Czasopismo Prawa Karnego i Nauk Penalnych
Journal of Criminal Law and Penal Studies
ISSN: 1506-1817 e-ISSN: 2719-6569
Rok/Volume XXV: 2021 Zeszyt/No. 2

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Kettling as a Deprivation of Liberty under Polish Law[2]

Kettling jako pozbawienie wolności na gruncie polskiego prawa

1. Introductory remarks

One of the techniques of operational activities used by police officers is kettling. It involves police officers encircling or surrounding a group of people, usually part of a public gathering. The purpose of the creation of the cordon is to prevent persons inside, by the fact of maintaining the cordon or even sometimes by the use of direct coercive measures, from leaving the encirclement area. The cordon is maintained by police officers for a specific period of time, usually measured in hours. The purpose of kettling may be, for example, to prevent persons suspected of committing an offence from leaving the place where the offence was committed or another place where kettling was carried out until police officers perform activities necessary to document the fact of committing such an offence or establish the identity of the perpetrators. Kettling may also have a preventive character when the surrounding of a group of persons is done in order to prevent undertaking of behaviours that may realize the elements of a prohibited act, or even in order to protect the surrounded group of persons from being harmed by a crime or contravention on the part of other persons.

In the case of kettling, a fundamental doubt arises as to whether, depending on the circumstances and purpose of its use, it constitutes

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[2] This paper is a result of the research project no. 2015/19/D/HS5/00102 „Preventive deprivation of liberty and human rights" funded by the Polish National Science Centre.

procedural detention or preventive detention, within the meaning of Article 15, Section 1, Items 2 and 3 of the Act of 6 April 1990 on the Police[3] in conjunction with Article 244 § 1 of the Act of 6 June 1997 – Code of Criminal Procedure[4] and Article 45 § 1 of the Act of 24 August 2001 – Code of Procedure in Cases of Contravention[s][5]. Recognising that kettling constitutes a type of deprivation of liberty opens up the need to ensure that all surrounded persons are guaranteed all the rights to which detainees are entitled, in particular the right to lodge a complaint with a court in order to have the lawfulness of the detention reviewed and the right to seek damages or compensation for unjustified detention. On the other hand, the exclusion of the qualification of kettling as a type of deprivation of liberty excludes also the need to apply to surrounded (encircled) persons the legal regime associated with procedural or preventive detention. Possible protection of the rights or freedoms which may have been violated as a result of the execution of the kettling, the harmed persons may then seek only by way of filing a notice of a suspicion that a crime or a contravention has been committed by the Police officers, by bringing an action against the State Treasury for compensation or redress for the damage or harm suffered as a result of an unlawful exercise of public authority, or in the course of complaint proceedings under Section VIII of the Act of 14 June 1960 – Code of Administrative Procedure[6].

2. ECtHR rulings

The problem of the kettling from the point of view of the possibility to qualify this situation as a type of deprivation of liberty within the meaning of Article 5 of the Convention for the Protection of Human Rights and Fundamental Freedoms, drawn up in Rome on 4 November 1950, subsequently amended by Protocols No. 3, 5 and 8 and supplemented by Protocol No. 2[7], was dealt with in a case by the European Court on Human Rights. The case concerned the actions of British police officers during

3 Journal of Laws 2020, item 360, with amendments, hereinafter: the Police Act.
4 Journal of Laws 2021, item 534, with amendments, hereinafter: k.p.k.
5 Journal of Laws 2021, item 457, with amendments, hereinafter: k.p.s.w.
6 Journal of Laws 2021, item 735, with amendments.
7 Journal of Laws 1993, No. 61, item 284, hereinafter: ECHR.

a demonstration in London in 2001. Both the people who took part in the demonstration and outsiders who found themselves accidentally in the place where the cordon was established, despite numerous requests, could not leave the place of encirclement (surroundings) for several hours. The police officers had orders not to let anyone outside the cordon[8].

The ECtHR stated that the kettling implemented by British police in the described situation, which had the effect of preventing the encircled persons from leaving their surroundings for a period of several hours, did not constitute a deprivation of liberty within the meaning of Article 5 ECHR. The ECtHR held that in the case in question the police conduct was justified by the circumstances of the incident and the risk of serious harm, and therefore the kettling could not be qualified as deprivation of liberty. As exculpatory circumstances, the ECtHR considered, inter alia, the size of the crowd, the variability of the conditions and their dangerous nature, and the aggressive behavior of some of the persons in the crowd[9].

The reasoning used by the ECtHR refers to the position generally accepted in the case-law of the ECtHR, according to which deprivation of liberty within the meaning of Article 5 ECHR must be distinguished from a mere restriction on freedom of movement within the meaning of Article 2 of Protocol No. 4 to the ECHR. A number of criteria must be taken into account in order to assess a particular situation as a deprivation of liberty, such as the type, duration, effects, and implementation of the measure. The difference between a deprivation of liberty and a restriction on freedom of movement relates principally to the degree or intensity and not to the nature or content of the restrictions on the individual's freedom[10]. Although the ECHR in the analyzed case directly

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[8] See judgment of the ECtHR of 15 March 2012 in case Austin and others v. UK, application no. 39692/09, 40713/09 and 41008/09, §§ 10–14.

[9] See judgment of the ECtHR of 15 March 2012 in Austin and Others v. UK, application no. 39692/09, 40713/09 and 41008/09, §§ 66–67.

[10] See, for example, judgment of the ECtHR of 8 June 1976 in Engel and Others v. the Netherlands, application no. 5100/71, 5101/71, 5102/71, 5354/72 and 5370/72, §§ 58–59; judgment of the ECHR of 6 November 1980 in Guzzardi v. Italy, application no. 7367/76, §§ 92–93; judgment of the ECtHR of 28 May 1985 in Ashingdane v. the United Kingdom, application no. 8225/78, § 41; judgment of the ECHR of 28 November 1988 in Nielsen v. Denmark, application no. 10929/84, § 67; judgment of the ECHR of 25 June 1996 in Amuur v. France, applicationo. 19776/92, § 42; judgment of the ECtHR of 12 January 2010 in Gillan and Quinton v. UK, application

referred to the above criteria, the presented argumentation in the scope of the assessment of the kettling, referring to the circumstances justifying the actions of the police, did not, however, concern the rationale for the distinction of deprivation of liberty, but the legitimacy (purposefulness) of the creation and maintenance of a cordon by police officers. It has been rightly pointed out in the literature that the assessment of whether a certain police action results in deprivation of liberty should be distinguished from the assessment of the legitimacy (purposefulness) of that action – these are two different perspectives that have been confused by the ECtHR[11].

It seems that a more adequate application of the criteria, such as „the type, duration, effects, and manner of implementation of the measure" in the analysed case, in terms of the occurrence of deprivation of liberty, without analysing the legitimacy (purposefulness) of the creation and maintenance of a cordon by the police, was presented in the dissenting opinion to the above ECtHR judgment. The judges found that:

> the applicants were confined within a relatively small area, together with some 3,000 other people, and their freedom of movement was greatly reduced; they were only able to stand up or sit on the ground and had no access to toilet facilities, food or water. The cordon was maintained through the presence of hundreds of riot police officers and the applicants were entirely dependent on the police officers' decisions as to when they could leave. Furthermore, the police could use force to keep the cordon in place, and refusal to comply with their instructions and restrictions was punishable by a prison sentence and could lead to arrest. All the applicants were contained in those conditions for six to seven hours[12].

The above argumentation formed the basis for the thesis that the kettling for several hours constituted a deprivation of liberty within the meaning of Article 5 ECHR.

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no. 4158/05, § 56; judgment of the ECtHR of 23 February 2012 in Creangă v. Romania, application no. 29226/03, § 91; judgment of the ECtHR of 23 February 2017 in De Tommaso v. Italy, application no. 43395/09, § 80. For more information, see T. Sroka, *Prewencyjne*..., p. 42 ff.

11 See paragraph 4 of the dissenting opinion of Judges Tulkens, Spielmann, and Garlicki to the judgment of the ECtHR of 15 March 2012 in Austin and Others v. United Kingdom, application no. 39692/09, 40713/09 and 41008/09; D. Cline, *Deprivation*..., p. 36–37; A. Ashworth, L. Zender, *Preventive*..., p. 61.

12 Paragraph 14 of the dissenting opinion of Judges Tulkens, Spielmann, and Garlicki to the judgment of the ECtHR of 15 March 2012 in Austin and Others v. United Kingdom, application no. 39692/09, 40713/09 and 41008/09.

3. Polish Constitution standard

Considering the doubts as to the classification of the kettling as deprivation of liberty, which appear even on the basis of the ECHR jurisprudence, as well as the lack of direct regulation of this technique of police operational activities in Polish law and the lack of adequate jurisprudence of Polish courts, the Supreme Court and the Constitutional Tribunal, it is necessary to analyse the legal nature of the kettling. For this purpose, it is necessary to determine, from the point of view of Article 41 Section 1 and 2 of the Constitution of the Republic of Poland, the criteria for distinguishing deprivation of liberty, and then to assess whether surrounding (cordoning off) by police officers and maintaining this cordon meets the criteria for deprivation of liberty within the meaning of the Constitution.

Neither in the doctrine of constitutional law nor in the jurisprudence of the Constitutional Tribunal have consistent criteria been developed so far to distinguish situations constituting a deprivation of liberty within the meaning of Article 41 Sections 1 and 2 of the Constitution, or to distinguish them from mere limitations of other constitutional freedoms, in particular the freedom of movement. However, an analysis of the above-mentioned sources allows for the conclusion that factors such as deprivation of the right to dispose of oneself, in terms of the right to freedom of movement[13], compulsion or lack of consent to stay in a particular place[14], or the intensity and the basis of the intrusion into the sphere of an individual's freedom and its effect[15], may be of relevance to the qualification of a particular situation as deprivation of liberty.

The issue of the concept of deprivation of liberty has been addressed more frequently in the case-law of the ECtHR[16]. As mentioned, this Court has repeatedly pointed out that in order to assess a particular situation for the occurrence of a deprivation of liberty, it is necessary to take into account a number of criteria, such as the nature, duration, effects, and manner of implementation of the measure in question. Developing these criteria, the ECtHR concluded that „the notion of deprivation of liberty

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13 See judgment of the CT of 8 January 2019, SK 6/16.
14 See judgment of the CT of 22 March 2017, SK 13/14.
15 See P. Wiliński, P. Karlik, in: *Konstytucja*..., p. 998.
16 For a detailed analysis of ECtHR case law, see T. Sroka, *Prewencyjne*..., p. 42–74.

comprises both an objective element, namely a person's confinement in a restricted space for a significant length of time, and a subjective element, namely the person's lack of valid consent to the confinement"[17]. It has been proposed in the literature that the objective criterion (the stay of a person in a certain restricted, closed space, where he is subjected to supervision by staff and is not free to leave the place of stay) and the subjective criterion (the lack of freely and voluntarily expressed consent to stay in a given place) resulting from the ECtHR jurisprudence should constitute the basis for distinguishing deprivation of liberty within the meaning of Article 41 Sections 1 and 2 of the Constitution[18].

As I have already indicated in another study[19], in order to assess the existence of a situation corresponding to the deprivation of liberty within the meaning of Article 41 Sections 1 and 2 of the Constitution, it is necessary to analyse *in concreto* four, or sometimes five, criteria. In the following, I will briefly recall the findings in this regard.

Firstly, the criterion of place needs to be assessed. The essence of deprivation of liberty is to impose on an individual the obligation to remain in a specific, limited space. An obligatory feature of deprivation of liberty is the exclusion of the possibility toshape freely the place of residence (stay) outside the designated place. This obligation is not limited to residence in a place that is institutionally and conventionally prepared to provide round-the-clock care and supervision of individuals, thus, for example, a prison, detention centre, psychiatric hospital, asylum centre, or other similar places. The obligation to remain in a certain limited space may also be implemented in other places, even *ad hoc* selected for this purpose, not excluding the home (place of residence).

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17 Judgment of the ECtHR of 5 June 2014 in Akopyan v. Ukraine, application no. 12317/06, § 67. See also judgment of the ECtHR of 16 June 2005 in Storck v. Germany, application no. 61603/00, § 74; judgment of the ECtHR of 27 March 2008 in Shtukaturov v. Russia, application no. 44009/05, § 106; judgment of the ECtHR of 17 January 2012 in Stanev v. Bulgaria, application no. 36760/06, § 117; judgment of the ECtHR of 14 February 2012 in D.D. v. Lithuania, application no. 13469/06, § 145; judgment of the ECtHR of 19 April 2012 in M. v. Ukraine, application no. 2452/04, § 69; judgment of the ECtHR of 16 October 2012 in Kędzior v. Poland, application no. 45026/07, § 55; judgment of the ECtHR of 22 January 2013 in Mihailovs v. Latvia, application No 35939/10, § 128; judgment of the ECHR of 16 September 2014 in Atudorei v. Romania, application no. 50131/08, § 128.

18 See M. Szwed, *Przymusowe*..., p. 129–138.

19 See T. Sroka, *Prewencyjne*..., p. 78–81.

Secondly, the coercion criterion requires analysis. As the ECtHR pointed out, „coercion is a crucial element in its examination of whether or not someone has been deprived of his or her liberty within the meaning of Article 5 § 1 of the Convention"[20]. Consequently, the essence of deprivation of liberty is the existence of a legal and factual possibility of compelling an individual to remain where he ought to be in accordance with the content of the obligation imposed on him. Where, therefore, an obligation is imposed on an individual to remain in a defined, confined space, public officials must have the power, in law and in fact, to use coercive measures in order to prevent the individual from leaving the defined space or to force him to return if he does so. However, for the existence of a deprivation of liberty, there is no necessity for the actual use of coercive measures, in particular physical „confinement" of the individual in a particular place. The possibility of using coercive measures or, at best the threat of their use, are sufficient. Therefore, the criterion of coercion must be interpreted in the direction of the existence of the legal and factual possibility of using coercive measures rather than the actual application of coercion to the individual. At the same time, coercive measures should be interpreted broadly, not only as measures of direct coercion but all mechanisms by which an individual can be „forced" in a commanding manner to comply with an obligation to remain in a certain place. Consequently, coercive measures may also include the threat of criminal prosecution for failure to comply with the obligation to stay at a designated place[21].

Thirdly, it is important to verify the control criterion. The deprivation of liberty requires the existence of mechanisms to control whether the individual fulfills the obligation to stay in the designated place. The type of mechanisms may depend on both the location of the person on whom the obligation to remain in the designated place has been imposed and the nature of the measure applied. The control can be realized both by direct actions and personal observations carried out by the personnel

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[20] Judgment of the ECtHR of 16 September 2014 in Valerian Dragomir v. Romania, application no. 51012/11, § 69; judgment of the ECtHR of 1 March 2016 in Popoviciu v. Romania, application no 52942/09, § 59.

[21] See judgment of the ECtHR of 12 January 2010 in Gillan and Quinton v. UK, application no. 4158/05, § 57, where the element of coercion in the event of failure to comply with an obligation to remain at a designated place was considered being the threat of detention at a police station, arrest and criminal prosecution.

of a particular place or persons performing public functions and by using various technical solutions. In all cases of deprivation of liberty, it must be possible, at least on a permanent, temporary, or random basis, with a frequency appropriate to the measure concerned, to carry out checks on the whereabouts of the individual.

Fourthly, the criterion of time also needs to be assessed. The essence of deprivation of liberty is to impose on an individual the obligation to remain in a defined, confined space on a continuous basis or for such a significant period during the day, that the effect of the execution of this obligation, because of the exclusion of the possibility of free movement for that period, is to make it impossible or very hard to lead a normal life, including the establishment of social relations. A detailed analysis of the time criterion will be required primarily in the second case. It is not possible to define in a precise manner the minimum duration of an individual's stay per day in a designated place for the acceptance of the qualification of deprivation of liberty. This assessment must always be made *in concreto*, taking into account the nature and extent of the restrictions on freedom that accompany the obligation to reside in a particular place.

On the other hand, if the indicated criteria for distinguishing deprivation of liberty are met, the total, overall period during which the obligation to remain in a particular place was in force is generally irrelevant. Any „detention", even of short duration, can constitute a deprivation of liberty. It is not possible to derive from the Constitution a minimum period after which a particular situation should be qualified as a deprivation of liberty, because such a criterion would weaken the guarantees for the protection of personal liberty. If an obligation to stay in a specific place on a permanent basis was imposed on an individual, with the existence of mechanisms to control the fulfillment of this obligation and the possibility to apply coercive measures in order to enforce it, the fulfillment of this obligation should be qualified as a deprivation of liberty within the meaning of Article 41 Sections 1 and 2 of the Constitution, even if this obligation was in force for a short period[22].

However, there is an important interpretative problem associated with the analysis of the time criterion. In modern society, during various

[22] See judgment of the ECtHR of 7 March 2013 in Ostendorf v. Germany, application no. 15598/08, § 64.

types of interactions of citizens with persons performing public functions, there are often factual situations in which an individual, for a short period, has a limited possibility of free movement, even with the existence of objective possibilities of applying coercive measures, in order to allow for public officials to carry out the duties prescribed by law. It seems that the most illustrative examples in this respect are the actions taken by police officers. Often an individual is obliged to stay for a short period in a designated place for the purpose of being questioned or identification, or for a road check carried out by police officers. Additionally, the police officers have the statutory power to use measures of direct coercion in the event of disobedience to their instructions, such as an order to remain in the designated place. Therefore, the question arises, whether a short-term obligation to stay in a certain place for the time of being questioned or identification or roadside check by police officers constitutes a deprivation of liberty or, for some reasons, it is only a restriction of freedom of movement.

Qualifying any situation in which an individual would be obliged to remain in a certain place for the duration of the performance of certain duties by public officials as a deprivation of liberty would lead to the paralysis of social life and would significantly impede the performance of even the basic duties of the state in the public sphere. At the same time, it does not appear that in this type of situation, the individual should be afforded the guarantees of protection of personal liberty inherent in a strictly custodial situation. Consequently, it must be presumed that if the exclusion of the freedom of movement (linked to the obligation to remain in a certain place) is not the aim of a particular measure per se, but only an additional and unavoidable side effect that takes place only for a short period and only for the purpose of immediately completing certain formalities for which the individual should remain in the designated place, that measure should not qualify as deprivation of liberty[23]. Therefore, if the restriction on the freedom of movement is imposed only for the time which is objectively necessary and sufficient for the performance of the duty incumbent on the representatives of public authorities and no coercive measures have been taken in respect of the individual, and the duty was not intended to create a situation corresponding to a deprivation

[23] See T. Sroka, *Prewencyjne*..., p. 62–63.

of liberty, such restriction of the freedom of movement shall not be classified as a deprivation of liberty within the meaning of Article 41 Sections 1 and 2 of the Constitution[24]. However, if coercive measures (for example, direct coercion) were actually used against an individual in order to enforce the obligation to remain at a designated place, that situation must nevertheless be regarded as a deprivation of liberty[25].

Finally, in order to distinguish situations that constitute a deprivation of liberty, it will sometimes be necessary to analyse an additional criterion of consent. Where, in view of the actual possibilities of exercising freedom of movement, it is objectively possible for an individual to choose to remain in a particular place which is accessible to him and in which measures involving deprivation of liberty are also carried out, or even to consent to the application of measures of direct coercion, the deprivation of liberty will be constituted only by the absence of a legally relevant authorisation (consent) to stay in a particular place or the use of coercive measures, expressed by the person directly concerned. This criterion will be relevant for assessing, for example, a patient's stay in a psychiatric hospital or a nursing home as deprivation of liberty.

The criteria presented above for distinguishing deprivation of liberty within the meaning of Article 41 Sections 1 and 2 of the Constitution should be applied to the assessment of the kettling. Since kettling consists of police officers encircling or surrounding a group of persons in order to prevent persons inside the police cordon from leaving the encirclement area, the application of kettling has the effect of precluding persons inside the cordon from freely shaping their place of stay. This is because individuals are required to stay within a specific, limited space, which is the lap area. The criterion of place is thus fulfilled.

4. Specific legal regulations

Police officers forming a cordon create conditions in which, due to the human barrier, it is highly difficult or even impossible for persons inside the cordon to leave the encirclement area. In addition, police officers,

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[24] See T. Sroka, *Prewencyjne*..., p. 66–67.

[25] See judgment of the ECtHR of 24 June 2008 in Foka v. Turkey, application no. 28940/95, § 75; judgment of the ECtHR of 23 July 2013 in M.A. v. Cyprus, application no. 41872/10, § 193; T. Sroka, *Prewencyjne*..., p. 62–63.

in order to enforce a given order to remain in a designated place, have – resulting from Article 16 Section 1 of the Police Act in connection with Article 11 Section 1 of the Act of 24 May 2013 on Direct Coercive Measures and Firearms[26] – statutory authority to use direct coercive measures. At the same time, a person who intentionally, without adhering to specific orders issued by a Police or Border Guard officer on the basis of the law, prevents or considerably obstructs the performance of official activities can be held liable for the contravention provided for in Article 65a of the Act of 20 May 1971 – Contraventions Code[27]. Consequently, due to the creation of a physical barrier making it difficult or impossible to leave the encirclement area, the possibility of police officers using direct coercive measures and the threat of criminal liability for not complying with the orders given to remain in the encirclement area, it should be concluded that the criterion of coercion is met.

During the implementation of the kettling, persons inside the cordon remain under constant observation by the surrounding police officers, who have full control over the situation in the place of encirclement, including the behaviour of persons who are surrounded. This is sufficient to satisfy the control criterion.

Finally, in the case of the application of the kettling, the persons inside the cordon are forced to remain in the place where they are surrounded for the entire period of the performance of the above-mentioned technique of operational activities by police officers. Regardless of the length of the total period of the kettling, the persons inside the cordon must remain within the encirclement at all times. Consequently, the time criterion is also met.

In view of the above, the thesis should be made that the kettling, i.e. encircling or surrounding a group of persons by police officers in order to prevent the persons inside the police cordon from leaving the place of encirclement, meet, in principle, the criteria of deprivation of liberty within the meaning of Article 41 Sections 1 and 2 of the Constitution[28]. In a similar way, the kettling was assessed by three ECtHR judges in a dissenting opinion to the cited ECtHR judgment in Austin and others

[26] Journal of Laws 2019, item 2418, with amendments.
[27] Journal of Laws 2021, item 281, with amendments.
[28] See T. Sroka, *Prewencyjne*..., p. 66.

v. UK[29]. In their view, the existence of a deprivation of liberty within the meaning of Article 5 ECHR was demonstrated by the fact that:

> the applicants were confined within a relatively small area, together with some 3,000 other people, and their freedom of movement was greatly reduced; they were only able to stand up or sit on the ground and had no access to toilet facilities, food or water. The cordon was maintained through the presence of hundreds of riot police officers and the applicants were entirely dependent on the police officers' decisions as to when they could leave. Furthermore, the police could use force to keep the cordon in place, and refusal to comply with their instructions and restrictions was punishable by a prison sentence and could lead to arrest. All the applicants were contained in those conditions for six to seven hours[30].

Nevertheless, it should be noted that sometimes the kettling is used by police officers in order to quickly isolate a group of people who, due to the factual circumstances, need to be questioned or require identification. Bearing in mind the comments concerning the criterion of time, it should be assumed that if the purpose of the application of the kettling is to exclude the freedom of movement of a group of persons in order to enable police officers to perform their actions consisting in the identification of persons inside the cordon, the encirclement is performed exclusively for the time objectively necessary and sufficient for the performance of the activity of identification (the police officers immediately proceed to check the persons inside the cordon, which is conducted in a continuous and efficient manner), and no measures of (direct) coercion are applied to the persons inside the cordon, then such an incident of kettling should be classified only as a restriction of freedom of movement, not as a deprivation of liberty. However, if measures of (direct) coercion were used against persons within the surrounded area, the encirclement of a group of persons did not take place in order to immediately perform the activity of identification, the activity of identification was not undertaken without undue delay or the activity was carried out in a tardy manner, the kettling should be qualified as deprivation of liberty.

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29 See judgment of the ECtHR of 15 March 2012 in Austin and Others v. the United Kingdom, application no. 39692/09, 40713/09 and 41008/09.

30 Paragraph 14 of the dissenting opinion of Judges Tulkens, Spielmann, and Garlicki to the judgment of the ECtHR of 15 March 2012 in Austin and Others v. United Kingdom, application no. 39692/09, 40713/09 and 41008/09.

Consequently, it is necessary to analyse the whole situation *in concreto*, taking into account the specific facts of the case. Only analysis of all circumstances of the particular situation makes it possible to assess whether a particular example of kettling constitutes a deprivation of liberty or merely a restriction on freedom of movement. Even the general thesis that kettling meets, in principle, the criteria of deprivation of liberty within the meaning of Article 41 Section 1 and 2 of the Constitution does not mean that, as indicated above, there cannot exist such factual circumstances in which the effect of kettling will be only a restriction on the freedom of movement and not a deprivation of liberty.

Since the kettling, meets, as a rule, the criteria for deprivation of liberty within the meaning of Article 41 Sections 1 and 2 of the Constitution (apart from the exception described above), it is necessary to apply to the protection of rights and freedoms of persons subjected to the kettling the constitutional and convention standard of protection against arbitrary deprivation of liberty. It is, therefore, necessary to highlight some selected issues in this regard.

First and foremost, it is the duty of police officers to apply to persons subjected to kettling the legal standard applicable to deprivation of liberty. If, due to the circumstances, surrounding (encirclement) by police officers does not exceptionally constitute a short-term restriction on freedom of movement, it should be treated as detention. Depending on the basis and circumstances of the application of the kettling, it will most often be detention within the meaning of Article 15, Section 1, Subsection 2 or 3 of the Police Act. As a consequence, it is necessary for police officers to apply the detention mode provided forin Article 244––246 k.p.k. in conjunction with Article 15, Section 1, Subsection 2, and Section 2 of the Police Act, or in Articles 45–47 k.p.s.w. in conjunction with Article 15, Section 1, Subsection 2 of the Police Act.

In fulfillment of the constitutional guarantee of protection against arbitrary deprivation of liberty, each person detained (deprived of liberty) as a result of the application of the kettling should – pursuant to Article 41, Section 3, the first sentence of the Constitution, Article 244 § 2 k.p.k. and Article 46 § 1 k.p.s.w. – be immediately informed of the reasons for detention. The implementation of this obligation in the case of the kettling requires, at the very least, to communicate in public by the police officers in a manner that allows for all surrounded people

to obtain and understood information about the reasons for forming and maintaining a police cordon and further actions that will be taken against persons inside the cordon.

Additionally, in accordance with the content of Article 244 § 2 k.p.k. and Article 46 § 1 k.p.s.w., persons inside the police cordon should be informed about their rights, in particular the right to appeal to a court to control the legality of deprivation of liberty. This instruction, like the communication of the reasons for the application of the kettling, may be given to the public in such a way that all persons who are inside the cordon may understand the instruction. The lack of presenting the information, both on the reasons for the use of the kettling taking the form of deprivation of liberty, as well as on the rights to which the persons inside the cordon are entitled, should be qualified as a violation of the procedure of deprivation of liberty prescribed by law (specified by statute) within the meaning of Article 41 Section 1 of the Constitution. In such a case, if a judicial review is initiated, the court should find that the police detention in a form of kettling was improper (incorrect).

At the same time, according to Article 245 § 1 k.p.k. and Article 46 § 4 k.p.s.w., each person detained under the kettling, upon request, shall be allowed to contact an advocate or a legal adviser and shall be provided with an opportunity to talk directly to them. This may involve, inter alia, allowing an advocate or legal adviser to enter the cordoned area in order to communicate and talk with a person inside the cordon and then allowing the advocate or legal adviser to leave the encirclement after providing appropriate legal assistance to the person concerned. As in the case of information and instructions, preventing persons cordoned off by the police, in a situation of a deprivation of liberty, from having recourse to a lawyer should result, when a judicial review is initiated, in a finding by the court that their detention by the police was improper (incorrect).

Pursuant to Articles 244 § 3 k.p.k. and Articles 46 § 2 k.p.s.w., a detention report should be drawn up for each person apprehended within the kettling, a copy of which should be delivered to each detained person. In view of the fact that an assessment of the existence of grounds for deprivation of liberty always requires an assessment *in concreto* of all the circumstances of the incident, taking into account particular factors relating to the individual concerned, it is not permissible to draw up

a summary record of the detention of all the persons who were inside the cordon. In order to individualize the decision to deprive a person of liberty and then allow for the court to assess the legality of the detention of a particular person in a specific factual situation, it is necessary to draw up a separate report of the detention of each person who was inside the cordon. Failure to draw up a report of detention in a form of kettling should result, when a judicial review is initiated, in a court finding that the deprivation of liberty was improper (incorrect).

Finally, the most important right of a person who has been deprived of liberty as a result of the use of kettling by police officers is the right, arising from Article 41 Section 2 of the Constitution, to appeal to a court in order to immediately establish the legality of the deprivation of liberty. This includes situations where the police action resulting in the establishment and maintenance of the cordon was completed before the person who was „trapped" inside the cordon decided to exercise his right to judicial review of the legality of the deprivation of liberty. The Constitutional Tribunal pointed out:

> the basic aim of the provision under consideration is to bring about, as quickly as possible, the release of a person unlawfully deprived of liberty. In the opinion of the Constitutional Tribunal, however, the guarantees laid down in Article 41(2) of the Constitution also apply to persons who were deprived of their liberty but were released before the appeal was lodged with the court. In such a case, the initiation of legal proceedings is primarily intended to enable the wronged party to assert the right to compensation for unlawful deprivation of liberty, guaranteed in Article 41 Section 5 of the Constitution. (…) The court's finding of violations of law may be important to initiate action to prevent similar violations in the future[31].

Therefore, any person who has been detained inside a police cordon as a result of the use of the kettling has the right to lodge a complaint to the court, pursuant to Article 246 § 1 k.p.k. or Article 47 § 1 k.p.s.w., in order to examine the justification, legality, and correctness of the detention.

A situation in which the legal assessment of the use of the kettling by police officers is different from the assessment made by the person who was inside the cordon is problematic. Such a situation occurs when police officers claim that the encirclement of a group of persons was effected solely for the purpose of questioning all the persons, that it lasted

[31] Judgment of the CT of 11 June 2002, SK 5/02. See also the judgment of the CT of 6 December 2004, SK 29/04.

for a period objectively necessary and sufficient for the performance of carding activities, and that no measures of direct coercion were used against the persons cordoned off, and because of this the situation did not constitute a deprivation of liberty in the meaning of Article 41 Sections 1 and 2 of the Constitution (and detention within the meaning of Article 15 Sections 1, 2, or 3 of the Police Act). A consequence of such a position may also be a failure to draw up a detention report.

It should be borne in mind that a person deprived of his or her liberty must be able to initiate appropriate proceedings before a court, and the exercise of this possibility (of an adequate remedy) cannot depend on the goodwill or discretion of anyone. Consequently: „the proper guarantee of the right of appeal to a court in Article 41 Section 2 of the Constitution thus implies that a person who has been deprived of his liberty must be able to initiate legal proceedings of his own, and this possibility must not in any way depend on the prior decision or consent of any other person, body or entity"[32]. This means that irrespective of the possible position of the police officers as to the legal nature of the application of the kettling in a particular case, the person who was inside the cordon must be guaranteed the possibility to independently initiate a judicial review of the application of the kettling, irrespective of the position of the police officers.

5. Conclusion

The role of the court in the procedure for reviewing the lawfulness of the deprivation of liberty is primarily to assess whether the proceedings initiated by an appeal, which in the case of kettling will take the form of a complaint against detention, are in fact concerned with reviewing the lawfulness of the deprivation of liberty. Therefore, it is the court's duty to make a legal assessment of the situation, in which the applicant found himself as a result of being surrounded by a cordon of police officers, from the point of view of criteria of a deprivation of liberty. The court should verify, taking into account the criterion of place, compulsion, control, and time, as well as taking the specificity of the circumstances and the purpose of the police officers' actions, whether the

[32] T. Sroka, *Prewencyjne*..., p. 460.

complainant was in fact deprived of liberty (detained), or whether only his freedom of movement was merely restricted. In the first case, the court's duty is to assess the merits, legality, and correctness of the detention (deprivation of liberty), while in the second case the court should leave the appeal (complaint) without examination[33].

The problem may be also a situation in which the grounds or factual circumstances of the use of the kettling do not allow for the actions of police officers to be qualified as the type of detention provided forin Article 15 Section 1 of the Police Act. This situation can create difficulties in assessing whether the law provides a procedure under which an individual can initiate a review of the legality of a deprivation of liberty before a court. In such a case, in order to realise the constitutional guarantees of protection of an individual against arbitrary deprivation of liberty, the provisions concerning control of detention realised under Article 15, Section 1 of the Police Act should at least be applied accordingly.

In extreme cases, however, it should be borne in mind that:

> the constitutional guarantee of judicial review of the lawfulness of any deprivation of personal liberty of an individual also requires that, where the legislature has not provided for a procedure for judicial review of the lawfulness of the deprivation of liberty, the initiation of such review by the individual is possible before a common court directly on the basis of Article 45 Section 1 in conjunction with Article 177 of the Constitution, having regard to Article 8 Section 2 of the Constitution. Although it is debatable to what extent Article 45 Section1 of the Constitution is sufficiently concrete for it to constitute a direct basis for resolving a case by a court, in the sphere of access to court itself, the content of Article 41 Section 2 in conjunction with Article 45 Section 1 in conjunction with Article 177 of the Constitution should lead to an acknowledgement of the admissibility of the judicial path even in the event of legislative deficiencies in this respect. Therefore, in the event of a deprivation of personal liberty of an individual within the meaning of Article 41 Section 1 and 2 of the Constitution by way of factual or legal actions on the part of public authorities, the court to which the legal remedy (appeal) was addressed, aimed at controlling the legality of the deprivation of liberty, shall realise the constitutional right of the individual under Article 41 Section 2 of the Constitution, in the absence of legislation providing for judicial review of a particular case of deprivation of liberty, shall be obliged, applying Article 8 Section 2 of the Constitution directly,

[33] In such a situation, the complaint would not concern a detention, but the actions of police officers that do not constitute deprivation of liberty, in the case of which there is no right to complain directly to the court. The appeal would therefore be inadmissible under the law and as such should be left by the court without examination.

> Article 41 Section 2 in conjunction with Article 45 Section 1 in conjunction with Article 177 of the Constitution, to hear the case of the individual concerning review of the legality of the deprivation of liberty. A different interpretation would result in a complete elimination of the fundamental constitutional guarantee of protection of individuals against arbitrary deprivation of liberty[34].

Such a solution may prove necessary for the judicial assessment of the legality of certain cases of deprivation of liberty that are results of kettling.

Summary

One of the techniques of operational activities used by police officers is kettling. It involves police officers encircling or surrounding a group of people, usually part of a public gathering. This paper tackles this operational technique from the perspective of both international law and Polish Constitution. It provides an in depth analysis of intertwined character of variety of regulation regarding the concept of „deprivation of liberty".

Keywords

deprivation of liberty, human rights, right to court, preventive detention, coercive measures

Bibliography

Ashworth A., Zender L., *Preventive Justice*, Oxford 2014.

Cline D., *Deprivation of Liberty: Has the European Court of Human Rights Recognised a 'Public Safety' Exception?*, „Mercourios" 2013, no. 76.

Sroka T., *Prewencyjne pozbawienie wolności*, Kraków 2021.

Szwed M., *Przymusowe umieszczenie w zakładzie psychiatrycznym w świetle współczesnych standardów ochrony praw człowieka*, Warszawa 2020.

Wiliński P., Karlik P., in: *Konstytucja RP. Komentarz. Tom I. Art. 1-86*, ed. M. Safjan, L. Bosek, Warszawa 2016.

[34] T. Sroka, *Prewencyjne*..., p. 455–456.