ANALYSIS OF THE CASE OF M.B. v. POLAND

JUDGMENT OF THE EUROPEAN COURT OF HUMAN RIGHTS

ISSUED ON 27 APRIL 2004

Narine Gasparyan

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Legal Guide

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Introduction

This analysis considers the judgment of 27 April 2004 of the European Court of Human Rights (hereinafter referred to as the "European Court") in the case of M.B. v. Poland. The case concerns the issues of lawful arrest and detention, and the violation of the right to liberty and security guaranteed by Article 5 of the European Convention on Human Rights (hereinafter referred to as "ECHR") that was decided by the European Court.

This analysis considers the facts of the case and includes a thorough examination of the Applicant's complaints and the Polish Government's arguments. It also provides an overview of the specific approaches of the European Court regarding the interpretation of the rights and freedoms in question. However, the analysis does not specifically address the issue of just satisfaction. The analysis applies a checklist which the European Court uses when examining violations of each ECHR right and freedom. The analysis also highlights the significant features of the case which played an important role and became the principal guide to the interpretation of the rights and freedoms guaranteed by the ECHR.

This analysis is educational in character and is primarily designed to enable legal professionals, including judges, lawyers, advocates, legal service providers and others involved in the protection of human rights, including law students, to identify the criteria and the standards that the European Court follows when interpreting the rights and freedoms guaranteed by the ECHR.

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PART I – CASE OF M.B. v. POLAND

A. Summary of the facts of the case

The Applicant, Mr. M.B. is a Polish national. He was born in 1967. The Applicant submitted an application to the European Court against the Republic of Poland on 19 July 1995. The European Court agreed the applicantApplicant's request not to dislcose his name. . The Applicant died on 26 July 1998. By a decision of 8 March 2001, the Court held that the case could be pursued by the Applicant's father, Mr. H.B.

In 1994 the Białystok Regional Prosecutor instituted investigations concerning suspected fraudulent activities[1].

On 28 March 1995 the Applicant was charged with fraud, committed jointly with other persons**.** On 30 March 1995 the Białystok Regional Prosecutor ordered that he be held on remand. The Applicant was charged with fraud by obtaining a loan of USD 380,000 from a state-owned bank under false pretences. The loan had not been repaid. It was further considered that the evidence in the case file indicated there was a strong charge against the Applicant, while his attitude and the circumstances of the case indicated that he would jeopardise the criminal proceedings if left at liberty.

The chronology of further events and legal proceedings, which were held in the case of M.B. are described in Table No. 1 below.

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1 Chapter III of the Code of Criminal Procedure of 1969, applicable at the material time, entitled "Parties to proceedings, defence counsel, representatives of victims and representatives of society", described a prosecutor as a party to criminal proceedings. According to all the relevant provisions of the Code read together, a prosecutor performed investigative and prosecuting functions in the course of criminal proceedings. In particular, after completing the investigation, he drew up a bill of indictment and represented the prosecuting authority before the court competent to deal with the case.

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Table No.1

THE CIRCUMSTANCES OF THE CASE	
3 April 1995	The Applicant's lawyer appealed against the detention order, arguing, *inter alia*, that his bad health was incompatible with his detention.
6 April 1995	The Applicant himself appealed against the detention order.
11 April 1995	The Białystok Regional Prosecutor passed a decision raising charges against the Applicant. It was stated that the charges against him were credible given the evidence gathered in the investigations.

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10 April 1995	The Warsaw Regional Court, at a session held *in camera*, refused the Applicant's lawyer's appeal of 3 April 1995against the detention order[2].
25 April 1995	The Applicant requested his release**.**
27 April 1995	The Warsaw Regional Court dismissed the appeal of the Applicant of 6 April 1995.
28 April 1995	The Warsaw Regional Court refused to allow the Applicant's appeal against the decision of 11 April 1995 by which the prosecution had raised charges against the Applicant.
28 April 1995	Białystok Regional Prosecutor refused the Applicant's application for release of 25 April 1995.
18 May 1995	Białystok Appellate Prosecutor upheld this decision, considering that although a medical certificate confirmed that the Applicant was suffering from Marfan syndrome which was a connective tissue disorder, so affected many structures, including the skeleton, lungs, eyes, heart and blood vessels, the Applicant was under the medical supervision of a prison doctor.
13 June 1995	Charges against the Applicant were supplemented by two further counts of fraud, committed by obtaining another two bank loans under false pretences. The prosecuting authorities referred, *inter alia,* to various Polish and foreign documents and to other evidence. When questioned by the prosecutor on that day, the Applicant requested that detailed written grounds of these charges be prepared and served on him and on his lawyer.
26 June 1995	The Warsaw Regional Court prolonged the Applicant's detention for three months, until 29 September 1995.
28 June 1995	The Applicant was served with the document requested on 13 June 1995.
13 July 1995	The Applicant requested again to be released.
17 July 1995	The Applicant's request for release was refused by the Białystok Regional Prosecutor.
17 July 1995	The Applicant requested to be released in order to undergo a specialised ophthalmologic examination, submitting that he suffered from an ailment which seriously affected his eyesight, and that his eyesight had severely deteriorated as a result of his detention.
27 July 1995	The Warsaw Court of Appeal dismissed the Applicant's appeal against the decision of the Warsaw Regional Court of 26 June 1995 prolonging his detention for a further three months.
11 August 1995	The Białystok Appellate Prosecutor upheld the decision of 17 July 1995, considering that the evidence against the Applicant made the charges against him sufficiently strong
12 September 1995	The Applicant's new request for release, submitted on 8 September

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2 According to Article 87 of the Code of Criminal Procedure of 1969 provides:

"The Court pronounces its decisions at a hearing if the law provides for it; and otherwise, at a court session held in camera. ..."

Article 88 provides of the Code of Criminal Procedure of 1969 provides:

"A court session in camera may be attended by a prosecutor (...); other parties may attend if the law provides for it."

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	1995, was refused by the Białystok Regional Prosecutor.
15 September 1995	The Applicant's fresh request for release was again refused. The prosecuting authorities considered that the evidence gathered so far in the proceedings supported the charges against the Applicant, and that there were genuine grounds for believing that, if released, he would exert pressure on the witnesses.
18 September 1995	The Applicant's detention was prolonged until 29 November 1995. The Warsaw Regional Court considered that further measures had to be taken in order to complete the evidence gathered so far during the investigations.
26 October 1995	The Warsaw Court of Appeal dismissed the Applicant's appeal against the Decision of 18 September 1995 of Warsaw Regional Court.
16, 17, 20 and 21 November 1995	The Applicant was given access to the case file and was informed of his right to submit, within three days, motions for further evidence to be admitted.
21 November 1995	The Białystok Regional Prosecutor again refused to release the Applicant. On the same day the Applicant requested the Białystok Appellate Prosecutor to set aside this decision.
23 November 1995	The Warsaw Court of Appeal prolonged the Applicant's detention until 29 December 1995.
23 November 1995	On the same day the court's registry was served with the Applicant's letter in which he requested the court to allow him to be present at the court session concerning the prolongation of his detention[3].
26 November 1995	The Warsaw Court of Appeal upheld the decision of the Warsaw Regional Court of 26 October 1995 prolonging the Applicant's detention.
27 November 1995	The court replied that Applicant's request had been included in the case file.
8, 12 and 15 December 1995	The Applicant examined his case files.
14 December 1985	The Warsaw Court of Appeal dismissed the Applicant's appeal against the decision of 23 November 1995 prolonging his detention until 29 December 1995.
15 December 1995	The Applicant requested that certain pages that had been taken out of the case file and transferred to the file of another case, which had been severed from the Applicant's case in June 1995, be re-included into his file so that he could have access to them.
21 December 1995	The Białystok Regional Prosecutor closed the investigation, considering that the case-file contained enough evidence for a bill of indictment to be lodged with a court.

3 At the relevant time the presence of the parties at court sessions other than hearings was regulated in Articles 87 and 88 of the Code of Criminal Procedure of 1969, which, insofar as relevant, provided:

Pursuant to Article 249 of the new Code of Criminal Procedure, before deciding on the application of the preventive measures, the court shall hear the person charged with offence. The lawyer of the detainee should be allowed to attend in the court session, if he or she is present. It is not mandatory to inform the lawyer of the date and time of the court session, unless the suspect so requests and if it will not hinder the proceedings.

The court shall inform the lawyer of a detained person of the date and time of court sessions at which a decision is to be taken concerning prolongation of detention on remand, or an appeal against a decision to impose or to prolong detention on remand is to be considered.

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21 December 1995	The prosecutor ordered that the Applicant be given access to documents that he had requested on 15 December.
21 December 1995	The Białystok Appellate Prosecutor refused to allow the Applicant's appeal against the decision to prolong his detention, given on 23 November 1995.
8 January 1996	The Applicant requested to be released and on 10 January 1996 he proposed paying bail in the amount of PLN 5,000.
19 January 1996	The Applicant requested that access be granted to the case-file, submitting that he had not been shown items Nos. 85, 86, 87.
19 January 1996	By a letter of 19 January 1996, submitted to the court on 24 January 1996, the applicant requested to be allowed to read the case file again.
25 January 1996	The Warsaw Regional Court dismissed the Applicant's request to be released on bail.
25 January 1996	The Applicant was given the refusal to release, which was upheld by the Warsaw Appellate Court on 13 February 1996.
21 February 1996	The Applicant wrote to the Court again requesting to be given access to the case file.
28 February 1996	The case-file was forwarded by the prosecution to the Białystok detention centre and the Applicant read it again on 1 March 1996.
7 March 1996	The Warsaw Regional Court held a hearing concerning the Applicant's request for release on bail and the amount of bail to be paid. The Applicant's lawyer attended that hearing. The court fixed the bail at PLN 15,000. The Applicant was released on the same day after bail had been paid.
26 July 1998	The Applicant died of Marfan syndrome.
20 August 1998	Warsaw Regional Court discontinued the criminal proceedings against him.

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B. The Applicant's complaints under the ECHR

Mr. M.B. lodged his application with the European Commission on 19 July 1995 under Article 25 of the ECHR. The Applicant complained in particular, that he was arrested by a public prosecutor who was not a "judge or an officer authorised by law to exercise judicial power", as required by Article 5 § 3 of the ECHR. The Applicant further complained under Article 5 § 4 that he was never brought before a judge in the proceedings concerning his detention. Therefore he did not have any possibility to challenge any of the points relied on by the prosecution in support of his detention.

The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force. The application was allocated to the Fourth Section of the Court and a Chamber for considering the case was constituted as provided in Rule 26 § 1 of the Rules of the Court. On 8 March 2001, the Court declared the application partly admissible. On 1 November 2001, the Court changed the composition of its Sections (Rule 25 § 1) and the case was assigned to the newly composed Fourth Section (Rule 52 § 1). By a decision of 28 January 2003 the Court declared admissible the Applicant's complaint that, on arrest, he had not been brought promptly before a "judge or an officer authorised by law to exercise judicial power", and that the proceedings concerning his detention on remand had not been truly adversarial. It rejected the remainder of the application.

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Table No.2 highlights the complaints of the Applicant under the European Convention and the Polish Government's arguments against the alleged violations raised by the Applicant before the European Court during its hearings held in private on 23 March 2004:

Table No. 2

Articles allegedly violated	***The Applicant's complaints***	***The arguments of the Government of Poland***
Article 5 § 3 which reads 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 Applicant complained that he was deprived of his liberty by a decision of the Public Prosecutor and not of a "judge or other officer authorised by law to exercise judicial power" as required by the European Convention.	The Government did not comment on the complaint.
Article 5 § 4, which reads as follows: "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."	The Applicant complained that in the proceedings concerning his detention he was never brought before a judge. Therefore he did not have any possibility of challenging any points relied on by the prosecution in support of his detention.	The Government admitted that during his detention on remand the Applicant did not participate in the sessions concerning the review of his detention by the Warsaw Regional Court and Warsaw Court of Appeal since the Code of Criminal Procedure, applicable at that time, did not allow for the presence of the detainee, or of his lawyer, at court sessions, where the lawfulness of his detention was examined.

C. The Judgment of the European Court

Table No. 3 below underlines the complaint of the Applicant made before the European Court, the objections of the Government of Poland made orally and presented in written memorials, as well as the standing of the Court on the complaints raised by the Applicant. It also explains the judgment of the European Court, highlighting the reasoning set forth with respect to the complaints of the Applicant and the alleged violations of his rights guaranteed by Article 5 § 3 and 5 § 4 of ECHR.

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Table No. 3

ALLEGED VIOLATION OF ARTICLE 5 § 3 OF THE CONVENTION		
The Applicant's complaints	***Objections of the Government of Poland***	***Judgment of the European Court***
The Applicant submitted that the prosecutor, as his position was defined by Polish law applicable at the material time, could not be deemed to perform a judicial function and that, therefore, he should not have been vested with the power to order detention. The Applicant complained under Article 5 § 3 of the Convention that he was deprived of his liberty by a decision of the Public Prosecutor and not of a "judge or other officer authorised by law to exercise judicial power"[4] as required by the Convention. The prosecutor, under Polish law as it stood at that time, was also investigating the case and was to represent the prosecution later in the judicial proceedings. He submitted that the prosecutor was a representative of the executive[5].	The Government did not comment on the complaint.	The Court recalled that in its judgment in the case of *Niedbała v. Poland* (no. 27915/95, §§ 48-57, 4 July 2000, unreported) it had already dealt with the question of whether under the Polish legislation at the material time a prosecutor could be regarded as a "judicial officer" endowed with the attributes of "independence" and "impartiality" required under Article 5 § 3. The Court found a violation of Article 5 § 3 in that case, considering that a prosecutor did not offer these necessary guarantees. The Court found that the present case was similar to the *Niedbała* case. There were no reasons to come to a different conclusion in this case. Consequently, the Court concluded that the Applicant's right to be brought "before a judge or other officer authorised by law to exercise

4 In pursuance of Article 1 of the Act of 20 June 1985, the courts are entrusted with administration of justice in the Republic of Poland. The courts are courts of appeal, regional courts and district courts. Under Article 9 of the Law, the Supreme Court exercises supervisory jurisdiction over lower courts. Article 1 of the Act of 20 June 1985 on Prosecuting Authorities which determines general principles concerning the structure, functions and organisation of prosecuting authorities, at the material time read as follows:

"1. The prosecuting authorities shall be the Prosecutor General, prosecutors and military prosecutors. Prosecutors and military prosecutors shall be subordinate to the Prosecutor General.

2. The Prosecutor General shall be the highest prosecuting authority; his functions shall be carried out by the Minister of Justice."

Article 2 of the Act reads:

"The prosecuting authorities shall ensure the observance of the rule of law and the prosecution of criminal offences."

5 At the material time the relations between the organs of the Polish State were set out in interim legislation, i.e. the Constitutional Act of 17 October 1992. Article 1 of the Act laid down the principle of the separation of powers in the following terms:

"The legislative power of the State shall be vested in the Sejm and the Senate of the Republic of Poland; the executive power shall be vested in the President of Poland and the Council of Ministers; and judicial power shall be vested in the independent courts."

Under Article 56 of the Act, the Council of Ministers shall be composed of the Prime Minister, Deputy Prime Ministers and Ministers.

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		judicial power" had not been respected. There had accordingly been a violation of Article 5 § 3 of the Convention.
ALLEGED VIOLATION OF ARTICLE 5 § 4 OF THE CONVENTION		
The Applicant reiterated that the requirements of Article 5 § 4 of the Convention were not met in that the proceedings concerning the review of his detention were not adversarial. Neither the Applicant nor his lawyer was entitled to be present before the court or to be acquainted with the arguments advanced by the prosecution in support of the Applicant's detention[6].	As to the substance of this part of the application, the Government admitted that during his detention on remand, the Applicant did not participate in the sessions concerning the review of his detention by the Warsaw Regional Court and Warsaw Court of Appeal. This was because the Code of Criminal Procedure, applicable at that time, did not allow for the presence of the detainee, or of his lawyer, at court sessions, where the lawfulness of his detention was examined.	The Court recalled that by virtue of Article 5 § 4, an arrested or detained person is entitled to bring proceedings for the review by a court of the procedural and substantive conditions which are essential for the "lawfulness", in the sense of Article 5 § 1, of his or her deprivation of liberty (see the *Brogan and Others v. the United Kingdom* judgment of 29 November 1988, Series A no. 154-B, p. 34, § 65). Although it is not always necessary that the procedure under Article 5 § 4 be attended by the same guarantees as those required under Article 6 § 1 for civil or criminal litigation (see, the *De Wilde, Ooms and Versyp v. Belgium* judgment of 18 June 1971, p. 42, § 78 in fine…), it must have a judicial character and provide guarantees appropriate to the kind of deprivation of liberty in question. It is essential that the person concerned should have access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation (see the *De Wilde, Ooms and Versyp v. Belgium* judgment, p. 41, § 76; …). In the present case, detention on remand was at that time imposed by a warrant of a prosecutor. An appeal to the court lay against a detention order. The law did not entitle either the Applicant himself or

6 Under Article 3 of the Code of Criminal Procedure of 1969 "organs conducting criminal proceedings [including a prosecutor] shall examine and take into account evidence in favour of as well as against the accused."

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		his lawyer to attend the court sessions held in proceedings instituted following such an appeal. Moreover, the law did not entitle either the Applicant himself or his lawyer to attend court sessions held in any other kind of subsequent proceedings concerning review of the lawfulness of detention, including proceedings in which the prolongation of his detention was being considered. What is more, the applicable provisions did not require the prosecutor's submissions in support of the Applicant's detention to be communicated either to the Applicant or to his lawyer. Thus, it was open to the prosecution to attend relevant court sessions and to make, in the absence of the suspect, any further submissions in support of the prolongation of the detention order, while neither the Applicant nor his counsel had any opportunity to be acquainted with them or to formulate any objections, or to comment thereon. In the Court's opinion, the Applicant's worsening state of health, which finally led to his death, was a factor which should have militated in favour of his appearing in person. There is a strong probability that the Applicant's presence could have convinced the authorities that he should to be released. In the light of the foregoing considerations, the Court concluded that the Applicant did not receive the benefit of procedure that was really adversarial. The Court found that the proceedings concerning review of the Applicant's detention did not fully comply with the guarantees afforded by Article 5 § 4.

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Table No. 4

ARTICLES ALLEGEDLY VIOLATED AND DAMAGE	COURT'S JUDGMENT
Article 5 § 3 of ECHR	**Violation (unanimous)**
Article 5 § 4 of ECHR	**Violation (unanimous)**
100,000 EUR for non-pecuniary damage was claimed. **No claim further reimbursement of legal costs and expenses**	**EUR 2,500 (two thousand five hundred euros) in respect of non-pecuniary damage, to be converted into Polish zlotys together with any tax that may be chargeable on the above amounts was granted.** **The remainder of the Applicant's claim for just satisfaction was dismissed.**

PART II -- STUDY OF THE JUDGEMENT OF THE EUROPEAN COURT

The right to liberty and security is considered one of the fundamental human rights. It is regulated by a number of international and regional human rights instruments.

Article 3 of *Universal Declaration of Human Rights* provides as follows[7].

> Everyone has the right to life, liberty and security of person.

Article 9 of *UDHR* states:

> No one shall be subjected to arbitrary arrest, detention or exile.

Articles 9.1, 9.4 and 9.5 of the *International Covenant on Civil and Political Rights*[8] provide as follows:

> 1. Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law....
>
> 4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.
>
> 5. Anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation.

Article 11, *ICCPR* provides as follows:

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7 Universal Declaration on Human Rights (hereinafter refereed to as "UDHR"), adopted and proclaimed by General Assembly resolution 217 A (III) of 10 December 1948.

8 International Covenant on Civil and Political Rights (hereinafter referred to as "ICCPR"), adopted and opened for signature, ratification and accession by General Assembly resolution 2200A (XXI) of 16 December 1966, entry into force 23 March 1976, in accordance with Article 49.

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No one shall be imprisoned merely on the ground of inability to fulfill a contractual obligation[9].

Article 5 *ECHR* provides 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 of reasonable suspicion of having committed and 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 unauthorized 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 the 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 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.
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.

9 According to Article 4 1 & 2 of ICCPR: "1. In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed, the States Parties to the present Covenant may take measures derogating from their obligations under the present Covenant to the extent strictly required by the exigencies of the situation, provided that such measures are not inconsistent with their other obligations under international law and do not involve discrimination solely on the ground of race, colour, sex, language, religion or social origin. 2. No derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision".

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Article 1 of Protocol No. 4 *ECHR* provides as follows:

> No one shall be deprived of his liberty merely on the ground of inability to fulfill a contractual obligation.

The right to liberty and security is protected by a number of international and regional human rights mechanisms, including but not limited to the United Nations Human Rights Committee, the European Court of Human Rights, the Special Representative on Human Rights Defenders, the African Commission on Human and People's Rights and the Inter-American Commission on Human Rights.

The right to liberty may apply to different scopes of relations to be regulated, in particular:

> The right to liberty may be invoked in respect of all deprivations of liberty, whether arising in relation to the application of criminal law, by reason of mental illness, vagrancy, drug addiction, or immigration control. While some particular elements of the rights are applicable only to persons against whom criminal charges have been brought, the rest, and in particular the important guarantee contained in ICCPR Article 9(4) to have a court control over the legality of the detention, applies to all persons deprived of their liberty by arrest or detention[10].

The rights to liberty and security are closely linked to each other. The right to liberty is more about the protection of the "physical liberty" given the scope of the rights and freedoms guaranteed by it. These rights include but are not limited to the following:

- the right not to be deprived of liberty except on such grounds and in accordance with such procedure as are established by law[11];
- the right not to be arbitrarily arrested, detained or exiled[12];
- the right to be brought promptly before a judge other officer authorised by law to exercise judicial power[13];
- the right to take proceedings for deciding the lawfulness of his detention[14];

The right to liberty also covers certain rights which deal with the treatment and respect of detainees as well as the right to be free from torture and cruel, inhumane and degrading treatment[15].

The right to security of the person, as described above, is closely linked with the right to liberty as well as the positive responsibilities of the state in respect of ensuring security and safety of people in the context of the implementation of the rights on the respect of family and personal life and the freedom of association, as well as other relevant rights.

10 United Nations Human Rights Committee [UNHRC]. (1982). General comment 6, Article 6, compilation of general comments and general recommendations adopted by Human Rights Treaty Bodies. (HRI\GEN\1\Rev.1 at 6 (1994). Geneva: Office of High Commissioner for Human Rights.

11 See Article 5(1) of ECHR. See also Article 9(1) of ICCPR.

12 See Article 9 of UDHR. See also Article 9 (1) of ICCPR and Article 5(1) of ECHR.

13 See Article 9 (3) of ICCPR. See also Article 5(3) of ECHR.

14 See Article 10 of UDHR. See also Article 9 (4) of ICCPR and Article 5(4) of ECHR.

15 See Article 5 of UDHR. See also Article 7 of ICCPR and Article 3 of ECHR.

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The right to security in person includes very important rights and freedoms which, applied together, ensure a fair trial and the right to liberty and security. In the broader sense, the right to liberty and security ensures that nobody is kept under unlawful or arbitrary detention; nobody is detained because he/she has exercised the rights and freedoms guaranteed by international instruments, including the ECHR, and that detention after trial is conducted in compliance with international standards for a fair trial.

Right to appear before a judge/the term "Officer" – Article 5(3) of ECHR

In the case of M.B. v. Poland the Applicant complained that he was deprived of his liberty by a decision of the Public Prosecutor and not of a "judge or other officer authorised by law to exercise judicial powers" as required by Article 5(3) of ECHR[16]. The Applicant also submitted that the Prosecutor was a representative of the executive. The independence of the judiciary is a key guarantee for any person(s) whose rights are exercised before a court, or any other authority entitled by the law to exercise "judicial powers". The principle on the independence of judiciary is prescribed by many international and regional instruments, including the UN Basic Principles on the Independence of the Judiciary[17], the "Judges' Charter in Europe"[18]; Recommendation No. R(94)12 of the Committee of Ministers of the Council of Europe to Member States on the Independence, Efficiency and Role of Judges[19]; the European Charter on the Statute for Judges of the Council of Europe[20] and the "Universal Charter of the Judge"[21]. All the mentioned documents are aimed at prescribing minimum requirements and basic principles for an independent judiciary.

Judicial independence, impartiality and efficiency are basic guarantees and requirements for the effective protection of the rights and freedoms, as well as the rights of a person deprived of his/her liberty by a decision of a competent authority, set forth in ECHR. The issue of "independence" of the judiciary has been interpreted by the European Court in a number of its judgments and the Court has found that independence from the executive and the parties are principal requirements for the independent judiciary[22]. A study of the case law of the European Court shows that the Court has also underlined certain attributes and conditions which should be in place in order for an "officer" to be considered the proper authority to

16 During the time when the case proceedings were held under the Polish legislation the Prosecutor had also the power to investigate the case and was to represent prosecution later in judicial proceedings.

17 UN Basic Principles on the Independence of the Judiciary, Adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985.

18 Judges' Charter in Europe, adopted on March 20th, 1993 in Wiesbaden (Germany) by the European Association of Judges, regional group of the International Association of Judges.

19 Recommendation No R(94)12 of the Committee of Ministers of the Council of Europe to Member States on the Independence, Efficiency and Role of Judges, adopted by the Committee of Ministers on 13 October 1994 at the 518th meeting of the Ministers' Deputies.

20 European Charter on the Statute for Judges of the Council of Europe, approved in Strasbourg on 8-10 July 1998.

21 "Universal Charter of the Judge", unanimously adopted in November 1999 in Taipei by the International Association of Judges International Association Of Judges.

22 See for example the judgment of the European Court on the case of Ringeissen v. Austria (1980).

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exercise judicial powers. Although an officer does not have to fully comply with the judicial powers of a judge nor be identical to a position of a "judge" both in terns of rights and responsibilities; however, certain minimum required attributes and conditions should be in place in order for "an officer" to be considered an authority capable of exercising judicial powers. In the case of *Schiesser v. Switzerland*[23] the European Court indicated:

> … The "officer" is not identical with the "judge" but must nevertheless have some of the latter's attributes, that is to say he must satisfy certain conditions each of which constitutes a guarantee for the person arrested.
>
> The first of such conditions is independence of the executive and of the parties….
>
> In addition, under Article 5 para. 3, there is both a procedural and a substantive requirement. The Procedural requirement places the "officer" under the obligation of hearing himself the individual brought before him…; the substantive requirement imposes on him the obligations of reviewing the circumstances militating for or against detention, of deciding, by reference to legal criteria, whether there are reasons to justify detention and of ordering release if there are not such reasons…[24]

The Court also considered other factors relevant in the mentioned judgment, such as the issues on whether or not the "officer" meets the requirements on the training and experience to exercise judicial powers[25].

Furthering later judgments, the European Court precisely identified the importance of the "officer" implementing judicial powers being independent and impartial. In the case of *Huber v. Switzerland*[26] the European Court indicated:

> …Clearly the Convention does not rule out the possibility of the judicial officer who orders the detention carrying out other duties, but his impartiality is capable of appearing open to doubt if he is entitled to intervene in the subsequent criminal proceedings as a representative of the prosecuting authority[27].

In the case of *Hube*r the Court, by referring to its several other judgments - in particular De *Jong, Baljet and Van Den Brink* - indicated that

> … the auditeur-militair, who had ordered the detention of the Applicants, could also be called upon to assume, in the same case, the role of prosecuting authority after referral of the case to the Military Court[28].

It is noticeable that as a result of the judgment on the case of *Huber*, the Zurich Code of Criminal Procedure was partially amended on 1 September 1991, the amends coming into force on 1 July 1992. According to the amendment, the Criminal Court and not the District

23 See the Judgment of the European Court on the Case of Schiesser v. Switzerland (26 October 1979).

24 Ibid at para 31.

25 Ibid at para 32.

26 See the judgment of the European Court on the case of Huber v. Switzerland (25 September 1990).

27 Ibid at para. 43.

28 Ibid at para. 42.

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Attorney will be competent to pass a decision as to the detention on remand of the persons charged (Resolution DH (91) 40 of 13 December 1991)[29].

A very similar judgment was reached in the case of *Niedbala v. Poland*[30], which the Court referred to while deciding the case of *M.B. v. Poland.* In the case of *Niedbala,* the Court again underlined the importance of an "officer" meeting certain conditions before exercising "judicial powers". The Court particularly indicated:

> … Before an "officer" can be said to exercise "judicial powers" within the meaning of this provision, he or she must satisfy certain conditions providing a guarantee to the person detained against any arbitrary or unjustified deprivation of liberty[31].

The Court then went further in terms of explaining the conditions and their specifics and indicated in particular:

> … Thus, the 'officer' must be independent of the executive and the parties. In this respect, objective appearances at the time of the decision on detention are material: if it appears at that time that the 'officer' may later intervene in subsequent criminal proceedings on behalf of the prosecuting authority, his independence and impartiality may be open to doubt. … The 'officer' must hear the individual brought before him in person and review, by reference to legal criteria, whether or not the detention is justified. If it is not so justified, the "officer" must have the power to make a binding order for the detainee's release. …[32]

In its judgments on the cases of *Nikolova v. Bulgaria*[33] and *Assenov and others v. Bulgaria*[34], the Court again indicated that the judicial control of interferences by the executive with the individual's right to liberty is an essential feature of the guarantee embodied in Article 5 § 3 and similarly an officer should meet the above mentioned conditions before exercising a judicial power.

The study of the case law of the European Court shows that the Court carefully considers certain conditions which should be in place when an "officer" is exercising a judicial power. These are considered the main guarantees for ensuring that individual's arrests or detention are not arbitrary and that he/she is treated in accordance with the minimum standards and principles set out in Article 5(3) of the Convention.

In its judgment on the case of *M.B. v. Poland* the Court followed the same procedure and referred to its earlier judgment in *Niedbala v. Poland*, when it considered whether under the Polish legislation at the material time the prosecutor could be regarded as a "judicial" officer endowed with the attributes of "independence" and "impartiality" required under Article 5(3) of ECHR. The Court found in that case that the prosecutor cannot be considered as "judicial" officer under the meaning of the Convention. Given that the facts of *M.B. v. Poland* were similar, the Court decided that in this case Article 5 (3) had also been violated.

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29 URL: http://www.echr.coe.int/eng/EDocs/EffectsOf Judgments.html

30 See the judgment of the European Court on the case of Niedbala v. Poland (4 July 2000).

31 Ibid at para. 48.

32 Ibid at para 49.

33 See the judgment of the European Court on the case of Nikolova v. Bulgaria (5 March 1999).

34 See the judgment of the European Court on the case of Assenov and others v. Bulgaria (28 October 1998).

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Right to Take Proceedings-- Article 5 (4) of the Convention

Article 5(4) of ECHR provides as follows:

> 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.

Article 9 (4) of ICCPR provides as follows:

> ... 4. Anyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings before a court, in order that court may decide without delay on the lawfulness of his detention and order his release if the detention is not lawful.

Article 5 of EHCR gives protection against arbitrary detention and can be used to challenge unjustified detention. In order to ensure that Article 5 is not breached, the proper procedures must be carefully followed. The right to initiate proceedings is a principal right of a person deprived of his/her liberty as prescribed by ECHR which will allow him/her to challenge the "lawfulness" of his/her detention in accordance with Article 5 (4) of ECHR.

The norms of the Convention and the case law of the European Court provide that Article 5(4) does not ensure any guarantees for the right to an appeal against decisions ordering or extending detention. It ensures the rights to challenge the lawfulness of the detention or arrest in terms of the compliance of the procedure to the requirements of Article 5(4), mainly in terms of having judicial character. In general it speaks of "proceedings" and not appeals. In the case of *De Wilde, Ooms and Versyp v. Belgium* the European Court stated:

> At first sight, the wording of Article 5 (4) (art. 5-4) might make one think that it guarantees the right of the detainee always to have supervised by a court the lawfulness of a previous decision which has deprived him of his liberty. The two official texts do not however use the same terms, since the English text speaks of "proceedings" and not of "appeal", "recourse" or "remedy" (compare Articles 13 and 26 (art. 13, art. 26)). Besides, it is clear that the purpose of Article 5 (4) (art. 5-4) is to assure to persons who are arrested and detained the right to a judicial supervision of the lawfulness of the measure to which they are thereby subjected; the word "court" ("tribunal") is there found in the singular and not in the plural…[35].

The study of the case law of the European Court shows that in many cases the right to take proceedings guaranteed by Article 5(4) overlaps with Article 5(3) and/or Article 5 (1) (a) particularly in cases when the provision of procedural guarantees, such as the issue of independence and impartiality of a court or a tribunal, as well as the term "officer" with respect of meeting the requirements for the exercise of "judicial powers", are examined. However, the Court made clear that:

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35 See the judgment of the European Court on the case of De Wilde, Ooms and Versyp v. Belgium (18 June 1971) para. 76.

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> … Where the decision depriving a person of his liberty is one taken by an administrative body, there is no doubt that Article 5 (4) (art. 5-4) obliges the Contracting States to make available to the person detained a right of recourse to a court; but there is nothing to indicate that the same applies when the decision is made by a court at the close of judicial proceedings. In the latter case the supervision required by Article 5 (4) (art. 5-4) is incorporated in the decision; this is so, for example, where a sentence of imprisonment is pronounced after "conviction by a competent court" (Article 5 (1) (a) of the Convention) (art. 5-1-a). It may therefore be concluded that Article 5 (4) (art. 5-4) is observed if the arrest or detention of a vagrant, provided for in paragraph (1) (e) (art. 5-1-e), is ordered by a "court" within the meaning of paragraph (4) (art. 5-4)[36].

In the case of *M.B. v. Poland* the Applicant divided its complaints under Article 5(4) of ECHR into two parts.

The first head of complaint:

Firstly, the Applicant complained that in the proceedings concerning his detention he was never brought before a judge, therefore he did not have an opportunity to challenge the points relied on by the prosecution in support of his detention.

The Government admitted that during his detention on remand, the Applicant did not participate in the sessions concerning the review of his detention by the Warsaw Regional Court and Warsaw Court of Appeal, by reason of the requirements of the Code of Criminal Procedure applicable at that time. The Code did not allow for the presence of the detainee or of his lawyer at court sessions, where the lawfulness of his detention was examined.

In reaching its judgment, the Court reaffirmed that by virtue of Article 5 (4), an arrested or detained person is entitled to bring proceedings for review of the procedural and substantive conditions which are essential for the “lawfulness”, in the sense of Article 5(1), of his or her deprivation of liberty. The Court relied on its earlier judgment, namely *Brogan and Others v. the United Kingdom* (29 November 1988), in support of its position. The Court indicated that, despite the fact that it is not always necessary that the procedure under Article 5(4) be attended by the same guarantees as those required under Article 6(1) for civil or criminal litigation, it must have a judicial character and provide guarantees appropriate to the kind of deprivation of liberty in question. The Court further confirmed that it is essential that the person concerned should have access to a court and the opportunity to be heard either in person or, where necessary, through some form of representation, failing which he will not have been afforded "the fundamental guarantees of procedure applied in matters of deprivation of liberty".

A study of the case law shows that the Court has adopted this approach in a number of its earlier judgments. In the case of *De Wilde, Ooms and Versyp v. Belgium*[37] a magistrate - in

36 Ibid. at para 76.

37 Ibid. at para 76.

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addition to being recognised as a judicial organ - was conferred a role similar to an administrative function in matters related to vagrancy under Belgian legislation. The Court found that the proceedings did not provide guarantees of judicial control which led the Court to conclude that Article 5(4) had been breached.

Correspondingly, in the case of *Winterwerp v. the Netherlands*[38] the Court reaffirmed its approach by indicating that the requirements of Article 5(4) will be met only:

> …on condition that "the procedure followed has a judicial character and gives to the individual concerned guarantees appropriate to the kind of deprivation of liberty in question"; "in order to determine whether a proceeding provides adequate guarantees, regard must be had to the particular nature of the circumstances in which such proceeding takes place[39].

In *Weeks v. UK*[40], where a prison inmate was sentenced to indeterminate life imprisonment under English law, the Court held that the elements used by the judges at the time of the initial pronouncement may evolve over time. Judicial review of the lawfulness of the deprivation of liberty must therefore be capable of being effected on each "recall" to prison, and at reasonable intervals during the detention[41].

A study of the further judgments shows that the Court also underlines the questions of the independence and impartiality of the courts and tribunals as a guarantee for effective protection of the right to take proceedings guaranteed by Article 5(4) of ECHR. In the case of *D. N. v. Switzerland*[42], the Court stated:

> … In examining the impartiality of R.W. in exercising his functions as judge rapporteur, the Court recalls that impartiality must be determined by a subjective test, that is on the basis of the personal conviction of a particular judge in a given case, and also by an objective test, that is ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect [43].

The second head of complaint:

The Applicant's second complaint under Article 5(4) concerned the violation of the principle of the equality of arms. The Applicant submitted that the requirements of Article 5(4) of the Convention were not met in that the proceedings concerning review of his detention were not adversarial, since neither he nor his lawyer were entitled to be present before the court or to be acquainted with the arguments advanced by the prosecution in support of the Applicant's detention.

The principle of "equality of arms" is an international legal concept and a very important guarantee for a fair trial. Equality of arms, which must be observed throughout the trial process, means that both parties are treated in a manner ensuring that they have a

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38 See the judgment of the European Court in the case of Winterwerp v. the Netherlands (24 October 1979).

39 Ibid at para. 57.

40 See the judgment of the European Court on the case of Weeks v. UK (2 March 1987).

41 Ibid at para. 58.

42 See the judgment of the European Court on the case of D.N. v. Switzerland (29 March 2001).

43 Ibid. at para. 44.

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procedurally equal position during the course of the trial, and are in an equal position to argue their case[44]. It also means that each party must be afforded a reasonable opportunity to present its case, under conditions that do not place it at a substantial disadvantage vis à vis the opposing party[45].

An examination of the European Court's judgment shows that the principle of "equality of arms" is applicable not only to Article 6 of ECHR (right to fair trial) but also to Article 5 (4) where the question of lawful detention or arrest is at stake i.e. in the early stage of the trial. In the case of Toth v. Austria the Court indicated:

> …In fact Mr. Toth did not have the opportunity to contest properly the reasons invoked to justify the continuation of his detention. Any questions by the Court of Appeal would have enabled the representative of the prosecuting authority to put forward his views; they could have prompted, on the part of the accused, reactions warranting consideration by the members of the court before they reached their decision. As the proceedings did not ensure equal treatment, they were not truly adversarial (see, mutatis mutandis, the *Sanchez-Reisse* judgment of 21 October 1986, Series A no. 107, p. 19, para. 51)[46].

A study of the further judgments shows that the Court went even further in terms of interpreting the scope of Article 5(4). In the case of *Nikolova v. Bulgaria*[47], the Court recalls the conditions for the form and content of lawfulness made by the judge.

> … arrested or detained persons are entitled to a review bearing upon the procedural and substantive conditions which are essential for the 'lawfulness', in the sense of the Convention, of their deprivation of liberty. This means that the competent court has to examine 'not only compliance with the procedural requirements set out in [domestic law] but also the reasonableness of the suspicion grounding the arrest and the legitimacy of the purpose pursued by the arrest and the ensuing detention.' (…) A court examining an appeal against detention must provide guarantees of a judicial procedure. The proceedings must be adversarial and must always ensure 'equality of arms' between the parties, the prosecutor and the detained person. (…) Equality of arms is not ensured if counsel is denied access to those documents in the investigation file which are essential in order effectively to challenge the lawfulness of his client's detention. (…) In the case of a person whose detention falls within the ambit of Article 5 § 1 (c), a hearing is required …[48]

A study of the case law shows that the Court considers the concept of "legality" while judging the compliance of arrest or detention to the requirements of Article 5(4) of ECHR, in particular the question on whether or not the domestic courts ensured, that the detained

44 See European Court judgments in the cases of Ofrer and Hopfinger, Nos. 524/59 and 617/59, Dec. 19.12.60, Yearbook 6, p. 680 and 696. See also Rule of Law, Fair Trial and Judicial Reform, International Committee for Human Rights, 2003. URL: http://www.ichr-law.org/english/expertise/areas/rule_of_law.htm

45 Amnesty International Fair Trials Manual; Amnesty International Publications 1 Easton Street, London WC1X 8DJ, United Kingdom. © Amnesty International Publications 1998, Paragraph 13.2. URL: http://www.amnesty.org/ailib/intcam/fairtrial/indxftm_b.htm

46 See the judgment of the European Court on the case of Toth v. Austria (1992), para. 84.

47 See the judgment of the European Court on the case of Nikolova v. Bulgaria (25 March 1999).

48 Ibid at para. 58.

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person had been provided with the opportunity “to question whether his detention is consistent with the national law and the Convention and is not arbitrary”[49]. One of the important factors to be considered is the existence of the procedures to enable detained or arrested persons to challenge the reasonableness of the suspicions about his/her having committed an offence. In the case of *Jėčius v. Lithuania* the European Court found:

> … The Court reiterates that Article 5 § 4 of the Convention entitles arrested or detained persons to a review bearing upon the procedural and substantive conditions which are essential for the “lawfulness”, in Convention terms, of their deprivation of liberty. This means that the competent court has to examine not only compliance with the procedural requirements of domestic law but also the reasonableness of the suspicion underpinning the arrest and the legitimacy of the purpose pursued by the arrest and the ensuing detention (see the Brogan and Others v. the United Kingdom judgment of 29 November 1988, Series A no. 145-B, pp. 34-35, § 65)[50].

Thus the principle of “fair trial” particularly the “equality of arms” and the right to be heard by the impartial and independent tribunal is vital while considering the “lawfulness” of the detention.

In the case of *Niedbala v. Poland*[51] ,the Court, by referring to the case of *Nikolova v. Bulgaria,* reaffirmed that “equality of arms” between the parties, the prosecutor and the detained person must be ensured, particularly when the appeal proceedings against detention order is being examined[52].

In the case in question, the Court followed its standing on the applicability of the principles of fair trial, include the principle of “equality of arms” while discussing the question of “lawfulness” of the detention. The Court indicated that the law did not entitle either the Applicant himself or his lawyer to attend the court in subsequent proceedings concerning review of the lawfulness of detention, including proceedings in which the prolongation of his detention was being considered. Moreover, the applicable provisions of the legislation did not require the prosecutor's submissions in support of the Applicant's detention to be communicated either to the Applicant or to his lawyer. The Court further added that it was open to the prosecution to attend relevant court sessions and to make, in the absence of the suspect, any further submissions in support of the prolongation of the detention order, whereas the Applicant and/or his counsel had no opportunity to be acquainted with them or to formulate any objections or pass comment. The Court also underlined the fact that the Applicant’s health condition, which finally led to his death, was a factor which should have militated in favour of his appearing in person: if he was allowed to attend the court hearing, this could have convinced the authorities that he should be released. In the light of the facts and the considerations, the Court concluded that the Applicant did not receive the benefit of an adversarial procedure.[53]. In other words, the Polish authorities did not ensure equality of arms in the courts while examining the case of the Applicant.

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49 Council of Europe, Guide to the Implementation of Article 5 of the European Convention on Human Rights, Monica Macovei, Human Rights handbook, Number 5.

50 See the judgment of the European Court in the case of Jėčius v. Lithuania (31 July 2000), para.100

51 See the judgment of the European Court on the case of Niedbala v. Poland (4 July 2000).

52 Ibid. at para. 66.

53 See the judgment of the European Court on the Case of M.B. v. Poland (27 July 2004), para. 66.

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Therefore the Court found that the proceedings concerning review of the Applicant's detention did not fully comply with the guarantees afforded by Article 5 (4) of ECHR.

PART III -- SIGNIFICANT FEATURES OF THE CASE

There are two very significant features which the European Court reaffirmed in the judgment of the case of *M.B. v. Poland*. These two issues are considered very important guarantees for persons deprived of liberty: the right to appear before a judge and the right to take proceedings under Article 5 of ECHR:

1. Right to Appear before a Judge/the term "officer": The Court reaffirmed the requirement that the "officer" must comply with certain conditions to be considered as a proper authority capable of exercising "judicial powers". Among the conditions the Court emphasised the following: a) the "officer" must be independent of the executive and of b) the "officer" must be independent of the parties, relying on its earlier judgment in *Niedbała v. Poland.* In the judgment of the case of M.B. v. Poland the Court stated:

> The Court recalls that in its judgment in the case of Niedbała v. Poland (no. 27915/95, §§ 48-57, 4 July 2000, unreported) it has already dealt with the question of whether under the Polish legislation at the material time a prosecutor could be regarded as a "judicial officer" endowed with the attributes of "independence" and "impartiality" required under Article 5 § 3. The Court found a violation of Article 5 § 3 in that case considering that a prosecutor did not offer these necessary guarantees[54].

This Analysis has already provided information on this and other attributes that the Court takes into account while deciding whether an "officer" meets all the conditions necessary to exercise judicial functions.

2. The Court reaffirmed the very important principle of challenging the "legality" of detention before a Court.

In the judgment in *M.B. v. Poland* the Court reaffirmed and underlined a number of principles which guarantee the exercise of the right of a person deprived of his/her liberty to take proceedings:

a) Arrested or detained persons have a right to take proceedings to review the procedural and substantive conditions which are essential for the "lawfulness", within the meaning of Article 5 of ECHR, of his/her deprivation of liberty[55];
b) Arrested or detained persons have a right to be heard in person or, where necessary, through some form of representation. In the case of *M.B.*, the Court underlined the importance of taking into consideration the health condition of a person deprived of his liberty[56];
c) The proceedings should be adversarial. This includes, but is not limited to the following rights and guarantees: the right to make known to the Court any evidence required for its claim to succeed; to have knowledge of, and challenge if necessary, any fact or evidence adduced or observed by the Court; the right to the principle of

54 Ibid. at para. 59.

55 Ibid. at para. 65.

56 Ibid. at para. 66.

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equality of arms[57]; the right of timely access to all relevant documents pertaining to the proceedings and speedily adoption of a decision; the right to calling and challenging witnesses in civil proceedings; the right to proper opportunity to present the case including calling evidence and challenging evidence called by their opponent[58];

d) The right to be heard by following the requirements of "fair trial" guaranteed by Article 6, in particular those related to impartiality and independence[59]. In the judgment of the case in question, the European Court, by accepting the fact that it is not always necessary that the procedure under Article 5(4) be attended by the same guarantees as those required under Article 6(1) for civil or criminal litigation, held that the proceedings which examine the lawfulness of the detention or arrest "must have a judicial character and provide guarantees appropriate to the kind of deprivation of liberty in question"[60].

e) The examination of the "lawfulness" of detention must have a "judicial character" within the meaning of Article 5(4) of ECHR[61].

These were the issues that the Court examined in the case of *M.B.*, finding that the proceedings concerning the review of the Applicant's detention did not fully comply with the guarantees prescribed by Article 5(4) of ECHR.

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57 The Principle of "Equality of Arms" means that the parties to the proceedings must be on an "equal footing"; that the parties must have equal access to records, case files and other relevant documents in the case.

58 Council of Europe, Guide to the Implementation of Article 5 of the European Convention on Human Rights, Monica Macovei, Human Rights handbook, Number 5. See also Rule of Law, Fair Trial and Judicial Reform, International Committee for Human Rights, 2003. URL: http://www.ichr-law.org/english/expertise/areas/rule_of_law.htm

59 See the judgment of the European Court on the case of M.B. v. Poland (27 July 2004), para. 65. See also Council of Europe, Guide to the Implementation of Article 5 of the European Convention on Human Rights, Monica Macovei, Human Rights handbook, No. 5, Section VI (1), page 60.

60 See the judgment of the European Court on the case of M.B. v. Poland (27 July 2004), para. 65.

61 Ibid.

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