Fair Trials

IMPROVING JUDICIAL ASSESSMENT OF FLIGHT RISK: (FLIGHTRISK)

Review of European Court of Human Rights (ECtHR) Judgments

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About Fair Trials

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FLIGHTRISK: Review of ECtHR judgments

1. Introduction

The Review of European Court of Human Rights (ECtHR) judgments is one component of a Fair Trials-led project on Flight Risk, funded by the European Commission. The overall project considers the national experience of five European Union (EU), Member States (Austria, Belgium, Bulgaria, Ireland, and Poland) to conduct comparative research and provide a regional overview of the legal position surrounding Flight Risk in the context of Pre-trial detention. The project aims to assess the level of practical implementation of the European Convention on Human Rights (ECHR) when assessing Flight Risk. It promotes a coherent approach rooted in the fundamental principles and values of the European Union to improve judicial decision-making and strengthen mutual trust and recognition and cross-border cooperation in criminal matters.

The Review provides a brief contextual overview of the legal framework specific to Article 5 ECHR and the legal instruments that inform it, before turning to an analysis of the case law of the European Court of Human Rights (ECtHR). The paper draws conclusions from the decision-making process and reflects on steps that can be taken on a regional level to strengthen judicial decision-making across the EU.

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1.1 Legal framework

The EU has developed measures to promote judicial cooperation in criminal matters among Member States. Article 82(2) of the Treaty on the Functioning of the European Union (TFEU) sets out the competence of the EU to legislate for criminal matters and provides the legal basis for judicial cooperation in cross-border criminal matters. It notes that such cooperation is based on the principles of mutual trust and mutual recognition of judicial decisions and provides that Directives may be adopted to achieve uniform standards. Directives are legally binding instruments that establish objectives for Member States to achieve. While the objective of the Directives must be fulfilled, how this is achieved rests with Member States.

> *"To the extent necessary to facilitate mutual recognition of judgments and judicial decisions and police and judicial cooperation in criminal matters having a cross-border dimension, the European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, establish minimum rules. Such rules shall take into account the differences between the legal traditions and systems of the Member States. They shall concern:*
>
> *(a) mutual admissibility of evidence between Member States;*
>
> *(b) the rights of individuals in criminal procedure;*
>
> *(c) the rights of victims of crime;*
>
> *(d) any other specific aspects of criminal procedure which the Council has identified in advance by a decision; for the adoption of such a decision, the Council shall act unanimously after obtaining the consent of the European Parliament.*
>
> *Adoption of the minimum rules referred to in this paragraph shall not prevent Member States from maintaining or introducing a higher level of protection for individuals."*

Framework decisions (FD) and Recommendations also form part of the panoply of instruments applicable to cross-border criminal cooperation. Like Directives, it is the objective of the framework decisions that must be implemented by Member States, and the means to achieve these aims are at the discretion of the Member State. The Treaty of Lisbon abolished framework decisions in favour of Directives, however, there remain several framework decisions that continue to be in effect and are of relevance to this Review. Finally, in terms of

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the relevant legal instruments, Recommendations are non-binding and serve to set standards across the EU and provide a 'line of action without imposing any legal obligation.'[1]

Despite the competence bestowed upon by Article 82 TFEU, legislation tackling Pre-trial detention has not been developed. However, legal standards have emerged through the case law of the ECtHR, in line with the European Convention on Human Rights (ECHR). A key provision relied upon by the ECtHR in the context of Pre-trial detention and Flight Risk is Article 5 ECHR enshrining an individual's right to liberty. Article 5 ECHR, provides that:

> *"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."*[2]

It aims to ensure that no one should be arbitrarily deprived of liberty. The right to liberty is a fundamental right. It contains a positive obligation to actively protect against unlawful interference with the right to liberty. It is not an absolute right, and it may be curtailed, but only in accordance with the law. The Article elaborates on the permissible encroachments of the right to liberty. Article 5(1)(c) addresses the deprivation of liberty for the purposes of preventing an individual from absconding where they are suspected to have committed a criminal offence.

> *"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]

The provision includes the test of a '*reasonable suspicion'* that the detention is '*necessary'* to prevent the individual from absconding. The '*reasonable suspicion'* standard requires an *"existence of facts or information which would satisfy an objective observer that the person concerned may have committed an offence."*[4] Central to this provision is the fundamental principle of the presumption of innocence, enshrined in Article 48(1) of the Charter of

[1] See https://european-union.europa.eu/institutions-law-budget/law/types-legislation_en
[2] Article 5 (1) ECHR.
[3] Article 5 (1)(C) ECHR.
[4] ECtHR, *Guide on Article 5 of the European Convention on Human Rights - Right to liberty and security* updated on 31August 2022, available at https://www.echr.coe.int/documents/d/echr/guide_art_5_eng, para 90.

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Fundamental Rights and Freedoms, Article 6(2) ECHR and elaborated upon in Directive EU 2016/343 on the presumption of innocence in criminal proceedings.[5] Advocate General Wathelet, referencing the case law of the ECtHR, commented that *"there is a direct link in the case law of the ECtHR between the right to liberty and the presumption of innocence. They are inseparable*."[6]

As noted at the outset, the right to liberty is not absolute and may be limited once the '*reasonable suspicion'* test is satisfied and if one of the four grounds of detention developed in the jurisprudence discussed below has been substantiated. Several Directives were introduced to strengthen individual rights during criminal proceedings while bolstering mutual trust and recognition. As the preambles of the procedural rights Directives note:

> *"The implementation of the principle of mutual recognition of decisions in criminal matters presupposes that Member States have trust in each other's criminal justice systems. The extent of mutual recognition is very much dependent on a number of parameters, which include mechanisms for safeguarding the rights of suspected or accused persons and common minimum standards necessary to facilitate the application of the principle of mutual recognition."*[7]

While these Directives do not specifically address Flight Risk, the rights they seek to protect equally apply at the Pre-trial stage. Examples of these provisions include the right to information in criminal proceedings[8] which applies from the moment a person is suspected of committing a criminal offence. It requires that individuals have access and knowledge of the case that is against them, and details of their rights in a language of their understanding.[9] The Directive providing the right of access to a lawyer[10] protects against arbitrary detention from the moment of arrest and bolsters the rights enshrined in Article 5 ECHR and central to

[5] Directive EU 2016/343 on the presumption of innocence in criminal proceedings.
[6] CJEU Case C-310/18 PPU *Milev,* Opinion of AG Wathelet, 7 August 2018 para 62. See also the European Commission, Green Paper*, on the presumption of innocence,* 2006, COM(2006) 174, Final, available at https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52006DC0174&from=ES
[7] Directive 2010/64/EU Of the European Parliament and of the Council of 20 October 2010 on the right to interpretation and translation in criminal proceedings, at Preamble 3 and Directive 2012/13/EU of the European Parliament and of the Council of 22 May 2012 on the right to Information In criminal proceedings, at Preamble 3.
[8] Ibid.
[9] Ibid., Article 4.
[10] Directive 2013/48/EU of 22 October 2013 on the right of access to a lawyer in criminal proceedings.

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this Review. The Directive on the right to interpretation and translation[11] is also particularly valuable in this context as it ensures that anyone suspected of a crime is provided with a free translation. An essential safeguard in the context of cross-border criminal proceedings.

Notwithstanding numerous Directives[12] addressing procedural rights and cross-border cooperation in criminal matters, there remains no harmonisation of EU rules surrounding Pre-trial detention or Flight Risk. This means that although broadly speaking, Member States enjoy significant cross-border cooperation in criminal matters, underpinned by fundamental concepts of mutual trust and recognition, the practical implementation of key aspects of these measures are often so divergent as to undermine mutual trust and recognition.

2. The ECtHR approach to flight risk

2.1 Grounds for pre-trial detention: A focus on Flight Risk

The limited permissible grounds for detaining an individual Pre-trial were set out by the ECtHR in *Piruzyan v. Armenia*. The Court found that:

> *"The risk that the accused would fail to appear for trial (see Stögmüller v. Austria, 10 November 1969, § 15, Series A no. 9); the risk that the accused, if released, would take action to prejudice the administration of justice (see Wemhoff v. Germany, 27 June 1968, § 14, Series A no. 7) or commit further offences (see Matznetter v. Austria, 10 November 1969, § 9, Series A no. 10) or cause public disorder (see Letellier, cited above, § 51)."*[13]

In light of the jurisprudence, and in a bid to consolidate the measures and standards for ordering Pre-trial detention, the European Commission noted in a Recommendation that Member States should only impose Pre-trial detention in the following circumstances;

> "*on the basis of a reasonable suspicion established through a careful case-by-case assessment, that the suspect has committed the offence in question and should limit the legal grounds for pre-trail detention to (a) risk of absconding; (b) risk of re-*

[11] Directive 2010/64/EU of 20 October 2010 on the right to interpretation and translation in criminal proceedings.
[12] Directive 2016/343EU 9 March 2016 on the strengthening of certain aspects of the presumption of innocence and of the right to be present at the trial in criminal proceedings.
[13] ECtHR [Third Section], *Piruzyan v. Armenia*, No. 33376/07, judgment of 26 June 2012, para 94.

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offending, (c) risk of interfering with the course of justice or (d) risk of a threat to public order."[14]

In addition to setting out the legal standard and the permissible grounds, the Recommendation also refers to how this assessment should be conducted. It provides that every decision by a judicial authority imposing or prolonging Pre-trial detention is duly reasoned and justified and that it references the specific circumstances of the accused and justifies the detention.[15] These principles were developed from the evolving case law of the ECtHR and serve to provide a template for judges from the national courts when deliberating on issues of pre-trial detention and alternative measures. Of the four grounds referred to above, the first one, namely '*the risk that the accused would fail to appear for trial'* or Flight Risk, is relevant for this study.

2.2.1 Assessing flight risk

A variety of different reasons have been given by national courts when directing Pre-trial detention due to a perceived risk of flight. These include for example, a given history of non-appearance at Court by the accused,[16] the difficulty apprehending the individual at the outset of proceedings,[17] and the likelihood of a sentence on conviction which would give rise to a danger of absconding.[18] Often the concerns of Flight Risk are either combined with or justified by the nature and seriousness of the alleged offence by the national courts.[19] In its assessment of Flight Risk, the Court has rejected any attempt to invoke Pre-trial detention simply due to the nature of the offence or the likely sentence imposed on conviction.

"The seriousness of the penalty and the strength of the evidence gathered may be relevant factors, but are not in themselves decisive in this respect, and the possibility of obtaining guarantees to ensure the appearance of the accused may be used to prevent this risk." [20]

[14] European Commission Recommendations (EU) 2023/681 of 8 December 2022 on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions, para. 19.
[15] Ibid., para. 22.
[16] ECtHR [GC], *Selahattin Demirtaş v. Turkey* (no.2) No 14305/17, judgment of 22 December 2020.
[17] ECtHR [Second Section], *Gilanov v. The Republic of Moldova,* No 44719/10, judgment of 13 December 2022.
[18] ECtHR [Court Chamber]. *Stögmüller v Austria* No. 1602/62, judgment of 10 November 1969.
[19] ECtHR [GC], *Idalov v. Russia*, No. 5826/03, judgment of 22 May 2012.
[20] ECtHR [Fourth Section], *Maksim Savov v. Bulgaria*, No. 28143/10 judgment of 13 January 2021.

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The Court has been unequivocal in any attempt to direct Pre-trial detention where Flight Risk has been raised as an issue, entirely based on the seriousness of the alleged offences, and in the absence of other factors supporting Flight Risk. *"The risk of flight cannot be gauged solely on the basis of the severity of the possible sentence."*[21]

Equally, the ECtHR has been highly critical of cases where on account of the nature and seriousness of the offence, the State has specifically legislated for Pre-trial detention only, with no possibility of applying alternative measures. In doing so, the State shifts the presumption in favour of pre-trial detention and frustrates the presumption of innocence by displacing detention as a last resort. The effect is to absolve the State of a requirement to give a reasoned consideration to alternative measures. Precluding alternative measures on this basis was found to be incompatible with Article 5 ECHR.

> *"The Court notes that in S.B.C. v. the United Kingdom (no. 39360/98, 19 June 2001) it found a violation of Article 5 § 3 because the English law did not allow the right of bail to a particular category of accused. The Court found in that case that the possibility of any consideration of pre-trial release on bail had been excluded in advance by the legislature."* [22]

In particular the Court has repeatedly found that Flight Risk alone cannot give rise to Pre-trial detention, where sufficient guarantees can be given which could ensure Court attendance. Guarantees, for examples could include the lodgement of a sum of money, regular attendance at a police station, surrender of passports and an undertaking not to apply for other travel documentation. In *Letellier v. France,* the Court held as follows:

> *"When the only remaining reason for continued detention is the fear that the accused will abscond and thereby subsequently avoid appearing for trial, he must be released if he is in a position to provide adequate guarantees to ensure that he will so appear, for example by lodging a security*."[23]

[21] ECtHR [Second Section], *Radonjić and Romić v. Serbia*, No. 43674/16, judgment of 4 April 2023. See also ECtHR [Second Section], *Gilanov v. The Republic of Moldova*, No 44719/10, judgment of 13 December 2022, ECtHR [Court Chamber], *Neumeister v. Austria,* No. 1936/63, judgment of 27 June 1968.
[22] ECtHR [Fourth Section], *Boicenco v. Moldova* No. 41088/05, judgment of 11 July 2006, para 134.
[23] ECtHR [Court Chamber], *Letellier v. France*, No. 12369/86, judgment of 26 June 1991, para 46.

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2.3 Criteria developed for assessing flight risk

As discussed, the Court will not entertain the serious nature of the allegations or the severity of the potential sentence on conviction as a singularly defining ground to direct Pre-trial detention in the context of Flight Risk. Instead, and through its jurisprudence, the Court has identified criteria for evaluating and determining if an individual is a Flight Risk and should be detained pending the outcome of the case. These criteria relate primarily to the character and personal circumstances of the accused.

The case of *Neumeister v. Austria* is one of the early considerations of the relevant criteria. The standards articulated in this case have since been consistently applied and adopted in subsequent cases. Here the Applicant had been on bail pending his trial. However, arising from a subsequent statement made by his co-accused, the allegations against Mr Neumeister became more serious, and as a result, the State applied to revoke bail and remand the Applicant in custody. The Court noted that this development which elevated the case against the Applicant was not a reason alone to determine Flight Risk, but instead listed other criteria that also must be taken into account.

> *"…other factors, especially those relating to the character of the person involved, his morals, his home, his occupation, his assets, his family ties and all kinds of links with the country in which he is being prosecuted may either confirm the existence of a danger of flight or make it appear so small that it cannot justify detention pending trial."* [24]

This case, and particularly the factors set out above, have been repeatedly relied upon by the ECtHR in subsequent judgments addressing the concerns of Flight Risk.[25] In the case of *Panchenko v. Russia*, the ECtHR commented on the failure of the domestic court to fully consider the individual's personal circumstances, particularly his permanent residence and family ties,

> *"…it was not until 29 February 2000 that the city court, when ordering the applicant's release from custody, took stock of the applicant's personal circumstances, such as his*

[24] ECtHR [Court Chamber], *Neumeister v. Austria,* No. 1936/63, judgment of 27 June 1968, para.10.

[25] ECtHR [Fourth Section], *Becciev v. Moldova*, No 9190/03, judgment of 4 October 2006, para. 58. Referred also in *inter alia,* ECtHR [Fourth Section], *Maksim Savov v. Bulgaria*, No. 28143/10 judgment of 13 January 2021. ECtHR [Second Section], *Tuncer Bakirhan v. Turkey*, No. 31417/19, judgment of 14 December 2021.

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permanent residence and family ties, positive work references and the absence of a criminal record, which mitigated, if not removed, the risk of his absconding or interfering with the administration of justice"[26]

In *Stögmüller v. Austria* the Court expanded on the elements deemed to be relevant for evaluating Flight Risk:

"One must note, in this respect, that the danger of an accused absconding does not result just because it is possible or easy for him to cross the frontier … there must be a whole set of circumstances, particularly, the heavy sentence to be expected or the accused's particular distaste of detention, or the lack of well-established ties in the country, which give reason to suppose that the consequences and hazards of flight will seem to him to be a lesser evil than continued imprisonment."[27]

The Court has consistently rejected the cherry-picking of criteria, and this comes to the fore when considering community ties and family links. Often by virtue of being a foreign national, community ties are more tenuous, family links more remote. The potential burden of extradition proceedings should the individual abscond weighs heavy in the minds of the authorities, alternatives to detention become less attractive, and often the result is that foreign nationals are disproportionately overrepresented when it comes to Pre-trial detention.[28] To this end, the Council of Europe has formulated Recommendations to Member States that a lack of ties to the community shall not be '*sufficient to conclude that there is a risk of flight'* and that alternatives to Pre-trial detention shall always be considered by judicial decision-makers.[29]

The development of criteria from the case law of the ECtHR demonstrates that a case-by-case analysis is required. This analysis must refer to the relevant personal circumstances of the individual, coupled with the circumstances of the allegations. Namely, the nature of the alleged offence, the strength of the evidence, and the likely sentence to be imposed. While weight is attached to the character of the accused – with specific reference to the morals of

[26] ECtHR [First Section], *Panchenko v. Russia* No. 45100/98, judgment of 8 May 2005. See also ECtHR [GC], *Idalov v.Russia*, No. 5826/03, judgment of 22 May 2012.
[27] ECtHR [Court Chamber]. *Stögmüller v Austria* No. 1602/62, judgment of 10 November 1969, para. 15.
[28] Fair Trials, *A Measure of Last Resort: The practice of pre-trial detention decision-making in the EU*, 2016, available at: https://www.fairtrials.org/publication/measure-last-resort, p.21.
[29] Recommendations CM/Rec (2012)12 of the Committee of Ministers to Member States concerning foreign prisoners 10 October 2012.

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the individual, previous convictions, and their circumstances including family and community ties, and employment – the Court has been consistent in the need for a holistic approach in any assessment of Flight Risk.

2.4 Requirement of evidence-based criteria in assessing flight risk

Further to developing the criteria to be considered in assessing Flight Risk, the ECtHR has also elaborated on how this assessment should be undertaken. The case law of the ECtHR, has been unequivocal in its requirement that the criteria be evidence-based and firmly rooted in fact.[30]

In *Panchenko v. Russia,* the ECtHR considered whether the continued detention of the Applicant was justified on the grounds of a perceived risk of absconding. The Court held that there was a breach of Article 5(4) ECHR, due to the lack of concrete facts considered in support of the perceived risk of flight, noting that the examples given were '*general and abstract*.'[31] Further, the Court commented that the national court failed to properly take into account the family ties, permanent address and the fact that the Applicant had no criminal record.

> *"The Court finally observes that the decisions extending the applicant's detention on remand were stereotypically worded and in summary form. They did not describe in detail the applicant's personal situation beyond a mere reference to his "personality" and were not accompanied with any explanation as to what his personality actually was and why it made his detention necessary."*[32]

The Court in *Grubnyk v. Ukraine*, held *"that the domestic courts gave 'relevant' reasons for his detention which were 'sufficient' under the circumstances to meet the minimum standard of Article 5(3) of the Convention,"* [33] and as a result found that there was no violation of Article 5 ECHR.

Any risks or concerns referred to and relied upon when ordering Pre-trial detention must be duly substantiated, and the reasoning must not be abstract, general or stereotyped. The

[30] ECtHR [First Section], *Trzaska v. Poland*, No. 25792/94, judgment of 11 July 2000, para 65. See also ECtHR [Second Section], *Radonjić and Romić v. Serbia*, No. 43674/16, judgment of 4 April 2023.
[31] ECtHR [First Section], *Panchenko v. Russia* No. 45100/98, judgment of 8 May 2005. para 94.
[32] Ibid., para 107.
[33] ECtHR [Fifth Section], *Grubnyk v. Ukraine*, No 58444/15, judgment of 17 December 2020, para 129.

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personal circumstance must be well considered and evidenced.[34] More recently, in the case of *Kovrov & Others v. Russia,* the Court rejected the contention of risk of flight in circumstances where the finding was not supported by facts.

> *"In the present case the decisions of the domestic authorities gave no reasons why, notwithstanding the arguments put forward by the applicant, they considered the risk of his absconding to be decisive. They referred to the fact that the applicant did not have any place of residence, however, the mere absence of a fixed residence does not give rise to a danger of absconding (see Pshevecherskiy v. Russia, no. 28957/02, § 68, 24 May 2007). The Court finds that the existence of such a risk was not established in the case at hand."*[35]

In *Makarov v. Russia,* the Court delved into the obligation of the domestic authorities to "*analyse the applicant's situation…and to give specific reasons, supported by evidentiary finding,"*[36] when detaining the Applicant pre-trial. In that case, the Court was highly critical of the failure to consider the Applicant's submissions rebutting Flight Risk and accepting the arguments of the Russian internal security services without conducting a sufficient analysis of its credibility:

> *"It is a matter of serious concern for the Court that the domestic authorities applied a selective and inconsistent approach to the assessment of the parties' arguments pertaining to the grounds for the applicant's detention. While deeming the applicant's arguments to be subjective and giving no heed to relevant facts which mitigated the risk of his absconding, the courts accepted the information from the FSB officials uncritically, without questioning its credibility"*[37]

[34] ECtHR [GC], *Merabishvili v. Georgia*, No. 72508/13, judgment of 28 November 2017, ECtHR [Second Section], *Gilanov v. The Republic of Moldova,* No 44719/10, judgment of 13 December 2022, ECtHR [GC], *Selahattin Demirtaş v. Turkey* (no.2) (App. no 14305/17) 22 December 2020, ECtHR [Fourth Section], *Maksim Savov v. Bulgaria,* No. 28143/10, judgment of 13 October 2020, ECtHR [Third Section], *Hysa v. Albania* No. 52048/16, judgment of 21 February 2023, ECtHR [Second Section], *Bakirhan and others v. Turkey*, No. 40029/05, judgment of 7 December 2010.

[35] ECtHR [Third Section], *Kovrov & Others v. Russia* Numbers. 42296/09, 71805/11, 75089/13, 1327/16, 14206/16, judgment of 16 November 2023.

[36] ECtHR [First Section], *Alexsandr Makarov v. Russia* (No. 15217/07), judgment of 14 September 2009, para 127.

[37] Ibid.

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2.5 The link between flight risk and time spent in custody

The ECtHR has found that when an individual is detained pending trial, the risk of flight decreases as any sentence that might follow on conviction would be reduced to consider the time already spent in pre-trial detention. This was suggested in *Neumeister v. Austria,* where it was noted that the danger of absconding should decrease as the time spent in detention passes. The rationale for this lies in the probability that the time spent in custody on remand would be deducted from the total period of imprisonment should the individual ultimately be convicted. Therefore, this too should form part of the balancing exercise when determining Flight Risk. This was followed in subsequent cases, including in *IA v France,* where the Court noted that the risk of flight, '*necessarily decreases as time passes*."[38]

2.6 The duty to consider alternative measures

Alternative measures refer to the application of '*less restrictive measures'* as an alternative to detention.[39] Article 5(3) ECHR notes that pending trial, *"release may be conditioned by guarantees to appear for trial."*

In the case of *Jabolonski v. Poland,* the Court examined the reasons grounding the Applicant's detention pending trial. It was considered following Article 5(4) and the right of the Applicant to review the lawfulness of his detention. The Court noted that the reasons given for detaining the Applicant were to ensure the proper conduct of the trial. Absent from the deliberation was any consideration of what gave rise to the risk of flight, or alternative measures that could guarantee attendance. As a result, the Court found a violation of Article 5(4) ECHR.[40] In doing so, the ECtHR held that the specific duty to consider alternative measures is reflected in the '*purpose'* of Article 5 ECHR, and as a result that the underlying principle of the presumption of innocence favours release:

> *"Under Article 5 § 3 the authorities, when deciding whether a person should be released or detained, are obliged to consider alternative measures of ensuring his appearance at trial. Indeed, that Article lays down not only the right to "trial within a reasonable time or release pending trial" but also provides that "release may be conditioned by guarantees to appear for trial" … That provision does not give the judicial authorities a choice between either bringing the accused to trial within a*

[38] ECtHR [Court Chamber], *IA v. France* No 28213/95, judgment of 23 September 1998, para 105.
[39] European Commission Recommendations (EU) 2023/681 of 8 December 2022 on procedural rights of suspects and accused persons subject to pre-trial detention and on material detention conditions, para. 5.
[40] ECtHR [Fourth Section], *Jabolonski v. Poland*, No. 33492/96, judgment of 21 December 2000, para 84.

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reasonable time or granting him provisional release – even subject to guarantees. Until conviction, he must be presumed innocent, and the purpose of Article 5 § 3 is essentially to require his provisional release once his continuing detention ceases to be reasonable (see the Neumeister judgment cited above, § 4).”[41]

The Court ultimately found that considering the years spent in Pre-trial detention, there was inadequate consideration given to whether the same aim of bringing the Applicant to trial could be achieved with less restrictive means, such as admitting him to bail or under police supervision, as provided for by domestic law. Specifically, the Court found that the national courts had failed to properly reflect on what the specific factors were that gave rise to a finding of Flight Risk, and why alternative measures provided for in law were not deemed fit to ensure the attendance of the Applicant at trial.[42] The obligation to consider alternative measures was reiterated in the case of *Idalov v. Russia,* where the Court held that “*when deciding whether a person should be released or detained, the authorities are obliged to consider alternative measures of ensuring his appearance at trial.”*[43]

In the case of *Merabishvili v. Georgia*, the Court again referred explicitly to the duty to consider alternative measures in the context of Flight Risk. Referring to the meaning of Article 5(3) and the previous jurisprudence of the Court, it held that:

“when the only remaining reason for detention is the fear that the accused will flee and thus avoid appearing for trial, he or she must be released pending trial if it is possible to obtain guarantees that will ensure that appearance.”[44]

This position has been supported by the Commission in its Green Paper on Detention, which noted that: *“a judicial authority must apply the most lenient coercive measure appropriate, i.e. choose an alternative measure to pre-trial detention, if this is sufficient to eliminate the*

[41] Ibid., para 83.
[42] Ibid., para. 84.
[43] See ECtHR [GC], *Idalov v. Russia*, No. 5826/03, judgment of 22 May 2012, para 140. See also ECtHR [Fourth Section], *Sulaoja v. Estonia*, No. 55939/00 judgment of 15 February 2005.
[44] ECtHR [GC], *Merabishvili v. Georgia*, No. 72508/13, judgment of 28 November 2017, para. 223.

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risks of absconding or reoffending."[45] Alternative measures referred to above have included bail conditions,[46] police supervision,[47] handing in passports to authorities.[48]

A number of framework decisions[49] were introduced as a means to improve cross-border judicial cooperation in criminal matters. The European Supervision Order (ESO) is particularly relevant in this context. It provides cross-border supervision by authorities of individuals accused of committing a crime as an alternative to pre-trial detention. To this end. Article 2 of the ESO specifically sets out the objectives of the instrument:

> *"to ensure the due course of justice and, in particular, that the person concerned will be available to stand trial*" and "*to promote, where appropriate, the use, in the course of criminal proceedings, of non-custodial measures for persons who are not resident in the Member State where the proceedings are taking place;*"[50]

The ESO particularly addresses the plight of foreign nationals accused of criminal conduct. Preamble 5 notes the challenges foreign nationals are confronted with when applying for alternatives to pre-trial detention. The ESO looks to address this inequality and promote the right to liberty and the presumption of innocence.

> *"As regards the detention of persons subject to criminal proceedings, there is a risk of different treatment between those who are resident in the trial state and those who are not: a non-resident risks being remanded in custody pending trial even where, in similar circumstances, a resident would not. In a common European area of justice without internal borders, it is necessary to take action to ensure that a person subject to criminal*

[45] European Commission, Green Paper, *Strengthening mutual trust in the European judicial area – A Green Paper on the application of EU criminal justice legislation in the field of detention*, 2011 (COM(2011) 327 final), available at: https://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:52011DC0327 p.9.

[46] ECtHR [Fourth Section], *Jabolonski v. Polond*, No. 33492/96, judgment of 21 December 2000.

[47] Ibid.

[48] ECtHR [Court Chamber], *Neumeister v. Austria,* No. 1936/63, judgment of 27 June 1968.

[49] For example, Council Framework Decision 2008/947/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments and probation decisions with a view to the supervision of probation measures and alternative sanctions, Council Framework Decision 2008/909/JHA of 27 November 2008 on the application of the principle of mutual recognition to judgments in criminal matters imposing custodial sentences or measures involving deprivation of liberty for the purpose of their enforcement in the European Union.

[50] Council Framework Decision 2009/829/JHA of 23 October 2009 on the application between Member States of the European Union, of the principle of mutual recognition to decisions on supervision measures as. an alternative to provisional detention, Art. 2.

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proceedings who is not resident in the trial state is not treated any differently from a person subject to criminal proceedings who is so resident." [51]

3 Concluding observations

The lack of harmonisation of the rules surrounding pre-trial detention has resulted in significantly diverging approaches in the assessment of Flight Risk across the EU. These varying approaches can frustrate the mutual trust between Member States, which underpins cross-border criminal cooperation. However, notwithstanding the legislative gaps identified during this research, a series of cases from the ECtHR have emerged to develop standards and tools in line with Article 5 ECHR and the core connected principles. These principles, which include detention as a measure of last resort and the presumption of innocence, are compromised when an individual is detained pending trial. When Pre-trial detention is invoked, notwithstanding these principles, the ECtHR has emphasised the importance of taking a holistic and evidenced-based approach, looking beyond the offences alleged, to take into account the character and circumstances of the accused and the potential alternative measures that could address concerns of Flight Risk.

4 Recommendations

There are several ways to address the issues identified in this Review. A starting point would be to codify the existing principles and standards espoused by the case law of the ECtHR. At the same time, there is a clear need to legislate specifically on pre-trial detention and Flight Risk in the EU. The legislation could build on the European Commission Recommendations relating to pre-trial detention, and apply the safeguards guaranteed by the Procedural Rights Directives specifically to pre-trial detention and Flight Risk. The provisions could address *inter alia* when pre-trial detention is applied, the duration of the detention, the conditions relating to pre-trial detention, including access to a lawyer, and the available review procedures. Such measures would bring about uniform standards and create a consistent approach across the EU.

The implementation by Member States of alternatives to detention to address the overuse of pre-trial detention could benefit from further consideration. For example, the ESO, which aims to secure the attendance of the accused at trial without pre-trial detention, is poorly

[51] Ibid., Preamble 5.

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implemented and underutilised. For Judges to be able to give alternative measures practical effect, Member States need to adopt and apply the available tools. This could be achieved by encouraging coherent and timely implementation by governments, as well as conducting effective monitoring.

Equally important is the awareness raising among stakeholders of the available provisions, their benefits, and how to apply them in practice, through handbooks and training seminars. These tools need to be more accessible to the practitioners and the authorities that would seek to rely upon them, as it is with consistent application that best practices will be formed and networks between authorities forged.

To this end, measures to promote cooperation between key stakeholders including judges, lawyers, police, and probation services, through establishing and developing networks, sharing best practices, and opening channels of communication should be facilitated.

Through harmonising criminal justice procedures and setting standards of practices firmly rooted in fundamental rights, real meaning would be given to mutual trust. The resultant coherent and consistent practices would in turn serve to improve judicial decision-making in the assessment of Flight Risk and pre-trial detention and strengthen cross-border cooperation in criminal procedures.

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