They parked their personnel carriers crosswise to prevent the Danish group of football fans from colliding with the Swedish group. Thereafter, they turned the group of Danish football fans around and took them down a side street to register and search them.

166. As established by the national courts, it was at that moment of intense action, in the immediate vicinity of the on-going fight at Amagertorv Square, that the second and third applicants were considered inciting others to take part in the fighting. Those two applicants were therefore detained at 3.50 p.m., in full compliance with the manoeuvre tactics aimed at detaining only the instigators (see paragraph 163 above). According to Police Constable P.W. (see paragraph 22 above) the purpose of detaining those two applicants was to ensure calm and prevent clashes, an approach which apparently succeeded because it became obvious that the hooligans from Aarhus were missing someone to take control.

167. The Court also notes that four other alleged hooligans from Copenhagen were detained at the same time, leaving around forty-four persons from the Danish group at liberty in the side street, including the first applicant. In the Court's view, this shows that the police did not resort to excessive detentions, but took care to detain only those who, in their assessment, posed a risk of disturbance of public order and a danger to the safety of individuals and public security.

168. The first applicant left the side street and apparently continued to another bar. It was not until 4.45 p.m. – after, as established by the national courts, he had been heard inciting others to take part in a fight, this time in front of Tivoli Gardens – that he was detained.

169. In these circumstances, the Court sees no reason to cast doubt on the City Court's conclusion in its judgment of 25 November 2010 that "less radical measures could not be deemed sufficient to avert the risk of additional unrest in those circumstances" and that "the Copenhagen Police did not exceed their powers by detaining [the applicants] under section 5(3) of the Police Act on that basis". That finding was upheld on 6 September 2011 by the High Court of Western Denmark, and leave to appeal to the Supreme Court was subsequently refused.

The Court lacks any cogent grounds to depart from the national courts' findings, and is therefore satisfied that the applicants' detention could reasonably be considered "necessary" to prevent their instigating or continuing to instigate football hooliganism, given that less stringent measures would not have sufficed.

170. As regards the duration of the detention at issue, according to the City Court's assessment, with which the Court sees no reason to disagree:

> "the detention of [the applicants] [which lasted almost eight hours] was ended as soon as the city centre had become quiet, in the assessment of the police, after a group comprising thirty-five Danes was arrested towards midnight. The court finds, in the

> circumstances of the present case, that there is no basis for invalidating the correctness of the assessment made by the police, according to which the release of the detainees before the city centre had become quiet would have entailed a concrete and imminent risk of further unrest, including clashes with spectators who had been let out of the national stadium after the end of the match and who were still in the streets in large numbers."

171. The Court observes in addition that there was a careful monitoring of whether the risk had passed. In particular, it notes the testimony provided by Chief Inspector P.J. (see paragraph 24 above), who was responsible for upholding the detentions and releasing the detainees, and for verifying that standard procedures were complied with, including making sure that the six-hour rule was observed. As is apparent from his statement, there was a constant dialogue between him, the control room supervisor and the police in the streets, enabling him to assess when he should start releasing the detainees.

172. Having regard to the above-mentioned considerations, the Court is also satisfied that the applicants were released as soon as the imminent risk had passed, that it lasted for no longer than was necessary to prevent them from taking further steps towards instigating a hooligan brawl in the centre of Copenhagen on 10 October 2009, and that this risk assessment was sufficiently monitored.

173. Accordingly, the Court considers that the domestic courts struck a fair balance between the importance of the right to liberty and the importance of preventing the applicants from organising and taking part in a hooligan brawl.

(v) Conclusion

174. In the light of the above, the Court concludes that the applicants' preventive detention complied with sub-paragraph (c) of Article 5 § 1, and that accordingly, there has been no violation of Article 5 § 1 of the Convention.

FOR THESE REASONS, THE COURT,

1. *Decides*, unanimously, to join the applications;

2. *Declares*, unanimously, the applications admissible;

3. *Holds*, by fifteen votes to two that there has been no violation of Article 5 § 1 of the Convention.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 22 October 2018, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Prebensen	Guido Raimondi
Deputy to the Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judges De Gaetano and Wojtyczek is annexed to this judgment.

G.R.
S.C.P.

JOINT PARTLY DISSENTING OPINION OF JUDGES DE GAETANO AND WOJTYCZEK

1. With all due respect to our colleagues, we disagree with the view of the majority that there has been no violation of Article 5 § 1 in the instant case (point no. 3 of the operative part of the judgment).

2. The case raises fundamental issues of treaty interpretation. We note that the Court's recent case-law has often opted for an evolutive and teleological interpretation of the Convention and has not hesitated to depart from existing case-law in order to broaden the scope of the rights protected under the Convention. In the instant case the majority opted for a different approach: to focus on the letter of the Convention and on the *travaux préparatoires* (see, for instance, paragraphs 114 and 115 of the judgment, and also paragraph 99). Concomitantly with this, they did not hesitate to limit the scope of the rights protected by invoking the letter of the Convention and adapting their interpretation to that letter. Moreover, in a very unusual step, the majority criticised previous compositions of the Court for the lack of sufficient reasoning in judgments based on the idea of the evolutive interpretation of the Convention (see paragraph 108 of the judgment).

We agree in broad terms with the general philosophy of treaty interpretation adopted by the majority and hope that this approach will be upheld and consolidated in future Grand Chamber cases. In particular, we share the view that interpretation of the Convention should give precedence to the directives of linguistic interpretation (on this term, see J. Wróblewski, *The Judicial Application of Law*, Springer-Science-Business-Media B.V., Dordrecht, 1992, pp. 97-100). We also share the view that the letter of the Convention may justify the Court revisiting an over-extensive interpretation of a particular provision. However, we express our strong objection concerning two points. Firstly, we consider that the methodology was not correctly applied, and therefore we cannot agree with the conclusions of the majority to the effect that the detention of the applicants was covered by Article 5 § 1 (c).

Secondly, and more critically, we note that the general philosophy of treaty interpretation endorsed in the instant judgment has frequently been rejected in many other Grand Chamber and Chamber judgments, especially in cases concerning Article 8. It is entirely unclear why in some cases the Court adopts an evolutive interpretation departing from the original intent of the parties and from the text of the treaty, whereas in other cases, like this one, it adopts the opposite approach. The result is that the Court has neither presented a coherent theory of treaty interpretation serving as a basis for its judgments nor explained its choices concerning the interpretative rules it applies.

3. The Court, in the exercise of its mandate as defined and delimited by Article 19 of the Convention, has a special role to play in developing European legal culture. An important element of legal culture is the culture of interpretation. The latter presupposes clear and precise rules of interpretation. In many legal systems there exists a coherent set of rules of interpretation, usually unwritten but clearly explained and applied in judicial decisions, with judgments often containing extensive and precise considerations concerning the interpretative rules underpinning the reasoning. European human rights law has not yet reached the level of development and refinement of domestic legal systems on this point and the European Court of Human Rights not only has not developed a sufficiently coherent interpretative methodology within the scope of the discretion left to it by the general rules of treaty interpretation, but has often overlooked, or shied away from, the applicable customary rules of treaty interpretation codified in the Vienna Convention on the Law of Treaties. Viewed from the domestic perspective, the role of the Court in building up a culture of interpretation is far from satisfactory.

4. We fully agree with the majority that in settling interpretative issues the Court should duly examine the *travaux préparatoires* and try to establish to the extent possible the original intent of the High Contracting Parties. We would like to underline at the same time that Article 32 of the Vienna Convention on the Law of Treaties (which codifies the rules of treaty interpretation) formulates the following rule in this respect:

> "Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:
>
> (a) Leaves the meaning ambiguous or obscure; or
>
> (b) Leads to a result which is manifestly absurd or unreasonable."

The *travaux préparatoires* are a subsidiary means of treaty interpretation which is important in cases when the wording of the treaty remains unclear, but which cannot be decisive when the linguistic interpretation of the treaty leads ineluctably to one clear result which is not manifestly absurd or unreasonable.

We are, moreover, not unmindful of the fact that *Lawless v. Ireland (no. 3)* (1 July 1961, Series A no. 3) was decided at a time when the full judicialisation of the Convention depended on the States which had ratified the Convention accepting also what until then were its optional provisions. It has been convincingly shown that the optional nature of important parts of the 1950 Convention influenced the authority and practices of both the Commission and the Court well into the mid-1970s, with both institutions at that time taking a very cautious approach to the Convention (see Mikael Rask Madsen, "'Legal Diplomacy' – Law, Politics and the Genesis of

Postwar European Human Rights", in *Human Rights in the Twentieth Century: A Critical History*, Stefan-Ludwig Hoffmann (ed.), Cambridge University Press, Cambridge, 2011, pp. 62, 75-79).

5. The majority insist on the necessity of adopting a flexible interpretation of Article 5 § 1 (c) (see paragraphs 118, 120, 126 *in fine*, 127, 137 and 141 of the judgment). We find this insistence quite baffling. In European legal culture there is a commonly accepted principle that provisions guaranteeing personal freedom should be interpreted strictly and literally. It is difficult to reconcile the approach adopted by the majority with the established canons of legal interpretation: *in dubio pro libertate*; *in dubio interpretatio pro regula contra limitationem facienda*; *exceptio est strictissimae interpretationis*; *odiosa sunt restringenda*; *poenalia sunt restringenda*; *mala restringenda sunt, non amplianda et multiplicanda*, and so on.

All these canons point in one direction: that the aims of a provision protecting individual freedom can only be achieved though strict interpretation of the exceptions thereto, making the teleological and the linguistic methods of treaty interpretation converge in cases similar to the one at hand.

6. We agree with the majority that in the instant case the starting-point is the wording of Article 5 of the Convention. At the same time we consider that Article 5 § 1 (c) cannot be interpreted in a vacuum but has to be read in the context of other Convention provisions, and in particular Article 5 § 3. This last provision is worded as follows:

> "Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and 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 wording of this provision leaves no doubt as to the purpose of an arrest effected under Article 5 § 1 (c), namely to bring a person to criminal trial, that is, a trial for an offence committed by that person.

7. We further note that the situation referred to in Article 5 § 1 (c), "fleeing after having done so", is always a specific situation covered by the broader situation referred to in the words "on reasonable suspicion of having committed an offence". The danger of a person fleeing after committing an offence always presupposes that there is a reasonable suspicion that an offence has already been committed. Specifying in the last ground what has already been said in a more general manner in the first ground seems prima facie superfluous. The introduction of the third ground can only be explained by the fact that this is an exemplification of situations when there is a reasonable suspicion of a person having committed an offence. In our view, the same approach applies to the situation referred to by the words "when it is reasonably considered necessary to prevent his committing an offence". It should be read as an exemplification of a broader

situation labelled as a "reasonable suspicion of having committed an offence".

8. The majority express the following view: "It follows directly from the wording of Article 5 § 3 that if the person is not 'arrested or detained' but has been released, there is no obligation to bring him or her promptly before a judge" (see paragraph 129 of the judgment).

We would rather say that a person arrested or detained "for the purpose of bringing him before the competent legal authority", under Article 5 § 1 (c), should either be brought promptly before a judge or released. If a person arrested for the purpose of bringing him before a judge or other officer authorised by law to exercise judicial power has been promptly released, there is no need to bring that person before a judge. In that case the possibility of contesting *ex post* before a judge the legality of the decision to arrest the person suffices.

9. We further note that among the three grounds for detention, the first one ("reasonable suspicion of having committed an offence") and the third one (the risk of fleeing) clearly refer to criminal proceedings. In such a situation it is difficult to understand how, and much more difficult to maintain that, the second ground ("when it is reasonably considered necessary to prevent an offence") does not refer to criminal proceedings concerning an offence which has already been committed, at least in the form of an attempted offence or a conspiracy to commit an offence.

10. We note that in many legal systems, the law does not provide for preventive detention of football supporters. Instead, States may opt for the criminalisation of acts committed at the "forefront" ("*Vorfeld*") of a main criminal offence, especially the preparation of an offence or the fact of carrying certain dangerous objects in certain specific circumstances. In this context, preventive detention does not appear a necessary means of combating football violence or hooliganism. In any event, if the High Contracting Parties consider that the Convention prevents them from applying certain legitimate means of constraint, they can amend this treaty.

We note also that the domestic courts in the present case established that the three applicants had instigated brawls between football fans (see paragraph 25 of the judgment). It is not clear why the applicants were not prosecuted for the instigation of such fights.

11. We would like to note the following points concerning the content and the application of domestic law.

Firstly, the relevant domestic law is worded in the following terms:

> "1. The police shall avert any risk of disturbance of public order and any danger to the safety of individuals and public security.
>
> ...
>
> 3. Where the less intrusive measures set out in subsection 2 are found to be inadequate to avert a risk or danger, the police may, if necessary, detain the person(s)

> causing the risk or danger. Such detention must be as short and moderate as possible and should not extend beyond six hours where possible.
>
> ...” (Section 5 of the Police Act (Act no. 444 of 9 September 2004) – see paragraph 29 of the judgment)

The wording appears very broad and vague. In particular, preventive detention may be resorted to because of any risk of disturbance of public order or any danger to the safety of individuals and public security, and is not limited to an imminent danger that a specific criminal offence will be committed. Such a basis for preventive detention is problematic from the viewpoint of the requirement of precision and clarity of domestic law, that is, the requirement of “quality of the law”.

Secondly, the domestic courts established the intent of the law-maker in the following terms:

> “It also appears from the preparatory notes on the same provision that normally the six-hour period can only be exceeded in connection with actions involving the detention of a considerable number of people, in which situations the time spent on transfer to the police station and registration and identification of detainees would render it impossible, in practice, to observe the six-hour rule.” (see paragraph 25 of the judgment)

However, as pointed out by the applicants and confirmed by the testimonies of the police officers (see paragraphs 21 and 24), the total number of people detained in connection with the football event did not render it impossible, in practice, to observe the six-hour rule. The police decided to exceed the six-hour rule in order to prevent the applicants from returning to the city centre and possibly engaging in clashes. It is clear that the police did not consider that the law granted them sufficient powers.

12. For the reasons explained above, we consider that the detention of the three applicants constituted a violation of Article 5 § 1 of the Convention.