THE STATE'S SECURITY AS A LEGITIMATE AIM OF LIMITATION OF FOREIGNERS' HUMAN RIGHTS— ARE THERE ANY BOUNDARIES?¹

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National security has always been perceived as justification for deportation of foreigners or other restriction of their rights and freedoms. Nevertheless, all conditions and guarantees against arbitrariness of the State's actions set out in the relevant treaties should never be underestimated or ignored. The fulfillment of those requirements is a condition sine qua non for legitimacy and justification of any limitation of rights and freedoms of foreigners. In the wake of restrictions of immigration laws and policies, the State's authorities too often have undermined recognized legal standards when the interests of national security are at stake. Although the European Court of Human Rights affords a wide margin of appreciation in assessment what may pose a threat for interests of national security, the executive may not be allowed to stretch this notion beyond its natural meaning. Any interference in protected rights and freedoms will be in breach of the European Convention on Human Rights unless it is "in accordance with the law", pursues a legitimate aim, and is "necessary in a democratic society" for achieving that aim. According to the Convention, a fair balance must be struck between concurring interests of an alien and the State even if the measures are undertaken on national security grounds. The executive must demonstrate the existence of specific facts serving as a basis for its assessment that a foreigner presents a national security risk, and its rulings cannot be based solely on uncorroborated allegations and general statements.

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INTRODUCTION

In this day and age, the competence of national authorities to refuse foreigners entry into their territory, as well as to deport such persons for the purposes of protecting the public interest, is no longer questioned, on condition, stipulated in international law, that such actions must be taken lawfully. On the other hand, in light of the significant threat of terrorist violence that states have to face at the beginning of the 21st century, it is recognised that they must be allowed to take a firm stand in protecting their populations against such acts.² However, this creates the risk that changes made to immigration regulations and so-called counter-terrorist legislation, brought forward in order to facilitate the protection of national security, will in practice become a catch-all phrase used for gaining unlimited powers to deport foreigners, in particular those coming from the Arab countries. Given the broad mandate of national authorities, it becomes necessary to provide foreigners with adequate protection against abuse of power. The scope of permissible interference in human rights and freedoms on the grounds of national security is subject to certain restrictions by the bodies of the Council of Europe. The European Convention on Human Rights (ECHR) provides for a catalogue of guarantees granted to foreigners and related obligations imposed on national authorities.

This work analyses and explores in detail the key requirements defined by the European Court for Human Rights (ECtHR) as those which must be met for a restriction of the foreigner's rights and freedom on national security grounds to be justified. This will be followed by an assessment of whether, and to what extent, national authorities may lawfully deport an alien for security reasons, as well as to what degree the state's competence with respect to immigration control is limited by requirements determined in Strasbourg case-law.

I. LIMITATION OF HUMAN RIGHTS AND FREEDOMS

Limitation is a permissible restriction of human rights and freedoms imposed for the purpose of protecting a particular legitimate aim provided by the ECHR. One of such purposes under which state authorities are permitted to interfere with the rights and freedoms of the individual is "State's security", more commonly referred to as "national security". The

² *Boutaghi v. France*, judgment of 18. 11. 2010, appl. 42360/08, § 45; *Daoudi v. France*, judgment of 3. 12. 2009, appl. 19576/08, § 65; *Othman (Abu Qatada) v. United Kingdom*, judgment of 17. 01. 2012, appl. 8139/09, § 183; *Auad v. Bulgaria*, judgment of 11. 10. 2011, appl. 46390/10, § 95.

provisions of the Convention permit interference in the rights of the foreigner on condition that such restriction is in accordance with law, is imposed for the purpose of protecting a legitimate aim, and is “necessary in a democratic society”. Any interference in the protected rights of the individual must meet the above requirements of the limitation clause as well as other requirements laid down in relevant Strasbourg case-law.

II. THE LEGALITY TEST

First and foremost, each limitation must pass the legality test, i.e. be in accordance with law. A state’s act constituting interference in the rights and freedoms of a foreigner must have a sound legal basis, that is, must be firmly anchored in the law of a given state. At the same time—in light of Strasbourg case-law—“the law” in question is required to meet the standards of quality: The provisions of law that constitute the legal basis for the interference must be generally available, formulated with sufficient precision, and foreseeable³ in order to indicate the foreigner in what circumstances and under what conditions the public authorities are entitled to interfere with his or her rights, including the issuing of a removal order. It follows that the requirement of foreseeability constitutes a key element of the quality of “law” and, in consequence, a component of the legality test for interference in rights of the individual.⁴ Furthermore, the legality test is strongly related with the necessity for domestic law to ensure a sufficient measure of legal protection against arbitrary interferences by public authorities, including a guarantee of applying adequate legal measures.⁵

III. NATIONAL SECURITY AS A LEGITIMATE AIM OF INTERFERENCE

Within limitation clauses of central importance are the degree of specificity of the reason for restricting the rights and freedoms of the

³ *Lupsa v. Romania*, judgment of 8. 06. 2006, appl. 10337/04, § 32; *Al-Nashif v. Bulgaria*, judgment of 20. 06. 2002, appl. 50963/99, § 119; *Shevanova v. Latvia*, judgment of 15. 06. 2006, appl. 58822/00, § 72; *Onur v. United Kingdom*, judgment of 17. 02. 2009, appl. 27319/07, § 48; *Slivenko v. Latvia*, [GC] judgment of 9. 10. 2003, appl. 48321/99, § 100.

⁴ *Shevanova v. Latvia*, § 72; *Slivenko v. Latvia*, § 100; *Onur v. United Kingdom*, § 48; *Lupsa v. Romania*, § 32.

⁵ *Al-Nashif v. Bulgaria*, § 119; *Lupsa v. Romania*, §§ 32 and 34; *Malone v. United Kingdom*, judgment of 2. 08. 1984, appl. 869/79, §§ 67–68. For more see M. Szuniewicz, *Ochrona jednostki przed arbitralnością działania organów władzy publicznej – uwagi na tle standardów Rady Europy*, in *NAUKI SPOŁECZNE NA RZECZ BEZPIECZEŃSTWA WEWNĘTRZNEGO*, 301–316, passim (P. Bogdalski, M. Nepelski eds., Szcztytno, Wyższa Szkoła Policji w Szcztytnie, 2014).

individual, i.e. the so-called legitimate aim of interference. The ECHR counts “state’s security” (“national security”) as the first among the legal interests for the protection of which is permissible to restrict the rights and freedoms of the individual. The implications arising out of the principle stated in Article 1 of the ECHR, which calls the State parties to secure the rights and freedoms to everyone within their jurisdiction, are twofold: First, the rights and guarantees granted by the Convention apply to foreigners within the territory of the member states of the Council of Europe; and second, any exception to that principle, including the circumstances used as grounds for restricting human rights and freedoms within a limitation clause (for example, grounds for the deportation of foreigners), should not be broadly interpreted (*exceptiones non sunt extendendae*).

Meanwhile, an analysis of reasons behind interfering with human rights and freedoms on “national security” grounds points to a transparently obvious conclusion that this is a vague notion that escapes precise and comprehensive definition.⁶ The ECtHR has emphasised on numerous occasions that such a lack of definitional clarity is unavoidable due to it being impossible to list in detail all conduct that may indicate a threat to national security,⁷ such threat itself being a concept that is difficult to define and anticipate in advance due to its varying character.⁸ The exceptionally broad scope of the notion of “national security” prevents the formulation of a precise and exhaustive catalogue of specific conduct that would substantiate the issuing of a decision to deport an alien.⁹ With respect to the above, the ECtHR leaves state authorities with a large margin of appreciation to determine what is in the interests of national security¹⁰.

However, whereas a degree of flexibility in such a determination doubtless guarantees the effectiveness of measures taken to protect national security, the protection of national interests, when broadly defined, allows the grounds for interference to be broadly interpreted as well, a situation which may consequently lead to arbitrariness of action taken by state authorities. Given the lack of precision in defining the notion of “national security” in domestic law, the grounds for interference may be subject to far reaching interpretation and abuse of power, especially in the age of the so-

⁶ *C.G. and others v. Bulgaria*, judgment of 24. 04. 2008, appl. 1365/07, § 43.

⁷ *Lupsa v. Romania*, § 37; *Al-Nashif v. Bulgaria*, § 121; and *C.G. and others v. Bulgaria*, § 40.

⁸ *Al-Nashif v. Bulgaria*, § 121; *Liu v. Russia (no. 2)*, judgment of 26.07.2011, appl. 29157/09, § 159.

⁹ See M. Szuniewicz, *Kryterium ochrony bezpieczeństwa państwa i porządku publicznego w polskim orzecznictwie imigracyjnym na tle standardów Rady Europy*, 3 PRZEGLĄD PRAWA PUBLICZNEGO 8 (2013).

¹⁰ *C.G. and others v. Bulgaria*, § 43.

called “war on terror”.¹¹ Therefore, questions arise whether it is contrary to the rule of law if the lack of precise and comprehensive definitions of a threat to national security and of national security grounds may result in the deportation of foreigners.¹² It is clearly indicated in Strasbourg case-law that such a lack of definitional precision and the resulting broad discretionary powers given to state authorities are permitted on condition that the scope and way of using such margin of appreciation is formulated with sufficient clarity as to protect the individual against arbitrary interferences by public authorities.¹³ The ECtHR has repeatedly emphasised that domestic law is contrary to the rule of law if the legal discretion granted to the executive is expressed in terms of an unfettered power.¹⁴ Consequently, the law must indicate the scope of any such discretion conferred on the competent authorities and give the individual adequate procedural guarantees, including a legal measure for the protection against arbitrary interference by public authorities.¹⁵

The scope of discretion and margin of appreciation given to state authorities are not unlimited and are subject to scrutiny by the ECtHR. While acknowledging the arguments for taking far reaching measures to protect national security, the Court has also reiterated that the limits of this notion should not be stretched beyond its natural meaning.¹⁶ The judges in Strasbourg have stressed that while the executive’s assessment of what poses a threat to national security will naturally be of significant weight, the courts reviewing the executive’s decisions must be able to react in cases where invoking that concept has no reasonable basis on the facts or reveal an interpretation of “national security” that is unlawful or contrary to common sense and arbitrary.¹⁷

Given that, when national security grounds are involved, the margin of appreciation may be prone to “overuse” and the classification of a foreigner’s entry to or stay in a state as a “threat to national security” may

¹¹ See M. Szuniewicz, *Kryterium* ..., at 8.

¹² *Lupsa v. Romania*, §§ 33–34; *Al-Nashif v. Bulgaria*, § 119 *et seq.*; *C.G. and others v. Bulgaria*, § 40.

¹³ *Shevanova v. Latvia*, § 72. See M. Szuniewicz, *Ochrona jednostki* ..., at 305.

¹⁴ *Musa and others v. Bulgaria*, judgment of 11. 01. 2007, appl. 61259/00, § 62; *Bashir and others v. Bulgaria*, judgment of 14. 06. 2007, appl. 65028/01, § 41; *Al-Nashif v. Bulgaria*, § 119; *Shevanova v. Latvia*, § 72.

¹⁵ *Rotaru v. Romania*, judgment of 4. 05. 2000, appl. 28341/95, § 55 *et seq.*; *Amann v. Switzerland*, [GC] judgment of 16. 02. 2000, appl. 27798/95, §§ 55–56; similarly, *Shevanova v. Latvia*, § 72; *Al-Nashif v. Bulgaria*, §§ 119, 123–124, and 128; *Lupsa v. Romania*, § 42; *Estrikh v. Latvia*, judgment of 18. 01. 2007, appl. 73819/01, § 177.

¹⁶ *Liu v. Russia (no. 2)*, § 88; *C.G. and others v. Bulgaria*, § 43.

¹⁷ *Al-Nashif v. Bulgaria*, § 124; *Liu v. Russia (no. 2)*, § 88.

perhaps be given insufficient consideration, the ECtHR requires state authorities to indicate the specific grounds for claiming that the foreigner's conduct poses a real threat, as well as to produce a forecast showing the effect of his or her stay in the territory of a given state. As a rule, any decision that is unfavourable to the individual and interferes with his or her protected rights and freedoms should be made taking account of the particular circumstances of each individual case and be supported by duly documented evidence. The public administration body or the court hearing the case should demonstrate that a given person poses a real threat to national security. Moreover, the analysis and assessment of grounds for restricting the person's rights must be conducted in the context of actual threats to the security of a given state rather than hypothetical threats envisaged based on a discretionary decision of the authorities¹⁸.

Meanwhile, it is a frequent mistake of state authorities to invoke the need for protecting national security in a blanket and indiscriminate way that has little basis on the evidence of a given case.¹⁹ In multiple cases, the ECtHR has found that the allegations against individuals (foreigners) were of a general nature that made it impossible for them to effectively challenge the security services' assertions by providing exonerating evidence or an alternative interpretation of the facts.²⁰ The most frequent mistake of state authorities pointed out by the Strasbourg judges was the failure to provide meaningful scrutiny of whether there was sufficient evidence to recognise a given person as posing a threat to the state's security, as well as the authorities' uncontrolled discretion to blankly invoke national security with little or no reference either to why a given alien was classified as posing a risk to the security of the state or to any factual circumstances underlying such classification.²¹

As a consequence, the Court has recognised on numerous occasions the failure of domestic courts to carry out a proper and effective examination of the assertion according to which foreigners had been accused of presenting a

¹⁸ For further considerations in this respect with references to Polish immigration cases, see M. Szuniewicz, *Kryterium* ..., at 9 *et seq.*

¹⁹ See M. Szuniewicz, *Bezpieczeństwo państwa jako 'słowo-wytrych' dla ograniczenia praw i wolności człowieka – kilka uwag na tle orzecznictwa ETPCz*, 3 *PARADYMATY BADAŃ NAD BEZPIECZEŃSTWEM, INFRASTRUKTURA KRYTYCZNA W PROCESIE ZARZĄDZANIA W SYTUACJACH KRYZYSOWYCH* 232 (A. Gałęcki, A. Kurkiewicz, and S. Mikołajczak eds., Poznań 2014).

²⁰ *A. and others v. United Kingdom*, [GC] judgment of 19. 02. 2009, appl. 3455/05, § 220 *et seq.*; *Liu v. Russia* (no. 2), § 90.

²¹ *M. and others v. Bulgaria*, judgment of 26. 07. 2011, appl. 41416/08, § 102; *Madah and others v. Bulgaria*, judgment of 10. 05. 2012, appl. 45237/08, §§ 19 and 98; *Liu v. Russia* (no. 2), §§ 74–75 and 84.

national security risk.²² It was on this basis that in the cases mentioned above the Court found a violation of Article 13 of the ECHR, which provides the right for an effective remedy before national authorities. This was based on the grounds that even in the cases where national security is at stake the individual must be afforded a degree of legal protection against arbitrary interference by the authorities and given an effective remedy against assertions made by the authorities.²³

The circumstances calling for the need of protecting the public interest are, in principle, limited to the nature and seriousness of the offence committed,²⁴ although the very fact of an alien being convicted of a criminal offence does not alone constitute sufficient grounds for his or her deportation.²⁵ The national security clause should be invoked only when a direct relationship between the conviction of a foreigner and his or her posing an actual national security risk is conclusively demonstrated. This condition makes it necessary for state authorities to specifically indicate how the foreigner poses a risk to national security, which, in turn, calls for a forecast showing the effects of his or her further stay in the territory of a given state.

The analysis and assessment of grounds for issuing a removal order must be conducted in the context of the actual threats to national security presented by a foreigner, not merely hypothetical threats envisaged based on a discretionary decision of state authorities. It is therefore necessary to demonstrate in what particular way the foreigner's violation of the law presents a risk to the security and defence of the state, but also to specifically indicate the grounds for classifying the person's conduct as a real threat to national security. The assessment of how real a given threat is may be interpreted in the category of probability, "it is therefore enough to find that an objective possibility of threat arises out of an alien's entry or stay".²⁶ In order to lawfully classify a foreigner's stay as presenting a risk to

²² *Raza v. Bulgaria*, judgment of 11. 02. 2010, appl. 31465/08, § 54; *Kaushal and others v. Bulgaria*, judgment of 2. 09. 2010, appl. 1537/08, § 31; *M. and others v. Bulgaria*, § 98; *C.G. and others v. Bulgaria*, § 47; *Madah and others v. Bulgaria*, §§ 29 and 98.

²³ *C.G. and others v. Bulgaria*, §§ 39–40; *Amie and others v. Bulgaria*, judgment of 12. 02. 2013, appl. 58149/08, § 92.

²⁴ *Yildiz v. Austria*, judgment of 31. 10. 2002, appl. 37295/97, § 46; *Sezen v. Netherlands*, judgment of 31. 01. 2006, appl. 50252/99, § 43; *El Boujaïdi v. France*, judgment of 26. 09. 1997, appl. 25613/94, § 40; *Liu v. Russia (no. 2)*, § 83.

²⁵ *Boultif v. Switzerland*, judgment of 2. 08. 2001, appl. 54273/00, §§ 50–51; *Baghli v. France*, judgment of 30. 11. 1999, appl. 34374/97, § 48; *D. v. United Kingdom*, judgment of 2. 05. 1997, appl. 30240/96, § 46.

²⁶ J. Chlebny, *Ochrona interesu publicznego a prawo cudzoziemca do pobytu w Polsce*, 10 EUROPEJSKI PRZEGLĄD SĄDOWY 16 (2007, my translation).

national security, it is necessary to produce a forecast demonstrating the effects of his or her further stay in the territory of the state.²⁷ When invoking the grounds of protecting national security, the authorities should conclusively determine how a deportation of the foreigner is necessary for the sake of the state's security.

IV. THE NECESSITY TEST AND THE PRINCIPLE OF WEIGHING-UP THE PUBLIC INTEREST

The necessity test is another key element of the limitation clause. This test requires the authorities to assess whether the inference in an individual's rights and freedoms is "necessary in a democratic society", i.e. "justified by a pressing social need".²⁸ The signatory parties to the Convention enjoy a margin of appreciation and discretion when it comes to establishing if such need exists, their decisions being subject to the Court's scrutiny nonetheless: the ECtHR's role is to determine whether the reasons adduced by the national authorities were "relevant and sufficient"²⁹ and whether the measures taken were "proportionate to the legitimate aims pursued".³⁰ It follows that in the case-law, the necessity test is integrally related to the principle of proportionality, a fact which makes it necessary to weigh up competing values and interests, i.e. to reconcile the public interest with respect to national security and the foreigner's interest concerning the respect for his or her rights and freedoms, as well as to ensure "a fair balance between the relevant interests".³¹ That which of these interests ought to be given primary importance requires to be assessed *ad casum*, taking account of all the circumstances of the individual case.³² This, in turn, renders it necessary to conduct an investigation aimed at obtaining possibly the most conclusive evidence. The relevant authorities (in particular administrative authorities) are under the obligation to make all necessary efforts to establish the facts of the case, including the foreigner's personal

²⁷ See M. Szuniewicz, *Kryterium* ..., at 9.

²⁸ *Bouchelkia v. France*, judgment of 29. 01. 1997, appl. 23078/93, § 48; *Mehemi v. France*, judgment of 26. 09. 1997, appl. 25017/94, § 34; *Radovanovic v. Austria*, judgment of 22. 04. 2004, appl. 42703/98, § 31; *Slivenko v. Latvia*, § 113.

²⁹ *Chauvy and others v. France*, judgment of 29. 06. 2004, appl. 64915/01, § 70.

³⁰ *Bouchelkia v. France*, § 48; *Mehemi v. France*, § 34; *Radovanovic v. Austria*, § 31; *Slivenko v. Latvia*, § 113.

³¹ *Sezen v. Netherlands*, judgment of 31. 01. 2006, appl. 50252/99, § 41; *Radovanovic v. Austria*, § 32; *Slivenko v. Latvia*, § 113; *Bouchelkia v. France*, § 49; *Mehemi v. France*, § 35.

³² *Klass and others v. Germany*, judgment of 6. 09. 1978, appl. 5029/71, § 9 *et seq.*; *Weber and Saravia v. Germany*, decision of 29. 06. 2006, appl. 54934/00, § 106; *Kennedy v. United Kingdom*, judgment of 18. 05. 2010, appl. 26839/05, § 153.

and family situation, and to analyse all relevant evidence in detail.³³

When taking measures that restrict the rights and freedoms of an individual, public authorities are obliged to conclusively demonstrate that it is national security that is at stake in a given case, but also to specify, based on actual evidence obtained in the course of the investigation procedure, what kind of threat is specifically posed by him or her to national security. However, even when it is convincingly demonstrated that a given foreigner presents a national security risk, public authorities are not relieved from the obligation to collect further evidence showing that the threat is so serious as to necessitate the restriction of the person's rights guaranteed by the Convention, leading in consequence, for example, to deportation. It remains a grave violation of the principle of proportionality to adopt the view according to which any decision resulting in the interference in a foreigner's rights and freedoms is entirely legitimate if only national security—the primary interest of the state—is at stake; in line with this erroneous view, the very nature of the goods protected exempts the authorities from carefully weighing up the conflicting interests based on the facts of the case. The interest of the state should not be *a priori* perceived as overriding the rights of an individual, an assertion that is of particular significance in the context of the actual practice of national authorities that tends to claim national security to be of the first importance—a value in itself that is inherently superior to all rights and freedoms guaranteed to individuals, in particular to foreigners.³⁴ However, rather than assume the superiority of public interests over individual interests, it should be conclusively demonstrated that there is no means of protecting the legitimate aim of national security other than to impose far reaching restrictions on the rights and freedoms of an individual. It follows that disproportionate interference cannot be perceived as necessary if the adoption of less restrictive measures would yield an equally satisfactory result.

As is required by the principle of proportionality, the assessment of whether the measure, which resulted in the interference with the rights and freedoms of the foreigner, was proportionate to the aim pursued, i.e. the protection of national security, can only be performed following a detailed analysis of all the facts of the case and a balanced weighing up of legal interests and values. This is why it is of crucial importance for the authority taking the decision about the interference to prove that a given person poses

³³ For more see M. Szuniewicz, *Deportacja cudzoziemców w świetle zobowiązań z artykułu 8 Europejskiej Konwencji Praw Człowieka*, 5 POLSKI ROCZNIK PRAW CZŁOWIEKA I PRAWA HUMANITARNEGO (2014, in print).

³⁴ See M. Szuniewicz, *Bezpieczeństwo państwa ...*, at 235.

a real threat to the state's security, to indicate what factual circumstances justify such a restriction of his or her rights and freedoms, to show how serious the threat is, and whether the situation actually necessitates the implementation of such measures.³⁵ Where no such reasoning is provided and no argument is built based on evidence gathered in the course of the investigation procedure, it is difficult to properly assess whether the action taken by the state authorities was justified or, conversely, whether it may have been the outcome of an arbitrary, if not overzealous, decision.³⁶ What is more, in the cases where no such arguments are offered, the ECtHR will recognise failure to fulfil the requirements of the limitation clause. As a result, the measures employed by state authorities will be declared as contrary to the provisions of the Convention. The Court has found that foreigners did not enjoy the minimum degree of protection against arbitrariness on the part of the authorities in multiple cases where the relevant authorities invoked the national security clause without presenting specific reasons for the interference and failed to provide the reviewing body with evidence indicating a definite threat to the public interest, especially where no effective judicial control had been exercised and the measures had been taken based on classified information. In consequence, the Court has declared that the interference was contrary to law and, as such, constituted a violation of the requirements set by the Convention.³⁷

Of key importance to the assessment of whether the above mentioned requirements were met and all the elements of the limitation clause were satisfied is the reasons presented by the authorities for taking a given measure (for example, a removal order), including the specific factual and legal grounds on which the decision was based. It follows that the reasons offered by the decision-making authority must not be limited to some general phrases invoking the interest of the state, such as, "this is required for the purposes of national security" or "this is motivated by important reasons connected with the security of the state".³⁸ No action that is unfavourable to the individual and interferes with his or her protected rights and freedoms should be taken unless it is based on clearly specified and evidence-based reasons that are in compliance with existing legislation.

What is more, each case must allow for the individual to be able to challenge the executive's assertion that national security is at stake, as well

³⁵ See M. Szuniewicz, *Kryterium* ..., at 11, 16 and others.

³⁶ See M. Szuniewicz, *Bezpieczeństwo państwa* ..., at 238 *et seq.*

³⁷ *M. and others v. Bulgaria*, § 102 *et seq.*; *Raza v. Bulgaria*, §§ 55–56; *C.G. and others v. Bulgaria*, § 42 *et seq.*; *Lupsa v. Romania*, § 42.

³⁸ See M. Szuniewicz, *Bezpieczeństwo państwa* ..., at 236.

as to satisfy the fair balance requirement. In order to effectively exercise his or her right to challenge the public authorities' decision, the individual must have access to the findings of the investigation, the evidence which the authority found credible and which it denied credibility, as well as all other facts that had a bearing on the case. Such information should be given in the reasons for the decision. Restricting the individual's access to such information, either partly or completely, substantially undermines his or her right to an effective remedy provided for by Article 13 of the Convention.

In relation to the above, the Court has explicitly stated that even where national security is at stake the concepts of lawfulness and the rule of law in a democratic society require that measures affecting fundamental human rights must be subject to some form of adversarial proceedings before an independent body competent to review the reasons for the decision and relevant evidence indicating that a national security risk is posed by the foreigner.³⁹ In line with the standards laid down by the Council of Europe, each person (also a foreigner) must be granted adequate procedural guarantees,⁴⁰ while the main requirement imposed on national authorities by the Court is to ensure that the individual is provided with at least a minimum degree of protection against arbitrary interferences by public authorities, a guarantee of the rule of law in a democratic society. In light of the above, particular attention should be paid to the issue of procedural constraints arising out of the use of classified information.

V. THE USE OF CLASSIFIED INFORMATION AND THE GUARANTEE OF A FAIR TRIAL

The main features of the right to a fair trial laid down in Article 6 of the ECHR include the adversarial procedure and the principle of the equality of arms, which guarantees each party to be afforded a reasonable opportunity to be heard.⁴¹ Although aliens in deportation procedures are not entitled to guarantees established in Article 6 of the ECHR, the Court in Strasbourg has indirectly but clearly recognized the right of access to court, in sense of Article 6, for aliens subject to deportation on state-security grounds⁴² in order to react in cases where invoked an alien's threat to national security

³⁹ *Al-Nashif v. Bulgaria*, §§ 123–124; *Lupsa v. Romania*, §§ 33–34; *Bashir and others v. Bulgaria*, § 41; *Musa and others v. Bulgaria*, §§ 60–64; *Liu v. Russia (no. 2)*, § 87; *M. and others v. Bulgaria*, § 100; *Kaushal and others v. Bulgaria*, § 29.

⁴⁰ *M. and others v. Bulgaria*, § 100; and *Kaushal and others v. Bulgaria*, § 29.

⁴¹ *Matyjek v. Poland*, judgment of 24. 04. 2007, appl. 38184/03, § 55.

⁴² *Al-Nashif v. Bulgaria*, §§ 123–124.

has no reasonable basis on facts and is arbitrary.⁴³ The Court stressed that aliens subject to extradition, even on grounds relating to terrorism, should be protected, by virtue of Article 6 of the ECHR, from travesties of justice in a given State.⁴⁴

The ECtHR has confirmed that justified national security reasons may constitute sufficient grounds for implementing certain restraints on procedural guarantees⁴⁵ and, in exceptional circumstances, for the use of classified material collected in the course of a security investigation.⁴⁶ It must be borne in mind that the use of evidence obtained by means of such methods of investigation does not automatically imply a need to close the trial to the public.⁴⁷

In exceptional circumstances, the need for protecting national security—particularly in relation to the special procedure of gaining access to and using classified information—may be considered as sufficient grounds that make it justified to close the trial to the public and/or to classify the reasons for the deportation decision.⁴⁸ In such cases, it becomes impossible to rely on the findings concerning the facts of the case and specify the threat which the foreigner is believed to present to the security of the state. The fact that certain evidence was not made available to the defence should not be considered as automatically leading to a violation of the defendant's right to a fair trial.⁴⁹ In fact, the need for imposing appropriate restraints on procedural guarantees with respect to the use of confidential material in the cases where national security is at stake has never been questioned by the bodies of the Council of Europe⁵⁰ [see, for example, *Recommendation Rec. (2004) 20 of the Committee of Ministers to member states on judicial review of administrative acts*, Dec. 15, 2004)].

However, whereas this will obviously result in it being occasionally

⁴³ See also *Lupsa v. Romania*, § 33-34; *Kaushal and others v. Bulgaria*, § 29; *Musa and others v. Bulgaria*, §§ 60 et seq.; *Bashir and others v. Bulgaria*, § 41; *Liu v. Russia (no. 2)*, § 87.

⁴⁴ *Mamatkulov and Askarov v. Turkey*, [GC] judgment of 4. 2. 2005, appl. 46827/99 and 46951/99, §§ 84 et seq. For more see N. Sitaropoulos, *The Role and Limits of the European Court of Human Rights in Supervising State Security and Anti-Terrorism Measures Affecting Aliens' Rights*, available at <http://ssrn.com/abstract=1948391> 21-24 (last visited Sept. 1, 2014).

⁴⁵ *Dağtekin and others v. Turkey*, judgment of 13. 12. 2007, appl. 70516/01, § 34.

⁴⁶ *Klass and others v. Germany*, § 49.

⁴⁷ *Welke and Bialek v. Poland*, judgment of 1. 03. 2011, appl. 15924/05, § 63; *Belashev v. Russia*, judgment of 4. 12. 2008, appl. 28617/03, § 83; *Nikolova and Vandova v. Bulgaria*, judgment of 17. 12. 2013, appl. 20688/04, §§ 74 and 85.

⁴⁸ *Lupsa v. Romania*, §§ 33-34; *Al-Nashif v. Bulgaria*, § 119 et seq.; *C.G. and others v. Bulgaria*, § 40; *Liu v. Russia (no. 2)*, § 87; *M. and others v. Bulgaria*, § 100; *Kaushal and others v. Bulgaria*, § 29.

⁴⁹ *Al-Khawaja and Tahery v. United Kingdom*, [GC] judgment of 15. 12. 2011, appl. 26766/05 and 22228/06, § 145.

⁵⁰ *Chahal v. United Kingdom*, judgment of 15. 11. 1996, appl. 22414/93, § 131.

necessary to classify some or all of the materials used in proceedings touching upon matters related to national security, and even parts of the decisions rendered in them,⁵¹ “the complete concealment from the public of the entirety of a judicial decision in such proceedings cannot be regarded as warranted”.⁵² This is all the more relevant considering that the ECtHR claims the transparency of judgments to be the fundamental safeguard against arbitrary interferences by public authorities and a *sine qua non* requirement for the effective protection of the legal interest of the individual within the judicial review procedure.⁵³ What is more, public authorities are placed under an obligation to guarantee a fair trial to the individual, which requires the authorities to ensure that any difficulties caused to the individual by a limitation on his or her rights are sufficiently counterbalanced by the procedures followed by the judicial authorities.⁵⁴ The Court has recognised that there are techniques which allow for a certain degree of access to decisions made by public authorities without disclosing the source of information.

A recent series of the ECtHR’s judgments in Romanian and Bulgarian cases defined the standard for access to evidence and grounds for decisions containing classified information. The Court has recommended the adoption of appropriate procedures which provide the defendant with adequate procedural guarantees, in particular access to the case file, without creating the risk of disclosure of confidential data.⁵⁵ A multitude of practical problems have arisen in numerous deportation proceedings instituted against foreigners, which called for the implementation of new solutions. For example, the United Kingdom has established Special Immigration Appeals Commission (SIAC) and adopted a special procedure allowing a security-cleared counsel to take part in the proceedings.⁵⁶ It follows that there exist techniques which can accommodate legitimate security concerns without fully negating fundamental procedural guarantees granted to the individual.⁵⁷ According to the ECtHR, the difficulties caused to the individual by a restriction of access to the case file and to adversarial procedure could be counterbalanced by appointing a special advocate with

⁵¹ *A. and others v. United Kingdom*, § 205 *et seq.*; *Raza v. Bulgaria*, § 53.

⁵² *Raza v. Bulgaria*, § 53.

⁵³ *Fazliyski v. Bulgaria*, judgment of 16. 04. 2013, appl. 40908/05, § 69; *Kaushal and others v. Bulgaria*, § 30; *Raza v. Bulgaria*, § 53.

⁵⁴ *Kennedy v. United Kingdom*, § 184; *Jasper v. United Kingdom*, [GC] judgement of 16. 02. 2000, appl. 27052/95, §§ 51–53; *A. and others v. United Kingdom*, § 205.

⁵⁵ See M. Szuniewicz, *Kryterium ...*, at 20.

⁵⁶ *A. and others v. United Kingdom*, §§ 210 and 219–220. J. Chlebny, *Ochrona jednostki ...*, at 22.

⁵⁷ *Raza v. Bulgaria*, § 53.

the capacity to review the file of the case and put forward arguments in favour of the defendant.

CONCLUSION

As much as it is justified and necessary in a democratic society to invoke the protection of public interest as grounds for restricting the rights and freedoms of a foreigner, national security—especially in cases where a decision is made to deport an alien—does not constitute an absolute value in itself. First, in compliance with the requirements of the legality test, the provisions of domestic law must precisely specify the scope of restriction of the rights and freedoms of the individual permitted on national security grounds. Second, a legitimate aim and reason for interference, national security should not be interpreted broadly and cannot be effectively invoked without a reference to particular facts indicating that a foreigner poses a real and serious threat to the security of the state. Third, even if the individual is found to present a risk to national security, the authorities are still required to demonstrate that the interference with his or her rights and freedoms is “necessary in a democratic society”. According to the principle of proportionality, a fair balance should be found between the competing values and interests: the public interest with respect to national security and the foreigner’s interest concerning the respect for his or her rights and freedoms, as the public interest does not implicitly override the interest of the individual. Fourth, the above requirements make it necessary to conduct a fair investigation aimed at obtaining possibly most conclusive evidence, a stage that should be followed by a thorough analysis of the facts of each individual case. The results of the enquiry should then be made available in the reasons for the deportation decision. Rather than invoking the need for protecting national security in a blanket and indiscriminate way, the relevant authorities should specify the legal and factual circumstances that were the basis for implementing the measure which was unfavourable to the individual.

In this context, particularly alarming is the procedure of gaining access to and using classified information. As much as the reasons of the state’s security justify the implementation of certain restraints on procedural guarantees, the foreigner should enjoy at least a minimum degree of protection against arbitrariness on the part of the authorities. For this reason, the measures taken by national authorities should allow for some form of adversarial procedure and respect the principle of the equality of arms, including the guarantee of applying adequate legal measures, in order to

grant the foreigner—or a security-cleared counsel—access to the files of the case without creating the risk of disclosure of confidential data and sources of information. Finally, one can only condemn the practice of abusing the national security clause and using counter-terrorist legislation as an excuse for unjustified interference with the rights and freedoms of foreigners, especially when discriminatory action is taken against persons from the so-called “high-risk countries”.