



UK courts struck right balance between the fight against terrorism and suspects' procedural rights

In today's **Chamber** judgment¹ in the case of **Sher and Others v. the United Kingdom** (application no. 5201/11) the European Court of Human Rights held:

by six votes to one, that there had been **no violation of Article 5 § 4 (right to take proceedings to challenge lawfulness of detention)** of the European Convention on Human Rights; and

unanimously, that there had been **no violation of Article 8 (right to respect for private and family life)** of the Convention.

The case concerned the arrest and detention of three Pakistani nationals, the applicants, in the context of a counterterrorism operation. The applicants were detained for 13 days, before ultimately being released without charge. During that period they were brought twice before a court with warrants for their further detention being granted. They were then taken into immigration detention and have since voluntarily returned to Pakistan. In their complaints before the European Court, they complained in particular about the hearings on requests for prolongation of their detention because certain evidence in favour of their continued detention had been withheld from them and that one such hearing had been held for a short period in closed session. They also complained about the search of their homes during their detention.

The Court accepted that the UK authorities had suspected an imminent terrorist attack and had launched an extremely complex investigation aimed at thwarting it.

Reiterating that terrorism fell into a special category, it held that Article 5 § 4 could not be used to prevent the use of a closed hearing or to place disproportionate difficulties in the way of police authorities in taking effective measures to counter terrorism. In the applicants' case, the threat of an imminent terrorist attack and national security considerations had justified restrictions on the applicants' right to adversarial proceedings concerning the warrants for their further detention. Similarly, the Court found that the fight against terrorism and the urgency of the situation had justified a search of the applicants' homes pursuant to a search warrant framed in relatively broad terms.

Moreover, there had been sufficient safeguards against the risk of arbitrariness both in respect of the proceedings for warrants of further detention, in the form of a legal framework setting out clear and detailed procedural rules, as well as in respect of the search warrants, which had been issued by a judge, without the applicants suggesting that there had been no reasonable grounds for doing so.

Principal facts

The applicants, Sultan Sher, Mohammed Rizwan Sharif and Mohammed Umer Farooq, are Pakistani nationals who were born in 1987, 1980, and 1983 respectively. The applicants previously resided in the United Kingdom on student visas and now live in Pakistan.

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.

Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

On 8 April 2009 the applicants were all arrested in various locations in the North West of England under the Terrorism Act 2000 ("the Act") on suspicion of being involved in the commission, preparation and instigation of acts of terrorism. On 9 April 2009, they were provided with interview briefings giving the names of other suspects and informing them that they would be asked questions in interview regarding any knowledge or information they might have in relation to acts of terrorism. Between 10 and 18 April 2009, as the investigation progressed, the applicants were provided with increasingly detailed pre-interview briefings, outlining the belief that they had been part of a conspiracy to murder with explosives and referring to specific items including, emails, computer communications, user names, text messages and highlighted maps of public places in the North West of England.

Meanwhile, on 8 April 2009 search warrants were granted in respect of the applicants' homes. These warrants were authorised to be used on "one occasion only". The relevant material for the purpose of the search included a long list of items, including correspondence, books and electronic equipment. The search of Mr Sher's home was conducted over a 10-day period. Mr Sharif and Mr Farooq shared a residence which was searched over a period of 12 days.

A hearing took place before the Magistrates Court on 10 April to consider an application for further detention of the applicants after the expiry of the initial 48-hour period permitted by the legislation. They were notified of the hearing, informed of their rights under the Act and the provisions under which they could be excluded from the hearing. Part of the hearing was held in private to enable the Judge to scrutinise and ask questions regarding material withheld from the applicants detailing the police operation and ongoing investigation. The warrants were granted and detention was authorised for seven days, beginning with their day of arrest. A second hearing was held on 15 April to consider an application for further detention of the applicants. They appeared by video link and while some information was withheld from them, they were not excluded from any part of the hearing. The Judge granted the extensions sought until 22 April 2009.

On 21 April 2009, the applicants were released without charge.

On 26 June 2009, the applicants commenced judicial review proceedings challenging the legality of their treatment between 8 and 21 April 2009. In particular, they alleged that they had not been provided with sufficient information at the time of arrest or during their detention as to the nature of the allegations against them. Furthermore, they alleged that the closed procedure permitted in hearing the application for warrants of further detention was unfair. Finally, they argued that the searches of their homes had been unlawful as the terms of warrant were too wide and the search had been carried out over a number of days despite the warrant allowing a search "on one occasion" only. On 21 July 2009, the Judge refused the applicants permission to apply for judicial review.

Complaints, procedure and composition of the Court

Relying on Article 5 §§ 2 and 4 (right to be informed promptly of the reasons for arrest/right to take proceedings to challenge lawfulness of detention), the applicants complained, first, that they had not been given adequate information by the police on arrest and during detention to enable them to mount an effective challenge to their detention. Secondly, relying on Article 5 § 4, the applicants complained about the procedure for granting warrants of further detention, notably alleging that it allowed for closed hearings without the provision of special advocates. Finally, they complained that the scope of the search warrants and the manner of their execution had violated Article 8 (right to respect for private and family life).

The application was lodged with the European Court of Human Rights on 17 January 2011.

Judgment was given by a Chamber of seven judges, composed as follows:

Guido **Raimondi** (Italy), *President*,
 Päivi **Hirvelä** (Finland),
 Ledi **Bianku** (Albania),
 Nona **Tsotsoria** (Georgia),
 Paul **Mahoney** (the United Kingdom),
 Faris **Vehabović** (Bosnia and Herzegovina),
 Yonko **Grozev** (Bulgaria),

and also Françoise **Elens-Passos**, *Section Registrar*.

Decision of the Court

Article 5 § 4 (right to take proceedings to challenge lawfulness of detention)

The Court accepted that the threat of an imminent terrorist attack had justified restrictions on the applicants' Article 5 § 4 rights.

Reiterating that terrorism fell into a special category, it held that Article 5 § 4 could not preclude the use of a closed court hearing - in the absence of the detainee or his lawyer - for the submission of confidential sources of information supporting the authorities' line of investigation. Article 5 § 4 could not be applied in such a manner as to put disproportionate difficulties in the way of police authorities in taking effective measures to counter organised terrorism.

Moreover, the legal framework under Schedule 8 of the 2000 Terrorism Act governing proceedings for warrants of further detention had set out clear and detailed procedural rules enabling the applicants to know the nature of the allegations against them and, with legal representation, to have the opportunity to refute those allegations, and to participate effectively in proceedings concerning their continued detention.

Furthermore, the applicants and their legal advisers had been given reasons for the withholding of certain information. The information to be withheld had been limited to the further inquiries to be conducted, and had been submitted to a judge who, in closed session, had been able to ensure that no material had been unnecessarily withheld from the applicants and to determine, in their interests, whether there had been reasonable grounds for believing that their further detention had been necessary.

Indeed, even in the absence of express provision in the relevant law, the judge had had the power to appoint a special advocate if he considered such appointment necessary to secure the fairness of the proceedings. Significantly, the applicants had not requested the appointment of a special advocate.

There had therefore been no violation of Article 5 § 4 of the Convention.

Article 8 (right to respect for private and family life)

The Court acknowledged that the search warrant had been relatively broad, authorising the search and seizure of correspondence, books, electronic equipment and numerous other items. However, in the Court's view, the fight against terrorism and the urgency of the situation could justify a search based on such broad terms. In cases of this nature, the authorities had to be permitted some flexibility to assess, on the basis of what was found during a search, which items could be linked to terrorist activities and to seize them for further examination.

As to the existence of safeguards against the risk of arbitrariness, it noted that the warrant had been issued by a judge and that the applicants had not argued that there were no reasonable grounds for

granting the warrant. Moreover, it had been open to the applicants to lodge a judicial review action or to claim damages in respect of any specific item seized during the search.

There had therefore been no violation of Article 8 of the Convention.

Other Articles

The Court rejected, pursuant to Article 35 §§ 1 and 4 (failure to exhaust domestic remedies), the applicants' complaints under Article 5 §§ 2 and 4 and Article 8, regarding the provision of information by the police concerning the reasons for their arrest and detention and regarding the manner of the execution of the search warrants. The Court explained that the rule requiring applicants to pursue all appropriate legal proceedings before the domestic courts reflected the fundamentally subsidiary role of the Convention mechanism. The fact that the applicants disputed the findings of the Divisional Court as to the true nature of the claims advanced and the appropriate domestic remedy underlined the importance of review of that judgment by a more senior domestic court. The Court was satisfied that the Government had demonstrated the availability of possible remedies and concluded that the applicants had failed to establish that these remedies were inadequate and ineffective in the particular circumstances of their case.

Separate opinions

Judge Vehabović expressed a dissenting opinion, which is annexed to the judgment.

The judgment is available only in English.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.