**Strasbourg, 3 April 2024**

**ADMINISTRATIVE MEASURES IN THE CONTEXT OF CT**

Reply by the Council of Europe to the OHCHR Questionnaire of 16 February 2024

1. *Human Rights and administrative measures in Counter-Terrorism*

At the level of the Council of Europe there is no definition of administrative measures taken in the context of the fight against terrorism.

Across the Council of Europe administrative measures can vary: confinement to a designated area; immigration detention pending removal; deprivation of nationality; deportation; funds or assets freezing; terrorism lists etc. They are generally imposed by a judicial or executive authority against an individual or an entity that pose a risk to national security. These measures can, for example, be taken when there is not enough evidence to bring a criminal charge, or they can be imposed simultaneously with criminal measures.

Due to their particular nature, administrative measures taken in the context of counter-terrorism can be examined through the lens of Article 6 (criminal limb) of the European Convention of Human Rights (ECHR) and the case-law of the European Court of Human Rights (hereinafter “the Court”), insofar as some administrative measures have a coercive character and can restrict the exercise of human rights.

The concept of a “criminal charge”, used in Article 6 § 1 of the ECHR has an autonomous meaning independent of the definitions employed by the domestic legal systems of the member states[[1]](#footnote-0), and therefore has to be understood within the meaning of the Convention. As such, individuals subject to some non-criminal proceedings (disciplinary proceedings, administrative proceedings, expulsion and extradition proceedings, etc.) could be regarded as being “charged with a criminal offence” and claim the protection of Article 6.

The concept of “charge”, within the meaning of the Convention, takes a “substantive” rather than a “formal” conception in order to properly investigate the realities of the procedures in question.[[2]](#footnote-1) The notion of “criminal” must therefore be understood based on the criteria[[3]](#footnote-2) outlined in the Court`s case law: its classification in domestic law, the nature of the offence and the severity of the penalty that the person concerned risks incurring. The second and third criteria are alternative and not necessarily cumulative; however, a cumulative approach may be adopted where separate analysis of each criterion does not make it possible to reach a clear conclusion.

For these reasons, some of the administrative measures may fall within the ambit of the criminal head of Article 6 of the ECHR, if the aforementioned criteria developed in the Court’s case-law are met.

1. *The Council of Europe Counter-Terrorism legal framework*

The Council of Europe`s main international instrument in the counter-terrorism field is the 2005 Warsaw Convention on the Prevention of Terrorism (CETS No. 196). The treaty calls for the establishment of appropriate national terrorism prevention policies and requires State Parties to ensure that certain acts are criminal offences, including recruitment and training for terrorism.

The Convention also establishes the duty to investigate terrorism offences while also facilitating mutual legal assistance and co-operation in criminal matters, ensuring that suspected offenders are extradited or prosecuted in cases with overlapping jurisdiction.

The 2005 Additional Protocol to the Convention on the Prevention of Terrorism (CETS No. 217), builds upon the Convention, and is aimed specifically at addressing foreign terrorist fighters and returnees, reinforcing the main substantive criminal law elements of the United Nations Security Council Resolution 2178 (2014). The protocol aims at enhancing international co-operation and mutual legal assistance to prevent and prosecute persons travelling abroad for the purposes of terrorism.

Accordingly, it covers both the persons travelling as well as those organising, recruiting or facilitating such travel with the intent to support terrorist groups or attacks, and those who return from abroad.

In addition to the above-mentioned documents, the Council of Europe counter-terrorism framework entails various other Conventions; Recommendations of the Committee of Ministers to member States[[4]](#footnote-3); Parliamentary Assembly Resolutions; Strategies elaborated by the Council of Europe Committee on Counter-Terrorism (CDCT)[[5]](#footnote-4), among other items.

1. *Safeguards and human rights*

The Court has stated that every measure taken in the context of the fight against terrorism must be accompanied by adequate safeguards to ensure respect for human rights[[6]](#footnote-5). In a number of judgments, it has also underlined the balance between, on one hand, the defence of the institutions and of democracy for the common interest and on the other hand, the protection of individual rights. The Court has also emphasised that terrorist violence, in itself, represents a grave threat to human rights.[[7]](#footnote-6)

From the Court's case-law, relevant legal proceedings must be carried out in accordance with the institutional guarantees (independent and impartial tribunal etc.) and procedural guarantees (fair hearing, presumption of innocence etc.) established by Art. 6 of the Convention.

For example, in the case of *Big Brother Watch and Others v. The United Kingdom*, the Court ruled that member States cannot have unlimited discretion to subject individuals within their jurisdiction to secret surveillance. They can adopt legal norms that permit such surveillance but only as an exceptional measure, taken in certain conditions and with effective guarantees against abuse. In addition, in all circumstances it must be possible to challenge the measure before the domestic competent authority*[[8]](#footnote-7)*.

In cases concerning deportation proceedings of a non-national suspected of involvement in terrorist activities, the Court stated that human rights must be respected despite the seriousness of the offences committed*[[9]](#footnote-8)*.

In the case *of K2 v. the United Kingdom*, a dual national (Sudanese and British) was suspected in taking part in terrorism-related activities and had links with a number of Islamic extremists. The Secretary of State of the United Kingdom issued an order and deprived the applicant of his British citizenship. In addition, they decided to exercise the Crown`s common prerogative power and exclude him from the United Kingdom. This decision was taken in reliance on information which was not made public in the interests of national security. The applicant challenged without success these measures before the Special Immigration Appeals Commission and before the competent judicial bodies. Following that, he lodged an application with the Court claiming that the administrative measures had violated his right to respect for private life and had been discriminatory.

The Court examined the evidence and found that the administrative measures were not arbitrary and that the authorities acted diligently and in accordance with the domestic and international law. It noted that the interference to his private and family life caused by the deprivation of citizenship was limited and was not disproportionate to the legitimate aim pursued (the protection of the public from the threat of terrorism). In addition, the applicant was not rendered stateless by the decision to deprive him of his British citizenship as he still had the Sudanese citizenship. Also, the applicant failed to prove that he was discriminated against[[10]](#footnote-9).

In the case of *Ghoumid and Others v. France* a group of five dual nationals were convicted in 2007 for their participation in a criminal conspiracy to commit a terrorist act. After serving their sentences they were released in 2009 and 2010, then deprived of their French nationality in 2015 by orders of the Prime Minister. Following the dismissal of their domestic remedies, the applicants lodged an application with the Court, asserting that the deprivation had constituted a violation of their right to respect for their private life and their right to respect for their family life. In addition, they invoked Art. 8 and Article 4 of Protocol No. 7 and argued that the deprivation of nationality has to be regarded as a second punishment which was added to their already served conviction. In the first place the Court noted that in the French legal system the deprivation of nationality is not a “criminal” measure, and it does not represent a criminal punishment. The measure is provided for in the Civil Code (Article 25) and the *Conseil d`Etat* (a governmental body that acts both as legal adviser to the executive branch and as the supreme court for the administrative justice) clarified that in this particular case it represented an “administrative sanction”. The Court found that the measure didn`t have disproportionate consequences for the applicants (they all have dual nationality) and noted that the measure did not automatically entail deportation from France[[11]](#footnote-10).

The Court held that there had been a violation of Article 8 in the case *of Beghal v. the United Kingdom* concerning the use of counter-terrorism legislation in the United Kingdom (Terrorism Act 2000). Based on this legislation, people could be subjected (by police and immigration officers) to examination for up to nine hours and compelled to answer questions, without being formally detained or having access to a lawyer. The legislation was only applicable to passengers at ports, airports and international rail terminals. The Court ruled that during the period of time when the counter-terrorism legislation was applicable, the power to examine persons according to its provisions was neither sufficiently circumscribed nor subject to adequate legal safeguards against abuse[[12]](#footnote-11).

In the case of *Pagerie v. France*, in the context of the state of emergency (*État d’Urgence*) declared in 2015 following the terrorist attacks, administrative measures were imposed upon the applicant to not leave his residence for determined periods of time established by the authorities (*assignation à résidence*). Before the Court, the applicant invoked in this regard (among other provisions) Art. 2 of Protocol 4 of the Convention. The Court found that this administrative measure had not been disproportionate or arbitrary given the internal context in France and the applicant's involvement in activities related to terrorism[[13]](#footnote-12).

In the case of *H.F. and Others v. France,* the Court found a violation of Article 3 § 2 (“No one shall be deprived of the right to enter the territory of State of which he is national”) of Protocol No. 4. The case concerned the refusal to grant the applicants` requests for the repatriation by the French authorities of their family members who were being held in camps in north-eastern Syria. The applicants claimed that their family members were exposed to inhuman and degrading treatment in Syria on account of the French authorities` inaction. The Court concluded that the examination of the requests for repatriation made by the applicants had not been surrounded by appropriate safeguard against arbitrariness. The situation of the applicant`s family members could be characterised, at the time of their requests to the French authorities for their repatriation, as a humanitarian emergency which required an individual examination of their requests. The applicants received only a general policy document from the authorities explaining the government's position on requests for repatriation of French citizens who had gone to Syria and Iraq. The applicants did not receive any explanation for the choice underlying the decision taken in respect of their requests and the decision making-process was not transparent in their regard. Furthermore, the Court found that the situation could not be remedied by the proceedings brought by the applicants before the domestic courts[[14]](#footnote-13).

In the case *Muhamad and Muhamad v. Romania,* concerning proceedings as a result of which the applicants were deported from Romania to Pakistan, the Court held that there had been a violation of Article 1 (procedural safeguards relating to expulsion of aliens) of Protocol No. 7 to the Convention. The Court found that the applicants had received only very general information about the legal characterisation of the accusations against them and that the authorities didn’t indicate the applicant`s specific acts which allegedly endangered national security. The applicants were not provided with any information about the key stages in the proceedings and they did not have access to classified documents in the file. Therefore, the limitations imposed of the applicant`s rights were not counterbalanced in the domestic proceedings by adequate safeguards[[15]](#footnote-14).

In case of *Nada v. Switzerland*, the applicant alleged that the ban on entering or transiting through Switzerland, which had been imposed on him as a result of the addition of his name to a terrorist list, had breached, among other rights, his freedom of movement. The applicant was ordered not to leave a particular area (an Italian enclave surrounded by a Swiss canton and separated from the rest of Italy by Lake Lugano), arguing that the restriction prevented him from seeing his friends and from receiving appropriate medical treatment for his health problems. In this respect, the Court rejected the application and noted that Switzerland had the right to prevent the entry of an alien in certain conditions and the measure was legally taken. In addition, the applicant was not in a situation of detention, he was free to move within the territory of his permanent residence. The measure permitted the applicant to seek exemptions from the entry or transit ban and such exemptions were granted to him, but he did not make use of them. In addition, he was not restricted in receiving any visitors.

In the same case, the Court ruled that the restrictions imposed on the applicant`s freedom of movement did not strike a fair balance between his rights guaranteed by Article 8, on the one hand, and the legitimate aims of the prevention of crime and the protection of Switzerland's national security, on the other. Therefore, the interference with the applicant's right to respect for private and family life was not proportionate and not necessary in a democratic society. The Court found also that the applicant did not have any effective means of obtaining the removal of his name from the terrorist list[[16]](#footnote-15).

1. *Accountability*

Council of Europe member States are obliged to comply with the final judgements of the European Court of Human Rights and to remedy violations. The States enjoy a margin of appreciation as regards the means to be used so they can, in principle, identify the appropriate measures to be taken in each case.

The supervision of the execution of judgements is ensured by the Committee of Ministers of the Council of Europe and cases remain under its supervision until the required measures have been taken. In some cases, the Committee of Ministers can assist execution in different ways, notably through recommendations. The Committee of Ministers is aided in its supervision task by the Department for the Executions of Judgements.

The measures to be taken may relate to the individual applicant and in these cases, execution measures must put an end to the violation and remedy its negative consequences for the applicant. This can imply the payment of any sum awarded by the Court (as just satisfaction) or agreed between the parties. When mere monetary compensation cannot adequately erase the consequences of a violation, the authorities must take any other individual measure which may be required to remedy the violation. Sometimes, the judgements themselves contain additional recommendations in this respect.

Measures can be of a general nature and in such cases, execution requires general measures to prevent future violations similar to those found by the Court, whether through changes of legislation or other types of measures.

For example, in the case of *H.F. and Others v. France* (quoted above), the Court ruled that France has to reexamine the requests to enter French territory, while ensuring that appropriate safeguards are afforded against any arbitrariness. In addition, France was obliged to pay the applicants a sum of money to compensate the damage established as being consequent to the violations found.

In the previously mentioned cases *of Muhammad and Muhammad v. Romania* and *Beghal v. The United Kingdom*, among others, the Court obliged to pay the respondent States an amount of money to the applicants, as a compensation for the damage caused.

In the case of *A. and Others v. the United Kingdom* the Court found several violations of the Convention in relation with the counter terrorism legislation in the UK which permitted the indefinite detention of non-nationals certified by the Secretary of State as suspected of involvement in terrorism. Following these findings, the UK modified its legislation accordingly.

1. Case of *Blokhin v. Russia*, application no.[*47152/06*](https://hudoc.echr.coe.int/eng#%7B%22appno%22:%5B%2247152/06%22%5D%7D), judgement of 23 March 2016, § 179. [↑](#footnote-ref-0)
2. Case of *Dewlwe v. Belgium*, application no. [*6903/75*](https://hudoc.echr.coe.int/eng#%7B%22appno%22:%5B%226903/75%22%5D%7D)*), judgement of 27 February 1990,* § 44. [↑](#footnote-ref-1)
3. For example, in the case of *Engels and Others v. The Netherlands*, applications nos.5100/71; 5101/71; 5102/71; 5354/72; [5370/7](https://hudoc.echr.coe.int/eng#%7B%22appno%22:%5B%225370/72%22%5D%7D), judgement of 8 June 1976, §§ 82-83. [↑](#footnote-ref-2)
4. For example: Recommendation CM/Rec(2022)7 of the Committee of Ministers to Member States on the risk assessment of individuals indicted or convicted for terrorism crimes; Recommendation CM(Rec(2022)8 of the Committee of Ministers to member States on the use of information collected in conflict zones as evidence in criminal proceedings related to terrorist offences. [↑](#footnote-ref-3)
5. For example: the second Council of Europe Counter-Terrorism Strategy (2023-2027) with its Annex (2023-2027 Counter-Terrorism Action Plan). [↑](#footnote-ref-4)
6. Case of *Brogan and Others v. the United Kingdom*, applications no. 11209/84; 11234/84; 11266/84; [*11386/85*](https://hudoc.echr.coe.int/eng#%7B%22appno%22:%5B%2211386/85%22%5D%7D), judgement of 29 November 1988, § 48. [↑](#footnote-ref-5)
7. Case of *Othman (Abu Quatada) v. the United Kingdom*, application no. [8139/09](https://hudoc.echr.coe.int/eng#%7B%22appno%22:%5B%228139/09%22%5D%7D), judgement of 09.05.2012, § 183. Case of *Trabelsi v. Belgium*, application no. [140/10](https://hudoc.echr.coe.int/eng#%7B%22appno%22:%5B%22140/10%22%5D%7D), judgement of 16.02.2015, § 117. Case of *Ouabour v. Belgium*, application no. no [26417/10](https://hudoc.echr.coe.int/eng#%7B%22appno%22:%5B%2226417/10%22%5D%7D), judgement of 02.09.2015, § 63. [↑](#footnote-ref-6)
8. Case of *Big Brother Watch and Others v. The United Kingdom*, application nos. [58170/13](https://hudoc.echr.coe.int/eng#%7B%22appno%22:%5B%2258170/13%22%5D%7D), [62322/14](https://hudoc.echr.coe.int/eng#%7B%22appno%22:%5B%2262322/14%22%5D%7D) and [24960/15](https://hudoc.echr.coe.int/eng#%7B%22appno%22:%5B%2224960/15%22%5D%7D)), judgement of 25 May 2021, §§ 332-339; case of *Roman Zakharov v. Russia*, application no. [*47143/06*](https://hudoc.echr.coe.int/eng#%7B%22appno%22:%5B%2247143/06%22%5D%7D), judgement of 4 December 2015, §§ 227-234; case of *Kennedy v. The United Kingdom*, application no. [26839/05](https://hudoc.echr.coe.int/eng#%7B%22appno%22:%5B%2226839/05%22%5D%7D), judgement of 18 August 2010, § 130; case of *Heglas v. the Czech Republic*, application no.[5935/02](https://hudoc.echr.coe.int/eng#%7B%22appno%22:%5B%225935/02%22%5D%7D), judgement of 09 July 2007, §§ 72-75; case of *The Association for European Integration and Human Rights and Ekimdzhiev v. Bulgaria*, application no. [62540/00](https://hudoc.echr.coe.int/eng#%7B%22appno%22:%5B%2262540/00%22%5D%7D), judgement of 30 January 2008, §§ 75-77;

Case of *A. and Others v. The United Kingdom*, application no. [3455/05](https://hudoc.echr.coe.int/eng#%7B%22appno%22:%5B%223455/05%22%5D%7D) , judgement of 19 February 2009, §164; the case of *Auad v. Bulgaria*, application no. [46390/10](https://hudoc.echr.coe.int/eng#%7B%22appno%22:%5B%2246390/10%22%5D%7D), judgement of 11.01.2012, §§ 128-135; case of *Klass and Others v. Germany*, application no. [5029/71](https://hudoc.echr.coe.int/eng#%7B%22appno%22:%5B%225029/71%22%5D%7D), judgement of 6 September 1978, §§ 48-50, § 59. [↑](#footnote-ref-7)
9. Case of *Chahal v. The United Kingdom*, application no. [22414/93](https://hudoc.echr.coe.int/eng#%7B%22appno%22:%5B%2222414/93%22%5D%7D), judgement of 15 November 1996, §§ 79-80. In the same vein, see the case of *Saadi v. Italy*, application no. [37201/06](https://hudoc.echr.coe.int/eng#%7B%22appno%22:%5B%2237201/06%22%5D%7D), judgement of 28 February 2008, §§ 137-138; the case of *Selmouni v. France*, application no [25803/94](https://hudoc.echr.coe.int/eng#%7B%22appno%22:%5B%2225803/94%22%5D%7D), judgement of 28 July 1999, § 95; the case of *Charahili v. Turkey*, application no. [46605/07](https://hudoc.echr.coe.int/eng#%7B%22appno%22:%5B%2246605/07%22%5D%7D), judgement of 13.07.2010, § 58; the case of *A.M. v. France*, application no. [12148/18](https://hudoc.echr.coe.int/eng#%7B%22appno%22:%5B%2212148/18%22%5D%7D), judgement of 29 July 2019, § 112. [↑](#footnote-ref-8)
10. Case of *K2 v. the United Kingdom*, application no. [42387/13](https://hudoc.echr.coe.int/eng#%7B%22appno%22:%5B%2242387/13%22%5D%7D), judgement of 07 February 2017, §§ 48-67. Also see the case of Ramadan v. Malta, application no. [76136/12](https://hudoc.echr.coe.int/eng#%7B%22appno%22:%5B%2276136/12%22%5D%7D), judgement of 17.10.2016, §§ 84-95. [↑](#footnote-ref-9)
11. Case of *Ghoumid and Others v. France*, application no. [52273/16](https://hudoc.echr.coe.int/eng#%7B%22appno%22:%5B%2252273/16%22%5D%7D) and 4 others, judgement of 25.09.2020, §§ 41-52 and §§ 63-74. [↑](#footnote-ref-10)
12. Case of B*eghal v. the United Kingdom*, application no. [4755/16](https://hudoc.echr.coe.int/eng#%7B%22appno%22:%5B%224755/16%22%5D%7D), judgement of 28.05.2019, §§ 87-110. [↑](#footnote-ref-11)
13. Case of *Pagerie v. France*, application no. [24203/16](https://hudoc.echr.coe.int/eng#%7B%22appno%22:%5B%2224203/16%22%5D%7D), judgement of 19.04.2023, § 209. [↑](#footnote-ref-12)
14. Case of *H.F. and Others v. France*, application nos. [24384/19](https://hudoc.echr.coe.int/eng#%7B%22appno%22:%5B%2224384/19%22%5D%7D) and [44234/20](https://hudoc.echr.coe.int/eng#%7B%22appno%22:%5B%2244234/20%22%5D%7D), judgement of 14 September 2022, , §§ 243-276; §§ 277-284. [↑](#footnote-ref-13)
15. Case of *Muhammad and Muhammad v. Romania*, application no. [80982/12](https://hudoc.echr.coe.int/eng#%7B%22appno%22:%5B%2280982/12%22%5D%7D), judgement of 15 October 2020, §§ 114-123 and §§ 203-207. [↑](#footnote-ref-14)
16. Case of *Nada v. Switzerland*, application no. [10593/08](https://hudoc.echr.coe.int/eng#%7B%22appno%22:%5B%2210593/08%22%5D%7D), judgement of 12 September 2012, §§ 207-214, §§ 224-234. In this case, Switzerland adopted punitive measures (based on the Swiss Federal Taliban Ordinance) in the framework of an international sanctions regime (the UN Security Council Resolutions). Also see, the case of *Al-Dulimi et Montana Management Inc. c. Suisse*, application no [5809/08](https://hudoc.echr.coe.int/eng#%7B%22appno%22:%5B%225809/08%22%5D%7D), judgement of 21 June 2016. [↑](#footnote-ref-15)