



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

Information Note on the Court's case-law 177

August-September 2014

Hassan v. the United Kingdom [GC] - 29750/09

Judgment 16.9.2014 [GC]

Article 5

Article 5-1

Lawful arrest or detention

Internment in Iraq under Third and Fourth Geneva Conventions: *no violation*

Article 1

Jurisdiction of States

Responsibility of States

Territorial jurisdiction in relation to internment of Iraqi national by coalition of armed forces in Iraq

Facts – In March 2003 a coalition of armed forces led by the United States of America invaded Iraq. After occupying the region of Basrah, the British army started arresting high-ranking members of the ruling Ba'ath Party and the applicant, a senior member of the party, went into hiding leaving his brother Tarek behind to protect the family home in Umm Qasr. On the morning of 23 April 2003 a British Army unit came to the house hoping to arrest the applicant. According to their records, they found Tarek Hassan in the house armed with an AK-47 machine gun and arrested him on suspicion of being a combatant or a civilian posing a threat to security. He was taken later that day to Camp Bucca, a detention facility in Iraq operated by the United States. Parts of the camp were also used by the United Kingdom to detain and interrogate detainees. Following interrogation by both United States and United Kingdom authorities, Tarek Hassan was deemed to be of no intelligence value and, according to the records, was released on or around 2 May 2003 at a drop-off point in Umm Qasr. His body was discovered, bearing marks of torture and execution, some 700 kilometres away in early September 2003.

In 2007 the applicant brought proceedings in the English administrative court, but these were dismissed on the grounds that Camp Bucca was a United States rather than a United Kingdom military establishment.

In his application to the European Court, the applicant alleged that his brother was arrested and detained by British forces in Iraq and subsequently found dead in unexplained circumstances. He complained under Article 5 §§ 1, 2, 3 and 4 of the Convention that the arrest and detention were arbitrary and unlawful and lacking in procedural safeguards and under Articles 2, 3 and 5 that the United Kingdom authorities had failed to carry out an investigation into the circumstances of the detention, ill-treatment and death.

Law – Articles 2 and 3: There was no evidence to suggest that Tarek Hassan had been ill-treated while in detention such as to give rise to an obligation under Article 3 to carry out an official investigation. Nor was there any evidence that the United Kingdom authorities were responsible in any way, directly or indirectly, for his death, which had occurred some four months after his release from Camp Bucca, in a distant part of the country not controlled by United Kingdom forces. In the absence of any evidence of the involvement of United Kingdom State agents in the death, or even of any evidence that the death occurred within territory controlled by the United Kingdom, no obligation to investigate under Article 2 could arise.

Conclusion: inadmissible (manifestly ill-founded).

Article 5 §§ 1, 2, 3 and 4

(a) *Jurisdiction*

(i) *Period between capture by British troops and admission to Camp Bucca*: Tarek Hassan was within the physical power and control of the United Kingdom soldiers and therefore fell within United Kingdom jurisdiction. The Court rejected the Government's argument that jurisdiction should not apply in the active hostilities phase of an international armed conflict, where the agents of the Contracting State were operating in territory of which they were not the occupying power, and where the conduct of the State should instead be subject to the requirements of international humanitarian law. In the Court's view, such a conclusion was inconsistent with its own case-law and with the case-law of the International Court of Justice holding that international human rights law and international humanitarian law could apply concurrently.*

(ii) *Period after admission to Camp Bucca*: The Court did not accept the Government's argument that jurisdiction should be excluded for the period following Tarek Hassan's admission to Camp Bucca as it involved a transfer of custody from the United Kingdom to the United States. Tarek Hassan was admitted to the Camp as a United Kingdom prisoner. Shortly after his admission, he was taken to a compound entirely controlled by United Kingdom forces. Under the Memorandum of Understanding between the United Kingdom, United States and Australian Governments relating to the transfer of custody of detainees it was the United Kingdom which had responsibility for the classification of United Kingdom detainees under the Third and Fourth Geneva Conventions** and for deciding whether they should be released. While it was true that certain operational aspects relating to Tarek Hassan's detention at Camp Bucca were transferred to United States forces (such as escorting him to and from the compound and guarding him elsewhere in the camp) the United Kingdom had retained authority and control over all aspects of the detention relevant to the applicant's complaints under Article 5.

Tarek Hassan had thus been within the jurisdiction of the United Kingdom from the moment of his capture on 23 April 2003 until his release, most probably at Umm Qasr on 2 May 2003.

Conclusion: within the jurisdiction (unanimously).

(b) *Merits*: There were important differences of context and purpose between arrests carried out during peacetime and the arrest of a combatant in the course of an armed conflict. Detention under the powers provided for in the Third and Fourth Geneva Conventions was not congruent with any of the permitted grounds of deprivation of liberty set out in subparagraphs (a) to (f) of Article 5 § 1.

The United Kingdom had not lodged any formal request under Article 15 of the Convention (derogation in time of emergency) allowing it to derogate from its obligations under Article 5 in respect of its operations in Iraq. Instead, the Government had in their

submissions requested the Court to disapply United Kingdom's obligations under Article 5 or in some other way interpret them in the light of the powers of detention available to it under international humanitarian law.

The starting point for the Court's examination was its constant practice of interpreting the Convention in the light of the 1969 Vienna Convention on the Law of Treaties, Article 31 § 3 of which made it necessary when interpreting a treaty to take into account (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions, (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation and (c) any relevant rules of international law applicable in the relations between the parties.

As to Article 31 § 3 (a), there had been no subsequent agreement between the Contracting States as to the interpretation of Article 5 in situations of international armed conflict. However, as regards Article 31 § 3 (b), the Court had previously stated that a consistent practice on the part of the Contracting States, subsequent to their ratification of the Convention, could be taken as establishing their agreement not only as regards interpretation but even to modify the text of the Convention. The practice of the Contracting States was not to derogate from their obligations under Article 5 in order to detain persons on the basis of the Third and Fourth Geneva Conventions during international armed conflicts. That practice was mirrored by State practice in relation to the International Covenant for the Protection of Civil and Political Rights.

As to the criterion contained in Article 31 § 3 (c), the Court reiterated that the Convention had to be interpreted in harmony with other rules of international law, including the rules of international humanitarian law. The Court had to endeavour to interpret and apply the Convention in a manner which was consistent with the framework under international law delineated by the International Court of Justice. Accordingly, the lack of a formal derogation under Article 15 of the Convention did not prevent the Court from taking account of the context and the provisions of international humanitarian law when interpreting and applying Article 5 in the applicant's case.

Nonetheless, even in situations of international armed conflict, the safeguards under the Convention continued to apply, albeit interpreted against the background of the provisions of international humanitarian law. By reason of the co-existence of the safeguards provided by international humanitarian law and by the Convention in time of armed conflict, the grounds of permitted deprivation of liberty set out under subparagraphs (a) to (f) should be accommodated, as far as possible, with the taking of prisoners of war and the detention of civilians who pose a risk to security under the Third and Fourth Geneva Conventions. The Court was mindful of the fact that internment in peacetime did not fall within the scheme of deprivation of liberty governed by Article 5 of the Convention without the exercise of the power of derogation under Article 15. It could only be in cases of international armed conflict, where the taking of prisoners of war and the detention of civilians who pose a threat to security were accepted features of international humanitarian law, that Article 5 could be interpreted as permitting the exercise of such broad powers.

As with the grounds of permitted detention set out in those subparagraphs, deprivation of liberty pursuant to powers under international humanitarian law had to be "lawful" to preclude a violation of Article 5 § 1. That meant that detention had to comply with the rules of international humanitarian law, and most importantly, that it should be in keeping with the fundamental purpose of Article 5 § 1, which was to protect the individual from arbitrariness.

As regards procedural safeguards, the Court considered that, in relation to detention taking place during an international armed conflict, Article 5 §§ 2 and 4 must also be interpreted in a manner which took into account the context and the applicable rules of

international humanitarian law. Articles 43 and 78 of the Fourth Geneva Convention provided that internment “shall be subject to periodical review, if possible every six months, by a competent body”. Whilst it might not be practicable, in the course of an international armed conflict, for the legality of detention to be determined by an independent “court” in the sense generally required by Article 5 § 4, nonetheless, if the Contracting State is to comply with its obligations under Article 5 § 4 in this context, the “competent body” should provide sufficient guarantees of impartiality and fair procedure to protect against arbitrariness. Moreover, the first review should take place shortly after the person is taken into detention, with subsequent reviews at frequent intervals, to ensure that any person who does not fall into one of the categories subject to internment under international humanitarian law is released without undue delay. Article 5 § 3, however, had no application in the present case since Tarek Hassan was not detained in accordance with the provisions of paragraph 1 (c) of Article 5.

Turning to the facts of the applicant’s case, the Court considered that the United Kingdom authorities had had reason to believe that Tarek Hassan, who was found by British troops armed and on the roof of his brother’s house, where other weapons and documents of a military intelligence value had been retrieved, might be either a person who should be detained as a prisoner of war or whose internment was necessary for imperative reasons of security, both of which provided a legitimate ground for capture and detention under the Third and Fourth Geneva Conventions. Almost immediately following his admission to Camp Bucca, he had been subject to a screening process in the form of two interviews by United States and United Kingdom military intelligence officers, which had led to his being cleared for release since it was established that he was a civilian who did not pose a threat to security. The evidence pointed to his having been physically released from the Camp shortly thereafter.

Against this background, it would appear that Tarek Hassan’s capture and detention was consistent with the powers available to the United Kingdom under the Third and Fourth Geneva Conventions, and was not arbitrary. Moreover, in the light of his clearance for release and physical release within a few days of being brought to the Camp, it was unnecessary for the Court to examine whether the screening process constituted an adequate safeguard to protect against arbitrary detention. Finally, it would appear from the context and the questions that Tarek Hassan was asked during the two screening interviews that the reason for his detention would have been apparent to him.

Conclusion: no violation (thirteen votes to four).

(See also *Al-Skeini and Others v. the United Kingdom* [GC], 55721/07, and *Al-Jedda v. the United Kingdom* [GC], 27021/08, both delivered on 7 July 2011, Information Note 143)

* See, in particular, [Advisory Opinion on The Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory](#) (9 July 2004).

** There are four [Geneva Conventions of 12 August 1949](#): the third is the Geneva Convention relative to the Treatment of Prisoners of War, and the fourth the Geneva Convention relative to the Protection of Civilian Persons in Time of War.