

## Volume 13, Issue 2, Spring 2013

**Court:** European Court of Human Rights

**Case:** Ostendorf v. Germany

**Date:** March 7, 2013

**Written By:** Mark Hamburger

### *Summary of Case:*

This case concerns the interpretation of sub-paragraphs (b) and (c) of Article 5 § 1 of the European Convention on Human Rights (“Convention”). Specifically, the European Court of Human Rights (“Court”) is asked to consider whether Mr. Henrick Ostendorf’s (“the applicant”) detention deprived him of his liberty interests under Article 5 § 1 of the Convention.

### *Background*

The applicant is a supporter of Werder Bremen Football club, which plays in the German Federal Football league. He attends both home and away games regularly. Since September 3rd 1996, the applicant has been registered by the Bremen police in a database of persons prepared to use violence in the context of sporting events. The Bremen Police refer to the applicant as a “gang leader” of the Bremen hooligans. On April 10th 2004, the applicant and some thirty to forty other football fans travelled from Bremen to Frankfurt am Main by train to attend the match of Eintracht Frankfurt against Werder Bremen. The Bremen Police, having knowledge of this information, forwarded it to the Frankfurt am Main Police. Once the applicant and his group arrived to Frankfurt am Main central station, the Frankfurt am Main police verified them and stopped them for questioning. During the stop, the police searched the members of the group and seized a mouth protection device and several pairs of gloves filled with quartz sand. Thereafter, the police escorted the group to a pub. When the group left the pub, the police noticed that the applicant was no longer with the group. He was then found by the police in a locked cubicle in the ladies’ bathroom of the pub. He was immediately arrested and had his phone confiscated. The applicant was detained at approximately 2:30 p.m. and then released that same day at approximately 6:30 p.m., one hour after the football match had ended.

*Procedural History*

On August 17th 2004, the president of the Frankfurt am Main police dismissed the applicant's complaint alleging that his detention and the seizure of his mobile phone had been unlawful. Relying on section 32 § 1 no. 2 of the Hessian Public Security and Order Act, the president found that the applicant's detention had been necessary in order to prevent the imminent commission of "a criminal or regulatory offence of considerable importance to the general public." Applicant then brought an action against the Land of Hesse in the Frankfurt am Main Administrative Court. The Frankfurt am Main Administrative Court dismissed the applicant's complaint, having found that the applicant's detention had been lawful and not breached his rights. Months later, applicant lodged an appeal against the Administrative Court's judgment. The Hessian Administrative Court of Appeal dismissed the applicant's request to lodge an appeal, because there were no serious doubts as to the correctness of the Administrative Court's judgment. Finally, the applicant lodged a constitutional complaint with the Federal Constitutional Court. He complained that his detention had breached his right to liberty. On February 26th 2008, the Federal Constitutional Court, without giving reasons, declined to consider the applicant's constitutional complaint.

On March 20th 2008, the applicant lodged the present complaint with the Court against the Federal Republic of Germany under Article 34 of the Convention. The applicant alleged, in particular, that his detention for preventive purposes on April 10, 2004 in the context of a football match had breached his right to liberty under Article 5 of the Convention.

*Domestic Law*

Under Section 32 § 1 no. 2 of the Hessian Public Security and Order Act, on custody, the police may take a person into custody if this is indispensable in order to prevent the imminent commission or continuation of a criminal or regulatory offence of considerable importance to the general public.

*European Convention on Human Rights*

Article 5 of the Convention, which, in so far as relevant, 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 fulfillment 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; ...

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 authorized 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...

### *Discussion*

The issue before the Court is whether the applicant's detention amounted to a deprivation of liberty for the purposes of Article 5 § 1. As the Court points out, the goal of Article 5 § 1 is to ensure that no one is arbitrarily deprived of their liberty. Sub-paragraphs (a) to (f) of Article 5 § 1 contain an exhaustive list of permissible grounds for deprivation of liberty. The Court makes clear that these sub-paragraphs will be construed narrowly and that no deprivation of liberty will be lawful unless it falls within one of those grounds.

Relying on the arguments presented by the Government, the Court focuses its discussion on sub-paragraphs (b) and (c) of Article 5 § 1 of the

Convention. Beginning with sub-paragraph (c) of Article 5 § 1, the Court notes that the applicant had not yet committed an offence and therefore he was not detained “on reasonable suspicion of having committed an offence” within the meaning of the first alternative of Article 5 § 1 (c). However, the second alternative of Article 5 § 1 (c) authorizes detention of a person also “when it is reasonably considered necessary to prevent his committing an offence.” In the present case, the Court observed that the Frankfurt am Main police had been informed by the Bremen police that the applicant was the leader of a group of football hooligans prepared to use violence. Moreover, the applicant had been observed speaking to a hooligan from Frankfurt am Main in the pub. Despite the police’s order to stay with the group, the applicant had separated and hidden himself in the ladies’ restroom. Based on these findings, the Court held that his detention could reasonably be classified as effected “to prevent his committing an offence.”

The Court, however, recalls that under paragraphs 1 (c) and 3 of Article 5, detention to prevent a person from committing an offence, must, in addition, be “effected for the purpose of bringing him before the competent legal authority” and that that person is “entitled to trial within a reasonable time.” In the present case, it was clear that the applicant had committed no crime. Rather, the reason for his detention was purely preventative from the outset. As the Court notes, his police custody only served the preventive purpose of ensuring that he would not commit offences in an imminent hooligan altercation. He was to be released once the risk of such an altercation had ceased to exist and his detention was thus not aimed at bringing him before a judge in the context of a pre-trial detention and at committing him for a criminal trial.

The Court briefly discusses whether the case-law concerning the scope of Article 5 § 1 (c) should be revised to allow for the detention of an individual for preventive purposes, without the need to bring him before a competent legal authority. However, as the Court points out, “that interpretation could neither be reconciled with the entire wording of sub-paragraph (c) of Article 5 § 1 nor with the system of protection set up by Article 5 as a whole.” Thus, because the applicant’s detention was not aimed at bringing him before “a competent legal authority” and at committing him to a criminal trial, the applicant’s detention could not be justified under Article 5 § 1 (c).

Next, the Court considers whether sub-paragraph (b) of Article 5 § 1 of the Convention applies. The question the Court must decide is

whether the applicant's detention was justified under the second limb of Article 5 § 1 (b) "in order to secure the fulfillment of any obligation prescribed by law." The obligation prescribed by law is Section 32 § 1 no. 2 of the Hessian Public Security Order Act. Under that provision, the police are entitled, as a measure to avert an imminent danger, to take a person into custody if it is indispensable to prevent the imminent commission of a criminal offence of considerable importance to the general public. In the present case, the police took the applicant into custody in order to prevent him from arranging a brawl between hooligans from Bremen and rival hooligans from Frankfurt am Main in the context of the football match on April 10th 2004.

In addition, in order to ensure, in accordance with the purpose of Article 5, that individuals are not subjected to arbitrary detention in such circumstances, 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 doing so. In the present case, the applicant was ordered by the police, prior to his arrest, to stay with the group of football supporters with whom he had travelled from Bremen with. He was further warned in a clear manner of the consequences of his failure to comply with that order as the police had announced that any person leaving the group would be arrested. Moreover, the group had already been searched at Frankfurt am Main central station and had been found to be in possession of instruments typically used in hooligan brawls. The Court considered that, by these measures, the applicant had been made aware of the fact that the police intended to avert a hooligan brawl and that he was under a specific obligation to refrain from arranging and/or participating in such a brawl in the city of Frankfurt.

Finally, the Court considered whether a due balance had been struck between the importance in a democratic society of securing the immediate fulfillment of the obligation in question and the importance of the right to liberty. The Court considered that the obligation on the applicant not to arrange and take part in a hooligan brawl, during which, as a rule, bodily assaults and breaches of the peace would be committed, was an important obligation incumbent on him in the public interest. On the other hand, the Court observed that the applicant's detention was for a duration of about four hours. The Court reasoned that the applicant had not been detained for longer than was necessary in order to prevent him from taking further steps toward organizing a hooligan brawl. The applicant's

detention at issue was, therefore, proportionate to the aim of securing the immediate fulfillment of the obligation at issue.

*Conclusion*

The Court held that the applicant's detention, having complied with sub-paragraph (b) of Article 5 § 1, did not violate Article 5 § 1 of the Convention.