

Case Reference 2009 / Round 4 (Semi-Finals & Finals)

IN THE EUROPEAN COURT OF HUMAN RIGHTS B E T W E E N:

MARS, HERMES and OTHERS

Applicants

– and –

PACIFICA

Respondent

BRIEF TO COUNSEL

In February 2007, Aria, which is not a member of the Council of Europe, suffered massive terrorist attacks, involving destruction of infrastructure and widespread loss of civilian life. Following the attacks, there followed a wave of political sympathy for Aria in the international community. A United Nations Security Council resolution recognised the attacks as a threat to international peace and security. Rebel forces, operating mainly from the territory of the Republic of Citroya, which is not a member of the Council of Europe, but claiming to have *'militants spread all over the world'*, assumed responsibility for these attacks. They additionally said that, among all the countries supporting the 'War on Terror' launched by Aria in the aftermath of the attacks, Carolyne and the Pacifica, which are both members of the Council of Europe, were next on their list and would *'suffer very dire consequences'*.

In response to the attacks on Aria, the Pacifican government, which firmly believed that it would be the next target, passed the Anti-Terrorism Counter-Measures Act 2007, which, inter alia, provided:

"Section 13: Detentions

- (a) The Secretary of State may order the detention of any person whom he suspects of being a terrorist, pending the making of a deportation order against him.*
- (b) The Secretary of State may detain any person whom he suspects of being a terrorist and against whom a deportation order has been made, pending his removal or departure from Pacifica.*

Section 14: Deportation, Removals

- (a) The Secretary of State may order the deportation of any person whom he suspects of being a terrorist.*

Section 15: Restriction Orders

- (a) The Secretary of State may issue a restriction order against any person whom he suspects of being a terrorist, pending the making of a deportation order against him.*
- (b) The Secretary of State may issue a restriction order against any person whom he suspects of being a terrorist, against whom a deportation order has been made, pending his removal or departure from Pacifica.*

- (c) A restriction order made against any individual in accordance with paragraphs (a) and (b) above may include:
1. a restriction on his association or communications with specified persons or other persons generally
 2. a restriction in respect of his place of residence or on the persons to whom he may give access to his place of residence
 3. a prohibition on his being at specified places or within a specified area at specified times or on specified days
 4. a prohibition or restriction on his movements to, from or within Pacifica, a specified part of Pacifica or a specified place or area within Pacifica.

Following the enactment of this legislation, the Pacifican government enacted the Human Rights (Designated Derogation) Order 2007 and entered a derogation under article 15 of the European Convention of Human Rights in relation only to section 13 of the Anti-Terrorism Counter-Measures Act 2007. In its view, these provisions were potentially inconsistent with article 5(1) of the convention, hence the need for a derogation. Pacifica also took the view that the provisions under article 15 of the Anti-Terrorism Counter-Measures Act 2007 did not amount to a deprivation of liberty. In the Derogation Order, the Pacifican government referred to the terrorist attacks in Aria as well as the United Nations Security Council Resolution, noting that:

‘There exists a real and imminent terrorist threat to Pacifica from persons suspected of involvement in international terrorism. In particular, there are people present in Pacifica suspected of being concerned in the commission, preparation or instigation of acts of international terrorism, of being members of organisations or groups which are so concerned or of having links with members of such organisations or groups, and who are threats to the national security of Pacifica’.

Neither Carolyn nor any other European State supporting Aria’s War on Terror adopted legislative measures similar to those adopted by Pacifica.

In January 2008, the head of the Pacifica Security Services was forced to resign due to his mishandling and potential misrepresentation of intelligence information. The Pacifican government nonetheless continued to assert that they had intelligence supporting their claim that there existed a real danger of a terrorist attack against Pacifica.

Mars and other nine people, all of whom were not Pacifican nationals, all of whom are illegal immigrants, have been detained under section 13 of the Anti-Terrorism Counter-Measures Act 2007. The government examined the possibility of returning them to their home countries. However, because of the existence of a real risk of them being subjected to torture if returned, the government was unable to do so. No Pacifican nationals have been made the subjects of such orders and the government has publicly stated that it has been able to deal with those Pacifican nationals considered to be a terrorist threat by way of restriction orders only. It has however added that it exercises its discretion on a case-by-case assessment of the threat posed by each individual applicant rather than upon the basis of nationality.

As regards restriction orders, Hermes and nine other people, all of whom are Pacifican nationals have been made the subject of the restriction orders under section 15 of the 2007 Act. All are suspected by the Secretary of State to have been involved in terrorism-related



activities and are assessed as posing a threat to the public within Pacifica or overseas. None though have been charged or prosecuted for any offence related to terrorism. The ten Pacifican nationals have been made subjects of the following restrictions:

1. They are confined to one-bedroom flats for 18 hours per day. During that time, they are not allowed to go into the communal areas of their buildings.
2. When allowed out, they are allowed in a limited 5 sq. km urban area, which has a small number of shops. Any restricted person with a religious belief has been placed in an area where they have access to a place of worship relevant to their faith.
3. They are not allowed any visitors unless the government approves such visits.
4. None of the Pacifican nationals have been able to find work during the 6-hour period they are permitted to leave their flats.
5. They are all required to wear electronic tags, both inside and outside the house.
6. The government must approve all social meetings outside their flats.
7. They are on a weekly basis subjected to searches of their entire flats.
8. All their mail is screened and their phone calls are recorded.

The ten non-Pacifican nationals detained brought proceedings in the Pacifican courts, arguing that there is no national emergency to justify the derogation from Article 5 of the European Convention on Human Rights and that consequently their detention constitutes an unlawful deprivation of liberty in breach of their rights under the Convention. They also argued that the measures have been applied in a discriminatory fashion since no Pacifican national has been made the subject of a detention order.

The ten Pacifican nationals subject to restriction orders also brought a case arguing that the restriction orders imposed on them amount to a breach of Article 5. The court decided that:

- Regarding the ten non-Pacifican nationals,
 - o Pursuant to the authority of *Lawless v Ireland*, the Pacifican Government is right in concluding that there existed a national emergency. The derogation was 'strictly required' by the exigencies of the situation and therefore complied with Article 15 of the European Convention on Human Rights. As such, the derogation is valid and there is therefore no breach of Article 5 by virtue of the detention of the non-Pacifican nationals. Furthermore, the application of the orders to non-Pacifican nationals is not discriminatory.
- Regarding the ten Pacifican nationals:
 - o The restriction imposed by the restriction orders does not amount to a restriction on liberty. Even if it did amount to a restriction on liberty, it would be in accordance with law and in compliance with Article 5(1)(c) of the European Convention of Human Rights. In particular, the restriction orders are reasonably necessary and proportionate to the terrorist threat posed by the individuals.

The applicants therefore made an application to the European Court of Human Rights on the following grounds:

- The House of Lords erred in finding that there was a national emergency justifying the derogation from Article 5 and it was wrong to determine that the

measures adopted were ‘strictly required’ in accordance with Article 15.
Furthermore, the non-Pacifican nationals had in fact been discriminated against in breach of Article 14.

(To be addressed by Senior Counsel)

- The restriction orders imposed on some of the applicants did amount to a restriction of liberty. Furthermore, pursuant to the case of *Guzzardi v Italy*, the restriction orders made against them {restrictions (i) to (viii)} were neither necessary nor proportionate.

(To be addressed by Junior Counsel)