Globalization, the State and the Individual, No 2(14)/2017, s. 241–247

Mishkov Radoslav Raychev

Assistant, PhD. student, Ministry of Interior Academy, Sofia

The right to security in the case of a. and others v. the United Kingdom

Summary

This report addresses the right to security in the face of a real danger of terrorist acts. The role of the State guaranteeing public security within the framework of the right to freedom of the individual.

Keywords: right, liberty, security, proportionality, terrorism, arbitrary, responsibility

The right of security is based on the need to guarantee the life and health of its citizens and the respect for public order. Article 5 of the ECHR protects "the right to liberty and security". The term „freedom" is interpreted by the court as a basic human right, which includes „the physical freedom of the person"[1]. The obligation of the state to ensure the security of its citizens and the rule of law by ensuring that the right to liberty is based on the general purpose of Article 5 – no one should be deprived of his liberty in an „arbitrary way"[2].

The facts

The case was examined by the Grand Chamber of The European Court of Human Rights. An appeal was lodged against the United Kingdom of Great Britain and Northern Ireland by eleven non-United Kingdom nationals. The applicants alleged, in particular, that they had been unlawfully detained, in breach of Articles 5 § 1 of the Convention and that they had not had adequate remedies at their disposal, in breach of Articles 5 § 4 of the Convention.

After the events of 11 September 2001 the United Kingdom joined with the United States of America in military action in Afghanistan, which had been used as a base for al-Qaeda training camps. As the main reason the Government contended that international terrorists, notably those associated with al-Qaeda, had the intention and capacity to mount attacks against civilian targets on an unprecedented scale. In the Government's assessment, the United Kingdom, because of its close links with the United States of America, was a particular target from network for Islamist terrorist operations linked to al-Qaeda. They considered that there was an emergency of a most serious kind threatening the life of the nation. Moreover, they considered that the threat came principally, but not exclusively, from a number of foreign nationals present in the United Kingdom, who were providing a support.

On 11 November 2001 the Secretary of State made a derogation order under section 14 of the Human Rights Act 1998 in which he set out the terms of a proposed notification to the Secretary General of the Council of Europe of a derogation pursuant to Article 15 of the Convention based on an existing state of emergency. As a result of the public emergency, provision is made in the Anti-terrorism, Crime and Security Act 2001, *inter alia*, for an extended power to arrest and detain a foreign national which will apply where it is intended to remove or deport the person from the United Kingdom but where removal or deportation is not for the time being possible, with the consequence that the detention would be unlawful under existing domestic-law powers. A number of these foreign nationals could not be deported because of the risk that they would suffer treatment contrary to Article 3 of the Convention in their countries of origin.

The extended power to arrest and detain will apply where the Secretary of State issues a certificate indicating his belief that the person's presence in the United Kingdom is a risk to national security and that he suspects the person of being an international terrorist. This is a measure which is strictly required by the exigencies of the situation. That certificate will be subject to an appeal to the Special Immigration Appeals Commission ('SIAC'), will have power to cancel it if it considers that the certificate should not have been issued. There will be an appeal on a point of law from a ruling by SIAC. In addition, it will be open to a detainee to end his detention at any time by agreeing to leave the United Kingdom.

Compared to Domestic-law powers of detention – the Immigration Act 1971 persons can be detained while waiting for their removal or deportation. This power of detention can only be exercised during the period necessary, in all the circumstances of the particular case, to effect removal and that, if it becomes clear that removal is not going to be possible within a reasonable time, detention will be unlawful [3].In some cases, where the intention remains to remove or deport a person on national security grounds, continued detention may not be consistent with Article 5 § 1 (f) as interpreted by the Court in the Chahal case[4].

The first seven applicants have challenged the legality of the derogation, claiming that their detention under the 2001 Act was in breach of their rights under Articles 14 of the Convention in proceedings before SIAC. The Special Immigration Appeals Commission did rule that the derogation was unlawful because the relevant provisions of the 2001 Act unjustifiably discriminated against foreign nationals, in breach of Article 14 of the Convention. The powers of the 2001 Act could properly be confined to non-nationals only if the threat stemmed exclusively, or almost exclusively, from non-nationals and the evidence did not support that conclusion.

Contrary to the view of SIAC, the Court of Appeal held that the approach adopted by the Secretary of State could be objectively justified. There was a rational connection between the detention of non-nationals who could not be deported because of fears for their safety, and the purpose which the Secretary of State wished to achieve, which was to remove non-nationals who posed a threat to national security. The Court of Appeal added that it was well established in international law that, in some situations, States could distinguish between nationals and non-nationals, especially in times of emergency.

The House of Lords found that the applicants' detention under Part 4 of the 2001 Act did not fall within the exception to the general right of liberty set out in Article 5 § 1 (f) of the Convention. Lord Bingham summarised the position in this way: "A non-national who faces the prospect of torture or inhuman treatment if returned to his own country, and who cannot be deported to any third country, and is not charged with any crime, may not under Article 5 § 1 (f) of the Conven-

tion and Schedule 3 to the Immigration Act 1971 be detained here even if judged to be a threat to national security" (see Lord Bingham, at paragraphs 8–9) [5].

The majority of Lords also examined whether the detention regime under Part 4 of the 2001 Act was a proportionate response to the emergency situation, and concluded that it did not rationally address the threat to security and was a disproportionate response to that threat. They relied on three principal grounds: firstly, that the detention scheme applied only to non-nationals suspected of international terrorism and did not address the threat which came from United Kingdom nationals who were also so suspected; secondly, that it left suspected international terrorists at liberty to leave the United Kingdom and continue their threatening activities abroad; thirdly, that the legislation was drafted too broadly, so that it could, in principle, apply to individuals suspected of involvement with international terrorist organisations which did not fall within the scope of the derogation. In addition, the majority held that the 2001 Act was discriminatory and inconsistent with Article 14 of the Convention, from which there had been no derogation.

The European Commissioner for Human Rights to the Council of Europe published opinion on certain aspects of the United Kingdom's derogation from Article 5 of the Convention and Part 4 of the 2001 Act. In that opinion he expressly criticised the lack of sufficient scrutiny by Parliament of the derogation provisions and questioned whether the nature of the al-Qaeda threat was a justifiable basis for recognising a public emergency threatening the life of the nation. He expressed emphasising that as a result of his visit he was in a position personally to testify to "the extremely agitated psychological state of many of them". The Commissioner also expressed a conclusion about the availability under the law of the United Kingdom of alternative measures to combat the threat of terrorism.

In relation to the conditions of detention and the effect of detention on the applicants' health the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment visited the detained applicants and made a number of criticisms of the conditions in which the detained applicants were held. On the occasion of inhumane conditions a group of eight consultant psychiatrists prepared a Joint Psychiatric Report on the detained. The Report has concluded "The problems described by the detainees are remarkably similar to the problems identified in the literature examining the impact of immigration detention. This literature describes very high levels of depression and anxiety and eloquently makes the point that the length of time in detention relates directly to the severity of symptoms and that it is detention *per se* which is causing these problems to deteriorate".

In view of these events the Government announced their intention to repeal Part 4 of the 2001 Act and replace it with a regime of control orders, which would impose various restrictions on individuals, regardless of nationality, reasonably suspected of being involved in terrorism and withdrew the derogation notice.

The law

The Court must consider the proceedings the certification proceedings in respect of each of the detained applicants in the light of the statements made by the parties, referring to the open materialc presented in the proceedings. It notes that the open materialc against the sixth, seventh, eighth, ninth and eleventh applicants contained detailed information about their actions. It considers that these allegations were sufficiently detailed to permit the applicants effectively to challenge them. It does not, therefore, find a violation of Article 5 § 4 in respect of the sixth, seventh, eighth, ninth and eleventh applicants.

With respect to the first, eleventh, third and fifth the Court does not consider that these applicants were in a position effectively to challenge the allegations against them. There has therefore been a violation of Article 5 § 4 in respect of them. The Court also found that there was a risk of the lack of proportionality of the measures taken to ensure the right of security to the right to freedom of the individual. It follows that there has been a violation of Article 5§ 1.

The court unanimously has held that there has been a violation of Article 5 § 4 in respect of the first, third, fifth and tenth applicants but that there was no violation of Article 5 § 4 in respect of the sixth, seventh, eighth, ninth, eleventh applicants and there has been also a violation of Article 5 § 1 of the Convention for all the affected complainants. The Court notes that the above violations could not give rise to an enforceable claim for compensation by the applicants before the national courts. It follows that there has been a violation of Article 5 § 5.

Reasoning

The Court considers that the House of Lords was correct in holding that the impugned powers were not to be seen as immigration measures, where a distinction between nationals and non-nationals would be legitimate, but instead as concerned with national security. Part 4 of the 2001 Act was designed to avert a real and imminent threat of terrorist attack which, on the evidence, was posed by both nationals and non-nationals. The choice by the Government and Parliament of an immigration measure to address what was essentially a security issue had the result of failing adequately to address the problem, while imposing a disproportionate and discriminatory burden of indefinite detention on one group of suspected terrorists. As the House of Lords found, there was no significant difference in the potential adverse impact of detention without charge on a national or on a non-national who in practice could not leave the country because of fear of torture abroad.

The argument of the Government in only to confining the measures to non-nationals, to take into account the sensitivities of the British Muslim popula-

tion in order to reduce the chances of recruitment among them by extremists. However, the Government have not placed before the Court any evidence to suggest that British Muslims were significantly more likely to react negatively to the detention without charge of national rather than foreign Muslims reasonably suspected of links to al-Qaeda. In this respect the Court notes that the system of control orders, put in place by the Prevention of Terrorism Act 2005, does not discriminate between national and non-national suspects.

In conclusion, therefore, the Court, like the House of Lords, and contrary to the Government's contention, finds that the derogating measures were disproportionate in that they discriminated unjustifiably between nationals and non-nationals. It follows that there has been a violation of Article 5 § 1.

Article 5 § 4 guarantees a right to "everyone who is deprived of his liberty by arrest or detention" to bring proceedings to test the legality of the detention and to obtain release if the detention is found to be unlawful. It entitles an arrested or detained person to institute proceedings bearing on the procedural and substantive conditions which are essential for the "lawfulness" of his or her deprivation of liberty. The notion of "lawfulness" under Article 5 § 4 has the same meaning as in § 1, so that the arrested or detained person is entitled to a review of the "lawfulness" of his detention in the light not only of the requirements of domestic law but also of the Convention, the general principles embodied therein and the aim of the restrictions permitted by Article 5 § 1.

The reviewing "court" must not have merely advisory functions but must have the competence to "decide" the "lawfulness" of the detention and to order release if the detention is unlawful [6]. The proceedings must be adversarial and must always ensure "equality of arms" between the parties. In remand cases, since the persistence of a reasonable suspicion that the accused person has committed an offence is a mandatory condition for the lawfulness of the continued detention, the detainee must be given an opportunity effectively to challenge the basis of the allegations against him [7].

In Chahal, the applicant was detained under Article 5 § 1 (f) pending deportation on national security grounds and the Secretary of State opposed his applications for bail and habeas corpus, also for reasons of national security. The Court recognised that the use of confidential material might be unavoidable where national security was at stake but held that this did not mean that the executive could be free from effective control by the domestic courts whenever they chose to assert that national security and terrorism were involved. The Court found a violation of Article 5 § 4 in the light of the fact that the High Court, which determined the habeas corpus application, did not have access to the full material on which the Secretary of State had based his decision. Although there was the safeguard of an advisory panel, chaired by a Court of Appeal judge, which had full sight of the national security evidence, the Court held that the panel could not be

considered as a "court" within the meaning of Article 5 § 4 because the applicant was not entitled to legal representation before it and was given only an outline of the national security case against him and because the panel had no power of decision and its advice to the Home Secretary was not binding.

The urgent need to protect the population of the United Kingdom from a terrorist attack and the right of the applicants under Article 5 § 4 to procedural fairness must be balanced. Although the Court has found that the applicants' detention did not fall within any of the categories listed in sub-paragraphs (a) to (f) of Article 5 § 1, it considers that the case-law relating to judicial control over detention on remand is relevant, since in such cases also the reasonableness of the suspicion against the detained person is a mandatory condition. Moreover, in the circumstances of the present case, and in view of the dramatic impact of the lengthy – and what appeared at that time to be indefinite – deprivation of liberty on the applicants' fundamental rights, Article 5 § 4 must import substantially the same fair-trial guarantees as Article 6 § 1 in its criminal aspect [8].

The right to security is a fundamental human right. Its observance and assurance by the government must not lead to the violation of other basic human rights. The case of A. and Others v. The United Kingdom reflects the need for safeguards to prevent arbitrary action against the individual‛s right to liberty and security. Public security meets the needs of citizens for the right to safe living, but not to make decisions about the violation of basic human rights- the right to freedom in the face of fear of terrorist acts.

References:

Creanga v Romania hudoc (2012); 56 EHRR 361 § 44 GC.

El-Masri v the Former Yugoslav Republic of Macedonia ECHR – 2012; EHHR 25 §§ 230-233 GC.

R. v. Governor of Durham Prison, ex parte Singh [1984] All ER 983.

Chahal v. The U. K., (22414/93) [1996] ECHR 54.

[2004] UKHL 56.

Fox, Campbell and Hartley v. the United Kingdom, 30 August 1990, § 45, Series A no. 182.

Becciev v. Moldova, no. 9190/03, §§ 68-72, 4 October 2005.

Garcia Alva v. Germany, no. 23541/94.

Tamar Meisels, The trouble with Terror (2008 Cambridge University Press).