

**EUROPEAN ASSOCIATION OF STATE REPRESENTATIVES**

XXIVth European Days, 15-17 June 2017

Oulu, Finland

**The Role of the State Territorial Representative Facing Threats to Security**

Finland 100 Years

Session I, 15 June 2017, 4-6 pm

**Context and Security Issues in European Countries**



# **RECONCILING COUNTER-TERRORISM MEASURES AND PROTECTION OF HUMAN RIGHTS**

**Paul Mahoney**

**(Former UK judge on the European Court of Human Rights. Any views expressed are personal.)**



- July 2005, London: Unsuccessful terrorist bomb attack on public transport system.
- Initial police interview of (subsequently prosecuted) suspects in the absence of a lawyer.
- Judgment by the European Court of Human Rights (Strasbourg) in the case of *Ibrahim and Others v. UK* (September 2016), concerning the suspects' right to a fair trial (as guaranteed by Article 6 of the European Convention on Human Rights).



What are the limits placed on the response to terrorism by the protection of human rights in a democratic society?

*Nota bene:* The vast majority of human rights guaranteed to individuals are not absolute, but may be subject to restrictions on their exercise in the interest of the community or other individuals.

## **Factual circumstances in *Ibrahim* : The suspects' access to legal assistance was delayed.**

- The first three applicants were subject to 'safety interviews' to obtain information necessary to ensure public safety.
- The fourth applicant's interview as a witness was continued in the absence of a lawyer even after he began to incriminate himself.
- The statements made at these initial police interviews were admitted in evidence at the subsequent trial of the suspects.

# Strasbourg Court's ruling

- (15 votes to 2) No violation of the ECHR fair trial guarantees as regards the first three applicants.
- (11 votes to 6) Violation as regards the fourth applicant.

# Case-law antecedents of *Ibrahim*

- Unsuccessful challenge of German legislation governing secret surveillance by police and security services: ‘*Some compromise between the requirements of defending democratic society and individual rights is inherent in the [ECHR] system.*’
- Cases from Northern Ireland, France (Basque terrorism), Belgium (Al Qaeda), on the right to liberty of terrorist suspects (arrest, detention, judicial control – Art. 5 ECHR): Recognition of the difficulties in dealing with terrorist crime, but no *carte blanche* for the authorities.
- Statutory power of the police in UK to stop and search individuals without reasonable suspicion (right to respect for private life – Art. 8 ECHR): The legislation lacked adequate safeguards against abuse.

# Reasoning in *Ibrahim* ruling

- As in previous cases, nuanced analysis of the impact of the difficulties of dealing with terrorism on the State's obligation to respect human rights.
- Restriction on immediate access to a lawyer may be compatible with the right to a fair trial in exceptional circumstances which have to be justified by the State.
- The difference between the findings on the facts: No violation for first three applicants, violation for the fourth applicant.

# Implications of the *Ibrahim* ruling

1st general point: The legitimacy of taking into account the ‘special nature’ of terrorist crime.

- This legitimacy is based on the core rights to life and to bodily security of other individuals (Arts. 2, 3 and 5 ECHR).
- Not a question of ‘security versus human rights’ or ‘*la raison d’Etat* versus the vulnerable individual’.

# Implications of the *Ibrahim* ruling

## 1st general point (cont'd):

- The case of hostage-taking at a school in Breslan (Russia): A tragic illustration of **the positive human-rights duty that the State owes to members of the public as potential or actual victims of terrorist activity.**
- As part of this positive duty, **intelligence-gathering through preventive surveillance measures:** surveillance of individual suspects, ‘mass’ surveillance of telephone and electronic communications networks, data surveillance (cf. Edward Snowden’s revelations).

# Implications of the *Ibrahim* ruling

## 2nd general point:

- **Subsidiarity and national discretion**, no system of ‘bright-line’ rules imposed by the ECHR.
- But **absolute prohibition of torture and inhuman treatment**:
  - asylum-seekers, extradition and deportation;
  - CIA rendition cases, where European States were held responsible for cooperation with USA.

# Considerations influencing the justification of heightened restrictions in the context of counter-terrorism measures

- 1. An adequate justificatory framework**
  - specifying the conditions for exceptional restrictions;
  - providing safeguards against abuse.
- 2. Individual assessment and justification in each case.**
- 3. Non-compliance with domestic law or codes of practice: carries a risk of violation of ECHR.**

# Considerations influencing the justification of heightened restrictions in the context of counter-terrorism measures

## 4. **Duration and extent of the restriction** on the normal exercise of the human right in question.

If reduced, the less likely it is that the ECHR will be infringed.

## 4. **Crucial role of the national authorities**

- The duty of decision-makers in democratic society to carry out a careful examination of the impact of counter-terrorism measures on the enjoyment of human rights.
- Subsidiarity that is visible and tangible.

# Conclusion

## ➤ **Heightened awareness of**

- the current level of the terrorist threat;
- the positive duty of the State to protect the core human rights to life and to bodily security of all people within its jurisdiction.

## ➤ **But exceptional restrictions on the normal exercise of human rights should:**

- be kept to the minimum;
- not be such as to extinguish the essence of the human right in question.

# Conclusion

- *‘The fight against terrorism and the protection of human rights can co-exist.’*
- **The national authorities** – notably State territorial representatives – are best placed to ensure reconciliation of counter-terrorism measures and human rights protection.