International Humanitarian Law Unit's Annual Lecture

Judge Robert Spano

Terrorism and Article 6 of the European Convention on Human Rights

Ibrahim and Others v United Kingdom (2016)

On 10th March 2017, Judge Robert Spano, judge of the European Court of Human Rights, delivered the 6th Annual Autumn Lecture of the HRLC's International Humanitarian Law Unit, entitled "Terrorism and Article 6 of the European Convention on Human Rights - *Ibrahim and Others v United Kingdom".*

Discussion point

Judge Spano discussed the following topics; the issue of terrorism and how the European Court of Human Rights ("ECtHR") is grappling with that, the issue of mass casualty crime, the responses by domestic courts and the tensions that arise with law enforcement and human rights.

Institutional elements of the European Court of Human Rights

Judge Spano firstly made some preliminary remarks about the ECtHR and the European Convention on Human Rights ("Convention"). He laid down the institutional elements of the ECtHR as a foundation to his discussion. He identified that there are two main elements to the ECtHR. Firstly, it is important to note that the ECtHR is an international court and the fact that it is international is fundamental in understanding the court's role. The basis of the Convention is that the Member State's ensure that the Convention is protected, the primary responsibility lies in the hands of the Member State. The domestic executive and the domestic judge should be the driving force of the Convention. Secondly, the court is the subsidiary a subsidiary organ, it comes into play as a mechanism which is intended to provide checks and balance at an international level for happenings at the domestic level. This means that there is functional and institutional relationship between the Court and its domestic counterparts. That relationship is a fundamental institutional paradigm for understanding cases regarding Article 6. Such cases, under the criminal limb are a fundamental manifestation of domestic judicial power. It is the domestic judge who deals with criminal offences, evidentiary assessment and procedural issues and ultimately decides, taking account of the jury, the establishment of guilt or innocence.

The question arises, what is the role of the ECtHR particular scenario. This can be viewed two dimensionally. You can firstly, say that the Court should be an arbitrator of principles, it looks to whether the framework that has been used and the application of general principles of human rights law and how that application has taken place in the individual case before the court. On the other hand, it can be argued that the Court should go further, the Court needs to be a mechanism where every element at the domestic process needs to be supervised. Historically, the Court has been an arbitrator of principles, nit the director of operations, it is a macro-level of supervisory court, not the micro-manager of the domestic process. This is in conformity with the two overarching principles, the principle of subsidiary and the 'fourth-instance doctrine.' The fourth-instance doctrine tells us that the Strasbourg Court is not a court where the verdict of guilt or innocent can be appealed, the court usually doesn't re-examine evidence. This also impacts the application of the Convention in the criminal process field, the Convention acts as a framework of principles, it is not is a Criminal Procedure Code. Every Member State, retains a right to retain its traditions and its legal philosophy in the field of criminal law. The Court will not impose

rules in the application of the criminal process, although it has been invited to do so, even in *Ibrahim and Others v United Kingdom* ("*Ibrahim"*).

The analytical framework in terrorist cases – A clash of principles, *Ibrahim and Others* § 252

Judge Spano emphasises that it is important to realise that a democratic society governed by a rule of law and human rights law is faced with a clash of principles and this was manifested by the Court in the *Ibrahim* judgment.

Judge Spano then quotes a passage from the judgment:

"The general requirements of fairness contained in Article 6 apply to all criminal proceedings, irrespective of the type of offence in issue. There can be no question of watering down fair trial rights for the sole reason that the individuals in question are suspected of involvement in terrorism. In these challenging times, the Court considers that it is of the utmost importance that the Contracting Parties demonstrate their commitment to human rights and the rule of law by ensuring respect for, inter alia, the minimum guarantees of Article 6 of the Convention. Nevertheless, when determining whether the proceedings as a whole have been fair the weight of the public interest in the investigation and punishment of the particular offence in issue may be taken into consideration .... "

So on the outset, you have the manifestation of the individual right on the one hand and on the other, the rights of society as encapsulated in governmental power to safeguard lives and integrity of the public.

Judge Spano then continues to cite the judgment:

"Moreover, Article 6 should not be applied in such a manner as to put disproportionate difficulties in the way of the police authorities in taking effective measures to counter terrorism or other serious crimes in discharge of their duty under Articles 2, 3 and 5 § 1 of the Convention to protect the right to life and the right to bodily security of members of the public …. However, public interest concerns cannot justify measures which extinguish the very essence of an applicant's defence rights."

So what the Court is confronted with in these types of situations, says Judge Spano, is a clash of between what can be termed as the 'prevention or protection principle' embodied in the positive obligations of States under Art 2 and 3 to safeguard the lives of people within the society, to prevent private horizontal relations in resulting in death on the one hand, and on the other, the 'individual protection principle,' the protection of those persons that are subject to governmental power in the criminal process because of a reasonable suspicion as to a crime having been committed.

Judge Spano emphasises that it is important to understand this dynamic because it creates difficulties. The Court invariably tries to create a holistic system, an inter-harmonious system where it tries to interpret one Convention provision in light of others so there is harmony and not clashes, so that the Member States do not have difficulty in reconciling. So on the one hand the Court states that the Member States have positive obligations under Article 2 (*McCann v UK, Osman v UK*) and on the other hand, Article 6 is the operationalisation of that positive obligation within the criminal process. The question arises how do we reconcile the minimum safeguards in a criminal process with the positive obligation of safeguarding lives. In the terrorist field, in Europe, the issue of the positive obligations under Article 2 are heavily debated. The question arises, to what extent Article 2 mandates proactive measures by government, to prevent or alleviate terrorist activities. There is a pending case in the Court, *Tagayeva and Others v Russia*, that may address

this issue. The *Osman* test states that when States have knowledge of an immediate risk to an identifiable or identified individual, they have a duty to act to protect their lives under Article 2. Judge Spano raises the question, to what extent can this duty be expanded to cover situations of mass killing, where the target is not an identifiable person but the public at large? The case of *Mastromatteo v Italy* expanded that test somewhat.

The Right to Legal Assistance – The framework under Article 6(3)(c) of the Convention: *Salduz v Turkey* (GC) (2008)

One of the elements manifesting the status of Article 6, is Article 15, under which Members States are allowed to derogate from Article 6. This is very important manifestation of Article. States are not allowed to derogate from Article 3 and usually from Article 2, but Article 6 can be derogated from and one example is in France. Due to the Paris killings in November 2015, France derogated from Article 6 due to the terrorist threat. This context must be borne in mind, before examining the elements of Article 6.

The right to legal assistance, Judge Spano states is seen as the "holy grail" by lawyers and rightly so. The Court has progressively and historically give recognition to the fundamental right under Art 6(3)(c) to legal assistance. This right gained the most recognition in a landmark judgment by the ECtHR, *Salduz v Turkey.* The case involved a seventeen-year-old Turk, who had been convicted to taking part in a protest, organised by a branch of the PKK. He was also convicted of raising a banner over a bridge. This actions fell under the scope of the terrorism law in Turkey at the time. Terrorism law at the time, had an inbuilt system that denied legal assistance. The applicant gave self-incriminating statements when detained and when he reached trial, where he had access to legal advice, Salduz retracted his statements, claiming that they were given under duress. The Court was presented with the question as to whether firstly, Art 6(3)(c) gave the right to legal assistance and secondly, if it did, was Turkey justified in imposing a systematic ban on legal access? Court found a violation in this case. Judge Spano referred paragraph 55 of the judgment:

"Against this background, the Court finds that in order for the right to a fair trial to remain sufficiently "practical and effective" (see paragraph 51 above), Article 6 § 1 requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of each case that there are compelling reasons to restrict this right. Even where compelling reasons may exceptionally justify denial of access to a lawyer, such restriction – whatever its justification – must not unduly prejudice the rights of the accused under Article 6 ... The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction."

The Court held that the systematic restriction of access to a lawyer could never be a compelling reason as it was not based on an individualised assessment. The Court held in paragraph 56 of the judgment that, that in itself was sufficient to constitute a breach but continues and goes to assess whether the incriminating statements prejudice the defence. The Court found that the domestic court had based conviction on the incriminating statements when there was no legal access provided and so there was a clear breach found.

The judgment of *Salduz* said Judge Spano, left some questions unanswered, that were addressed in *Ibrahim*:

1) What constituted 'compelling reasons'?

2) Does the lack of compelling reasons automatically sustain a breach of Article 6? If access to legal advice is restricted without compelling reasons, is that end to the matter, or should the court go to into seeing whether as a whole the trial was fair, even with the use of the statements given when legal access was denied?

Ibrahim and Others – A departure from *Salduz*?

Ibrahim dealt with the 2005 bombings in London, which killed over fifty people. Two weeks later, three individuals attempted to ignite a bomb. These three individuals were arrested and detained but refused between 4-8 hours on the basis of the Terrorism Act, on the basis of 'safety interviews.' Safety interviews are conducted in high urgency situations, when the police are trying to get further information for the suspect. The focus of the interviews are not to gain incriminating evidence, but to get the suspect to reveal information that will help the authorities gather information that will prevent further attacks and safeguard the public. At this point, the individuals didn't acknowledge their involvement, they were cautioned in way which was not fully compatible with domestic law. The police neglected to inform the suspects of the adverse inferences that could be drawn at trial, from their decision to remain silent. When the suspects came to trial, they changed their statements, claiming that they were involved, however, the whole situation was a hoax. The issue at trial was to assess their credibility. At the end of the trial, they were convicted. There was a fourth applicant in this case who was not involved in the perpetration of the crime but aided and abetted the other applicants. At first, he was called in as a witness by the police, when he started incriminating himself, the officers conducting the interview asked their supervisor whether he should be cautioned but the supervisor said the interview should go ahead. At trial, the applicant asked the trial judge to declare his initial statement as inadmissible but the trial judge refused. The jury found him guilty as well.

As to the first question of 'compelling reasons,' the Court said compelling reasons were situations where only in exceptional circumstances and had to be on a temporary nature based on individual assessment of the circumstances. Relevant factors when considering this involved whether the basis of restriction had a basis in domestic law and whether the scope of content of restrictions were sufficiently circumscribed by law so as to guide operational decision-making by those responsible for applying it. Where a respondent government demonstrated that the existence of an urgent need to advert serious consequences for life, liberty or integrity in a given case, could amount to compelling reasons. This test was considered to be met in the case of the first 3 applicants. Based on the factual urgency of the situation, the safety interviews were regulated by domestic law, the suspects were cautioned, even though there were anomalies of the scope of caution, that was considered as remedied at the trial stage through the instructions given to the jury. As to the fourth applicant, the government were arguing that there were compelling reasons even though the police had to act outside domestic law. Judge Spano said that argument is very problematic for an international court to accept. Essentially the government's argument was restricting human rights outside the boundaries of domestic law. Rule of law is predominant principle, it is encapsulated in the legality principle which a direct or indirect condition of the Convention principle. There is a separate opinion in the judgment that did not accept this argument, claiming that if the factual circumstances for the first three applicants were enough to constitute compelling reasons, then the fact that the police acted outside domestic law, then that should not detract from the factual circumstances.

As regards to the second question, that what happens when there are no compelling reasons, like in the fourth applicant case, the Court said that in itself did not automatically end the matter. The Court said the government must be able to show that due to the

overriding public interest, the positive obligation on it to prevent crime, the fairness of the trial as a whole was not irretrievably prejudice. The Court could not accept that there was no difference between a situation where there were compelling reasons and you enter a fairness assessment based on the merits and a situation where there was no compelling reason. There must be a difference. Court held that the situation where there were no compelling reasons, the Court will presume there is unfairness. Which is in line with the paragraph 55 of the judgment in *Salduz,* and it is for the government to rebut the presumption. The government was unable to rebut the presumption in the fourth applicant's case, and so the majority found a breach.

Terrorism and Article 6 - The logic of *Salduz* and *Ibrahim and Others*

Judge Spano aimed to contrast Article 6(3)(c) with the cases involving Article 6(d), the right to cross-examine witnesses. There is significant case law stemming from the UK, such as *Al-Khawaja and Tahery v UK.* There was a continual dialogue between the Strasbourg Court and the UK domestic courts. The question surrounded whether when a witness has given testimony pre-trial stage and whether that should be admitted as evidence for conviction, when the defence is not given the opportunity to cross-examine the witness at the trial stage. Initially at Chamber level, the Strasbourg court took a robust view, stating that hearsay evidence cannot be admitted. There was a backlash in UK regarding this as it was not in line with UK law, which ended with the UK Supreme Court's opinion in *Horncastle,* which was decided before the Grand Chamber heard *Al-Khawaja.* At the Grand Chamber level, there was a back-track, it is difficult for the Court to apply Article 6 in an absolute fashion. While there would be a lot of clarity, but the Convention provides minimum safeguards, it is not meant to create a procedural Code that requires States to reform their system. The response in *Al Khawaja* was to apply a three-part test and look to whether there were good reasons for hearing the witness' statement, whether the statement was the sole or decisive factor for the question and even if it was the sole reason, whether there were safeguards and counter-balances. Thus, like in the *Ibrahim* case, the Court was not willing to apply an exclusionary rule for Article 6.

The logic is that is neither a non-derogable right under Article 15 nor is it an unqualified right, it is a strange beast, remarks Judge Spano. Article 6 is somewhat in between, it's an intermediary right, it has implied restrictions and we have to find a way to manage those restrictions in a way that is pragmatic. The presumption of unfairness in *Ibrahim,* is meant to encapsulate this intermediary status of Article 6. It also is in line with the historical interpretation of Article 6 which is in some tension with Article 6(3)(c). This is because Art 6(1) says a person in a criminal case has a right to a fair trial, it introduces the fairness principles has a holistic principle in criminal cases, but in Article 6(3)(c) there is a preamble which states that suspects have certain minimum rights which was read once upon a time, as an invitation to look at Article 6(3)(c) rights as stand-alone rights. However, over the years, the Court has created a symbiosis between paragraph 1 and 3 of Article 6 so as to see Article 6(1) as stating the general principle of fairness for trials and Article 6(3)(c) are manifestations of that principle of fairness. Thus Article 6(3) rights are instrumental in obtaining a fair trial but they are not inherent. Judge Spano asks why does human rights law protect the right to a lawyer? It is because the lawyer is functional, the lawyer assists the suspect in getting a fair trial, that is the logic behind not viewing Article 6(3) rights in isolation.

Is the fight against terrorism "special" for Article 6 purposes?

Judge Spano argues that to answer that question in the affirmative is overly simplistic. He urges to look at Article 6 and the clash of principles, the 'protection principle' and 'individual principle' on a spectrum of where those justifications have bite, it is clear that terrorism as a mass casualty act is the apogee of that spectrum. It allows leeway to

governments providing restrictions which would not be acceptable in other situations. However, Article 6 does not allow for the normalisation of measures, Judge Spano, argues – terrorist types measures are not to evolve into the norm. The longer these terrorist measures persist, the easier it is for the society to accept them and the more use of them in the future.

Report by Naina Pagarani, 3rd Year Law student.