

Ivan Ivanov

Doctoral candidate, Institute for Legal Studies,
Bulgarian Academy of Sciences

National security vs. security of the person, ethnic profiling

S u m m a r y

This article is dedicated to content research of “non-food production safety” accordingly to Ukrainian legislation. Here the general requirements for non-food production safety are seen as well as its indices, which are verified by State.

Key words: safety, non-food production, indices of non-food production safety

In international human rights law, usually the “right to security” goes together with the “right to life” and “right to liberty” (Article 3 of the United Nation Declaration of Human Rights; Article 9 of the International Covenant on Civil and Political Rights (1966); Article 6 of the European Union Charter of Fundamental rights; Article 5 of the European Convention on Human Rights).

These three rights are strongly interconnected. The right to life is a supreme human right which imposes a duty to the state to protect the life of the people against unwarranted actions by public authorities and by private persons. The right to liberty protects the physical liberty of the person through a number of interrelated rights. The right to security is in very close association with the right to life and right to liberty.

This article focuses on the practices aiming to ensure national security and at the same time often violate disproportionately the rights to liberty and the security of the person of certain groups in the society because of their race and ethnicity. The right to security covers national and individual security.

What is national security?

National security is how the state protects the physical integrity of its citizens from external threats, such as invasion, terrorism and risks to human health. When a situation arises which threatens the continued existence of the state, and thereby of the human rights of the entire population, international law permits certain proportionate measures to counter that threat. The UN Sub-Commission on Prevention of Discrimination and Protection of Minorities stated in its Siracusa Principles. Principle B(iv) defines when a restriction can be said to serve national security:

“National security may be invoked to justify measures limiting certain rights only when they are taken to protect the existence of the nation or its territorial integrity or political independence against force or threat of force. National security cannot be invoked as a reason for imposing limitation to prevent merely local or relatively isolated threats to law and order. National security cannot be used as a pretext for imposing vague or arbitrary limitations and may only be invoked when there exists adequate safeguards and effective remedies against abuse. According to this definition, restrictions on the basis of national security are only justifiable if they address a threat to the “existence of the nation or its territorial integrity or political independence,” as distinct from localised violence and ordinary criminal activities”¹.

¹ Article 19, National Security

What is the right to security of the person?

The right to security of the person protects physical integrity, which has traditionally taken the understanding of this right more as of protection from direct physical abuse. Emerging standards enlarge the scope of the right including provisions for: the necessities of life (such as sustenance or healthcare); the right to social security; and the protection of health and safety, particularly in employment. Security of the person also raises issues about state or private surveillance of citizens.

The “right to liberty and security” is a unique right, as the expression has to be read as a whole. “Security of a person” must be understood in the context of physical liberty and it cannot be interpreted as to referring to different matters (such as a duty on the state to give someone personal protection from an attack by others, or right to social security). The guarantee of “security of person” serves to underline a requirement that the authorities in Strasbourg have developed when interpreting and explaining the right to liberty in Article 5. The European Court has stressed the importance of the right to liberty and security in many cases. Thus, in *Kurt v. Turkey*,¹ the Court held: ...that the authors of the Convention reinforced the individual’s protection against arbitrary deprivation of his or her liberty by guaranteeing a corpus of substantive rights which are intended to minimise the risks of arbitrariness by allowing the act of deprivation of liberty to be amenable to independent judicial scrutiny and by securing the accountability of the authorities for that act. [...] What is at stake is both the protection of the physical liberty of individuals as well as their personal security in a context which, in the absence of safeguards, could result in a subversion of the rule of law and place detainees beyond the reach of the most rudimentary forms of legal protection².

The main concern today is how to ensure national security and, at the same time, make sure that citizens’ individual security rights are not affected. Finding proportionate balance between the two became a challenge after the 9/11 attacks against the World Trade Center in New York, and later, after the terrorist attacks in Paris, Brussels, London, Berlin and other European cities.

The seriousness of the current terrorist threat in Europe and the rest of the world, forced governments to maintain high readiness to respond to imminent attacks by adopting measures to prevent attacks of terrorism. The debate today is how these measures to encounter terrorism effectively and at the same time maintain full respect to human rights of individuals. Authorities found that reaching such balance is extremely a complex and challenging task. However, the acting of law enforcement and anti-terrorism authorities indicates that they are giving

² The Right to Liberty and Security of the Person – a guide to the implementation of Article 5 of the European Convention of Human Rights – Human rights book 5, Monica Macovei.

more priority and wait to the state security than to individual human rights including the right to personal security.

The right to personal security has a strong link with, and in many instances, depends from the status of the national security. In the fight against terrorism, often the two types of security may establish collision especially when it comes to the respect of human rights and personal security of certain ethnic and minority groups. This is when ethnic profiling takes place as a result of border control, police and other law enforcement authorities' actions announced to ensure national security.

What is ethnic profiling?

“Ethnic profiling” is defined as the use by police, security, immigration or customs officials of generalisations based on race, ethnicity, religion or national origin – rather than individual behaviour or objective evidence – as the basis for suspicion in directing discretionary law enforcement actions. It is most often manifested in police officers' decisions about whom to stop for identity checks, questioning, searches and sometimes arrest. Ethnic profiling can also be used to “mine” (or undertake computerised searches of) databases for potential terrorist suspects or in targeting surveillance and anti-radicalisation policies³.

The institution called ethnic profiling was first developed in the U.S. in order to detect drug couriers, and was later implemented in traffic control, and more recently in counter-terrorism procedures. At the heart of these procedures is the idea that the race or ethnicity of the perpetrator serves as a useful tool for the detection of criminality. Thus, stops are not induced by suspicious or illegal behaviour, or by a piece of information that would concern the defendant specifically. Instead, a prediction provides grounds for police action: based on the high rate of criminality within the ethnic group or its dominant (exclusive) involvement in committing acts of terror, it seems like a rational assumption to stop someone on ethnic grounds. Measures are therefore applied not so much on the basis of the (suspicious) behaviour of the individual, but based on an aggregate reasoning. The goal is to make an efficient allocation (based on rational interconnections) of the limited amount of the available police and security resources. After all, the majority of the prison population is Roma (black, etc.), and almost all of the terrorists are Islam fundamentalists (mostly from Arab countries). Accordingly, appropriate restriction of the circle of suspects seems easily justifiable⁴.

Minorities and immigrant communities all across Europe have reported discriminatory treatment by the police. A number of reports indicate widespread profi-

³ ENAR, Fact sheet 40 “Ethnic profiling”, October 2009.

⁴ Andras Laszlo Pap “Ethnic Discrimination and the War against Terrorism- the case of Hungary”.

ling in France, Germany, Italy, the Netherlands, and other European Union member states⁵.

In the United States, racial profiling continues to be a prevalent and egregious form of discrimination. Police officers across the country routinely stop black and Latino men without cause. Since September 11, 2001, racial profiling has become much more prevalent for Muslim, Arab, and South Asian communities. Equally troubling are local immigration laws that invite rampant profiling of Latinos, Asian-Americans, and others presumed to be “foreign”, based on how they look or sound. Ethnic profiling is not only unfair but also unnecessary and counter-productive. Data shows that racial profiling is a bad tool because when it is used, the rate of discovering unlawful conduct is lower than when law enforcement activity is not infused by race stereotypes. For those who find themselves pulled aside for frequent or abusive stops based solely on their appearance, these stops are often embarrassing, humiliating, and even traumatizing⁶.

Unfair policing not only affects individuals, but also their families and entire communities, shaping a view of police as biased and untrustworthy. It generates reluctance to cooperate with police officers, which undermines efficiency in profound ways.

To ensure more effective measures for national security certain procedures suggested attempted to create a descriptive profile of suspects in order to help the authorities in filtering out potential perpetrators based on certain sets of (legal) behaviour and circumstances. In the case of drug couriers, such a characterisation might include short stopovers between significant drug sources and distribution locations, cash paid for an airline ticket, and the relationship of ethnicity, sex and age to criminal statistics. The case for ethnic profiling is further strengthened by the fact that the gangs that play key roles in organised crime tend to be almost exclusively ethnically homogenous. The irony of the situation is that it was right around the time of the World Trade Centre attacks that racial profiling suffered decisive rejection within professional as well as political circles. In the fall of 1999, 81% of those asked opposed stops and vehicle control based on ethnic profiling. By contrast, in a poll conducted a few weeks after September 11, 2001, 58% approved of the idea that Arabs (including American citizens) be subject to stricter security checks before a flight. Some commentators emphasise that ethnic profiling is in principle unacceptable. The result, according to these critics, is the harassment of the innocent minority middle class, which is subjected to a kind of “racial tax” that affects all aspects of people’s lives. A further unwanted result is

⁵ OSF Report, ethnic profiling- European union-pervasive, ineffective and discriminatory.

⁶ American Civil Liberties Union and Rights Working Group “The persistence of racial and ethnic profiling in the United States, a follow-up report to the U.N. Committee on the Elimination of Racial Discrimination.

the strengthening of racial/ethnic essentialism, reductionism to black and white (Roma and Hungarian; Arab and non-Arab, etc.)⁷.

In the past several years, the threat of terrorism has grown progressively, and countries around the globe have been struggling to combat this problem. Of particular concern to many people is the perceived trend toward using fears about security to justify the abuse of personal liberties and depriving citizens of their fundamental rights. How to effectively address security while respecting human rights constitutes a key challenge today. Ethnic and racial profiling in the form of behavioral screening initiatives implemented as a response to the increasing terrorism led to the subjection of minorities. In the name of national security, safety protocols are being adopted in non-uniform ways that disproportionately affects migrants' and ethnic minorities' human rights and reinforce harmful racial prejudices and stereotypes. The misbalance between basic freedoms guaranteed by international human rights law and the security policies implemented by the state, turned to be counterproductive because it reinforces racism and ethnocentrism as social norms and fails to ensure a consistent level of protection for all citizens. States should unify their efforts in fighting terrorism with principle approach to resolving the conflict arising between the need for national security and the respect of human rights based on the doctrine of proportionality. Proportionality means balancing two interests – the interest of the state in security and the interest of the individuals in the preservation of their fundamental rights. In order for state jurisprudences to know how to balance the interest of national security and the interest of the individual they need to have some idea of what is to be balanced against the infringement of the individual's right. Terrorism and measures to fight against it must never be allowed to destroy the democratic way of life in society or to endanger the security of its citizens.

References:

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European Convention on Human Rights, Article 5.

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ENAR, Fact sheet 40 “Ethnic profiling”, October 2009.

⁷ Andras Laszlo Pap “Ethnic Discrimination and the War against Terrorism- the case of Hungary”

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