EUROPEAN COURT OF HUMAN RIGHTS

BROGAN V. UNITED KINGDOM
European Court of Human Rights, 1988
Ser. A, No. 145-B, 11 EHRR 117

[In the 1970s and 1980s, terrorism in Northern Ireland caused thousands of deaths and tens of thousands of injuries. Parliamentary legislation in 1974 and 1976, subject to renewal each year, gave to the police special powers of arrest and detention. The 1976 Act was renewed annually until 1984, when it was replaced by the Prevention of Terrorism Act (1984 Act) proscribing both the Provisional Irish Repblican Army (IRA) and the Irish National Liberation Army (INLA) as terrorist organizations. Annual reports on the 1984 Act were required to be submitted to Parliament before annual renewal. The authors of these reports had concluded that ongoing terrorism made special powers of arrest and extended detention indispensable.

Under ordinary law, police had no power to arrest and detain a person merely to make inquiries, and arrest without warrant required reasonable suspicion that a specific crime had been committed. The 1984 Act differed. No charge had to be preferred during the permitted period of detention under that act. The detention was not necessarily the first step in a criminal proceeding leading to judicial investigation of a charge against the detained person.

Four persons who later initiated proceedings against the U.K. before the European Commission of Human Rights were arrested and detained in 1984 and 1985 under the 1984 Act. Each was told by the police that there were reasonable grounds for suspecting his involvement in terrorism, and was cautioned that he need not say anything. The Secretary of State agreed in each case to a police request for extension of detention. None was brought before a judge or charged after their release, which occurred after periods of detention ranging from 4 days and 6 hours to 6 days and 16 hours.]

II. GENERAL APPROACH

48. The Government have adverted extensively to the existence of particularly difficult circumstances in Northern Ireland, notably the threat posed by organised terrorism.

The Court, having taken notice of the growth of terrorism in modern society, has already recognised the need, inherent in the Convention system, for a proper balance between the defence of the institutions of democracy in the common interest and the protection of individual

rights (see the Klass and Others judgment of 6 September 1978, Series A no. 28, pp. 23 and 27-28, paras. 48-49 and 59).

The Government informed the Secretary General of the Council of Europe on 22 August 1984 that they were withdrawing a notice of derogation under Article 15 (art. 15) which had relied on an emergency situation in Northern Ireland (see Yearbook of the Convention, vol. 14, p. 32 [1971], vol. 16, pp. 26-28 [1973], vol. 18, p. 18 [1975], and vol. 21, p. 22 [1978], for communications giving notice of derogation, and Information Bulletin on Legal Activities within the Council of Europe and in Member States, vol. 21, p. 2 [July, 1985], for the withdrawal). The Government indicated accordingly that in their opinion "the provisions of the Convention are being fully executed". In any event, as they pointed out, the derogation did not apply to the area of law in issue in the present case.

Consequently, there is no call in the present proceedings to consider whether any derogation from the United Kingdom's obligations under the Convention might be permissible under Article 15 (art. 15) by reason of a terrorist campaign in Northern Ireland. Examination of the case must proceed on the basis that the Articles of the Convention in respect of which complaints have been made are fully applicable. This does not, however, preclude proper account being taken of the background circumstances of the case. In the context of Article 5 (art. 5), it is for the Court to determine the significance to be attached to those circumstances and to ascertain whether, in the instant case, the balance struck complied with the applicable provisions of that Article in the light of their particular wording and its overall object and purpose.

III. ALLEGED BREACH OF ARTICLE 5 PARA. 1 (art. 5-1)

49. The applicants alleged breach of Article 5 para. 1 (art. 5-1) of the Convention, which, in so far as relevant, provides:

"Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

...

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence ...;

..."

52. Article 5 para. 1 (c) (art. 5-1-c) also requires that the purpose of the arrest or detention should be to bring the person concerned before the competent legal authority.

The Government and the Commission have argued that such an intention was present and that if sufficient and usable evidence had been obtained during the police investigation that followed the applicants' arrest, they would undoubtedly have been charged and brought to trial.

The applicants contested these arguments and referred to the fact that they were neither charged nor brought before a court during their detention. No charge had necessarily to follow an arrest under section 12 of the 1984 Act and the requirement under the ordinary law to bring the person before a court had been made inapplicable to detention under this Act (see paragraphs 30 and 32 above). In the applicants' contention, this was therefore a power of administrative detention exercised for the purpose of gathering information, as the use in practice of the special powers corroborated.

53. The Court is not required to examine the impugned legislation in abstracto, but must confine itself to the circumstances of the case before it.

The fact that the applicants were neither charged nor brought before a court does not necessarily mean that the purpose of their detention was not in accordance with Article 5 para. 1 (c) (art. 5-1-c). As the Government and the Commission have stated, the existence of such a purpose must be considered independently of its achievement and sub-paragraph (c) of Article 5 para. 1 (art. 5-1-c) does not presuppose that the police should have obtained sufficient evidence to bring charges, either at the point of arrest or while the applicants were in custody.

Such evidence may have been unobtainable or, in view of the nature of the suspected offences, impossible to produce in court without endangering the lives of others. There is no reason to believe that the police investigation in this case was not in good faith or that the detention of the applicants was not intended to further that investigation by way of confirming or dispelling the concrete suspicions which, as the Court has found, grounded their arrest (see paragraph 51 above). Had it been possible, the police would, it can be assumed, have laid charges and the applicants would have been brought before the competent legal authority.

Their arrest and detention must therefore be taken to have been

effected for the purpose specified in paragraph 1 (c) (art. 5-1-c).

54. In conclusion, there has been no violation of Article 5 para. 1 (art. 5-1).

IV. ALLEGED BREACH OF ARTICLE 5 PARA. 3 (art. 5-3)

55. ...The applicants claimed, as a consequence of their arrest and detention under this legislation, to have been the victims of a violation of Article 5 para. 3 (art. 5-3), which provides:

"Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article (art. 5-1-c) shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial."

The applicants noted that . . . there was no plausible reason why a seven-day detention period was necessary, marking as it did such a radical departure from ordinary law . . . Nor was there any justification for not entrusting such decisions to the judiciary of Northern Ireland.

56. The Government have argued that in view of the nature and extent of the terrorist threat and the resulting problems in obtaining evidence sufficient to bring charges, the maximum statutory period of detention of seven days was an indispensable part of the effort to combat that threat, as successive parliamentary debates and reviews of the legislation had confirmed (see paragraphs 26-29 above). In particular, they drew attention to the difficulty faced by the security forces in obtaining evidence which is both admissible and usable in consequence of training in anti-interrogation techniques adopted by those involved in terrorism. Time was also needed to undertake necessary scientific examinations, to correlate information from other detainees and to liaise with other security forces. The Government claimed that the need for a power of extension of the period of detention was borne out by statistics. For instance, in 1987 extensions were granted in Northern Ireland in respect of 365 persons. Some 83 were detained in excess of five days and of this number 39 were charged with serious terrorist offences during the extended period.

As regards the suggestion that extensions of detention beyond the initial forty-eight-hour period should be controlled or even authorised by a judge, the Government pointed out the difficulty, in view of the acute sensitivity of some of the information on which the

suspicion was based, of producing it in court. Not only would the court have to sit in camera but neither the detained person nor his legal advisers could be present or told any of the details. This would require a fundamental and undesirable change in the law and procedure of the United Kingdom under which an individual who is deprived of his liberty is entitled to be represented by his legal advisers at any proceedings before a court relating to his detention. If entrusted with the power to grant extensions of detention, the judges would be seen to be exercising an executive rather than a judicial function. It would add nothing to the safeguards against abuse which the present arrangements are designed to achieve and could lead to unanswerable criticism of the judiciary. In all the circumstances, the Secretary of State was better placed to take such decisions and to ensure a consistent approach. ...

The assessment of "promptness" has to be made in the light of the object and purpose of Article 5 (art. 5) (see paragraph 48 above). The Court has regard to the importance of this Article (art. 5) in the Convention system: it enshrines a fundamental human right, namely the protection of the individual against arbitrary interferences by the State with his right to liberty (see the Bozano judgment of 18 December 1986, Series A no. 111, p. 23, para. 54). Judicial control of interferences by the executive with the individual's right to liberty is an essential feature of the guarantee embodied in Article 5 para. 3 (art. 5-3), which is intended to minimise the risk of arbitrariness. Judicial control is implied by the rule of law, "one of the fundamental principles of a democratic society ..., which is expressly referred to in the Preamble to the Convention" (see, mutatis mutandis, the above-mentioned Klass and Others judgment, Series A no. 28, pp. 25-26, para. 55) and "from which the whole Convention draws its inspiration" (see, mutatis mutandis, the Engel and Others judgment of 8 June 1976, Series A no. 22, p. 28, para. 69).

59. The obligation expressed in English by the word "promptly" and in French by the word "aussitôt" is clearly distinguishable from the less strict requirement in the second part of paragraph 3 (art. 5-3) ("reasonable time"/"délai raisonnable") and even from that in paragraph 4 of Article 5 (art. 5-4) ("speedily"/"à bref délai"). The term "promptly" also occurs in the English text of paragraph 2 (art. 5-2), where the French text uses the words "dans le plus court délai". As indicated in the Ireland v. the United Kingdom judgment (18 January 1978, Series A no. 25, p. 76, para. 199), "promptly" in paragraph 3 (art. 5-3) may be understood as having a broader significance than "aussitôt", which literally means immediately. Thus confronted with versions of a law-making treaty which are equally authentic but not exactly the same, the Court must interpret them in a

way that reconciles them as far as possible and is most appropriate in order to realise the aim and achieve the object of the treaty (see, inter alia, the Sunday Times judgment of 26 April 1979, Series A no. 30, p. 30, para. 48, and Article 33 para. 4 of the Vienna Convention of 23 May 1969 on the Law of Treaties).

The use in the French text of the word "aussitôt", with its constraining connotation of immediacy, confirms that the degree of flexibility attaching to the notion of "promptness" is limited, even if the attendant circumstances can never be ignored for the purposes of the assessment under paragraph 3

...

61. The investigation of terrorist offences undoubtedly presents the authorities with special problems, partial reference to which has already been made under Article 5 para. 1 (art. 5-1) (see paragraph 53 above). The Court takes full judicial notice of the factors adverted to by the Government in this connection. It is also true that in Northern Ireland the referral of police requests for extended detention to the Secretary of State and the individual scrutiny of each police request by a Minister do provide a form of executive control (see paragraph 37 above). In addition, the need for the continuation of the special powers has been constantly monitored by Parliament and their operation regularly reviewed by independent personalities (see paragraphs 26-29 above). The Court accepts that, subject to the existence of adequate safeguards, the context of terrorism in Northern Ireland has the effect of prolonging the period during which the authorities may, without violating Article 5 para. 3 (art. 5-3), keep a person suspected of serious terrorist offences in custody before bringing him before a judge or other judicial officer.

...

62. As indicated above (paragraph 59), the scope for flexibility in interpreting and applying the notion of "promptness" is very limited. In the Court's view, even the shortest of the four periods of detention, namely the four days and six hours spent in police custody by Mr McFadden (see paragraph 18 above), falls outside the strict constraints as to time permitted by the first part of Article 5 para. 3 (art. 5-3). To attach such importance to the special features of this case as to justify so lengthy a period of detention without appearance before a judge or other judicial officer would be an unacceptably wide interpretation of the plain meaning of the word "promptly". An interpretation to this effect would import into Article 5 para. 3 (art. 5-3) a serious weakening of a procedural guarantee

to the detriment of the individual and would entail consequences impairing the very essence of the right protected by this provision. The Court thus has to conclude that none of the applicants was either brought "promptly" before a judicial authority or released "promptly" following his arrest. The undoubted fact that the arrest and detention of the applicants were inspired by the legitimate aim of protecting the community as a whole from terrorism is not on its own sufficient to ensure compliance with the specific requirements of Article 5 para. 3 (art. 5-3).

There has thus been a breach of Article 5 para. 3 (art. 5-3) in respect of all four applicants.

...

JOINT DISSENTING OPINION OF JUDGES THÓR VILHJÁLMSSON, BINDSCHEDLER-ROBERT, GÖLCÜKLÜ, MATSCHER AND VALTICOS

...

The background to the instant case is a situation which no one would deny is exceptional. Terrorism in Northern Ireland has assumed alarming proportions and has claimed more than 2,000 victims who have died following actions of this kind....

It is therefore necessary to weigh carefully, on the one hand, the rights of detainees and, on the other, those of the population as a whole, which is seriously threatened by terrorist activity.

...

While considering, therefore, that there was no breach of Article 5 para. 3 (art. 5-3) in the instant case, we are anxious to stress that this view can be maintained only in so far as such exceptional conditions prevail in the country, and that the authorities should monitor the situation closely in order to return to the practices of ordinary law as soon as more normal conditions are restored, and even that, until then, an effort should be made to reduce as much as possible the length of time for which a person is detained before being brought before a judge.

...

DISSENTING OPINION OF JUDGES WALSH AND CARRILLO SALCEDO IN RESPECT OF

ARTICLE 5 PARA. 1 (c) (art. 5-1-c)

We believe that Article 5 (art. 5) of the European Convention on Human Rights does not afford to the State any margin of appreciation. If the concept of a margin of appreciation were to be read into Article 5 (art. 5), it would change the whole nature of this all-important provision which would then become subject to executive policy....

...In our opinion, Article 5 (art. 5) does not permit the arrest and detention of persons for interrogation in the hope that something will turn up in the course of the interrogation which would justify the bringing of a charge.

In our view the arrests in the present cases were for the purpose of interrogation at a time when there was no evidential basis for the bringing of any charge against them. No such evidence ever emerged and eventually they had to be released. That the legislation in question is used for such a purpose is amply borne out by the fact that since 1974 15,173 persons have been arrested and detained in the United Kingdom pursuant to the legislation yet less than 25% of those persons, namely 3,342, have been charged with any criminal offence arising out of the interrogation including offences totally unconnected with the original arrest and detention. Still fewer of them have been convicted of any offence of a terrorist type.

The Convention embodies the presumption of innocence and thus enshrines a most fundamental human right, namely the protection of the individual against arbitrary interference by the State with his right to liberty. The circumstances of the arrest and detention in the present cases were not compatible with this right and accordingly we are of the opinion that Article 5 para. 1 (art. 5-1) has been violated.

The undoubted fact that the arrest of the applicants was inspired by the legitimate aim of protecting the community as a whole from terrorism is in our opinion not sufficient to ensure compliance with the requirements of Article 5 para. 1 (c) (art. 5-1-c...

PARTLY DISSENTING OPINION OF JUDGE SIR VINCENT EVANS

...

The Commission for its part has for more than twenty years taken the view that in normal cases a period of up to four days before the detained person is brought before a judge is compatible with the requirement of promptitude and that a somewhat longer period is

justifiable in some circumstances. The Court has not hitherto cast doubt on the Commission's view in these respects. If anything, the Court's judgments in the de Jong, Baljet and van den Brink and other cases have tended by implication to confirm it.

Furthermore, the Court has consistently recognised that States must, in assessing the compatibility of their laws and practices with the requirements of the Convention, be permitted a "margin of appreciation" and that inherent in the whole Convention is the search for a fair balance between the demands of the general interest of the community and the protection of the individual's fundamental rights. In the Klass case, the Court agreed with the Commission that "some compromise between the requirements of defending democratic society and individual rights is inherent in the system of the Convention" (judgment of 6 September 1978, Series A no. 28, p. 28, para. 59).

In my opinion, the jurisprudence thus far developed constitutes a reasonable interpretation of Article 5 para. 3 (art. 5-3), and in particular of the word "promptly".

4. The need to assess the issue of promptness according to the special features of the case and to strike a fair balance between the different rights and interests involved are considerations which are surely relevant in the special circumstances of the situation in Northern Ireland where more than thirty thousand persons have been killed, maimed or injured as a direct result of terrorist activity in the last twenty years. The balance to be sought in applying the Convention in this situation is between, on the one hand, the interests of the community and of ordinary decent men, women and children who are so often the victims of terrorism and, on the other hand, the rights of persons suspected on reasonable grounds of belonging to or supporting a proscribed terrorist organisation or of otherwise being concerned in the commission, preparation or instigation of acts of terrorism.

... The need for the exceptional powers under section 12 to which such factors give rise is supported by the statistics quoted in the same paragraph of the judgment - that in 1987, for instance, of some 83 persons detained in excess of five days, 39 were charged with serious terrorist offences during the extended period.

DISSENTING OPINION OF JUDGE MARTENS

...

3. As the Court rightly recalls in paragraph 48 of its judgment, terrorism is a feature of modern life, which has attained its present extent and intensity only since the Convention was drafted. Terrorism - and particularly terorrism on the scale obtaining in Northern Ireland - is the very negation of the principles the Convention stands for and should therefore be combated as vigorously as possible. It seems obvious that to suppress terrorism the executive needs extraordinary powers, just as it seems obvious that Governments should to a large extent be free to choose the ways and means which they think most efficacious for combating terrorism. Of course, in combating terrorism the States Parties to the Convention have to respect the rights and freedoms secured therein to everyone. I subscribe to that and I am aware of the danger of measures being taken which, as the Court has put it, may undermine or even destroy democracy on the ground of defending it (see the Klass and Others judgment of 6 September 1978, Series A no. 28, p. 23, para. 49). But I think that this danger must not be exaggerated - especially with regard to States which have a long and firm traditon of democracy - and should not lead to the wings of national authorities being excessively clipped, for that would unduly benefit those who do not hesitate to trample on the rights and freedoms of others.

4. It goes without saying that a person against whom there is a reasonable suspicion of being involved in acts of terrorism should be free from torture or inhuman or degrading treatment. But it seems to me legitimate to ask whether he may not be detained, before being brought before a judge, for a somewhat longer period than is acceptable under ordinary criminal law. In this connection, I consider that the Court by saying, in the second section of paragraph 58 of its judgment, that Article 5 (art. 5) "enshrines a fundamental human right" somewhat overestimates the importance of this provision in the Convention system. Undoubtedly, the right to liberty and security of person is an important right, but it does not belong to that small nucleus of rights from which no derogation is permitted. This means that there is room for weighing the general interest in an effective combating of terrorism against the individual interests of those who are arrested on a reasonable suspicion of involvement in acts of terrorism....

...

Striking a fair balance between the interests of the community that suffers from terrorism and those of the individual is particularly difficult and national authorities, who from long and painful experience have acquired a far better insight into the requirements of effectively combating terrorism and of protecting

their citizens than an international judge can ever hope to acquire from print, are in principle in a better position to do so than that judge!

It is in this context that three factors seem to me to be of importance:

(i) The first factor is the particular extent, vehemence and persistence of the terrorism that has raged since 1969 in Northern Ireland, a community of 1.5 million people. In his address to the Court, the Solicitor General said that since 1969 2,646 persons have died as a direct result of terrorist activity and 30,658 have been maimed and injured. There were, he said, 43,649 bombing and shooting incidents. These data have not been disputed.

(ii) The second factor is that we are undoubtedly dealing with a society which has been a democracy for a long time and as such is fully aware both of the importance of the individual right to liberty and of the inherent dangers of giving too wide a power of detention to the executive

(iii) The third factor is that the United Kingdom legislature, apparently being aware of those dangers, has each time granted the extraordinary powers only for a limited period, i.e. one year on each occasion, and only after due inquiry into the continued need for the legislation by investigators who - as the Government have asserted and the applicants have not seriously denied - were independent and professionally qualified for such investigation. Time and again both these investigators and the British Parliament concluded that the section under discussion could not be dispensed with.

In my opinion, these three factors also make it highly desirable for an international judge to adopt an attitude of reserve.

Against this background I think that the Court can find that the United Kingdom, when enacting and maintaining section 12 of the 1984 Act, overstepped the margin of appreciation it is entitled to under Article 5 para. 3 (art. 5-3) only if it considers that the arguments for maintaining the seven-day period are wholly unconvincing and cannot be reasonably defended. In my opinion that condition has not been satisfied.