

Decision of 16.02.2005 regarding case number 3387/2004

Sofia City Court,

*Judge Rapporteur Donka Chakarova*¹

*(Abbreviation)*²

(Prepared and translated by Marianna Chaparova)

Art. 5, paragraph 1(b) and (f) of the European Convention on Human Rights

Pursuant to Art. 5, paragraph 1 (b) and (f) of the European Convention on Human Rights, which has a direct application on the territory of the Republic of Bulgaria through Article 5, paragraph 4 of the Bulgarian Constitution, an imposition of limitations to the free movement and personal freedom for certain persons is allowed, even if there is no information that such persons have committed or have been convicted of a crime.

In the present case, the plaintiff was placed in temporary housing for adults until the implementation of the compulsory administrative measure (CAM) "taking to the border." The plaintiff was subjected to a "lawful arrest or deprivation of freedom of a person against whom has been undertaken an action of deportation or extradition" within the meaning of Art. 5, paragraph 1 (b) and (f) from European Convention on Human Rights (ECHR). The meaning of this administrative measure is to guarantee the fulfillment of the deportation or extradition and not to deprive the plaintiff of his freedom. Therefore, it is necessary to determine the duration for which a person can be deprived of a basic human right and the balance of that deprivation against the importance of implementing the compulsory administrative measure "taking to the border."

Even in the absence of cooperation from the applicant, the competent authority should take active measures to remove obstacles for the implementation of CAM "taking to the border" and to terminate the involuntary placement. A person who has not been tried and convicted can be deprived of his freedom lawfully only if such deprivation is limited in time. In the absence of state action, the length of time of "involuntary placement" cannot be considered lawful under Art. 5, paragraph 1 (b) and (f) of the ECHR.

Production is made pursuant to Art. 33 and Administrative Order in connection with Art. 70, para. 3 of the ZMVR [Ordinance of the Ministry of the Interior]³.

¹ The decision is final. It has been confirmed by decision # 8364 from 09/27/2005 by administrative declaration # 4302/2005 of VAS.

² The material has been prepared and delivered by the Foundation of *Bulgarian Lawyers for Human Rights*. It has been published in "Human Rights," printed by the Foundation, and has been included in the current data base for the project "Improvement of the Jurisprudence in the Sphere of Human Rights in Bulgaria" that was conducted from November 2005 until August 2006.

³ Superseded – *Editor's note*.

A complaint was received from the S.A.D. against Order № ZDM-43/12.07.2004 of the Director of Migration that imposed compulsory administrative measure "involuntary placement in a detention facility for adults (DVNPL) in SDVR [Sofia Directorate of Internal Affairs]" until the problems with the fulfillment of another administrative measure "taking to the border" are resolved. The complaint alleges that the disputed order is void because it is based on law that has been superseded. The plaintiff seeks declaratory relief and asks that the court declare the disputed individual administrative act null and void. Further, the plaintiff requests that the administrative body be ordered to free him immediately.

The respondent Director of the Migration opposes the appeal.

The representative of the Sofia City Prosecutor considers the appeal to be unfounded.

The Court, after considering the arguments made by the parties and the proof gathered in the course of the trial, finds as a matter of fact and of law the following:

The appeal is procedurally acceptable - it has not been shown that the plaintiff was informed about the administrative act in question and, therefore, the complaint is considered timely filed.

Order # H 5255/12/07/04g of the Director of SDVR imposed on S.A.D. a prohibition against entering the Republic of Bulgaria for five years until 12/07/2009.

Director's Order # 3../12/07/04 stated that S.A.D. must be forcefully taken to the border and must await that procedure in DVNPL in SDVR pursuant to Art. 44, para. 6 of the Foreigners in the Republic of Bulgaria Act (FRBA).

There is nothing in the record that directly disputes these orders, and from the contents of the pleadings filed by S.A.D. on 04/10/2004 it can be inferred that they are not in dispute (paragraph three of the pleadings actually states that the lawfulness of the forceful measure "taking to the border" is not in question).

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With the Director's Order # ZDM-43/12.07.04, which is under attack in this case, [S.A.D.] was ordered to be forcefully placed in DVNPL in SDVR...This measure was justified by the following legal documents: Art. 44, para. FRBA 6 and § 3 of the Transitional and Final Provisions of Decree № I-13/29.01.2004 of Organizations and Function of the Special Housing for Temporary Placement of Foreigners, and by factual motives: the presence of the Order for Forceful Taking to the Border # 3../12.07.04, and S.A.D.'s lack of valid documents and money for traveling across the border. The administrative body concluded that, based on the described facts, immediate fulfillment of the forceful administrative measure ("PAM") "taking to the border" was not possible. Based on the provisions of Art. 121b, para. 2, Point 3 of LMI. This Court finds that the administrative act in question has been signed by a person with the power to do so and, as a result, is not void.

In its enactment of the order in dispute, the administrative body based its decision on Art. 44, para. 6 of FRBA, according to which the body signing an order for forceful “taking to the border” or expulsion can, based on its own judgment, place the foreigner in special housing until the problems preventing the expulsion have been resolved. The Administrative body also based its actions on § 3 of PZR of Act I-13/04. According to this act, special housing units for temporary placement of foreigners (SDVNC) on the territory of Sofia have not yet begun operation. As a temporary measure, the act allows for foreigners that are subject to expulsion from the territory of the Republic of Bulgaria by air and/or who have no documents and no finances to undertake the travel, to be placed in temporary housing for adults. Such placement is done pursuant to an order by the director of “Migrations” of MVR and with the approval of the director of SDVR.

In the present case, the director of SDVR (authorized under Art. 44, para. 1 of FRBA) has given the order that C.A.D. is to be subjected to forceful taking to the border and has further authorized C.A.D.’s placement in DVHPL-CDVR until the fulfillment of that order. The administrative act # 3.../12.07.04 from the director of SDVR is not in question in this case and cannot be subjected to direct control by the court. Order based on Art. 44, line 6 of ZCRB may be given in this case only by the Director of SDVR, to whom the legislature has given the power to determine whether a foreigner should be forcefully placed in a special temporary housing until any obstacles for the fulfillment of PAM “taking to the border” have been removed and whether such placement is an appropriate measure under Art. 44, para. 5 of FRBA.

The Director of “Migrations” is authorized to “place foreigners temporarily in special housing when the foreigners are subject to expulsion from the country (Art. 44, para. 8 of FRBA), and to control the way the special housing units are run by giving orders pursuant to Art. 44, para. 8 of FRBA. According to Art. 44, para. 8 of FRBA, the placement of foreigners into temporary housing is done pursuant an order for forced housing, issued by the appropriate administrative agencies from the Ministry of Internal Affairs. Such orders must include detailed explanation of the reasons why forced housing is necessary in the case, the legal justifications for such a decision, and a copy of the order pursuant to paragraph 6. In the case at hand, a copy of the Order by the Director of SDVR, issued pursuant to Art. 44, para. 6 of FRBA, has been attached to the administrative file. § 3 of Regulation № TCP I-13/04, which requires a coordination between the orders given by the Director of Migration Department and the Director of SDVR is contrary to the enactments made by the Ministry of the Interior, as well as to the Foreigners in the Republic of Bulgaria Act. As a result, the requirement for coordination should not be reviewed. In any event, the the contested measure has been signed and it is coordinated with the order by the Director of SDVR. Based on the applicable legal norms, this Court finds that the director of the Migration Department has acted within the scope of the powers conferred upon him by law and has properly issued his order pursuant to § 3 of the Transitional Ordinance on I-13/04. However, the Director erroneously based part of his order on Art. 44, para. 6 instead of on Art. 44, para. 8 of FRBA. Nevertheless, his violation does not constitute a substantial procedural error and, by itself, does not present sufficient grounds for the revocation of the administrative act.

When determining the accuracy of the facts related to this case, this Court takes as true that the orders by the director of SDVR imposing CAM "taking to the border" and "involuntary

placement until the order for escort to the border" were issued. From ... [the pleadings] it may be concluded that S. A. E. does not have an Algerian national identity document or other substituting document. Based on the information obtained during the questioning of the witness, L. K., S. A. E. has refused to meet or to contact any officials from the consular office of his home country. Additionally, there is no evidence that the applicant has the financial ability to pay for his return to his country of origin.

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The Court finds that the involuntary placement of C. A. E. was done legally and by competent authority. Legal justification for the imposition of limitations on the freedom of movement and the personal freedom of certain individuals without evidence that they have committed or have been convicted of any crimes, is grounded on the basis of the provision of Art. 5 of the European Convention on Human Rights (ECHR), ratified on 07.31.1992. The provisions of the ECHR have a direct effect in the Republic of Bulgaria pursuant to Art. 5 para. 4 of the Constitution of the Republic of Bulgaria. The contested order has a fixed time period for which an involuntary placement "to lowering barriers for implementation of CAM 'taking to the border' is permissible. Therefore, the legislative intent behind Art. 5, paragraph 1 (b) and (f) of ECHR's "lawful arrest or detention of a person against whom action is taken for deportation or extradition" needs to be determined. The reason of this provision is to ensure the implementation of the deportation, and not to detain the person. Therefore, the detention needs to be evaluated based on the duration for which the fundamental human right of the detainee has been revoked, as well as on how such revocation is balanced against the need for implementation of CAM. It is undisputed that S. A. D. has been held in DVNPL in SDVR to this day. He has been placed against his will in a specialized housing unit, and this act, which is a de facto deprivation of liberty, was made on 12.7.2004... There is no evidence that the Order authorizing his deprivation of liberty was not executed immediately. Therefore, it can be concluded that the time period during which C. A. D. has been deprived of his liberty is longer than six months. This length of time during which obstacles to the implementation of CAM "taking to the border" were not removed is excessive under any normal human criteria. However, the obstacles were not removed in part due to the applicant's lack of cooperation and his behavior ... has contributed to the length of time for which he was placed in a DVNPL. Nevertheless, it should be noted that the officials from the Ministry of Interior, who were in charge, had the power to remove the obstacles to the implementation of CAM "taking to the border" in a more reasonable timeframe. Pursuant to Art. 14, point 7 of the Bulgarian Identity Documents Act, foreigners residing in Bulgaria may be granted "temporary certificate to leave the Republic of Bulgaria." Therefore, in the absence of cooperation from the applicant, the authorities are required to take active measures to remove the obstacles for the implementation of CAM "taking to the border" and thus to terminate the involuntary placement. Since such measures were not taken in due course, this Court finds ... that such omission provides basis for the revocation of Order № ZDM-43/12.07.04 on the Director of the Migration Directorate. The order was issued contingent upon a condition that did not occur. The non-occurrence of the condition is due to the fault of both the accommodated person and the administrative authority. In any event, however, the length of time for which the applicant was held is obviously excessive, and immediate steps must be taken in order to implement the enforced CAM "removal to the border." Furthermore, there are other methods available, in addition to involuntary detention, that can be used to facilitate the

fulfillment of the order. The imposition of restrictions on the liberty of a person, who is not sentenced to “imprisonment,” may be legitimate only if it is limited in time. In the case at hand, due to the lack of action by the state authorities, it cannot be assumed that the duration of the “involuntary placement” is legal under Art. 5, paragraph 1 (b) and (f) of the ECHR. The Court does not control the performance of administrative acts (Art. 52 of APA) and their performance generally should not affect their legality. In this case, however, the order was issued pursuant to conditions that did not occur. The lengthy period of time, during which no measures were taken to fulfill the condition (removal of obstacles for implementation of CAM “taking to the border”), violates the legality of the individual administrative act in question. On those grounds, the Court finds that the contested order must be stricken.

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On such grounds, the Court held:

Canceled ... Order № ZDM-43/12.07.04g. by the Director of the Migration Department, which authorized C. A. D.’s placement in a DVNPL-SDVR.

The decision may be appealed within fourteen days from its announcement.

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