Information Note on the Court's case-law No. 116

February 2009

A. and Others v. the United Kingdom [GC] - 3455/05

Judgment 19.2.2009 [GC]

Article 5

Article 5-1-f

Expulsion

Extradition

Indefinite detention of foreign nationals suspected of involvement in terrorism: *violation*

Article 3

Degrading treatment

Inhuman treatment

Indefinite detention of foreign nationals suspected of involvement in terrorism: *no violation*

Article 5

Article 5-4

Take proceedings

Withholding on national security grounds of material relevant to lawfulness of detention: *violation; no-violation*

Article 15

Validity of derogation from Article 5 § 1 obligations in respect of powers to detain foreign nationals suspected of terrorism who could not be deported for fear of ill-treatment: *not valid*

Article 41

Just satisfaction

Entitlement where unlawful detention was result of public emergency and State's inability to deport applicants to their country of origin for fear of ill-treatment: *reduced award*

Facts: Following the terrorist attacks of 11 September 2001 on the United States of America, the British Government considered the United Kingdom to be under threat from a number of foreign nationals present in the country who were providing a support network for extremist Islamist terrorist operations linked to al-Qaeda. Since certain of these individuals could not be deported because they risked ill-treatment in their country of origin, the Government considered it necessary to create an extended power permitting their detention where the Secretary of State reasonably believed that their presence in the United Kingdom was a risk to national security and reasonably suspected that they were an "international terrorist". Since the Government considered that this detention scheme might not be consistent with Article 5 § 1 of the Convention, they issued a derogation notice under Article 15, in which they referred to the provisions of Part 4 of the Anti-Terrorism, Crime and Security Act 2001 ("the 2001 Act"), including the power to detain foreign nationals certified as "suspected international terrorists" who could not "for the time being" be removed from the United Kingdom.

Part 4 of the 2001 Act came into force in December 2001 and was repealed in March 2005. During the lifetime of the legislation 16 foreign nationals, including the 11 applicants, were certified and detained. Six of the applicants were detained in December 2001 and the others on various dates up until October 2003. The second and fourth applicants were released after electing to leave the United Kingdom, the second for Morocco within three days of his arrest and the fourth for France within three months. The others remained in detention at Belmarsh Prison, although three were transferred to a secure mental hospital following a deterioration in their mental health (which in one instance led to a suicide attempt) and another was released on bail in April 2004, under conditions equal to house arrest, again because of serious concerns over his mental health.

The decision to certify the applicants under the 2001 Act was subject to six-monthly review before the Special Immigration Appeals Commission (SIAC). Each of the applicants appealed against the Secretary of State's decision to certify him. SIAC used a procedure which enabled it to consider both evidence which could be made public ("open material") and sensitive evidence which could not be disclosed for reasons of national security ("closed material"). The detainee and his legal representatives were given the open material and permitted to comment on it in writing and at a hearing. The closed material was not disclosed to the detainee or his lawyers but to a "special advocate", appointed on behalf of each detainee by the Solicitor General. In addition to the open hearings, SIAC held closed hearings to examine the secret evidence, where the special advocate could make submissions on behalf of the detainee on procedural matters, such as the need for further disclosure, and as to the substance and reliability of the closed material. However, once the special advocate had seen the closed material he could not have any contact with the detainee or his lawyers, except with the leave of the court. SIAC dismissed each of the applicants' appeals against certification.

The applicants also brought proceedings in which they challenged the fundamental legality of the derogation under Article 15. These proceedings were eventually determined by the House of Lords on 16 December 2004. It held that although there was a public emergency threatening the life of the nation the detention scheme did not rationally address the threat to security and was therefore disproportionate. In particular, there was evidence that United Kingdom nationals were also involved in terrorist networks linked to al-Qaeda and that the detention scheme discriminated unjustifiably against foreign nationals. It therefore made a declaration of incompatibility under the Human Rights Act and quashed the derogation order. Part 4 of the 2001 Act was repealed by Parliament

in March 2005 and those applicants still in detention were released and made subject to control orders under the Prevention of Terrorism Act 2005.

Law

Articles 5 § 1 (f) and 15 – (a) *Scope of case*: The Government were not estopped from relying on subparagraph (f) before the Court even though they had not done so before the domestic courts, as they had expressly kept open the question of the application of Article 5 in the text of the derogation and in the domestic proceedings, and the House of Lords had considered the compatibility of the detention with Article 5 § 1 before assessing the validity of the derogation. Nor was there was any reason of principle to prevent the Government from raising all the arguments open to them to defend the proceedings before the Court, even if that involved calling into question the conclusion of their own supreme court. The applicants' preliminary objections on these two points were therefore dismissed.

(b) *Merits*: The Court would first ascertain whether the applicants' detention was permissible under Article 5 § 1 (f). Only if it was not would it need to determine the validity of the derogation.

(1) *Whether the detention was permissible*: The deprivation of liberty of persons "against whom action is being taken with a view to deportation or extradition" was justified only for as long as the deportation or extradition proceedings were in progress and provided they were prosecuted with due diligence. The Court found no violation in respect of the second and fourth applicants, who had been detained for only short periods before electing to leave the United Kingdom. However, it was clear that the remaining nine applicants had been certified and detained because they were suspected of being international terrorists whose presence at liberty in the United Kingdom gave rise to a threat to national security. One of the principal assumptions underlying the derogation notice, the 2001 Act and the decision to detain the applicants had been that they could not be removed or deported "for the time being". There was no evidence that there had been any realistic prospect of their being expelled without being put at real risk of ill-treatment. In these circumstances, the Government's policy of keeping the possibility of deporting the applicants "under active review" was not sufficiently certain or determinative to amount to "action ... being taken with a view to deportation". Accordingly, the applicants' detention did not fall within the exception set out in Article 5 § 1 (f).

(2) *Whether the derogation was valid*: The highest domestic court had examined this question and concluded that, though there had been a public emergency threatening the life of the nation the measures taken in response had not been strictly required by the exigencies of the situation. The Court therefore considered that it would be justified in reaching a contrary conclusion only if satisfied that the national court had misinterpreted or misapplied Article 15 or the related case-law or reached a conclusion that was manifestly unreasonable.

(i) *"Public emergency threatening the life of the nation"*: Before the domestic courts, the Secretary of State had provided evidence to show the existence of a threat of serious terrorist attacks planned against the United Kingdom. Additional closed evidence had been provided before SIAC. All but one of the national judges had accepted that danger to have been credible. Although no al-Qaeda attack had taken place within the territory at the time the derogation was made, the national authorities could not be criticised for fearing such an attack to be imminent. A State could not be required to wait for disaster to strike before taking measures to deal with it. The national authorities enjoyed a wide margin of appreciation in assessing the threat on the basis of the known facts. Weight had to attach to the

judgment of the executive and Parliament and, specifically, to the views of the national courts, who were better placed than the European Court to assess the relevant evidence. The Court therefore accepted that there had been a public emergency threatening the life of the nation.

(ii) *Whether the derogating measures were strictly required*: The Government had challenged the House of Lords' finding that the applicants' detention was disproportionate on five grounds. In response to their first argument that the domestic courts had afforded the State too narrow a margin of appreciation in assessing what measures were strictly necessary, the Court explained that the margin of appreciation doctrine had always been meant as a tool to define relations between the domestic authorities and the Court; it could not have the same application to relations between the different organs of State at the domestic level. The question whether the measures were strictly required was ultimately a judicial decision, particularly where, as here, the applicants had been deprived of their fundamental right to liberty over a long period. In any event, the House of Lords had approached the issues carefully and could not be said to have given inadequate weight to the views of the executive or Parliament. As to the Government's second argument, that the House of Lords had examined the legislation in the abstract rather than the applicants' concrete cases, the Court noted that the approach under Article 15 was necessarily focused on the general situation and that where, as in the instant case, the measures had been found to be disproportionate and discriminatory, there was no need to examine their application in each individual case. As to the Government's third point, that the House of Lords' conclusion had turned not on a rejection of the necessity to detain the applicants but on the absence of legislative power to detain nationals who posed a risk to national security, the Court considered that the House of Lords had been correct in holding that the extended powers of detention 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. The choice of an immigration measure to address what had essentially been a security issue had resulted in a failure adequately to address the problem, while imposing a disproportionate and discriminatory burden of indefinite detention on one group of suspected terrorists. 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 Government's final two arguments – that it had been legitimate to confine the detention scheme to non-nationals to avoid alienating the British Muslim population and that the State could better respond to the terrorist threat if it were able to detain its most serious source, namely non-nationals – failed for want of evidence. In sum, the derogating measures were disproportionate in that they discriminated unjustifiably between nationals and non-nationals.

Conclusion: violation save in respect of the second and fourth applicants (unanimously).

Article 5 § 4 – The applicants had complained that the procedure before SIAC was unfair because the evidence against them was not fully disclosed. The Court declared the complaints of the second and fourth applicants inadmissible as they were already at liberty when the proceedings to determine the lawfulness of the detention under the 2001 Act commenced. With regard to the remaining applicants, the strong public interest in obtaining information about al-Qaeda and its associates and keeping the sources secret had to be balanced against the applicants' right to procedural fairness in their appeals. It was therefore essential that as much information about the allegations and evidence against them was disclosed as was possible without compromising national security or the safety of

others and that they had the possibility effectively to challenge the case against them. The Court accepted that SIAC was a fully independent court that could examine all the relevant evidence and ensure that no material was unnecessarily withheld, that the special advocate provided an important additional safeguard and that there was nothing to indicate that excessive and unjustified secrecy had been employed or that there had not been compelling reasons for the lack of disclosure in each case. Ultimately, however, the question was whether, in cases where the underlying evidence was not disclosed, the allegations in the open material were sufficiently specific to enable the applicant to provide his representatives and the special advocate with information with which to refute them.

Applying that test, the Court noted that the open material against five of the applicants had included allegations (for example, about the purchase of specific telecommunications equipment, possession of specific documents linked to named terrorist suspects and meetings with named terrorist suspects with specific dates and places) that were sufficiently detailed to permit an effective challenge. The procedural requirement was thus satisfied in their case. However, the open evidence in the cases of the remaining four applicants was adjudged to have been insufficient to permit an effective challenge, either because a crucial element was missing (evidence of a link between money the applicants were alleged to have raised and terrorism) or because it was of a general and insubstantial nature such that SIAC had had to rely largely on the closed material.

Conclusion: violation in respect of four applicants, no violation in respect of five applicants and inadmissible in respect of remaining two (unanimously).

Article 5 § 5 – Since the violations of Article 5 §§ 1 and 4 could not give rise to an enforceable claim for compensation before the national courts, whose powers were limited to issuing a declaration of incompatibility with the Convention, there had been a violation of that provision too.

Conclusion: violation in respect of all but the second and fourth applicants (unanimously).

Article 3 – The European Convention prohibited in absolute terms torture and inhuman or degrading treatment and punishment even in the most difficult of circumstances, such as the fight against terrorism, and irrespective of the conduct of the person concerned.

The second applicant's complaint was declared inadmissible as he had been held for only a few days without undue hardship. As to the remaining ten applicants, their detention had not reached the high threshold of inhuman and degrading treatment for which a violation of Article 3 could be found. While the uncertainty and fear of indefinite detention must have caused them anxiety and distress, and had probably affected the mental health of some of them, the applicants had not been without any prospect or hope of release. They had successfully challenged the legality of the detention scheme under the 2001 Act before SIAC and the House of Lords. In addition, they had been able to bring individual challenges to the decision to certify them and SIAC was required by statute to review the continuing case for detention every six months. The applicants' situation was accordingly not comparable to an irreducible life sentence. The conditions in which they were detained could not be taken into account as they had not attempted to exhaust the remedies available to all prisoners under administrative and civil law.

Conclusion: no violation in respect of ten applicants, inadmissible in respect of remaining applicant (unanimously).

Article 41 – Individual awards ranging from EUR 1,700 to EUR 3,900 in respect of pecuniary and non-pecuniary damage. These awards were substantially lower than in past cases of unlawful detention, in view of the fact that the detention scheme had been devised in the face of a public emergency and as a bona fide attempt to reconcile the need to protect the public against terrorism with the obligation not to send the applicants back to countries where they faced a real risk of ill-treatment. Further, since all the applicants in respect of whom the Court had found a violation of Article 5 § 1 had become the subject of control orders after their release in March 2005, it could not be assumed that they would not have been subjected to some restriction on their liberty even if the violations had not occurred.
