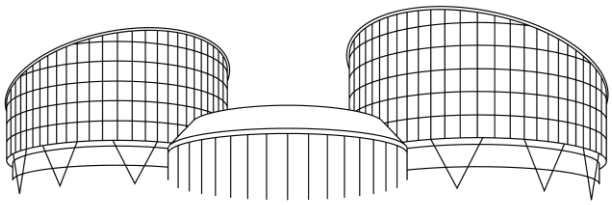

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIFTH SECTION

CASE OF OSTENDORF v. GERMANY

(Application no. 15598/08)

JUDGMENT

STRASBOURG

7 March 2013

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Ostendorf v. Germany,

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:

Mark Villiger, *President,*
Angelika Nußberger,
Boštjan M. Zupančič,
Ann Power-Forde,
Paul Lemmens,
Helena Jäderblom,
Aleš Pejchal, *judges,*

and Claudia Westerdiek, *Section Registrar,*

Having deliberated in private on 5 February 2013,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 15598/08) against the Federal Republic of Germany lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a German national, Mr Henrik Ostendorf ("the applicant"), on 20 March 2008.

2. The applicant was represented by Ms G. Pahl, a lawyer practising in Hamburg. The German Government ("the Government") were represented by one of their Agents, Mr H.-J. Behrens, *Ministerialrat,* of the Federal Ministry of Justice.

3. The applicant alleged, in particular, that that his detention for preventive purposes on 10 April 2004 in the context of a football match had breached his right to liberty under Article 5 of the Convention.

4. On 29 August 2011 the application was communicated to the Government.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1968 and lives in Bremen.

A. Background to the case

6. The applicant is a supporter of, *inter alia*, Werder Bremen football club, which plays in the German Federal Football League, and attends the club's football matches regularly.

7. Since 3 September 1996 the applicant has been registered by the Bremen police in a database on persons prepared to use violence in the context of sports events. Between 3 September 1996 and 24 May 2003 eight different incidents in the context of football games in which the applicant was considered to have been involved were listed. The applicant is further registered in a nation-wide database set up in 1994 on persons prepared to use violence in the context of sports events. In that database, persons are entered against whom criminal investigation proceedings were opened for offences in the context of sports events.

B. The applicant's arrest and detention

8. On 10 April 2004 the applicant and some thirty to forty other football fans travelled from Bremen to Frankfurt am Main by train in order to attend the match of Eintracht Frankfurt football club against Werder Bremen football club.

9. The Bremen police had previously informed the Frankfurt am Main police that some thirty to forty persons prepared to use violence in the context of sports events (so-called category C hooligans) planned to travel from Bremen to Frankfurt am Main.

10. On their arrival at Frankfurt am Main central station, the Frankfurt am Main police verified the identity of the members of the Bremen group of football fans. The majority of its members were considered by the police to be football hooligans prepared to use violence. The applicant had further been identified by the Bremen police as a "gang leader" of the Bremen hooligans. The police searched the members of the group and seized a mouth protection device and several pairs of gloves filled with quartz sand found on members of the group other than the applicant.

11. The group, placed under police surveillance, went to a pub. When the group left the pub, the police noted 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 arrested by the police there at approximately 2.30 p.m. and brought to the police station close to the football stadium; his mobile phone was seized.

12. The applicant was released at approximately 6.30 p.m. on the same day, one hour after the football match had ended. His mobile phone was returned to him on 15 April 2004.

C. The proceedings before the domestic authorities and courts

1. The decision of the president of the Frankfurt am Main Police

13. On 13 April 2004 the applicant lodged a complaint with the Frankfurt am Main Police Headquarters. He claimed that his detention on 10 April 2004 and the seizure of his mobile phone had been unlawful.

14. On 17 August 2004 the president of the Frankfurt am Main police dismissed the applicant's complaint. He found that the applicant's complaint was inadmissible. The applicant's detention constituted an administrative act which had become devoid of purpose by the lapse of time, as he had been released prior to lodging his complaint. Likewise, the seizure of his mobile phone had become devoid of purpose as the phone had been returned to him on 15 April 2004.

15. The president of the Frankfurt am Main Police further considered that, in any event, the applicant's complaint was also ill-founded. Relying on section 32 § 1 no. 2 of the Hessian Public Security and Order Act (see paragraph 33 below) 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". Having regard to the information available to the police, it had to be expected that there would be an altercation between hooligans from Bremen and from Frankfurt am Main in or in the vicinity of Frankfurt, which would entail the commission of criminal or regulatory offences, in the context of the football match. As a rule, the time and place of such altercations were agreed on in advance by the groups of hooligans concerned. The applicant was considered to have attempted to evade police surveillance in order to arrange an altercation between hooligans. He was known to the Bremen police as a "gang leader" of the Bremen hooligans. He had further been observed speaking to a hooligan from Frankfurt am Main in the pub. He had further attempted to hide in the ladies' bathroom of that pub. In order to prevent altercations between the groups of hooligans being arranged, it was indispensable to detain the applicant so as to separate him from the other members of the group. Furthermore, he could be released just one hour after the end of the football match, when the Frankfurt am Main and Bremen hooligans had left the stadium and its surroundings and were no longer in the applicant's vicinity.

16. Furthermore, the seizure of the applicant's mobile phone, based on section 40 no. 4 of the Hessian Public Security and Order Act (see paragraph 36 below), had been lawful. Having regard to the hooligans' usual practice, it had to be assumed that the applicant would use his mobile phone in order to contact other hooligans from Frankfurt am Main and Bremen in order to agree on the details of the hooligans' altercation. It had therefore been indispensable to seize the telephone and not to return it

immediately after the end of the football match in order to prevent such an altercation.

2. The judgment of the Frankfurt am Main Administrative Court

17. On 6 September 2004 the applicant, who was from then onwards represented by counsel, brought an action against the Land of Hesse in the Frankfurt am Main Administrative Court. He requested the court to declare that his detention on 10 April 2004 and the seizure of his mobile phone had been unlawful. He argued that he was not a "gang leader" of a group of football hooligans, had not planned to arrange an altercation between hooligans or to commit an offence and had therefore not posed a threat which would justify his detention. He had not hidden in the ladies' bathroom but had gone there because the men's bathroom had been in a state excluding its use.

18. On 14 June 2005 the Frankfurt am Main Administrative Court, having held a hearing, dismissed the applicant's action. It found that the applicant's detention on 10 April 2004 and the seizure of his mobile phone had been lawful and had not breached his rights.

19. The court had heard the applicant and a witness, police officer G., who had been present during the police operation on 10 April 2004. The latter had confirmed that the group from Bremen the police considered to be hooligans prepared to use violence had already consumed a considerable number of alcoholic beverages during the train trip. He had added that during a search of the members of the group in Frankfurt am Main, a mouth protection device and several pairs of gloves filled with quartz sand had been found, which were instruments typically used by hooligans during altercations. During these clashes, offences such as bodily assault and breach of the peace (*Landfriedensbruch* – that is, acts of violence against persons or things committed jointly by a crowd of people in a manner which endangers public safety) were committed on a regular basis. He had personally told the group that they would be accompanied to the football stadium by the police and that every person leaving the group would be arrested. He had considered the applicant to be the leader of the group at that time. When entering the ladies' bathroom, he had come across a man from Frankfurt who had claimed "to have nothing to do with the whole thing". When he had then found the applicant in a locked cubicle of the ladies' bathroom, the latter had not given any plausible explanation as to why he was there. When the applicant's mobile phone had then rung, it had displayed a male name and the addition "Ftm.".

20. The Administrative Court found that the applicant's detention for some four hours had been lawful under section 32 § 1 no. 2 of the Hessian Public Security and Order Act. It considered that in the circumstances of the case, it had been reasonable for the police to conclude that the applicant's detention had been necessary to prevent the commission of considerable

offences, such as bodily assault and breach of the peace. The applicant had attempted to evade police surveillance. As the applicant was a hooligan considered by the Bremen police to be a "gang leader" and was registered in a database of the Bremen police as a person prepared to use violence in the context of sports events, that conclusion had been appropriate. Moreover, it was a well-known practice of football hooligans, confirmed by witness G., to set up altercations. It was uncontested that the applicant had been in contact with a person considered by the police to be a hooligan from Frankfurt am Main.

21. The Administrative Court further considered that the seizure of the applicant's mobile phone had been lawful under section 40 no. 4 of the Hessian Public Security and Order Act. The applicant had had to be prevented from making arrangements for an altercation between hooligans both during his detention and directly after his release. It had not been possible to return the mobile phone to the applicant the next day as he did not live in Frankfurt am Main and had therefore been unable to pick it up on that day.

3. The decision of the Hessian Administrative Court of Appeal

22. On 1 February 2006 the Hessian Administrative Court of Appeal dismissed the applicant's request to be granted leave to lodge an appeal against the Administrative Court's judgment.

23. The Administrative Court of Appeal found that there were no serious doubts as to the correctness of the Administrative Court's judgment. It stressed that a person's detention, having regard to the serious restriction of the right to liberty it entailed, was only indispensable within the meaning of section 32 § 1 no. 2 of the Hessian Public Security and Order Act if concordant facts in the circumstances of the case warranted the conclusion that it was very likely that a criminal or regulatory offence would be committed in the imminent future by the person detained and that, thereby, the general public's interest in security would be seriously affected. The Administrative Court had convincingly found that, having regard to the circumstances and the information available, it had been reasonable for the police to assume that an altercation, entailing bodily assaults and breaches of the peace, between hooligans prepared to use violence had been imminent. It had further been reasonable for them to assume that the applicant's detention had been necessary to prevent such an altercation.

24. The Administrative Court of Appeal noted that at the time of the applicant's arrest, the Frankfurt am Main police had had at their disposal information transferred to it by the Bremen police that the applicant was member of a group of football fans prepared to use violence (so-called category C hooligans) and was known as a "gang leader" of that group. The transfer of such information was justified under the provisions of the Länder on data transfer between police authorities. In any event, it was the Bremen

police transferring the data in question, and not the Frankfurt am Main police receiving that information, which were responsible for the legality of the collection and transfer of the data in question. Therefore, the question whether the Bremen police had lawfully collected and stored data concerning the applicant was not to be determined in the present proceedings, which had been brought against the Land of Hesse, which was represented by the Frankfurt am Main Police Headquarters. Furthermore, the entries on the applicant in the database of the Bremen police had not been known to the Frankfurt am Main police on 10 April 2004 and the latter had not, therefore, based its assumptions concerning the applicant on those entries.

25. The Administrative Court of Appeal further did not share the applicant's view that, contrary to the Administrative Court's findings, the police could not reasonably have concluded that the applicant's detention was necessary to prevent the commission of an offence in the imminent future. The mere fact that the police had seized objects they had considered dangerous from the Bremen group of hooligans and that they had accompanied that group to the football stadium would not have sufficed to exclude an altercation between hooligan groups. Moreover, simply asking the applicant to rejoin the group of Bremen football supporters after he had been found by the police in the ladies' bathroom would not have been sufficient to prevent the risk of an altercation between hooligans being arranged. Likewise, the police had not been obliged to conclude that separating the applicant from the Bremen group of hooligans would be sufficient to prevent such an altercation. As had been confirmed by the applicant himself, such clashes did not, as a rule, take place in or close to the football stadium, but in different places.

26. The Administrative Court of Appeal further endorsed the Administrative Court's finding that it had been reasonable for the police to assume that the applicant, having been identified as a group leader prepared to use violence, would be personally involved in the altercation with the Frankfurt hooligans.

27. Finally, the Administrative Court of Appeal also confirmed that the police had been authorised to seize the applicant's mobile phone under section 40 no. 4 of the Hessian Public Security and Order Act. The applicant's telephone had been seized in order to prevent him from using it in order to commit an offence.

4. The decision of the Federal Constitutional Court

28. On 1 March 2006 the applicant lodged a constitutional complaint with the Federal Constitutional Court. He complained that his detention had breached his right to liberty. There had not been any reason to assume that he was about to commit a criminal offence. Furthermore, the administrative courts had wrongly refused to examine whether his registration in the

database of the Bremen police as a "gang leader" of persons prepared to use violence in the context of sports events was lawful. This registration led to him being prohibited by football clubs to enter football stadiums and to travel restrictions being imposed on him by the police during international football matches. Therefore, the fact that he had never been able to lodge an appeal against this registration had violated his right to liberty. Moreover, in the applicant's submission, the seizure of his mobile phone had violated the right to secrecy of telecommunications and his property rights under the Basic Law.

29. On 26 February 2008 the Federal Constitutional Court, without giving reasons, declined to consider the applicant's constitutional complaint (file no. 2 BvR 517/06).

II. RELEVANT DOMESTIC LAW

A. Provisions of the Hessian Public Security and Order Act

30. The Hessian Public Security and Order Act governs the powers of the Hessian police and administrative authorities to fulfil their duty to avert dangers to public security and order (see sections 1 and 3 of the Hessian Public Security and Order Act).

31. Section 11 of the Hessian Public Security and Order Act, on general powers, provides that the police may take the measures necessary to avert a danger to public security and order in individual cases unless the following provisions of the said Act provide for specific rules on their powers.

32. Under section 31 § 1 of the Hessian Public Security and Order Act, on banning orders (*Platzverweisung*), the police may temporarily ban a person from a place or prohibit a person from entering a place in order to avert a danger.

33. 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. This provision refers to the offences listed in the Criminal Code and in the Regulatory Offences Act. Under section 32 § 1 no. 3 of the said Act, a person may further be taken into custody if this is indispensable in order to enforce measures taken under section 31 of the said Act.

34. Section 33 § 1 of the Hessian Public Security and Order Act, on judicial decision, provides that where a person is detained on the basis of section 32 § 1 of the same Act, the police shall obtain, without delay, a judicial decision on the lawfulness and continuation of the deprivation of liberty. A judicial decision does not have to be obtained if it can be assumed that the decision would be made only after the grounds for the police measure ceased to exist.

35. Section 35 § 1 of the Hessian Public Security and Order Act, on the duration of deprivation of liberty, provides that a detained person shall be released as soon as the grounds for the police measure ceased to exist (no. 1) or twenty-four hours at the latest after his or her arrest if he or she has not been brought before a judge before that lapse of time (no. 2). The detained person shall equally be released if the continuation of the deprivation of liberty is declared unlawful by judicial decision (no. 3). The person concerned shall further be released in any case by the end of the day following his or her arrest at the latest if the continuation of the deprivation of liberty has not been ordered by judicial decision before that time. The judicial decision on detention under section 32 § 1 no. 2 must fix the maximum duration of detention which may not exceed six days (no. 4).

36. Section 40 no. 4 of the Hessian Public Security and Order Act provides that the police may seize an object if there are concrete reasons to assume that it will be used in order to commit a criminal or regulatory offence.

B. Provisions of criminal law

37. Under Article 125 of the Criminal Code, breach of the peace – or rioting – shall be punished with up to three years' imprisonment or a fine. A person is guilty of breach of the peace if he or she participates in acts of violence against persons or objects or in threats to persons to commit acts of violence which are committed by a crowd of people together in a manner posing a threat to public security. The same applies if the perpetrator encourages a crowd to commit such acts.

38. Article 223 of the Criminal Code, on bodily injury, provides that whoever physically assaults or damages the health of another person shall be liable to imprisonment of up to five years or a fine. Under Article 224 of the Criminal Code, on dangerous bodily injury, whoever causes bodily injury, in particular, by using a weapon or other dangerous instrument, by acting jointly with others or by a treatment posing a risk to life shall be liable to imprisonment from six months up to ten years, in less serious cases from three months to five years.

39. Article 231 of the Criminal Code, on participation in a brawl, provides that whoever takes part in a brawl or in an attack committed jointly by several persons shall be liable to imprisonment of up to three years or a fine for that participation alone if the death of a person or a serious bodily injury (Article 226 of the Criminal Code) was caused by that brawl or attack.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 5 OF THE CONVENTION

40. The applicant complained that his detention for preventive purposes in the context of the football match on 10 April 2004 had violated his right to liberty as provided in 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 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; ...
>
> 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. ..."

41. The Government contested that argument.

A. Admissibility

42. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

43. The applicant took the view that his detention had violated Article 5 § 1 of the Convention. He argued that the deprivation of his liberty failed to comply with any of the sub-paragraphs (a) to (f) of Article 5 § 1.

(i) Justification under sub-paragraph (c) of Article 5 § 1

44. The applicant submitted, in particular, that his detention could not have been "reasonably considered necessary to prevent his committing an offence" for the purposes of sub-paragraph (c) of Article 5 § 1. There had not been a sufficient suspicion that he had to be prevented from committing an unlawful act. The police's suspicion in this respect had only been based on his entry into the database of the Bremen police as a person prepared to use violence in the context of sports events. As the entries in that database were wrong and unlawful and as he had never been in a position to have examined his entry in that database before the domestic courts, the fact that he figured in that database could not have raised any sufficient suspicion that he was about to commit an offence. Without that unlawful entry into the police database, he would never have been taken into custody as a supposed gang leader of football hooligans. In any event, according to the information contained in that database, he had allegedly been involved in only ten incidents during a period of more than seven years and had been detained only once. Given the large number of football matches he had been present at, the small number of incidents did not justify his classification as a violent offender.

45. The applicant stressed that, in the factual circumstances of the case, the police's suspicion that the commission of a criminal offence by him had been imminent had been completely unfounded. He had separated from the group of Bremen football fans in the pub as he still had to pay and had to go to the bathroom which he had informed the police of. He had gone to the ladies' room as the men's room was in a poor state. A police officer and a male person from Frankfurt had approached him there and he had left the pub with the police without resistance before he had been taken into custody.

46. Moreover, the applicant argued that his detention had, in any event, been unnecessary. The police had had the situation fully under control. Due to their police surveillance and the previous seizure of objects considered as dangerous, the commission of any offence by the group of unarmed football fans would have been impossible. It would have been sufficient in order to avert a hooligan brawl prior to the match to escort the applicant together with the Bremen group of football fans to the football stadium or to simply separate him from the Bremen group and to seize his mobile phone without taking him into custody.

(ii) Justification under sub-paragraph (b) of Article 5 § 1

47. The applicant further argued that his detention had not been covered by sub-paragraph (b) of Article 5 § 1 either. It had neither been based on a court order nor had it been ordered to secure the fulfilment of any statutory obligation.

(b) The Government

48. The Government took the view that the applicant's custody had complied with Article 5 § 1 of the Convention. The applicant's detention, based on section 32 § 1 no. 2 of the Hessian Public Security and Order Act, had been lawful. It had further been justified under both sub-paragraph (c) and sub-paragraph (b) of Article 5 § 1.

(i) Justification under sub-paragraph (c) of Article 5 § 1

49. In the Government's submission, the applicant's detention had been justified under sub-paragraph (c) of Article 5 § 1 in the first place, as it had been "reasonably considered necessary to prevent his committing an offence". They stressed that the applicant had not yet committed a criminal offence as his preparatory acts arranging a hooligan brawl were not punishable under German law. However, the applicant had to been taken into custody by the police for preventive purposes as the police had reasonably considered his detention necessary in order to stop him from committing serious offences, in particular bodily injuries, breaches of the peace and participation in a brawl (Articles 223, 125 and 231 of the Criminal Code, see paragraphs 37-39 above), in the context of the football match.

50. The Government stressed that the applicant was a hooligan seeking violent altercations. Since the end of the 1980s, the applicant, who held right-wing extremist views and has worked for the right-wing National-Democratic Party of Germany (*Nationaldemokratische Partei Deutschlands*), has belonged to a group of nationalist football fans in Bremen classified by the police as "hooligans seeking violence" (so-called category C fans). He has been identified as one of the leaders of that group notably during a previous demonstration of hooligans against travel restrictions organised and animated by him. He has previously been convicted of breach of the peace in 1994 and criminal investigation proceedings were opened against him on a number of occasions, *inter alia*, for breaches of the peace and bodily injury.

51. In the Government's view, preventive police custody as that of the applicant was covered by sub-paragraph (c) of Article 5 § 1, despite the fact that it was not connected with criminal proceedings as required in the Court's current case-law, if it was indispensable to avert an imminent, specific criminal offence. This was confirmed by the wording of Article 5 § 1 (c), second alternative, which authorised detention of a person "when it is reasonably considered necessary to prevent his committing an offence". It was not necessary that the person concerned had already committed a criminal offence as this situation was covered by the first alternative of Article 5 § 1 (c) – detention "on reasonable suspicion of having committed an offence" – and the second alternative would be superfluous otherwise. Police custody for preventive purposes, which was only authorised as a

measure of last resort in order to avert imminent serious offences, also did not amount to arbitrary detention.

52. Furthermore, the State's duty flowing from Articles 2 and 3 of the Convention to protect the public from offences should be taken into account in the interpretation of Article 5 § 1 and militated in favour of an authorisation of preventive police custody under that provision.

53. The Government further argued that the fact that everyone detained in accordance with the provisions of paragraph 1 (c) of Article 5 § 1 was entitled, under Article 5 § 3 of the Convention, to "trial within a reasonable time" did not warrant the conclusion that Article 5 § 1 (c) only covered pre-trial detention. It was true that no criminal trial would be held in respect of persons held in police custody for preventive purposes as they were not accused of a criminal offence. However, the duty to bring a detainee promptly before a judge, as equally required by Article 5 § 3, also applied to persons in preventive police custody. The term "trial", in these circumstances, had to be understood as referring to the judicial decision on the lawfulness of the preventive police custody of the person concerned.

54. The Government stressed that the possibility to have recourse to such custody for preventive purposes was indispensable for the police in order to maintain public security and order. All German *Länder* therefore had provisions similar to those applicable in Hesse, which authorised custody for preventive purposes for a short period where this was indispensable to avert an imminent significant criminal or regulatory offence. The authorisation of custody for preventive purposes was particularly important in cases of imminent domestic violence or where there was a risk of clashes provoked by violent participants or counter-demonstrators in the context of demonstrations of right-wing or left-wing groups. Likewise, preventive police custody served to prevent persons ready to block the transport of casks for the storage and transport of radioactive material (CASTOR) on streets or by train from doing so. The weekly football matches of the German Federal football league and football championships, in particular, could no longer be carried out in a peaceful manner without taking recalcitrant hooligans provoking violent clashes with rival hooligans into preventive police custody. Finally, altercations between drunk persons in pubs or on fairs could often not be prevented without taking the person(s) concerned in preventive police custody.

55. Such preventive police custody was particularly important in Germany where, contrary to the applicable law in other Member States, criminal law punished acts by which an offence was prepared only in exceptional cases. Thereby, potential offenders were incited to give up their plans to commit an offence (without being punishable). However, in order to protect potential victims effectively, the police could not await the commission of an offence and the occurrence of serious damage prior to their intervening. It would, however, run counter to the protection of

fundamental rights if, in order for a preventive custody to comply with Article 5 § 1 (c) (first alternative), the State had to provide for more preparatory acts to be punishable under criminal law.

56. There had been no less intrusive means than the applicant's detention for a short duration in order to achieve the aim of crime prevention. The applicant no longer had to be brought before a judge as required by Article 5 § 3 as a court decision could not have been obtained before the end of the applicant's short detention. Requiring a court order would therefore have deprived the applicant of his liberty longer than necessary. The applicant had been free to obtain a court decision on the lawfulness of his detention after his release.

(ii) Justification under sub-paragraph (b) of Article 5 § 1

57. The applicant had further been arrested and detained in compliance with sub-paragraph (b) of Article 5 § 1 in order to secure the fulfilment of an obligation prescribed by law. Prior to his detention, the applicant had repeatedly been warned by the police, notably by police officer G., that the group of hooligans he had been part of would be escorted by the police on the way to the football stadium and that everyone who left that group might be arrested. It had been clear to the applicant that the police's order had been aimed at preventing arrangements of altercations with other hooligan groups. The applicant had failed to comply with the police's order, which had implemented his obligation prescribed by law – section 11 of the Hessian Public Security and Order Act (see paragraph 31 above) – to remain with the group and not to arrange an altercation. As it had been clear from his conduct that he would not comply with that order in the future, he had been taken into custody under section 32 § 1 no. 2 of the Hessian Public Security and Order Act.

58. The order had been lawful as there had been sufficient facts to indicate that the applicant – known to the police as a violence-seeking hooligan holding right-wing extremist views – had intended to evade the police escort in order to organise by mobile phone and take part in an altercation between hooligans supporting Eintracht Frankfurt football club and hooligans supporting Werder Bremen football club before or after the football match. The police could reasonably base that assumption on their surveillance of the applicant prior to his arrest. The applicant had been observed speaking to a hooligan from Frankfurt am Main and had given no plausible explanation why he had attempted to evade police surveillance by hiding in the ladies' toilets. The Government contested in particular that the applicant had informed the police that he still had to pay and to go to the restroom prior to leaving the group.

59. Moreover, the applicant had been identified by the Bremen police as the leader of a group of violence-seeking hooligans during many years of surveillance and criminal investigation proceedings had been opened for

related offences against him on several occasions. Furthermore, objects typically serving to attack or defend oneself during hooligan altercations had been found on members of the applicant's group. In addition, the police had generally experienced that hooligans, as a rule, fixed the time and place of altercations with rival hooligan groups in advance. During the altercation which the applicant had attempted to arrange, significant offences punishable under the Criminal Code, in particular bodily injuries, breaches of the peace and participation in a brawl, would have been committed by the applicant and the other hooligans involved.

60. The Government stressed in that context that, contrary to the applicant's view, the police's estimation that he had planned to organise an altercation between hooligans had not been based on the lawful entries concerning him in the database on violent football fans. At the time the Frankfurt am Main police had taken the applicant into custody, they had not been aware of those entries. The Bremen police had only informed them that the applicant was the leader of a group of violence-seeking hooligans travelling to Frankfurt. The police's view that he posed a threat to public security and his detention had not, therefore, been predetermined by his entry into that database.

61. The applicant's detention had also been proportionate. The applicant had persistently refused to comply with the police's orders. Moreover, there had been no effective alternative way to keep him under surveillance before and during the football match in order to prevent him from organising and taking part in an altercation between hooligans after the match. In particular, separating him from the group and seizing his mobile phone would have been insufficient to prevent him from organising a brawl with a different telephone. The duration of the custody of four hours had been the minimum period necessary as his detention had been necessary until the football match had been over and the hooligan groups had left the football stadium and its vicinity. The applicant's custody had served to prevent serious criminal offences and to maintain public order as no altercation between hooligans from Frankfurt and Bremen had taken place as a result of that custody.

62. The Government stressed that the police could not be expected to wait for the altercation to start before terminating it, which would have been very difficult, if not impossible, would necessitate a considerable number of police officers and entail dangers for life and limb of those officers as well as of uninvolved third persons. It would also not have sufficed to issue the applicant with a banning order under section 31 § 1 of the Hessian Public Security and Order Act (see paragraph 32 above). The banning order would have had to comprise the entire city of Frankfurt am Main as a hooligan altercation could have been organised anywhere within that city. The police would have been unable to control whether the applicant complied with such an order.

2. The Court's assessment

(a) Recapitulation of the relevant principles

(i) Deprivation of liberty

63. The Court reiterates that Article 5 § 1 protects the physical liberty of the person. It does not concern mere restrictions upon liberty of movement, which are addressed by Article 2 of Protocol no. 4 (see *Engel and Others v. the Netherlands*, 8 June 1976, § 58, Series A no. 22; *Guzzardi v. Italy*, 6 November 1980, § 92, Series A no. 39; and *Raimondo v. Italy*, 22 February 1994, § 39, Series A no. 281-A).

64. The Convention institutions have repeatedly found that being brought to a police station against one's will and being held in a cell amounted to a deprivation of liberty, even if the interference lasted for a relatively short duration (see, for instance, *Murray v. the United Kingdom* [GC], 28 October 1994, §§ 49 ss., Series A no. 300-A, concerning custody at an army centre for less than three hours for questioning; *Novotka v. Slovakia* (dec.), no. 47244/99, 4 November 2003 with further references, concerning one hour spent in police custody; *Shimovolos v. Russia*, no. 30194/09, §§ 49-50, 21 June 2011, concerning police custody of 45 minutes for questioning; see also *Witold Litwa v. Poland*, no. 26629/95, § 46, ECHR 2000-III, concerning confinement for six and a half hours in a sobering-up centre).

(ii) Grounds for detention

65. The Court reiterates that sub-paragraphs (a) to (f) of Article 5 § 1 contain an exhaustive list of permissible grounds for deprivation of liberty, and no deprivation of liberty will be lawful unless it falls within one of those grounds (see, *inter alia*, *Witold Litwa*, cited above, § 49; *Saadi v. the United Kingdom* [GC], no. 13229/03, § 43, ECHR 2008; and *Austin and Others v. the United Kingdom* [GC], nos. 39692/09, 40713/09 and 41008/09, § 60, ECHR 2012). Only a narrow interpretation of those exceptions is consistent with the aim of that provision, namely to ensure that no one is arbitrarily deprived of his liberty (see, among many others, *Shimovolos*, cited above, § 51).

66. Under the second alternative of sub-paragraph (c) of Article 5 § 1, the detention of a person may be justified "when it is reasonably considered necessary to prevent his committing an offence". Article 5 § 1 (c) does not, thereby, 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 propensity to unlawful acts. That ground of detention does no more than afford the Contracting States a means of preventing a concrete and specific offence (see *Guzzardi*, cited above, § 102; *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 liberty in an arbitrary fashion (see *Guzzardi*, cited above, § 102; and *M. v. Germany*, cited above, § 89).

67. Under the Court's well-established case-law, 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", a requirement which qualifies every category of detention referred to in Article 5 § 1 (c) (see *Lawless v. Ireland (no. 3)*, 1 July 1961, pp. 51-53, § 14, Series A no. 3; and, *mutatis mutandis*, *Engel and Others*, cited above, § 69; and *Jėčius v. Lithuania*, no. 34578/97, §§ 50-51, ECHR 2000-IX).

68. Sub-paragraph (c) thus permits deprivation of liberty only in connection with criminal proceedings (see *Ječius*, cited above, § 50). It governs pre-trial detention (see *Ciulla*, cited above, §§ 38-40). This is apparent from its wording, which must be read in conjunction both with sub-paragraph (a) and with paragraph 3, which form a whole with it (see, *inter alia*, *Ciulla*, cited above, § 38; and *Epple v. Germany*, no. 77909/01, § 35, 24 March 2005). Paragraph 3 of Article 5 states that everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of Article 5 shall be brought promptly before a judge – in any of the circumstances contemplated by the provisions of that paragraph – and shall be entitled to trial within a reasonable time (see also *Lawless (no. 3)*, cited above, pp. 51-53, § 14; and *Schwabe and M.G. v. Germany*, nos. 8080/08 and 8577/08, § 72, ECHR 2011 (extracts)).

69. Detention is further authorised under the second limb of sub-paragraph (b) of Article 5 § 1 to "secure the fulfilment" of an obligation prescribed by law. It concerns cases where the law permits the detention of a person to compel him to fulfil a specific and concrete obligation incumbent on him, and which he has until then failed to satisfy (see, *inter alia*, *Engel and Others*, cited above, § 69; *Guzzardi*, cited above, § 101; *Ciulla*, cited above, § 36; *Epple*, cited above, § 37; *A.D. v. Turkey*, no. 29986/96, § 20, 22 December 2005; and *Lolova-Karadzhova v. Bulgaria*, no. 17835/07, § 29, 27 March 2012).

70. 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; and *Iliya Stefanov v. Bulgaria*, no. 65755/01, § 72, 22 May 2008). That provision therefore does not justify, for example, administrative internment meant to compel a citizen to discharge his general duty of obedience to the law (see *Engel and Others*, cited above, § 69; and *Schwabe and M.G.*, cited above, § 73). Likewise, 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).

71. In order to be covered by Article 5 § 1 (b), the arrest and detention must further aim at or directly contribute to securing the fulfilment of the obligation and not be punitive in character (see already *Johansen v. Norway*, no. 10600/83, Commission decision of 14 October 1985, Decisions and Reports (DR) 44, p. 162; *Vasileva v. Denmark*, no. 52792/99, § 36, 25 September 2003; *Gatt v. Malta*, no. 28221/08, § 46, ECHR 2010; *Osypenko v. Ukraine*, no. 4634/04, § 57, 9 November 2010; and *Soare and Others v. Romania*, no. 24329/02, § 236, 22 February 2011). 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*, cited above, § 69; and *Johansen*, cited above, p. 162).

72. In addition, it is required that the nature of the obligation within the meaning of Article 5 § 1 (b) whose fulfilment is sought must in itself be compatible with the Convention (see already *McVeigh, O'Neill and Evans v. the United Kingdom*, nos. 8022/77, 8025/77 and 8027/77, Commission's report of 18 March 1981, DR 25, p. 15, § 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*, cited above, § 37; *Osypenko*, cited above, § 57; *Sarigiannis v. Italy*, no. 14569/05, § 43, 5 April 2011; and *Lolova-Karadzhova*, cited above, § 29).

73. 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 drawing such a balance (see *Vasileva*, cited above, §§ 37-38 with further references; *Iliya Stefanov*, cited above, § 72; *Gatt*, cited above, § 46; and *Soare and Others*, cited above, § 236).

(iii) Lawfulness of detention

74. The Court further reiterates that Article 5 § 1 of the Convention requires that any deprivation of liberty be "lawful", which includes the condition that it must be effected "in accordance with a procedure prescribed by law". The Convention here essentially refers back to national law and states the obligation to conform to the substantive and procedural rules thereof, but it requires in addition that any deprivation of liberty should be consistent with the purpose of Article 5, namely to protect

individuals from arbitrariness (see, *inter alia*, *Witold Litwa*, cited above, §§ 72-73; and *Vasileva*, cited above, § 32).

(b) Application of these principles to the present case

(i) Deprivation of liberty

75. The Court has to determine, first, whether the applicant's arrest and confinement in the context of the football match on 10 April 2004 amounted to a deprivation of liberty for the purposes of Article 5 § 1. It notes that the applicant was arrested by the police in a pub in Frankfurt am Main at approximately 2.30 p.m. and was brought to and detained in a police station against his will until approximately 6.30 p.m. in order to prevent him from committing an offence. Having regard to its case-law (see paragraph 64 above), the Court considers that, despite the relatively short duration of the detention, the applicant was thereby deprived of his liberty within the meaning of Article 5 § 1. The Government indeed did not contest this.

(ii) Ground for detention

76. That detention was justified only if it complied with one of the permissible grounds for a deprivation of liberty listed in sub-paragraphs (a) to (f) of Article 5 § 1.

(α) Justification under sub-paragraph (c) of Article 5 § 1

77. As the Government's argument focused on the compatibility of the applicant's custody for preventive purposes with sub-paragraph (c) of Article 5 § 1, the Court shall examine the compliance with that ground of detention first.

78. It is common ground between the parties that at the time of his arrest, the applicant had not yet committed a criminal offence under German law. He was not, therefore, detained "on reasonable suspicion of having committed an offence" within the meaning of the first alternative of Article 5 § 1 sub-paragraph (c). However, the second alternative of Article 5 § 1 (c) authorises the detention of a person also "when it is reasonably considered necessary to prevent his committing an offence". The applicant contested, in particular, that in the circumstances of the case, the police could reasonably have considered his custody necessary to prevent an offence.

79. The Court notes that the Frankfurt am Main police based their assessment that the applicant had been preparing and had planned to take part in a hooligan brawl and had thus prepared offences including bodily assault and breaches of the peace on a number of factual elements. Irrespective of the entries on the applicant in police databases, the Frankfurt am Main police had been informed by the Bremen police that the latter, who had been observing the applicant for several years, considered the applicant

as the leader of a group of football hooligans prepared to use violence. When searching the group of football supporters at Frankfurt am Main central station, the police had found a number of devices typically used in hooligan brawls on members of the applicant's group. The applicant had further been observed speaking to a hooligan from Frankfurt am Main in the pub. Despite the police's order to stay with the group which was to be escorted to the football stadium in order to prevent the arrangement or start of a hooligan brawl, the applicant had separated from the group and hidden himself in the ladies' restroom. It has not been proven in the proceedings before the domestic courts that the applicant had given any plausible explanation to the policeman having found him there at the relevant time as to why he had gone there (such as the poor state of the men's restroom). When his mobile phone then rang, it displayed a name from a person from Frankfurt am Main.

80. The Court is satisfied that, in these circumstances, the Frankfurt am Main police, who had not based their findings on entries on the applicant in a police database on persons prepared to use violence in the context of sports events (see paragraph 24 above), had had sufficient facts and information which would satisfy an objective observer that the applicant was planning to arrange and take part in a hooligan brawl in or around Frankfurt am Main, during which concrete and specific criminal offences, namely bodily assaults and breaches of the peace, would be committed (see, *a contrario*, *Shimovolos*, cited above, § 55, where a vague reference to "offences of an extremist nature" to be committed by a human rights activist who was to take part in an opposition rally was considered as not specific enough to satisfy the requirements of Article 5 § 1 (c)). His detention could thus be classified as effected "to prevent his committing an offence".

81. As regards the question whether the applicant's detention was "reasonably considered necessary" (see for the definition of "reasonableness", *mutatis mutandis*, *Fox, Campbell and Hartley v. the United Kingdom*, 30 August 1990, § 32, Series A no. 182; *O'Hara v. the United Kingdom*, no. 37555/97, § 34, ECHR 2001-X; and *Labita v. Italy* [GC], no. 26772/95, § 155, ECHR 2000-IV) in order to avert the commission of those offences, the Court observes that according to the police's experience, which is not contested by the applicant, hooligan brawls are usually arranged in advance, but do not take place inside or close to the football stadium. The Court is therefore satisfied that seizing the applicant's telephone alone and possibly separating him from his group, would not have been sufficient in itself to prevent him from arranging a brawl since he could have had access to another telephone. Moreover, the detention lasted some four hours, and only until approximately one hour after the end of the football match, when the football supporters had left the stadium and its surroundings and a brawl had thus become unlikely. The police could reasonably consider in these circumstances that the applicant's

detention for a relatively short duration was necessary to prevent his committing an offence (see, *a contrario*, *Schwabe and M.G.*, cited above, §§ 76-78).

82. 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". Under its long-established case-law, the second alternative of Article 5 § 1 (c) therefore only governs pre-trial detention and not custody for preventive purposes without the person concerned being suspected of having already committed a criminal offence (see paragraphs 66-68 above).

83. Having regard to the legal basis of the applicant's detention – section 32 § 1 no. 2 of the Hessian Public Security and Order Act, a provision aimed exclusively at preventing and not at prosecuting offences – and the reasons given by the domestic authorities and courts for his custody, it is, however, clear that the aim of his detention was purely preventive from the outset. As noted above, it is indeed uncontested that the applicant in the present case was not suspected of having committed a criminal offence as his preparatory acts were not punishable under German law. 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 to a criminal trial.

84. The Court notes that the Government advocated a revision of the Court's case-law on the scope of Article 5 § 1 (c) in this respect. It agrees with the Government that the wording of the second alternative of sub-paragraph (c) of Article 5 § 1, in so far as it permits detention "when it is reasonably considered necessary to prevent his committing an offence", would cover purely preventive police custody in order to avert imminent specific serious offences which is here at issue.

85. However, 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. Sub-paragraph (c) of Article 5 § 1 requires that the detention of the person concerned is "effected for the purpose of bringing him before the competent legal authority" and under Article 5 § 3 that person is "entitled to trial within a reasonable time". As the Court has confirmed in its case-law on many occasions, the second alternative of Article 5 § 1 (c) is consequently only covering deprivation of liberty in connection with criminal proceedings. In particular, contrary to the Government's submission, the term "trial" does not refer to a judicial decision on the lawfulness of the preventive police custody. Those proceedings are addressed in paragraph 4 of Article 5.

86. The Court further observes that, contrary to the Government's view, the second alternative of Article 5 § 1 cannot be considered as superfluous in addition to the first alternative of that provision (detention "on reasonable suspicion of having committed an offence"). A 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. That person may then be brought before a judge and be put on a criminal trial, for the purposes of Article 5 § 3, in respect of the punishable preparatory acts to the offence.

87. The Court further takes note of the Government's argument that the State's obligation under Articles 2 and 3 of the Convention to protect the public from offences should be taken into account in the interpretation of Article 5 § 1 and warranted an authorisation of preventive police custody under that provision. It reiterates in this respect that the Convention obliges State authorities to take reasonable steps within the scope of their powers to prevent threats to life or ill-treatment of which they had or ought to have had knowledge, but it does not permit a State to protect individuals from criminal acts of a person by measures which are in breach of that person's Convention rights, in particular the right to liberty as guaranteed by Article 5 § 1. That provision can thus be said to contain all grounds on which a person may be deprived of his liberty in the public interest, including the interest in protecting the public from crime (see *Jendrowiak v. Germany*, no. 30060/04, §§ 37-38, 14 April 2011). The State's positive obligations under different Convention Articles do not, therefore, as such warrant for a different or wider interpretation of the permissible grounds for a deprivation of liberty exhaustively listed in Article 5 § 1.

88. The Court is aware 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, as set out by the Government (see paragraph 54 above). It reiterates that 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 Article 5, which is to protect the individual from arbitrariness (see *Austin and Others*, cited above, § 56).

89. Nevertheless, as outlined above, it follows from the Court's long-standing interpretation of Art. 5 § 1 (c) that the applicant's detention cannot be justified under this sub-paragraph. The Court considers, however, that Article 5 § 1 of the Convention, and in particular its sub-paragraph (b), leaves room for custody for preventive purposes in the limited circumstances set out in it.

(*β*) Justification under sub-paragraph (b) of Article 5 § 1

90. The Court must therefore examine whether, as has also been argued by the Government, the applicant's detention was justified under the second limb of Article 5 § 1 (b) "in order to secure the fulfilment of an[y] obligation prescribed by law". As established in the Court's case-law (see paragraph 69 above), it is necessary for a detention to fall under that permissible ground for a deprivation of liberty, firstly, that the law permits the detention of the person concerned to compel him to fulfil a specific and concrete obligation incumbent on him, which he has until then failed to satisfy.

91. The Court notes in this respect that the applicant's detention was ordered by the police under section 32 § 1 no. 2 of the Hessian Public Security and Order Act. Under that provision, the police was entitled, as a measure to avert an imminent danger, to take a person into custody if this was indispensable to prevent the imminent commission of a criminal offence of considerable importance to the general public (see paragraph 33 above). 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 10 April 2004 in the city of Frankfurt or its vicinity and from committing offences including bodily assaults and breaches of the peace during that brawl.

92. In determining whether this obligation incumbent on the applicant – to keep the peace by not setting up and taking part in a hooligan brawl at the said time and place – can be considered as sufficiently "specific and concrete" for the purposes of sub-paragraph (b) of Article 5 § 1, the Court shall have regard to the obligations which it previously considered as falling within the ambit of that ground for detention. It has found, for instance, that the duty to comply with a banning order was, in principle, an obligation covered by that provision (see *Epple*, cited above, §§ 36-38). Likewise, the Court considered that the statutory obligation to give evidence as a witness was sufficiently specific and concrete for the purposes of Article 5 § 1 (b) and could thus be enforced by detention in a police station (see, in particular, *Iliya Stefanov*, cited above, §§ 73-75; and *Soare and Others*, cited above, §§ 234-239). The same holds true for detention in order to enforce a statutory obligation to disclose one's identity to the police (see, *inter alia*, *Vasileva*, cited above, §§ 35, 38; *Novotka*, cited above; and *Sarigiannis*, cited above, §§ 42-44) and (proportionate) detention to secure a person's presence at a court hearing (see *Lolova-Karadzhova*, cited above, §§ 31-32). Furthermore, the Court has considered the obligations to perform one's civilian service (see *Johansen*, cited above, p. 162) or to pay a guarantee in the case of breach of one's bail conditions (see *Gatt*, cited above, § 47) as sufficiently concrete and specific so as to fall under sub-paragraph (b) of Article 5 § 1.

93. In the Court's view, these examples illustrate that the "obligation" under Article 5 § 1 (b) must be very closely circumscribed. It follows that the obligation here at issue, namely, to keep the peace by *not* committing a criminal offence can only be considered as "specific and concrete" for the purposes of that provision if the place and time of the imminent commission of the offence and its potential victim(s) have been sufficiently specified. The Court is satisfied that this was the case here. The applicant was to be prevented from arranging a brawl between Bremen and Frankfurt am Main hooligans in the hours before, during or in the hours after the football match on 10 April 2004 in the city of Frankfurt or its vicinity and from committing offences including bodily assaults and breaches of the peace during such a brawl.

94. Moreover, prior to his detention, the applicant must have failed to fulfil his obligation to keep the peace by not committing a specific and concrete offence. In cases in which this type of obligation is at issue, it is sufficient if the applicant has taken clear and positive steps which indicate that he will not fulfil his obligation. The Court considers that this requirement bears special importance in the context of a duty to refrain from doing something such as the one in issue here, as distinct from a duty to perform a specific act (such as leaving a place, appearing in court, giving evidence as a witness or disclosing one's identity). 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 so doing.

95. 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 and who were to be escorted by the police to the football stadium. 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 escorted on their train trip from Bremen to Frankfurt and had 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 considers 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 or its vicinity on the day in question (compare, *a contrario*, *Schwabe and M.G.*, cited above, § 82).

96. Furthermore, the Court is satisfied that the domestic authorities could reasonably conclude that the applicant, by trying to evade police

surveillance and by entering into contact with a hooligan from Frankfurt am Main, was attempting to arrange a hooligan brawl. By taking these clear and positive steps or preparatory acts, the applicant had shown that he was not willing to comply with his obligation to keep the peace by refraining from arranging and/or participating in the altercation at issue.

97. The Court must verify, secondly, whether the applicant's detention was aimed at or directly contributed to securing the fulfilment of the obligation and was not punitive in character. It finds that the applicant's detention indeed served the purpose of preventing him from arranging and taking part in a hooligan brawl. His separation from the two groups of hooligans by his custody and his inability to contact any of them made it impossible for him to commit bodily assaults and breaches of the peace or to incite others to do so on 10 April 2004. The Court further notes that the legal basis for the order of the applicant's detention was a provision of the Hessian Public Security and Order Act, which governs the powers of the Hessian police in order to fulfil their duty to avert dangers to public security and order (see paragraphs 30 and 33 above). The police thus did not act under the provisions of the Criminal Code or the Code on Criminal Procedure for the purpose of prosecuting offences. Moreover, the Court notes that no criminal investigation proceedings were opened against the applicant in relation to his acts on 10 April 2004. His detention did not, therefore, have a punitive character.

98. The Court considers, thirdly, that the nature of the obligation whose fulfilment is sought – namely the duty not to arrange and take part in a hooligan brawl at the said time and place and not to commit bodily assaults and breaches of the peace in the course of that brawl – was itself compatible with the Convention.

99. Fourthly, for an obligation falling under the second limb of Article 5 § 1 (b), the basis for detention ceases to exist as soon as the relevant obligation has been fulfilled. In the present case, the applicant was under an obligation not to commit bodily assaults and breaches of the peace in the course of a brawl arranged by him between Bremen and Frankfurt am Main hooligans in the hours before, during or in the hours after the football match on 10 April 2004 in the city of Frankfurt or its vicinity.

100. The Court observes that in the case of a duty *not* to commit a specific offence at a certain time and place – as opposed to a duty to perform a specific act – it is difficult for an applicant to prove prior to the lapse of the time at which the offence was to be committed that he or she complied with that duty. The obligation at issue must be considered as having been "fulfilled", for the purposes of Article 5 § 1 (b), at the latest when it ceased to exist by lapse of the time at which the offence at issue was to take place. The Court would not exclude that, depending on the circumstances of a case, a person could show prior to the moment the offence at issue was to take place that he or she was no longer willing to

commit that offence – for instance by offering to leave and to stay away from the place of the planned offence and by supplying proof thereof. In such circumstances, such a person's detention would then have to be terminated forthwith in order to comply with Article 5 § 1 (b). In the present case, however, there is nothing to suggest that during his time in custody the applicant had given any indication of his willingness to comply with his duty to keep the peace by not arranging and/or participating in a hooligan brawl. Consequently, in these circumstances, it must be concluded that his obligation was "fulfilled" for the purposes of Article 5 (1) (b) insofar as it ceased to exist once the football match had ended and other football hooligans had been dispersed so that a brawl in Frankfurt could no longer have been arranged. At that moment, he ought to have been released and so he was.

101. Finally, the Court has to determine whether a due balance has been 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 paragraph 73 above). It considers 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 on a large scale, posing a considerable threat to the security of uninvolved third persons, was an important obligation incumbent on him in the public interest. The Government stressed – and this was uncontested by the applicant – that the police was obliged, nowadays, to avert hooligan brawls both during the weekly football matches of the German Federal Football League and during football championships (see paragraph 54 above). The obligation not to hinder the peaceful running of such a sports event involving large numbers of spectators and to protect the public from dangers notably to their physical integrity was therefore a weighty duty in the circumstances of the case.

102. Moreover, the Court is satisfied that the applicant, aged 35 at the time of his arrest, could reasonably have been considered by the police to have been the leader of the Bremen group of hooligans and that he had shown himself to be unwilling to comply with his duty to keep the peace by not organising a brawl between rival hooligans. As for the duration of his detention of some four hours, the Court, referring to its findings above (see paragraph 81), considers that the applicant had not been detained for longer than was necessary in order to prevent him from taking further steps towards organising a hooligan brawl in or in the vicinity of Frankfurt am Main on 10 April 2004. The applicant's detention at issue was, therefore, proportionate to the aim of securing the immediate fulfilment of his obligation at issue.

103. It follows that the applicant's deprivation of liberty was justified under the second limb of Article 5 § 1 (b).

(iii) Lawfulness of detention

104. The Court further considers that the applicant's detention, based on section 32 § 1 no. 2 of the Hessian Public Security and Order Act, was lawful and effected in accordance with the procedure prescribed by domestic law. This was indeed not contested by the parties.

(iv) Conclusion

105. Having regard to the foregoing, the Court concludes that, the applicant's detention having complied with sub-paragraph (b) of Article 5 § 1, there has been no violation of Article 5 § 1 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

106. The applicant further complained of a violation of his right to a fair and public hearing within a reasonable time in connection with his unjustified and unlawful entry in the Bremen police database as a person prepared to use violence in the context of sports events. He relied on Article 6 of the Convention.

107. The Court notes that the applicant, as the Hessian Administrative Court of Appeal has already set out (see paragraph 24 above), failed to bring any court proceedings in respect of his registration in a database of the Bremen police against that competent authority. Consequently, this part of the application must be rejected for non-exhaustion of domestic remedies, in accordance with Article 35 §§ 1 and 4 of the Convention.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the complaint under Article 5 of the Convention concerning the applicant's detention for preventive purposes admissible and the remainder of the application inadmissible;

2. *Holds* that there has been no violation of Article 5 § 1 of the Convention.

Done in English, and notified in writing on 7 March 2013, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek	Mark Villiger
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 Lemmens and Jäderblom is annexed to this judgment.

M.V.
C.W.

CONCURRING OPINION OF JUDGES LEMMENS AND JÄDERBLOM

1. We voted with the Chamber in finding that there has been no violation of Article 5 § 1 of the Convention. However, we cannot subscribe to the reasoning in the judgment. Unlike the majority, we consider that Article 5 § 1 (b) of the Convention is not applicable to the applicant's detention. However, again unlike the majority, we consider that it can be justified under Article 5 § 1 (c) of the Convention. Paradoxically, we concur in the overall conclusion.

2. The starting point of our analysis is formed by the facts of the case.

The applicant was arrested and detained for about four hours. There was no written order spelling out the reasons for his arrest. However, when the president of the Frankfurt am Main police examined the applicant's complaint, he stated that the detention was based on section 32 § 1 no. 2 of the Hessen Public Security and Order Act (see paragraph 15 of the judgment).

Section 32 §1 reads as follows:

> "1. The police authorities can take a person in custody, when this
>
> ...
>
> is indispensable , in order to prevent ("*verhindern*") the imminent commission or continuation of a criminal act or regulatory offence of considerable importance to the general public,
>
> is indispensable, in order to enforce measures taken under section 31, or
>
> ..."

Section 31, to which section 32 § 1 no. 3 refers, concerns banning orders ("*Platzverweisung*"). It gives the relevant authorities, including the police, the power to ban a person from a place or to prohibit a person from entering a place, in order to avert a danger (§ 1). The same authorities can also prohibit a person from entering a specific territory within a municipality or from staying there, when there are reasons to consider that the person will commit a criminal act on that territory (§ 3).

The applicant was detained on the basis of no. 2 of section 32 § 1 only. At no point during the domestic proceedings was no. 3 of section 32 § 1 invoked. We conclude that the applicant was detained in order to prevent him from committing specific criminal acts and regulatory offences, namely those that would be committed during an altercation between hooligans from Bremen and from Frankfurt am Main (see paragraph 91). He was not detained in order to enforce any order that would imply him being banned from entering the football stadium. Nor was he detained for the mere fact that he had left his group, which was under police surveillance on the way to the stadium.

It is on the basis of these facts that we will proceed to examine whether his detention could be justified under Article 5 § 1 of the Convention.

3. We will start with the provision that the majority considers applicable in the present case, namely Article 5 § 1 (b). This provision allows for the deprivation of liberty if it is "the lawful arrest or detention of a person (...) in order to secure the fulfilment of any obligation prescribed by law".

The majority considers that the applicant was under the specific and concrete obligation not to commit the criminal offence of setting up and taking part in a hooligan brawl at a specific time and place (paragraphs 92 and 93). In disobeying the police order to stay with the group of football supporters he belonged to, the applicant had failed to fulfil his obligation (see paragraph 95). The legal obligation followed, according to the majority, from section 32 § 1 no. 2 of the Hessen Public Security and Order Act (paragraph 91).

We agree with the majority's finding that the police took the applicant into custody in order to prevent him from committing criminal acts or regulatory offences and that there was a legal basis for that in the Hessian Act. However, we cannot accept that the deprivation of the applicant's liberty was thus made in order to secure the fulfilment of an obligation prescribed by law, within the meaning of Article 5 § 1 (b) of the Convention.

The reason for this is that the Hessen Act does not specify any obligation which the applicant failed to fulfil. Notwithstanding that the police had specifically ordered the applicant to refrain from arranging a brawl and to stay with his group of football fans, the obligation not to commit criminal acts or regulatory offences (see section 32 § 1 no. 2 of the Hessen Public Security and Order Act) is in our opinion too general for the purpose of Article 5 § 1 (b) of the Convention. There should be a specific and concrete obligation, and a demonstrated failure to fulfil that specific and concrete obligation. The "general duty of obedience to the law" is not such a specific and concrete obligation (*Engel and Others v. Netherlands*, 8 June 1976, p. 28, § 69, Series A no. 22). All the examples in the Court's case law, referred to in paragraph 92 of the judgment, concern obligations to perform specific acts. To the best of our knowledge the Court has never considered that an obligation to refrain from committing criminal acts could constitute an "obligation" within the meaning of Article 5 § 1 (b) of the Convention. The majority considerably extends the scope of that provision by holding that the duty not to commit a criminal offence in the imminent future, to be distinguished from the obligation to comply with a specific measure that has been ordered, is an obligation which, in case of non-fulfilment - or even, as in the present case, in case of the mere risk of non-fulfilment -, falls under it (compare *Schwabe and M.G. v. Germany*, nos 8080/08 and 8577/08, § 82, 1 December 2011). We think, as the Court held in the *Engel* case, that such "a wide interpretation would entail consequences incompatible with the

notion of the rule of law from which the whole Convention draws its inspiration" (*ibid.*, p. 28, § 69).

Things might have been different if a specific banning order had been imposed on the applicant, if he did not comply with that measure, and if in order to enforce compliance with that specific and concrete measure he would have been detained (see, *e.g.*, *Epple v. Germany*, no. 77909/01, § 36, 24 March 2005). However, as indicated above, a banning order has never been imposed on the applicant. There was no other obligation to fulfil than the general obligation - imposed by law, not by an individual measure - not to commit certain crimes and regulatory offences. This general obligation did not, in our opinion, become specific and concrete, merely because the applicant was reminded of it in the context of a specific football match.

We therefore consider that Article 5 § 1 (b) of the Convention does not apply.

4. It should be underlined that the applicant was detained in order to *prevent* him from committing criminal acts and regulatory offences. As indicated above, this was acknowledged by the president of the Frankfurt am Main police, who explicitly referred to section 32 § 1 no. 2 of the Hessen Public Security and Order Act. The preventive purpose of the detention naturally raises the question whether it could be justified under Article 5 § 1 (c) of the Convention. That is indeed the provision dealing specifically with detention for the purpose of prevention.

We note that the majority accepts that the applicant's detention was effected for the purpose of preventing him from committing an offence, and that the police could consider his detention reasonably necessary to achieve that aim (paragraphs 80 and 81). On these points we agree with the majority.

However, the majority is of the opinion that, while the detention in the present case fell within the scope of Article 5 § 1 (c) of the Convention, it could not be justified under that provision. For the majority, it follows from the wording of that provision, in conjunction with Article 5 § 3, that a preventive detention can be justified only if it is "effected for the purpose of bringing (the arrested or detained person) before the competent legal authority" (Article 5 § 1 (c)), understood in the sense of bringing him to trial (see Article 5 § 3) (paragraphs 67-68 and 82). The majority specifies that a preventive detention is permitted only "in connection with criminal proceedings" (paragraph 68, referring to *Ječius v. Lithuania*, no. 34578/97, § 50, ECHR 2000-IX). Since the applicant was not suspected of having committed any criminal act, as preparatory acts were not punishable under German law, he was not arrested and detained for prosecution purposes. For that reason, according to the majority, his detention did not comply with one of the conditions set forth in Article 5 § 1 (c) (paragraph 83). It is on this point that we respectfully disagree.

We do not question the majority's reliance on the current case law of the Court. That case law indeed confirms that Article 5 § 1 (c) only permits deprivation of liberty "in connection with criminal proceedings" (*Ciulla v. Italy*, 22 February 1989, p. 16, § 38, Series A no. 148; *Epple v. Germany*, cited above, § 35; *Schwabe and M.G. v. Germany*, cited above, § 72). This means that a preventive detention is possible "only in the context of criminal proceedings, for the purpose of bringing (a person) before the competent legal authority on suspicion of his having committed an offence" (*Ječius v. Lithuania*, cited above, § 50). In our view this case law has gone too far in holding that the requirement in Article 5 § 1 (c) of bringing the arrested or detained person "before the competent legal authority" means, in all of the situations set out in that provision, that the intention should be to bring "criminal proceedings" against that person. We think that in situations where there is a vital public interest in preventing someone from committing an offence a limited possibility does exist for the law enforcing authorities to detain that person for a short period, even if he has not yet committed a crime and therefore without the possibility that criminal proceedings will be opened against him.

We are aware of the fact that our opinion is not compatible with the current case law. However, we note that this case law without any specific explanation derogates from what the Court stated in *Lawless v. Ireland*, its very first case. There the Court held:

> "Whereas ... 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" (*Lawless v. Ireland*, 1 July 1961, p. 52, § 14, Series A no. 3; italics by us)."

We could not agree more. The later case law has unduly restricted the purpose of bringing the detainee before a judge to "deciding on the merits", and done away with the possible purpose of "examining the question of deprivation of liberty". We would be in favour of returning to the *Lawless* interpretation of Article 5 § 1 (c), in combination with Article 5 § 3, which does more justice to prevention as a possible justification for a deprivation of liberty than does the current interpretation.

5. We are also aware of the risks involved with purely preventive detentions of persons whom the authorities want to prevent from committing an offence, while they are not suspected of having already committed one. Surely, guarantees are needed, and the possibilities for such preventive detentions should be limited. We think that a number of the

conditions that the majority lists under Article 5 § 1 (b) are also relevant for a preventive detention under Article 5 § 1 (c). However, we do not consider that it is necessary to develop this idea further in the framework of this separate opinion.

One of the guarantees is, as indicated, that the detainee "shall be brought promptly before a judge or other officer authorised by law to exercise judicial power" (Article 5 § 3 of the Convention). However, as the Court held, 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 (*de Jong, Baljet and van den Brink v. Netherlands*, 22 May 1984, p. 25, § 52, Series A no. 77; *Brogan and Others v. United Kingdom*, 29 November 1988, pp. 31-32, § 58, Series A no. 145-B; *İkincisoy v. Turkey*, no. 26144/95, § 103, 27 July 2004). An early, "prompt" release, without any appearance before a judge or judicial officer, may occur frequently in cases of "administrative" detention for preventive purposes. Even so, in such a situation it will be enough for the purpose of guaranteeing the rights inherent in Article 5 of the Convention if the lawfulness of the detention can subsequently be challenged and decided by a court.

6. In the present case the applicant was detained in order to prevent a brawl in connection with a football match. In our opinion the police, faced with the situation of a large football event with the assembly of many aggressive supporters in which the applicant appeared and, as assessed by the authorities, planned to instigate fights, could reasonably consider it necessary to arrest and detain the applicant. He was detained for approximately four hours. It does not appear that this period exceeded what was required in order to prevent the applicant from fulfilling his intentions.

For these reasons, we conclude that the applicant's arrest and detention could be justified under Article 5 § 1 (c).