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SLUČAJ *McCann and Others v. the United Kingdom* I POZITIVNE OBAVEZE U VEZI SA PLANIRANJEM I KONTROLISANJEM OPERACIJA ORGANA BEZBEDNOSTI U SKLADU SA čl. 2. EKLJP**

SAŽETAK: Pozitivne obaveze su obaveze država potpisnica Evropske konvencije za zaštitu ljudskih prava i osnovnih sloboda da aktivno deluju kako bi zaštitile prava garantovana ovom Konvencijom. Kada je reč o zaštiti prava na život, kao jednog od osnovnih ljudskih prava, slučajem *McCann and Others v. the United Kingdom* su uspostavljene nove obaveze država potpisnica Konvencije kada je reč o planiranju i sprovođenju operacija pripadnika organa bezbednosti. Način na koji su te obaveze uspostavljene, njihov obim i sadržaj, kao i reakcije pravne teorije ali i prakse na ovu inovativnu presudu, predmet su analize ovog rada.

Ključne reči: Evropska konvencija, pozitivne obaveze, pravo na život, planiranje i kontrola operacija

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UVOD

Pozitivne obaveze podrazumevaju dužnost organa vlasti u državama potpisnicama Evropske konvencije za zaštitu ljudskih prava i osnovnih sloboda[1] da preduzmu sve neophodne mere u cilju zaštite ljudskih prava. Evropski sud za ljudska prava[2] nije dao definiciju pozitivnih obaveza. Njihovu suštinu je iskazao sudija Martens (Martens), koji je naveo da „negativne obaveze zahtevaju da se države članice uzdrže od postupanja, a pozitivne zahtevaju upravo postupanje".[3] P. van Dijk (P. van Dijk) ih stoga naziva „obavezama na delanje".[4]

Postupanje u skladu sa pozitivnim obavezama podrazumeva unošenje razumnih i podobnih mera za ostvarenje tog cilja u nacionalni pravni sistem.[5] Gotovo bez izuzetka pozitivne obaveze predstavljaju zahtev da države potpisnice EKLJP preduzmu određene akcije u cilju zaštite prava pojedinaca,[6] ali ne podrazumevaju i obavezu postizanja konkretnog rezultata.[7] Mahom su nastale kao posledica sudskog tumačenja[8] a ne zato što ih tekst EKLJP eksplicitno predviđa. Pravni osnov na kome se temelji doktrina pozitivnih obaveza predstavljaju čl. 1. i 13. EKLJP, kojim su uspostavljene opšte obaveze država ugovornica i istaknut princip delotvornosti koji je imao najznačajniju ulogu prilikom konstruisanja pozitivnih obaveza država.

Rani razvoj pozitivnih obaveza kada je reč o pravu na život, kao jednom od osnovnih i najvažnijih ljudskih prava, vezuje se za slučajeve *Stewart v. The United Kingdom*[9] i *Wolfgram v. Germany*.[10] Iako je njihov značaj nepobitan, slučaj koji je u ovom pogledu najvažniji i koji je inspirisao dalju sudsku praksu

[1] U daljem tekstu: Konvencija i EKLJP.

[2] U daljem tekstu: Evropski sud i Sud.

[3] Izdvojeno mišljenje sudije Martensa, koje je podržao sudija Ruso u presudi *Gül v. Switzerland*. – *Gül v. Switzerland*, (App. no. 23218/94), 19. 2. 1996.

[4] Van Dijk, P. (1998). Positive obligations' implied in the European Convention on Human Rights: Are the States still the 'masters' of the Convention? u: *The role of the nation-statein the 21st century – human rights, international organisations and foreign policy: essays in honour of Peter Baehr,* ed: Monique Castermans-Holleman, Fried van Hoof, and Jacqueline Smith. The Hague: Brill, 17.

[5] Akandji-Kombe, J. F. (2007). *Positive obligations under the European Convention on Human Rights*. Strasbourg, 5.

[6] Starmer, K. (1999). *European Human Rights Law: The Human Rights Act 1998 and the European Convention on Human Rights*. London: Legal Action Group, 139.

[7] De Than, C. (2003). Positive Obligations under the ECHR: Towards the Human Rights of Victims and Vulnerable Witnesses?. *The Journal of Criminal Law*, 168.

[8] Russel, D. (2010). Supplementing the European Convention on Human Rights: legislating for positive obligations. *Northern Ireland Legal Quarterly*. 3 (LXI), 283.

[9] *Stewart v. The United Kingdom*, (App. no. 10044/82), 10. 7. 1984.

[10] *Wolfgram v. Germany*, (App. no. 11254/84), 6. 10. 1986.

jeste *McCann and Others v. the United Kingdom*. Zbog inovativnosti pristupa Suda u ovom predmetu, njegove kompleksnosti i slojevitosti koja je podelila i sudijsko veće i, naposletku, zbog značaja koji je imao za razvoj dalje prakse Suda u ovom pogledu, upravo će ovaj slučaj biti predmet naše detaljne analize.

ČINJENIČNO STANJE U SLUČAJU *McCann and Others v. the United Kingdom*

Slučaj u kome su nesumnjivo postavljeni temelji razvitka pozitivnih obaveza na osnovu čl. 2. EKLJP jeste *McCann and Others v. the United Kingdom.*[11] Još u prvim mesecima 1988. godine vlasti su dobile informacije da Irska republikanska armija[12] planira teroristički napad na Gibraltar.[13] Načinjena je posebna savetodavna grupa pripadnika raznih jedinica organa bezbednosti, čiji je zadatak bio da pomogne gibraltarskoj policiji. U Operativnoj naredbi komesara policije i Pravilima vojnog učešća naglašeno je da je cilj operacije da zaštiti život i da se uhapse teroristi. Precizirano je da je upotreba sile dozvoljena samo na izričit zahtev viših policijskih službenika ili ako je to neophodno da bi se zaštitio život. Predviđena su i stroga pravila u vezi sa okolnostima u kojima je dozvoljeno da se otvori vatra ili puca bez upozorenja.

U martu 1988. godine identifikovani su članovi IRA-e u Malagi. Procenjeno je da će napad izvršiti putem automobila u kome će se nalaziti bomba koja će biti aktivirana na daljinu. Načinjen je plan da se članovi terorističke jedinice uhapse nakon što dovezu predmetni automobil u Gibraltar, kako bi se prikupilo dovoljno dokaza za suđenje. Predstavnici organa bezbednosti su upozoreni da su osumnjičeni opasni, naoružani i da je verovatno da će upotrebiti oružje ili detonirati bombu u slučaju sukoba.

Jedan od osumnjičenih, Šon Savidž (Sean Savage), primećen je kako parkira beli reno u području pod prismotrom. Još dva pripadnika terorističke jedinice, Danijel MekKan (Daniel McCann) i Maried Farel (Mairead Farrell), opaženi su kako gledaju u pravcu parkiranog automobila. Nakon što su se udaljili od područja pod prismotrom, stručnjak za demontiranje bombi je izvršio vizuelni pregled automobila i dao je mišljenje po kome se u automobilu nalazi bomba. Odlučeno je da hapšenje sprovedu pripadnici posebnih SAS[14] vojnih jedinica.[15]

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[11] *McCann and Others v. the United Kingdom*, (App. no. 18984/91), 27. 9. 1995.

[12] Irish Republican Army (Irska republikanska armija) – u daljem tekstu: IRA.

[13] *McCann and Others v. the United Kingdom*, *Op. cit.*, para. 13.

[14] Special Air Service (Specijalne jedinice). – *Ibid.*, para. 141.

[15] *Ibid.*, para. 54.

Savidž se odvojio od ostalih, te su ih pratile dve grupe vojnika. Nakon što su shvatili da su praćeni, troje osumnjičenih su načinili nagle pokrete koji su po navodima vojnika ukazivali na to da pokušavaju da detoniraju bombu u automobilu. Vojnici su ih upucali. Nakon pucnjave, kod troje upucanih nije pronađeno nikakvo oružje niti detonator. Pronađeni su, međutim, ključevi od automobila sakrivenog u Marbelji, u kome se nalazila eksplozivna naprava sa dva podešena tajmera.

U predstavci koja je podneta Komisiji u avgustu 1991. godine, podnosioci su tvrdili da su ubistva čije su žrtve Danijel MekKan, Maried Farel i Šon Savidž, a koje su počinili pripadnici SAS-a, predstavljala kršenje čl. 2. EKLJP. U martu 1994. godine Komisija je zauzela stav da u predmetnom slučaju nije došlo do takvog kršenja.

PRIMENA čl. 2. st. 2. EKLJP OD STRANE EVROPSKOG SUDA ZA LJUDSKA PRAVA U SLUČAJU *McCann and Others v. the United Kingdom*

Primena čl. 2. st. 2. EKLJP na slučajeve nehatnog ubistva

Sud je smatrao da izuzeci navedeni u st. 2. ukazuju da se ova odredba primenjuje na umišljajna ubistva, ali ne isključivo. U skladu sa prethodnom praksom Komisije,[16] tekst čl. 2, uzet u celini, demonstrira da se st. 2. ne propisuju instance kada je dozvoljeno umišljajno ubistvo, već da se njime opisuju situacije u kojima je dozvoljeno da upotrebe silu „koja može za rezultat imati, kao nenamernu posledicu, lišenje života“[17]. Sud je podsetio da, međutim, upotreba sile ne sme da bude veća od onog što je „apsolutno neophodno“ kako bi se ostvario neki od ciljeva predviđenih tačkama *a), b)* ili *c)* st. 2. čl. 2. EKLJP.

[16] Vremenom se praksa Komisije i Suda u ovom pogledu menjala. U slučaju *X v. Belgium* (App. no. 2758/66. *Godišnjak* 12, 174) smatralo se da čl. 2. EKLJP ne obuhvata i slučajeve nehatnog ubistva. Međutim, u predmetu *Association X. v. the United Kingdom* (App. no. 7154/75, 12. 7. 1978) Komisija je primenila šire tumačenje. Zauzet je stav da prva rečenica čl. 2. EKLJP nameće državama potpisnicama širu obavezu od one koja je sadržana u st. 2. ovog člana, te da koncept po kojem svi imaju pravo na zakonsku zaštitu svog prava obavezuje države članice Konvencije ne samo da se *uzdrže od umišljajnog oduzimanja života*, već i da pruže zaštitu pravu na život. U slučaju *Stewart v. The United Kingdom* (App. no. 10044/82, 10. 7. 1984) Komisija je prihvatila ovo tumačenje, naglašavajući da nijedna druga interpretacija EKLJP ne bi bila konzistentna sa svrhom EKLJP, niti sa doslovnim tumačenjem opšte obaveze da se pruži zaštita pravu na život. – *Stewart v. The United Kingdom*, (App. no. 10044/82), 10. 7. 1984. paras. 14–15.

[17] *McCann and Others v. the United Kingdom*, (App. no. 18984/91), 27. 9. 1995, para. 148.

Drugim rečima, ukoliko su pripadnici organa bezbednosti delovali u okviru zakona i kako bi ostvarili svrhu, odnosno cilj koji je dozvoljen EKLJP, neće biti kršenja ove konvencije ukoliko je ispoštovan uslov apsolutne neophodnosti primenjene sile.[18]

Način na koji je Sud tumačio pravni standard „apsolutno neophodno" iz čl. 2. st. 2. EKLJP u slučaju *McCann and Others v. the United Kingdom*

Sud je u ovoj presudi ponovio prethodni stav da upotreba termina „apsolutno neophodno" u čl. 2. st. 2. ukazuje da test neophodnosti koji se upotrebljava[19] mora biti *stroži i uverljiviji* od onog koji se primenjuje prilikom utvrđivanja da li je postupanje agenata države „neophodno u demokratskom društvu"[20] u skladu sa čl. 8. st. 2. i čl. 11. EKLJP. To podrazumeva da upotrebljena sila mora biti *strogo proporcionalna* postizanju jednom od ciljeva predviđenih tačkama *a*), *b*) i *c*) st. 2. čl. 2. EKLJP.[21]

Strazburški sud je naglasio da je slučajeve u kojim je neko lišen života nužno detaljno ispitati – što podrazumeva ne samo analizu postupanja pripadnika državnih organa, već i svih okolnosti slučaja, u koje spadaju i stvari poput planiranja i kontrole akcija organa bezbednosti koje su predmet ispitivanja.[22]

Kada je reč o usklađenosti nacionalnog zakonodavstva i prakse sa standardima iz čl. 2. EKLJP, stanovište Suda je bilo da EKLJP ne obavezuje države ugovornice da odredbe EKLJP inkorporišu u nacionalno zakonodavstvo.[23]

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[18] Bedri Eryilmaz, M. (1999). *Arrest and detention powers in English and Turkish law and practice in the light of the European convention on human rights*. The Hague: Martinus Nijhoff Publishers, 248

[19] Jedan od osnovnih principa u EKLJP jeste upravo princip neophodnosti. Naime, EKLJP implicitno obavezuje pripadnike organa bezbednosti da poduzimaju pozitivne korake kako bi se omogućila zaštita prava predviđenih u EKLJP. Stoga, oni se mogu umešati u uživanje ovih prava i sloboda samo onda kada je to neophodno kako bi se rešio određeni problem ili uklonila pretnja. – Palmer, P. (2000). Human Rights and British Policing. *Police Journal* 73 (1), 57.

[20] Komisija je smatrala da „neophodnost" podrazumeva „neodložnu društvenu potrebu" i da „test neophodnosti" podrazumeva procenu da li je mešanje u uživanje prava garantovanih EKLJP bilo proporcionalno legitimnom cilju koji se želeo postići. – Van Dijk, P., Van Hoof, F., Van Rijn, A., Zwaak, L. (2006). *Theory and practice of the European Convention on Human Rights*. Antwerpen – Oxford: Intersentia, 396.

[21] *McCann and Others v. the United Kingdom*, (App. no. 18984/91), 27. 9. 1995. para. 149.

[22] *Ibid.*, para. 150.

[23] „Niti čl. 13. EKLJP, niti bilo koji njen deo, ne predviđa unapred određen način na koji države članice EKLJP treba da osiguraju efikasnu implementaciju neke od odredbi

Konstatovano je da je čl. 2. gibraltarskog ustava sadržinski sličan čl. 2. EKLJP. Međutim, postojala je razlika kada je reč o standardu opravdanosti upotrebe sile koja za posledicu ima lišenje života – dok gibraltarski ustav zahteva da ta sila bude „razumno opravdana", EKLJP predviđa da ona mora biti „apsolutno neophodna". Premda se standard iz EKLJP doima strožim od onog predviđenog nacionalnim zakonodavstvom, Sud je našao da razlika između dva standarda nije dovoljno velika da se samo na osnovu nje utvrdi da je došlo do kršenja čl. 2. st. 2. EKLJP.[24] Drugim rečima, suština prava jeste bila zaštićena u domaćem zakonodavstvu.

Ovakvo rezonovanje Suda nas je dovelo korak bliže definisanju pravnog standarda „apsolutno neophodna sila", koji evidentno implicira stroži i ubedljiviji test neophodnosti od „razumno opravdane upotrebe sile". Međutim, suštinska razlika između ova dva pravna standarda nije prevelika. Najbolji način da je iskažemo bi bio da je apsolutno neophodna sila uvek razumno opravdana, dok razumno opravdana sila nije uvek i apsolutno neophodna.

Obuka i instrukcije pružene pripadnicima organa bezbednosti, planiranje i kontrola operacije kao elementi ocene da li je u slučaju *McCann and Others v. the United Kingdom* prekršen čl. 2. EKLJP

Odluka Suda u ovom slučaju predstavlja uzor za kasniju praksu kada je reč o stavu da obuka i instrukcije date predstavnicima nacionalnih organa bezbednosti, kao i potreba za operativnom kontrolom, u kontekstu predmetnog slučaja, čine upitnim da li je ipak došlo do kršenja čl. 2. st. 2. EKLJP. Stoga je na Sudu bilo da odgovori na to pitanje.

Podnosioci predstavke su tvrdili da propisi primenjeni na terenu nisu zahtevali da agenti države budu obučeni u skladu sa vrlo strogim standardima iz čl. 2. st. 2. EKLJP.[25] Sud je tako našao da regulacija o ulasku u sukob sa osumnjičenima, koja je predočena pripadnicima vojske i policije, sadrži čitav

EKLJP u svoje unutrašnje pravo. Premda na osnovu toga ne postoji obaveza država članica EKLJP da se inkorporišu odredbe EKLJP u domaće pravo, u skladu sa čl. 1. EKLJP suština prava i sloboda zaštićenih EKLJP mora biti garantovana u domaćem pravnom poretku, u ma kojoj formi, svima koji se nalaze u nadležnosti država potpisnica EKLJP." – *James and Others v. the United Kingdom*, (App. no. 8793/79), 21. 2. 1986, para. 84.

[24] *McCann and Others v. the United Kingdom*, (App. no. 18984/91), 27. 9. 1995. para. 15.

[25] Xenos, D. (2012). *The positive obligations of the state under the European Convention on Human Rights*. London and New York: Routledge, 124.

niz pravila o upotrebi sile koja na odgovarajući način odražava i nacionalni standard i suštinu standarda iz EKLJP.[26]

Sud takođe nije našao dokaze koji potvrđuju tvrdnje podnosilaca predstavke da su ubistva troje osumnjičenih bila unapred isplanirana. Nije bilo ubedljivih dokaza da je vojnicima eksplicitno ili implicitno naloženo da tako učine, niti da su sami odlučili da upotrebe smrtonosnu silu, iako to nije bilo opravdano.[27] Uverenje vojnika da je u automobilu bomba nije bilo potpuno bez osnova.[28] Odluka da se osumnjičenima dozvoli ulaz u Gibraltar je doneta kako bi se prikupilo dovoljno dokaza o planiranom bombaškom napadu. Upotreba specijalnih jedinica je uobičajena ukoliko postoje obaveštajne informacije o predstojećem terorističkom napadu. Sve to je navelo Sud na zaključak da nije postojala zavera niti prećutni plan da se osumnjičeni liše života.[29]

Sledeći zadatak Suda je bio da odgovori na pitanje da li je operacija planirana i sprovedena na adekvatan način, odnosno tako da se u najvećoj mogućoj meri smanji potreba za pribegavanje upotrebi smrtonosne sile.[30] Pri tome je jedno od ključnih pitanja bilo da li su prilikom pružanja informacija i uputstava vojnicima, na odgovarajući način vodili računa o pravu na život troje osumnjičenih.[31]

U ovom kontekstu, izuzetno je bila kritikovana već pomenuta odluka vlasti da ne uhapse osumnjičene odmah na gibraltarskoj granici. Sud je smatrao da je opasnost po stanovništvo Gibraltara bila veća od opasnosti da osumnjičeni izbegnu kasniju osudu zbog nedostatka dokaza. Samim tim, odgovorni za kontrolu ove operacije su načinili ozbiljno lošu procenu. U svetlu zaključaka do kojih su došle obaveštajne službe, Sud je našao da je usled ove odluke smrtonosni ishod postao mogućnost sa kojom se moralo računati, ako ne i najverovatniji ishod.[32]

U presudi se podseća da su se sve najvažnije pretpostavke sa sastanka od 5. marta ispostavile kao pogrešne, sem o nameri osumnjičenih da izvedu bombaški napad.[33] Sa druge strane, jeste bila reč o mogućim hipotezama jer

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[26] *McCann and Others v. the United Kingdom*, (App. no. 18984/91), 27. 9. 1995, para. 156.

[27] *Ibid.*, paras. 177–180.

[28] Na ovakav zaključak upućivale su informacije obaveštajnih službi, profili troje osumnjičenih koji su svi imali iskustva sa korišćenjem eksplozivnih naprava, kao i činjenica da je Savidž primećen kako pre izlaska iz kola obavlja neke sumnjive radnje unutar automobila. – *Ibid.*, para. 181.

[29] *Ibid.*, paras. 182–184.

[30] *Ibid.*, para.193.

[31] *Ibid.*, para. 201.

[32] *Ibid.*, para. 205.

[33] Ovo se odnosilo na pretpostavku da će se u automobilu nalaziti bomba koja će se detonirati uređajem sa radio-kontrolom, da će detonacija biti moguća prostim pritiskom

nije bilo dovoljno poznatih činjenica i informacije obaveštajnih službi su bile ograničenog obima.[34]

Upotreba sile je bila neizbežna iz više razloga. Nisu dovoljno razmotrene alternativne mogućnosti. Vojnici su dobili informaciju o postojanju bombe u automobilu koja se prema procenama detonira prostim pritiskanjem dugmeta, zajedno sa drugim nepotvrđenim pretpostavkama.[35] Vojnici koji su angažovani za ovu operaciju bili su obučeni da pucaju da ubiju i rečeno im je da postoji velika šansa da će u ovom slučaju upravo to morati da učine kako bi sprečili detoniranje bombe.

Sud je smatrao da je ovakvo planiranje i sprovođenje operacije izuzetno diskutabilno jer „u ovakvim okolnostima, obaveza vlasti da poštuju pravo na život osumnjičenih nametala im je dužnost da sa najvećom pažnjom evaluiraju informacije pre nego što ih prenesu vojnicima koji su obučeni da pucaju da ubiju“[36].

Dalje, ocena Suda je bila da refleksnom reagovanju vojnika u ovom izuzetno važnom pogledu „nedostaje stepen opreza prilikom upotrebe vatrenog oružja koji se može očekivati od pripadnika organa bezbednosti u demokratskom društvu, čak i kada su suočeni sa opasnim licima osumnjičenim za terorizam“[37]. Ovakvo reagovanje je u snažnom kontrastu sa standardima pažnje iz instrukcija o upotrebi vatrenog oružja koje su predočene policajcima.[38] Sve napred navedeno ukazuje na nedostatak odgovarajuće pažnje pripadnika organa bezbednosti prilikom organizovanja i sprovođenja operacije hapšenja.

Imajući sve navedeno u vidu, strazburške sudije nisu našle da su dokazi o apsolutnoj neophodnosti sile dovoljno ubedljivi. Tankom većinom od deset spram devet glasova, Sud je presudio da je u ovom pogledu došlo do kršenja čl. 2. EKLJP.[39]

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dugmeta, da će osumnjičeni biti naoružani i spremni da u slučaju pokušaja hapšenja upotrebe vatreno oružje, kao i da neće prezati od detoniranja bombe suočeni sa mogućnošću da im misija bude osujećena. – *McCann and Others v. the United Kingdom*, (App. no. 18984/91), 27. 9. 1995, para. 206.

[34] *Ibid.*, para. 207.

[35] *Ibid.*, paras. 207–209.

[36] *Ibid.*, para. 211.

[37] *Ibid.*, para. 212.

[38] Iz navedene formulacije je primetno da kontekst terorizma nije potpuno zanemaren, ali je prioritet dat čl. 2. EKLJP u ovom pogledu. F. N. Aoláin objašnjava da je „ovaj slučaj signalizirao ravnopravan pristup, u kome status žrtve, u ovom slučaju teroriste, ne umanjuje vrednost prava na njegov život.“ – prema: Campbell, C. (2005). Wars on terror and vicarious hegemons: the UK, international law and Northern Ireland conflict. *International and Comparative Law Quarterly,* 54 (2), 345.

[39] Ova odluka je potpuno suprotna već pomenutom stanovištu Komisije po kome ne samo da je bilo apsolutno neophodno pucati u osumnjičene kako bi se zaštitili drugi od nezakonitog nasilja, već i da „način na koji su vlasti planirale i sprovele operaciju ne ukazuje

Sudija Pikis (Pikis) bio je jedan od sudija Evropskog suda za ljudska prava koji su dali komentar na ovakav inovativan pristup Suda:

> „Nedavna odluka Suda u slučaju *McCann and Others v. the United Kingdom* daje dužnosti države da zaštiti život veći značaj nego što je to dosad bio slučaj. Operativna akcija koja podrazumeva opasnost po život mora biti planirana i kontrolisana tako da se eliminišu svi nepotrebni rizici po život koji nastaju upotrebom sile koji se mogu predvideti. Čak i kada su suočeni sa opasnošću po društveni poredak, organi države imaju obavezu da reaguju upotrebom sile koja je proporcionalna riziku. Države potpisnice imaju dodatnu obavezu da planiraju i kontrolišu sprovođenje operacije tako da ograniče okolnosti u kojima se koristi sila, a ukoliko je upotreba iste neizbežna, da minimiziraju njene efekte."[40]

Važno je ukazati na to da, premda se u presudi ne govori eksplicitno o pozitivnim obavezama država potpisnica, Sud jeste analizirao ponašanje organa bezbednosti prilikom planiranja i sprovođenja antiterorističke operacije u ovom slučaju kako bi doneo odluku o tome da li je Ujedinjeno Kraljevstvo postupalo u skladu sa svojim obavezama predviđenim čl. 2. EKLJP.[41]

Proporcionalnost postupanja vojnika u odnosu na dozvoljeni cilj zaštite lica od nezakonitog nasilja u slučaju *McCann and Others v. the United Kingdom*

Brojne informacije koje su vojnici dobili (o postojanju bombe u automobilu, o njenom jednostavnom detoniranju na daljinu, o tome da su osumnjičeni naoružani i opasni i da bi mogli aktivirati bombu i ugroziti brojne živote)[42] uticale su na to da se kod njih stvori slika postojanja neposredne opasnosti po život velikog broja ljudi, od strane poznatih terorista koji su skloni impulsivnim reakcijama i koji su u prošlosti pokazali okrutno odsustvo brige za živote drugih, pa i nevinih civila.

Vojnici su pucali u osumnjičene kada su oni načinili nešto što je protumačeno kao iznenadni preteći pokret, što je ponukalo vojnike da veruju da

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ni na kakvu nameru niti nedostatak potrebne pažnje koji bi upotrebu smrtonosne sile učinili neproporcionalnim cilju spasavanja života". – *McCann and Others v. the United Kingdom*, (App. no. 18984/91), 27. 9. 1995, para. 191.

[40] Izdvojeno mišljenje koje je dao sudija Pikis u slučaju *Andronicou and Constantinou v. Cyprus,* (App. no. 25052/94), 9. 10. 1997.

[41] Mowbray, A. (2004). *The Development of Positive Obligations Under the European Convention on Human Rights by the European Court of Human Right*s. Oxford: Hart Publishing, 9.

[42] *McCann and Others v. the United Kingdom*, *Op. cit.*, para. 195.

osumnjičeni žele da detoniraju bombu. Dokazano je da su MekKan i Farel pucali dok nisu pali na zemlju, ali ne i kada su na njoj ležali. Savidž je pogođen sa više metaka dok nije pao na zemlju, a na njega je pucano i u momentu pada ili nekoliko trenutaka posle. Farel je upucana osam puta, MekKan je pogođen pet puta, dok je Savidž imao šesnaest prostrelnih rana. Vojnici su svedočili da su pucali sa namerom da usmrte i da su nastavili da pucaju na osumnjičene dok nije odstranjena svaka sumnja da su fizički sposobni da detoniraju bombu. Naknadno je ustanovljeno da osumnjičeni nisu bili naoružani, da se detonator bombe nije nalazio ni kod koga od njih i da u automobilu koji su ostavili na parkingu nije bila nikakva bomba.[43]

Kada je reč o tome da li je upotrebljena sila bila proporcionalna, Sud je smatrao da su vojnici zaista verovali, u svetlu informacija koje su im date, da je apsolutno neophodno da pucaju u osumnjičene kako bi ih sprečili da detoniraju bombu. Njihovo postupanje je bilo u skladu sa naređenjima koje su primili od svojih starešina, ali i sa ciljem da spase mnoge nevine živote. Sud je stoga presudio da

> „...upotreba sile od strane pripadnika organa bezbednosti u pokušaju da ostvare jedan od ciljeva predviđenih u čl. 2. st. 2. EKLJP može biti opravdana ukoliko je zasnovana na iskrenom uverenju za koje se u vreme upotrebe sile smatralo da je utemeljeno i osnovano, ali se naknadno ispostavilo da je bilo pogrešno. Smatrati drugačije bi značilo nametnuti nerealan teret državama potpisnicama EKLJP i pripadnicima njihovih organa bezbednosti prilikom vršenja njihovih dužnosti, što bi moglo imati kobne posledice na njihove živote i živote drugih osoba.“[44]

Pravni komentatori su pohvalili Sud jer je uzeo u obzir

> „...ljudsku nesavršenost pripadnika državnih organa i teške operativne okolnosti u kojima oni deluju, odnosno reaguju.“[45]

Ova presuda je bila u skladu sa principom pravične ravnoteže[46] i bila je značajna za dalji razvoj ovog principa u sudskoj praksi Evropskog suda i njegovom tumačenju EKLJP.

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[43] *McCann and Others v. the United Kingdom*, (App. no. 18984/91), 27. 9. 1995, paras. 196–199

[44] *Ibid.*, para. 200

[45] Skinner, S. (2003) Death in Genoa: The G8 Summit Shooting and the Right to Life. *European Journal of Crime, Criminal Law and Criminal Justice,* 11 (3), 248

[46] Princip pravične ravnoteže je prisutan kako u ranijoj, tako i u novijoj praksi Suda. U predmetu *Soering v. the United Kingdom* (predstavka br. 14038/88, presuda od 7. jula 1989) Sud je zauzeo stav da „potraga za pravičnom ravnotežom između opštih interesa zajednice i zaštite osnovnih prava pojedinca“ je inherentna EKLJP u celini. Sud je koristio ovaj princip kao osnovu za ocenu proporcionalnosti mešanja država potpisnica u uživanje

Analiza izdvojenih mišljenja u slučaju *McCann and Others v. the United Kingdom*

Tesna većina sa kojom je doneta presuda u ovom slučaju pokazuje da sudije nisu imale jedinstven stav u pogledu brojnih pitanja o kojima se u njoj odlučivalo. Čak devet sudija je dalo Zajedničko izdvojeno mišljenje u okviru kog su izrazili neslaganje sa procenom većine u pogledu neadekvatnosti načina na koji je ova antiteroristička operacija planirana i sprovedena.[47] Istakli su da je prilikom procene istog Sud trebalo da se „odupre iskušenju naknadnog znanja“[48] i da ima u vidu da su organi bezbednosti morali da planiraju operaciju i donose odluke na osnovu nepotpunih informacija. Pored toga, oni su bili prinuđeni da postupaju u okviru zakona, dok su osumnjičeni njih smatrali za legitimnu metu i nisu marili za civilne žrtve. Pošto su imali kriminalnu nameru, osumnjičeni su sebe postavili u opasnu situaciju u kojoj je lako moglo da dođe do sukoba između njih i pripadnika organa bezbednosti.[49]

Prema stavu iz Zajedničkog izdvojenog mišljenja, Sud je trebalo da ima u vidu sve informacije koje su vlastima bile dostupne, a koje su ukazivale na predstojeći teroristički napad velikih razmera. To je i potvrđeno jer je naknadno pronađen automobil na drugom mestu, u kome se nalazila velika količina eksploziva i četiri detonatora. U ovom svetlu je upotreba specijalnih SAS jedinica opravdana. Zaključci do kojih se došlo na sastanku 5. marta su bili razumni, a instrukcije date gibraltarskoj policiji su sadržale zabranu upotrebe prekomerne sile. Odluka da se osumnjičeni uhapse tek nakon ulaska u Gibraltar doneta je iz praktičnih razloga i težnje za prikupljanjem dokaza, te se prema mišljenju ovih sudija ne može smatrati „ozbiljno pogrešnom procenom“.[50] Sudije se nisu složile sa kritikom ključnih procena koje su načinili organi bezbednosti a naknadno se ispostavilo da su pogrešne. Argumentovali

ljudskih prava podnosilaca predstavke, kao i za određivanje kada postoje pozitivne obaveze država potpisnica u skladu sa EKLJP. Postoje i izvesne kritike primene ovog principa. Uglavnom su zasnovane na tome što se na taj način Sud stavlja u središte pitanja koja spadaju u unutrašnju politiku država članica. Međutim, ne treba zanemariti da Sud dozvoljava nacionalnim državama izvesno polje slobodne procene u ovom pogledu. – V.: Mowbray, A. (2010). A study of the Principle of Fair Balance in the Jurisprudence of the European Court of Human Rights. *Human Rights Law Review,* 10 (2), 289–318.

[47] Mowbray, A. (2004). *The Development of Positive Obligations Under the European Convention on Human Rights by the European Court of Human Rights*. Oxford: Hart Publishing, 8.

[48] Zajedničko izdvojeno mišljenje sudija Ryssdal, Bernhardt, ThórVilhjálmsson, Gölcüklü, Palm, Pekkanen, Sir John Freeland, Baka i Jambrek u slučaju *McCann and Others v. the United Kingdom*, (App. no. 18984/91), 27. 9. 1995, para. 8.

[49] *Ibid.*, para. 9.

[50] *Ibid.*, paras. 10–13.

su da je bila reč o mogućim hipotezama u situaciji u kojoj veliki deo činjenica nije bio poznat i informacije obaveštajnih službi su bile ograničenog obima.[51]

Naročito su kritikovali zaključak po kome je upotreba smrtonosne sile učinjena „gotovo neizbežnom" određenim propustima prilikom prenošenja informacija vojnicima. Smatrali su da takav zaključak ne uzima u dovoljnoj meri u obzir činjenicu da je krajnji ishod događaja često određen stvarima koje se ne mogu predvideti.[52]

Sudije se u Zajedničkom izdvojenom mišljenju nisu saglasile ni sa stavom većine po kome refleksno reagovanje vojnika u ovom važnom aspektu pokazuje nedostatak odgovarajućeg stepena pažnje koji bi se mogao očekivati od pripadnika organa bezbednosti u demokratskom društvu, te da pripadnici tih organa nisu o tome vodili dovoljno računa prilikom planiranja i sprovođenja operacije hapšenja. Manjinski stav jeste da u situaciji kada su vojnici iskreno verovali da bi osumnjičeni svakog časa mogli da aktiviraju bombu jednostavnim pritiskom dugmeta, bilo bi izuzetno opasno pucati sa namerom da se osumnjičeni rane, jer na taj način ne bi bila isključena mogućnost da oni ipak budu sposobni da, iako ranjeni, pritisnu dugme kojim se aktivira bomba. Takvo postupanje je bilo u skladu sa njihovom obukom. Jedan od preduslova da se uopšte postane pripadnik specijalne SAS jedinice jeste i dokazana obazrivost. Pored toga, u prošlosti su u velikom broju slučajeva pripadnici ove jedinice uspešno obavili operacije hapšenja terorista.[53]

Iz ovih razloga, sudije koje su izdvojile svoje mišljenje od većine su zaključile:

> „Nismo uvereni da je Sud imao dovoljno osnova da zaključi, na osnovu prezentovanih dokaza i toga što je obuka vojnika zasnovana na prethodnom iskustvu u postupanju sa teroristima, da je vojnicima trebalo da bude pružena neka drugačija i bolja vrsta obuke, niti da postupanje vojnika u ovom slučaju ukazuje na nedostatak odgovarajućeg stepena pažnje koji bi se mogao očekivati od pripadnika organa bezbednosti u demokratskom društvu."[54]

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[51] *Ibid.*, paras. 12–18.

[52] U Zajedničkom izdvojenom mišljenju, objašnjeno je: „Da MekKan i Farel nisu načinili iznenadne pokrete dok su im se vojnici približavali, što je moglo biti izazvano time što se sasvim slučajno u blizini začula policijska sirena, vrlo je moguće da bi operacija hapšenja bila izvedena bez ispaljenog metka; da Savidž nije postupio kako jeste kada su mu se vojnici približili, što je moglo biti izazvano zvucima pucnjave u incidentu gde su žrtve bili MekKan i Farel, sasvim je moguće da bi i on bio uhapšen bez upotrebe vatrenog oružja." – Zajedničko izdvojeno mišljenje sudija Ryssdal, Bernhardt, ThórVilhjálmsson, Gölcüklü, Palm, Pekkanen, Sir John Freeland, Baka i Jambrek u slučaju *McCann and Others v. the United Kingdom*, (App. no. 18984/91), 27. 9. 1995, paras. 19–20.

[53] *Ibid.,* paras. 21–23.

[54] *McCann and Others v. the United Kingdom*, (App. no. 18984/91), 27. 9. 1995, para. 24.

Njihov konačni zaključak je bio da u postupku pred Evropskim sudom nije dokazano postojanje takvih nedostataka u načinu na koji je operacija hapšenja planirana i sprovedena koji bi opravdali zaključak većine da sila koja je primenjena prema osumnjičenima nije bila proporcionalna cilju zaštite nevinih lica od nezakonitog nasilja. Sudije su u Zajedničkom izdvojenom mišljenju stoga zauzele stav da je smrtonosna sila koja je upotrebljena, s obzirom na okolnosti ovog slučaja, bila apsolutno neophodna za ostvarenje navedenog cilja, te da Ujedinjeno Kraljevstvo nije prekršilo svoje obaveze iz čl. 2. EKLJP.

Odluka Suda u ovom slučaju nije podelila samo postupajuće sudije, već i pravne stručnjake. Dok je većina autora saglasna sa stavom po kome su

> „...britanske vlasti bile dužne, u skladu sa obavezom da poštuju pravo na život osumnjičenih, da primene najveći oprez prilikom evaluacija informacije koje su im bile dostupne pre nego što ih je prenela vojnicima obučenim da kada upotrebe oružje pucaju sa namerom da ubiju“,[55]

postoje i oni koji kritikuju ovu presudu. Razlozi koje navode se uglavnom odnose na one koji su istaknuti u Zajedničkom izdvojenom mišljenju.

Uticaj slučaja *McCann and Others v. the United Kingdom* na docniji razvoj sudske prakse

Standardi koji su razvijeni u ovom slučaju primenjivani su i u kasnijoj praksi suda, doprinoseći na taj način njenom razvoju. U slučaju *Andronicou and Constantinou v. Cyprus*[56] Sud je proširio domen primene pravila o nužnosti vođenja računa o pravu na život prilikom planiranja i kontrole operacija organa bezbednosti i u slučajevima u koje nisu umešani teroristi. U ovom slučaju je ponovo upotrebljen standard iskrenog uverenja, jer je Sud prihvatio da su pripadnici specijalnih jedinica

> „...iskreno verovali da… je neophodno da se on ubije kako bi se spasili životi Elzi Konstantinou i njihovi životi, te da je nužno da se više puta puca u njega kako bi se uklonio rizik da on posegne za oružjem.”[57]

Slično kao u slučaju *McCann and Others v. the United Kingdom*, Sud je pokazao razumevanje za tešku poziciju u kojoj su se pripadnici MMAD jedinice našli i naglasio je

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[55] Risius, G. (2000). Impact of judicial decisions on armed forces. *Military Law and War review,* 39 (1–4), 350.

[56] *Andronicou and Constantinou v. Cyprus,* (App. no. 25052/94), 9. 10. 1997.

[57] *Ibid.*, para. 192.

> „...da se ne može porediti naknadna, promišljena ocena situacije sa onom koju su oni morali doneti u afektu, u toku jedinstvene operacije spasavanja života koja nema presedan."[58]

Stanovište Suda jeste da su pripadnici organa bezbednosti imali pravo da pucaju i preduzmu sve mere za koje su iskreno i razumno verovali da su neophodne da eliminišu svaki rizik po njihove i živote zatočene žene.[59]

Standardi primenjeni u *McCann and Others v. the United Kingdom* su nadograđeni i kroz brojne slučajeve koji su se odnosili na sukob pobunjenika i turskih pripadnika organa bezbednosti u Severnoj Turskoj. Tako je u presudi *Güleç v. Turkey*[60] Sud naglasio da

> „...premda upotreba sile može biti opravdana u konkretnom slučaju st. 2. tačka (c) drugog člana EKLJP, mora biti postignuta ravnoteža između dozvoljenog cilja koji se pokušava postići i sredstava za njegovo postizanje."[61]

U slučaju *Ergi v. Turkey*[62] naglašeno je da odgovornost države postoji i kada organi bezbednosti ne preduzmu sve mere predostrožnosti prilikom izbora sredstava i metoda za sprovođenje sigurnosne operacije tako da se izbegnu ili makar minimiziraju civilni gubici.[63] A. Mobrej smatra ovaj slučaj izuzetno značajnim, jer pokazuje evoluciju pozitivne obaveze država da postupaju sa odgovarajućim stepenom pažnje kada je reč o planiranju i kontroli operacija pripadnika njihovih organa bezbednosti. Prema rečima ovog autora:

> „...ova presuda jasno elaborira potrebu da domaće vlasti, prilikom planiranja ovih operacija, vode računa o opasnostima po nevine posmatrače kako od ljudi koji su osumnjičeni da su teroristi ili kriminalci, tako i od pripadnika bezbednosnih jedinica. Vlasti moraju razviti i implementirati planove tako da poduzimaju sve razumne mere predostrožnosti sa ciljem da se izbegnu ili makar minimiziraju civilni gubici. Ovi zahtevi jesu strogi ali, imajući u vidu značaj prava na život i profesionalnost koja se opravdano može očekivati

[58] *Andronicou and Constantinou v. Cyprus,* (App. no. 25052/94), 9. 10. 1997, para. 192.

[59] Sud ja takođe istakao da je od svih ispaljenih metaka svega dva metka koje su ispalili specijalci zapravo pogodilo Elzi, premda je preciznost njihovog ciljanja bila ometena time što se Lefteris držao za Elzi, izlažući je riziku. Ova činjenica je ukazivala da su oni vodili računa o Elzinom životu i da su preduzimali neophodne mere da ga sačuvaju, istovremeno ne dovodeći svoj život u opasnost. – *Andronicou and Constantinou v. Cyprus, Op. cit.*, 9. 10. 1997.

[60] *Güleç v. Turkey*, (App. no. 54/1997/838/1044), 27. 7. 1998.

[61] *Ibid.*, para. 71.

[62] *Ergi v. Turkey*, (App. no. 66/1997/850/1057), 28. 7. 1998.

[63] *Ibid.*, para.79.

od bezbednosnih jedinica u demokratskim državama Evrope, jasno je da oni predstavljaju odlučne elemente pozitivne obaveze o kojoj je reč."[64]

U ovom kontekstu su interesantne i presude u slučajevima u vezi sa sukobom u Čečeniji. S obzirom na veliku disproporcionalnost upotrebljene sile, Sud je u presudi *Isayeva, Yusupova and Bazayeva v. Russia*[65] zaključio da

„...i ako bismo prihvatili tvrdnju da je vojska želela da ostvari legitiman cilj, Sud ne prihvata da je operacija planirana i sprovedena sa zahtevanom brigom za živote civila."[66]

Do istog zaključka strazburške sudije su došle i u slučaju *Isayeva v. Russia*.[67]

Analizom novije prakse Suda stičemo isti utisak – slučaj *McCann and Others v. the United Kingdom* i njime uspostavljeni standardi predstavljaju uzor u pogledu ustanovljavanja pozitivnih obaveza država kada je reč o planiranju, sprovođenju i kontroli operacija u kojima učestvuju pripadnici organa bezbednosti. Premda je domen primene ovih obaveza vremenom znatno proširen,[68] temelji koji su postavljeni uspostavljanjem adekvatnih pozitivnih obaveza država potpisnica EKLJP u ovom slučaju i danas čvrsto stoje. Predstavljaju bazu za dalju evoluciju ovih obaveza i izvor inspiracije prilikom budućeg tumačenja EKLJP.

ZAKLJUČAK

Slučaj koji smo analizirali je izazvao velike kontroverze i podelio je kako pravne praktičare, tako i teoretičare. Dok su jedni smatrali da je ovom presudom Sud otišao predaleko i vezao ruke zahtevima pripadnicima organa bezbednosti na način koji otežava efikasno sprovođenje operacija koje im spadaju u opis posla, drugi su pozdravljali hrabrost većine sudija da pravo na život stave na pijedestal koji zaslužuje.

Mi smo saglasni sa ocenom koju je dao A. Mobrej – da je donošenjem ovakve presude u predmetu *McCann and Others v. United Kingdom*

[64] Mowbray, A. (2004). *The Development of Positive Obligations Under the European Convention on Human Rights by the European Court of Human Rights*. Oxford: Hart Publishing, 13.

[65] *Isayeva, Yusupova and Bazayeva v. Russia*, (App. nos. 57947/00, 57948/00. i 57949/00), 24. 2. 2005.

[66] *Ibid.,* para. 199.

[67] *Isayeva v. Russia*, (App. no. 57950/00), 24. 2. 2005.

[68] V.: *Akpinar and Altun v. Turkey*, (App. no. 56760/00), 27. 2. 2007. i *Bitiyeva and X v. Russia*, (App. no. 57953/00 i 37392/03), 21. 6. 2007.

na efektivan način postavljen temelj spremnosti suda da ispita sa kakvom pažnjom su vlasti u državama potpisnicama EKLJP planirale i sprovele operacije svojih organa bezbednosti.[69]

Stoga je ova presuda, uprkos testu vremena, jedna od najznačajnijih kada je reč o evolutivnom tumačenju prava garantovanih EKLJP i daljem razvoju prakse Suda u pogledu zaštite prava na život.

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McCann and Others v. the United Kingdom AND POSITIVE OBLIGATIONS PERTAINING TO THE PLANNING AND CONTROL OF THE OPERATIONS OF LAW ENFORCEMENT IN LINE WITH ARTICLE 2 OF THE ECHR**

ABSTRACT: Positive obligations are obligations of the Member States of the European Convention for the Protection of Human Rights and Fundamental Freedoms to take active steps to protect the rights guaranteed by this Convention. When it comes to the protection of the right to life, as one of the basic human rights, the case of McCann and Others v. the United Kingdom set a precedent and established new obligations for States party to the Convention when it comes to planning and conducting law enforcement operations. The manner in which these obligations were established, their scope and content, as well as the comments from jurisprudence and practitioners on this innovative judgment, are the subject of the analysis of this paper.

Keywords: European Convention on Human Rights, positive obligations, right to life, planning and control of operations

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INTRODUCTION

The positive obligations of the European Convention on Human Rights (ECHR)[1] presuppose the obligation of the state authorities of the signatory countries to undertake all the necessary measures to protect human rights. The European Court of Human Rights[2] has not provided a definition of the positive obligations. Their essential characteristics were expressed by Judge Martens, who stated that "negative obligations require signatory states to refrain from acting in a certain way, while positive obligations require action".[3] P. van Dijk, therefore, calls them "obligations to act".[4]

Acting in accordance with the positive obligations entails introducing reasonable and adequate measures for the realization of that goal into the national legal system.[5] Virtually without exception, the positive obligations represent a requirement that countries that are signatories to the ECHR undertake specific actions in order to protect the rights of individuals,[6] but they do not presuppose the achievement of some concrete result.[7] For the most part, they have emerged as a result of court opinion[8] and not through explicit statements in the text of the ECHR. The legal basis for the doctrine of positive obligations are Articles 1 and 13 of the ECHR, which specify the general obligations of signatory countries and emphasize the principle of efficiency, which has had the most important role in the development of positive obligations.

The early development of the positive obligations concerning the right to life as one of the basic and most important human rights, is linked to *Stewart*

[1] Hereinafter: The Convention and ECHR.

[2] Hereinafter: "European Court" or "the Court".

[3] *Dissenting Opinion of Judge Martens supported by Judge Rousseau* in the case of *Gül v. Switzerland*. – *Gül v. Switzerland*, (App. no. 23218/94), 19. 2. 1996.

[4] Van Dijk, P. (1998). Positive obligations' implied in the European Convention on Human Rights: Are the States still the 'masters' of the Convention? in: *The role of the nation-state in the 21st century – human rights, international organisations and foreign policy: essays in honour of Peter Baehr* (ed: Monique Castermans-Holleman, Fried van Hoof, and Jacqueline Smith). The Hague: Brill, 17.

[5] Akandji-Kombe, J. F. (2007). *Positive obligations under the European Convention on Human Rights*. Strasbourg, 5.

[6] Starmer, K. (1999). *European Human Rights Law: The Human Rights Act 1998 and the European Convention on Human Rights*. London: Legal Action Group, 139.

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[8] Russel, D. (2010). Supplementing the European Convention on Human Rights: legislating for positive obligations. *Northern Ireland Legal Quarterly*. 3 (LXI), 283.

v. the United Kingdom[9] and *Wolfgram v. Germany*.[10] Even though their significance is undeniable, the case, which was crucial in this regard and which has inspired the subsequent judicial praxis was *McCann and Others v. the United Kingdom*. Due to the innovativeness of the Court's approach to this case, its complexity and multifaceted character, which divided the court council and ultimately the importance of the case for the subsequent development of the Court's practice in this regard, this case will be the subject of the analysis in this article.

FACTS IN THE *McCann and Others v. the United Kingdom* CASE

The case which undeniably resulted in setting the foundations for the development of positive obligations based on Article 2 of the ECHR was *McCann and Others v. the United Kingdom.*[11] Already in the first months of the year 1988, the authorities received information that the Irish Republican Army[12] was planning a terrorist attack on Gibraltar.[13] A special advisory group consisting of the members of different units of security organs was created with the aim of assisting the Gibraltar police force. The Operational Order of the Police Commissioner and the Rules of Military Engagement emphasized that the aim of the action was to protect lives and arrest the terrorists. It was clarified that the use of force was allowed only at the explicit command of police officers of high rank or in case of doing so is absolutely necessary to protect lives. Strict rules regarding the circumstances in which it was allowed to open fire without a warning were also defined.

In March of 1988, the members of the IRA were identified in Malaga. It was predicted that they would carry out the attack using a car with a remotely activated bomb. A plan was made to arrest the members of the terrorist unit after they drive into Gibraltar in the described car in order to collect enough evidence for a trial. The members of law enforcement were warned that the suspects were armed and dangerous and that they would probably use weapons or detonate the bomb in case of a conflict.

One of the suspects, Savage, was spotted as he was parking a white Renault in the area under surveillance. Two more members of the terrorist unit,

[9] *Stewart v. the United Kingdom*, (App. no. 10044/82), 10. 7. 1984.

[10] *Wolfgram v. Germany*, (App. no. 11254/84), 6. 10. 1986.

[11] *McCann and Others v. the United Kingdom*, (App. no. 18984/91), 27. 9. 1995.

[12] Irish Republican Army, hereinafter: "IRA".

[13] *McCann and Others v. the United Kingdom*, (App. no. 18984/91), 27. 9. 1995. para. 13.

McCann and Farrell, were spotted while they were looking in the direction of the parked car. After they left the area under surveillance, a bomb defusion specialist conducted a visual inspection of the car and expressed the opinion that a bomb was in the car. It was decided that members of special military forces, SAS[14], should carry out the arrest.[15]

Savage separated himself from the remaining two terrorists so two groups of soldiers were following them. After they realized that they were being followed, three suspects displayed sudden and unexpected moves suggesting that they were trying to detonate the bomb, according to the allegations of the soldiers. The soldiers shot them down. After the shooting, no weapons and no detonator were found in the possession of the suspects. However, keys to a car that was hidden in Marbella were found. The car contained an explosive device with two set timers.

In the appeal to the Commission submitted in August 1991, the plaintiffs claimed that the killings of Daniel McCann, Mairead Farrell and Sean Savage committed by the members of SAS represented a violation of Article 2 of the ECHR. In March of 1994, the Commission took the stance that no such violation had occurred.

THE APPLICATION OF ARTICLE 2, PARAGRAPH 2 OF THE ECHR TO *McCann and Others v. the United Kingdom* BY THE EUROPEAN COURT OF HUMAN RIGHTS

The application of Article 2 paragraph 2 of ECHR to cases of manslaughter

The Court opined that the exemptions mentioned in paragraph 2 indicate that this provision applies to murder cases, but not exclusively. Following Commissions earlier practice[16], the text of Article 2, taken in its entirety,

[14] Special Air Service – *McCann and Others v. the United Kingdom*, (App. no. 18984/91), 27. 9. 1995, para. 141.

[15] *Ibid.*, para. 54.

[16] The practice of the Commission and the Court in this regard changed over time. In the case *X v. Belgium* (App.no.2758/66, Annals 12, p. 174) it was considered that Article 2 of the ECHR does not apply to manslaughter cases. However, in the case *Association X. v. the United Kingdom* (App. no. 7154/75, 12. 7. 1978.), the Commission applied a broader interpretation. It took the stance that the first sentence of Article 2 of the ECHR imposes on the signatory states a broader obligation than the one contained in paragraph 2 of this article and the concept according to which all individuals have the right to the legal protection of their rights obligates the countries that subscribe to the Convention not only to refrain from premeditated murder but also to provide the protection to the right to life. In the case

demonstrates that the Article 2 does not specify when murder is allowed but that it specifies circumstances in which the use of force "that could result in unintended killing"[17] is allowed. The Court highlighted that the use of force, however, must not exceed the level that is absolutely necessary to accomplish some of the goals mentioned in lines a, b, or c or Article 2, paragraph 2 of the ECHR.

In other words, if the members of law enforcement act within the confines of the law and in order to accomplish a goal or aim that is allowed by ECHR, there will be no violation of this convention provided that the condition of the absolute necessity of the use of force is met.[18]

The way in which the Court interpreted the legal standard of "absolute necessity" from Article 2, paragraph 2 of the ECHR in the case *McCann and Others v. the United Kingdom*

In this verdict, the Court repeated the previous position that the use of the term "absolute necessity" in Article 2, paragraph 2 indicates that the necessity test that is being applied[19] must be stricter and more convincing than the one that is applied when determining whether the actions of the agents of the state are "necessary in a democratic society"[20] in reference to Article 8, paragraph 2 and Article 11 of the ECHR. This entails that the use of force must be

Stewart v. the United Kingdom (App. no. 10044/82, 10. 7. 1984.), the Commission accepted this interpretation, emphasizing that no other interpretation of the ECHR would be consistent with the purpose of the ECHR or with the literal interpretation of the general obligation to provide the protection to the right to life. – *Stewart v. the United Kingdom*, (App. no. 10044/82), 10. 7. 1984. paras. 14–15.

[17] *McCann and Others v. the United Kingdom*, (App. no. 18984/91), 27. 9. 1995, para. 148.

[18] Bedri Eryilmaz, M. (1999). *Arrest and detention powers in English and Turkish law and practice in the light of the European convention on human rights*. The Hague: Martinus Nijhoff Publishers, 248.

[19] One of the basic principles of the ECHR is precisely the principle of necessity. Namely, the ECHR implicitly obligates the members of the security organs to undertake positive steps to enable the protection of the rights prescribed in the ECHR. Therefore, they can intervene in the enjoyment of these rights and freedoms only when that is necessary to solve a particular problem or remove a threat. – Palmer, P. (2000). Human Rights and British Policing. *Police Journal,* 73(1), 57.

[20] The Commission took the view that "necessity" presupposes "unavoidable social need" and that "the test of necessity" presupposes the evaluation of whether the intervention in the enjoyment of the rights guaranteed by the ECHR would be proportional to the legitimate aim that was being pursued – Van Dijk, P., Van Hoof, F., Van Rijn, A., Zwaak, L. (2006). *Theory and practice of the European Convention on Human Rights*. Antwerpen – Oxford: Intersentia, 396.

strictly proportional to the accomplishment of one of the aims prescribed by lines a, b, and c of Article 2, paragraph 2 of the ECHR.[21]

The Strasbourg Court highlighted that the cases in which a person lost their life have to be examined in detail, which entails not only the analysis of the actions of the members of state bodies but also all the other circumstances of the case including the planning and control of actions of law enforcement organs under investigation.[22]

When it comes to the compatibility between national legislature and practice with the standards derived from Article 2 of the ECHR, the Court's opinion was that the ECHR does not oblige the signatory countries to incorporate the provisions of the ECHR into their national legislature.[23] It was determined that Article 2 of the Constitution of Gibraltar was similar to Article 2 of the ECHR in terms of its content. However, there was a difference with regard to the standard of justifiability of the use of force resulting in the loss of life – while the Constitution of Gibraltar requires "reasonable justifiability" of the use of force, the ECHR demands the use of force to be "absolutely necessary". Even though the standard of the ECHR seems stricter than the one embedded in the national legislature, the Court found that the difference between the two standards is not significant enough to determine that a violation of Article 2, paragraph 2 of the ECHR took place on that basis alone.[24] In other words, the legal essence was already protected within the national legislature.

The Court's reasoning brought us a step closer to defining the legal standard of "absolutely necessary use of force", which clearly implies a stricter and more convincing test of necessity than "reasonably justified use of force". However, the essential difference between the two legal standards is not so great. The best way to state it would be to say that absolutely necessary use of force is always reasonably justified while reasonably justified use of force is not always absolutely necessary.

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[21] *McCann and Others v. the United Kingdom*, (App. no. 18984/91), 27. 9. 1995, para. 149.

[22] *Ibid.*, para. 150.

[23] "Neither Article 13 of the ECHR nor any other part of this Convention prescribes a predefined way in which signatory states should ensure the efficient implementation of some provisions of the ECHR into their domestic law. Even though there is no obligation of the member states to incorporate the provisions of the ECHR into their national law, in accordance with Article 1 of the ECHR, the essence of the rights and liberties protected by the ECHR must be guaranteed in the domestic legal system, regardless of the method, to all individuals who are subjects to the legal systems of the countries that subscribe to the ECHR" – *James and Others v. the United Kingdom*, (App. no. 8793/79), 21. 2. 1986., para. 84.

[24] *McCann and Others v. the United Kingdom*, (App. no. 18984/91), 27. 9. 1995, para. 15.

Training and instruction of the members of law enforcement, planning and control of operations as elements in the assessment whether Article 2 of ECHR was violated in *McCann and Others v. United Kingdom*

The Court's verdict in this case represents a role model for the subsequent practice related to the position that training and instruction of the members of law enforcement as well as the need for operational control, in the context of the case at hand, raise the question of whether Article 2, paragraph 2 of the ECHR was, nonetheless, violated. In that light, the Court was responsible for answering this question.

The plaintiffs claimed that the regulations that were in place did not require the state agents to be trained in accordance with the strict standards of Article 2, paragraph 2 of the ECHR.[25] The Court found that the regulations regarding the use of force in the confrontations with suspects, which were communicated to the members of the military and the police, contain an entire list of rules about the use of force that reflect both the national standards and the essence of the ECHR standard[26]

The Court did not find any evidence in support of the plaintiffs' claim that the killings of the three suspects were premeditated. There was no convincing evidence that the soldiers were explicitly or implicitly instructed to do so nor that they decided to use deadly force even though it was not necessary to do so.[27] The soldiers' conviction that a bomb had been planted in the car was not unfounded.[28] The decision to allow the suspects to enter Gibraltar was made in order to collect enough evidence about a planned terrorist attack. The deployment of special operations units is customary if there is intelligence information about a danger of a terrorist attack. All of this compelled the Court to conclude that there was no conspiracy nor a covert plan to eliminate the suspects.[29]

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[25] Xenos, D. (2012). *The positive obligations of the state under the European Convention on Human Rights*. London and New York: Routledge, 124.

[26] *McCann and Others v. the United Kingdom*, (App. no. 18984/91), 27. 9. 1995, para. 156.

[27] *Ibid.*, paras. 177–180.

[28] This conclusion was corroborated by the information provided by intelligence agencies, the profiles of the three suspects who all had had previous experience in using explosive devices and the fact that Savage was observed performing suspicious actions while exiting the vehicle – *Ibid.*, para. 181.

[29] *McCann and Others v. the United Kingdom*, (App. no. 18984/91), 27. 9. 1995, paras. 182–184.

The subsequent task of the Court was to answer the question whether the operation was planned and executed in an adequate manner or in a manner which reduces the likelihood of the use of deadly force as much as possible.[30] In that process, one of the crucial questions was whether the officers who instructed and gave orders to the soldiers paid sufficient attention to the suspects' right to life.[31]

In this context, the authorities' decision not to arrest the suspects as soon as they entered Gibraltar was heavily criticized. The Court took the opinion that the danger for the population of Gibraltar was greater than the danger of the suspects avoiding a subsequent sentence due to the lack of evidence. By virtue of that fact, the people in charge of the operation made an extremely poor judgement call. In light of the conclusions reached by the intelligence service, the Court found that due to this faulty judgement, a deadly outcome became a possibility that had to be taken into account, if not the most probable outcome.[32]

The verdict highlights that all the crucial assumptions from the meeting of March 5 turned out to be wrong, except the one concerning the suspects intention to carry out a bombing attack.[33] On the other hand, alternative hypotheses were discussed because there were not enough known facts and the intelligence information was of limited scope.[34]

The use of deadly force was an unavoidable outcome due to a number of reasons. The alternatives were not properly considered. The soldiers received the information that the car contained a bomb that can be detonated remotely by simply pressing a button together with other unsubstantiated assumptions.[35] The soldiers who were deployed for this operation were trained to shoot to kill and they were informed that there was a high probability that they would have to do so in order to prevent the explosion.

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[30] This conclusion was corroborated by the information provided by intelligence agencies, the profiles of the three suspects who all had had previous experience in using explosive devices and the fact that Savage was observed performing suspicious actions while exiting the vehicle, para.193.

[31] *McCann and Others v. the United Kingdom*, (App. no. 18984/91), 27. 9. 1995, para. 201.

[32] *Ibid.*, para. 205.

[33] This applied to the assumption that there would be a bomb in the car, which could be detonated using a radio-controlled device, that the detonation would be possible through a simple press of a button, that the suspects would be armed and ready to use firearms in case there was an attempt of arrest and that they would not hesitate to detonate the bomb faced with the possibility that their mission would fail. – *Ibid.*, para. 206.

[34] *Ibid.*, para. 207.

[35] *Ibid.*, paras. 207–209.

The Court was of the opinion that this kind of planning and execution of the operation was highly disputable because

> "...under these circumstances, the obligation of the authorities was to respect the suspects right to life which required them to evaluate the information with the utmost care before conveying it to the soldiers who are trained to shoot to kill".[36]

Furthermore, the Court's assessment was that the reflexive reaction of the soldiers in such a delicate case

> "...lacked a degree of caution in the use of firearms which is expected from the members of the security forces in a democratic society even when they are facing dangerous individuals suspected of terrorist activities".[37]

This response was in stark contrast with the standards of due care from the instructions about the use of firearms which were communicated to the police forces.[38] All of the above suggests the lack of due care on the part of the members of the security forces in the event of planning and executing the operation of arrest.

Bearing all this in mind, the Strasbourg judges found no convincing evidence of the absolute necessity for the use of force. In a tight majority of ten versus nine votes, the Court ruled that the case constituted a violation of Article 2 of the ECHR.[39]

Judge Pikis was one of the judges of the European Court for Human Rights who commented on this innovative approach of the Court:

> "...the recent decision of the Court in the case *McCann and Others v. the United Kingdom* creates the obligation of the state to protect life, which is greater than what has been the case up to now. An operation that presupposes

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[36] *McCann and Others v. the United Kingdom*, (App. no. 18984/91), 27. 9. 1995, para. 211.

[37] *Ibid.*, para. 212.

[38] From the abovementioned formulation, it is apparent that the context of terrorism was not completely ignored but the priority was given to Article 2 of the ECHR in this regard. *N. Aolain* explains that "this case signaled a uniform approach in which the status of a victim, in this case a terrorist, does not reduce the significance of the right to life" – according to Campbell, C. (2005). Wars on terror and vicarious hegemons: the UK, international law and Northern Ireland conflict. *International and Comparative Law Quarterly* 54 (2), 345.

[39] This decision is completely in opposition to the abovementioned stance of the Commission according to which not only was it absolutely necessary to shoot the suspects in order to protect others from illegal violence but also "the way in which the authorities planned and carried out the operation did not indicate any kind of intention or lack of due care which would make the use of lethal force disproportional to the aim of saving lives". – *McCann and Others v. the United Kingdom*, (App. no. 18984/91), 27. 9. 1995. para. 191.

> a danger of a deadly outcome must be planned and controlled in a way that eliminates all the foreseeable unnecessary risks of death that arise through the use of force. Even when faced with an attack on the social order, state organs have the obligation to react with the use of force that is proportional to the risks. The signatory countries have an additional obligation to plan and control the execution of the operation in such a way as to restrict the circumstances in which force can be used, and if the use of force is unavoidable, to minimize its effects."[40]

It is important to point out that even though the verdict does not say anything explicit about the positive obligations of signatory countries, the Court did analyze the actions of the security organs during the planning and execution of the antiterrorist operation in this case in order to decide whether the United Kingdom acted in accordance with its obligations stemming from Article 2 of the ECHR.[41]

The proportionality of the soldiers' actions in relation to the permitted aim of protecting individuals from illegal violence in the case *McCann and Others v. the United Kingdom*

Numerous pieces of information that the soldiers received (about the presence of a bomb in the car, about the ease of activating it remotely, about the fact that the suspects were armed and dangerous and that they could activate the bomb and threaten numerous lives)[42] resulted in the conviction about immediate danger for the lives of many people stemming from the actions of known terrorists prone to impulsive reactions who had demonstrated cruel absence of care for the lives of others, including innocent civilians.

The soldiers shot the suspects when they acted in a way that was interpreted as sudden threatening action, which prompted the soldiers to believe that they were about to detonate the bomb. It was proven that McCann and Farrell fired their arms before falling on the ground but not while they were lying on it. Savage was shot with multiple bullets until he fell on the ground and he was also shot at after he fell. Farrell was shot eight times, McCann was shot five times, while Savage sustained 16 perforating gunshot wounds. The soldiers

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[40] *Dissenting Opinion of Judge Pikis* in the case *Andronicou and Constantinou v. Cyprus,* (App. no. 25052/94), 9. 10. 1997.

[41] Mowbray, A. (2004). *The Development of Positive Obligations Under the European Convention on Human Rights by the European Court of Human Right*s. Oxford: Hart Publishing, 9

[42] *McCann and Others v. the United Kingdom*, (App. no. 18984/91), 27. 9. 1995. para. 195.

testified that they had shot with the intention of killing and continued to shoot the suspects until any doubt that they were physically capable of detonating the bomb was removed. It was subsequently established that the suspects had not been armed and the bomb detonator had not been in their possession and there had been no bomb in the car that they parked at the parking lot.[43]

When it comes to the issue whether the use of force was proportional, the Court determined that the soldiers were in fact convinced, in light of the information that was given to them, that it was absolutely necessary for them to shoot the suspects in order to prevent the detonation. Their actions were in accordance with the orders of their superiors as well as with the goal of saving innocent lives. The Court, therefore, judged that

> "...the use of force on the part of the security organs in the attempt to achieve one of the goals prescribed by Article 2 Paragraph 2 of ECHR can be justified if it was based on sincere conviction regarded as justified and supported at the time, but subsequently proven wrong. Judging otherwise would entail placing unrealistic burden on the signatory countries and the members of their security organs in their on duty conduct, which could have lethal consequences on their lives and the lives of others"[44]

Legal commentators praised the Court for taking into account

> "...human fallibility of the members of state organs and difficult operational circumstances in which they operate and react."[45]

This verdict was in line with the principle of legal balance[46] and it was significant for further development of this principle in the practice of the Court and its interpretation of the ECHR.

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[43] *McCann and Others v. the United Kingdom*, (App. no. 18984/91), 27. 9. 1995, paras. 196–199.

[44] *Ibid.*, para. 200

[45] Skinner, S. (2003) Death in Genoa: The G8 Summit Shooting and the Right to Life. *European Journal of Crime, Criminal Law and Criminal Justice,* 11 (3), 248.

[46] The principle of fair balance is present both in the earlier and in the more recent practice of the Court. In the case *Soering v. the United Kingdom* (application No. 14038/88, verdict dated July 7, 1989), the Court took the view that "the pursuit of a fair balance between general interests of the community and the protection of basic rights of individuals" is inherent to the ECHR in its entirety. The Court applied this principle as the basis for the evaluation of the proportionality of the intervention of the signatory countries in the enjoyment of human rights of the plaintiffs as well as the assessment of when there are positive obligations of signatory states in accordance with the ECHR. There are also certain criticisms of the application of this principle. They are mostly based on the fact that in this way, the Court places itself at the core of the questions that pertain to the internal affairs of signatory states. However, it should not be ignored that the Court allows the signatory countries a certain space for free assessment in this regard. See: Mowbray, A. (2010). A study of

The analysis of dissenting opinions in the case *McCann and Others v. the United Kingdom*

The narrow margin with which the verdict was reached in this case shows that the judges did not have an unanimous stance in relation to the numerous issues that were the subject of the decision. As many as nine judges voiced a Joint Dissenting Opinion in which they expressed disagreement with the conclusion of the majority in relation to the inadequacy of the way in which this anti-terrorist operation was planned and executed.[47] They emphasized that during the Court's evaluation, it should have "resisted the temptation of post hoc knowledge"[48] and take into account that the security organs had to plan the operation and make decisions on the basis of incomplete information. Moreover, they were forced to act within the confines of the law while the suspects considered them legitimate targets and had no concerns for the lives of civilians. Because they had criminal intentions, the suspects placed themselves in a dangerous situation in which it was likely that there would be a confrontation between them and the members of security organs.[49]

According to the stance expressed in the Joint Dissenting Opinion, the Court should have taken into account all the information that was available to the authorities, which indicated that there was a danger of a terrorist attack of large proportions. This was supported by the fact that a car with a large amount of explosive and four detonators was found at a different location. In light of this, the use of special operations forces, SAS, was justified. The conclusions that were reached at the meeting of March 5 were reasonable and the instructions given to the Gibraltar police force included the prohibition of the unnecessary use of force. The decision to arrest the suspects only after they entered Gibraltar was reached for practical reasons in an attempt to collect evidence, which is why, in the opinion of these judges, it cannot be considered a "seriously mistaken estimate."[50] The judges disagreed with the criticism of crucial estimates made by security organs, which later turned out to be wrong. They argued that these were possible hypotheses in a situation in which a large

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the Principle of Fair Balance in the Jurisprudence of the European Court of Human Rights. *Human Rights Law Review,* 10 (2), 289–318.

[47] Mowbray, A. (2004). *The Development of Positive Obligations Under the European Convention on Human Rights by the European Court of Human Rights*. Oxford: Hart Publishing, 8.

[48] Joint Dissenting Opinion of Judges Ryssdal, Bernhardt, ThórVilhjálmsson, Gölcüklü, Palm, Pekkanen, Sir John Freeland, Baka and Jambrek in the case *McCann and Others v. the United Kingdom*, (App. no. 18984/91), 27. 9. 1995. para. 8.

[49] *Ibid.*, para. 9.

[50] *Ibid.*, paras. 10–13.

number of facts was unknown and the information of the security services was of limited scope.[51]

They were especially critical of the conclusion according to which the use of deadly force was made "virtually unavoidable" through particular mistakes in the process of conveying information to the soldiers. They believed that such a conclusion did not assign sufficient significance to the fact that the final outcome is often determined by factors that cannot be foreseen.[52]

In the Joint Dissenting Opinion, the judges disagreed with the majority position according to which reflexive responses of the soldiers in that important aspect exhibits the lack of a sufficient degree of care, which would be expected from the members of security organs in a democratic society and that the members of these organs did not pay sufficient attention to that in their planning and execution of the arrest operation. The minority position was that in the situation in which soldiers sincerely believed that the suspects could activate the bomb at any moment with a simple press of a button, it would be extremely dangerous to shoot with the intention of disabling the suspects because that would not exclude the possibility of them still being able to activate the bomb. What they did was in accordance with their training. One of the preconditions of joining the special operation unit, SAS, is proven caution. In addition, members of this unit had successfully carried out operations of arresting terrorists in a large number of cases.[53]

For these reasons, the judges who dissented from the majority concluded:

> "...we are not convinced that the Court had a strong basis to conclude, on the basis of presented evidence and the fact that the soldiers training was based on past experience of dealing with terrorists, that the soldiers should have been given a different and better type of training and the actions of the soldiers exhibits a lack of proper degree of care which should be expected from the members of security organs in a democratic society."[54]

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[51] Joint Dissenting Opinion of Judges Ryssdal, Bernhardt, ThórVilhjálmsson, Gölcüklü, Palm, Pekkanen, Sir John Freeland, Baka and Jambrek in the case *McCann and Others v. the United Kingdom*, (App. no. 18984/91), 27. 9. 1995, paras. 12–18.

[52] In the Joint Dissenting Opinion, it was explained that: "McCann and Farrell did not make any sudden moves while the soldiers were approaching them, which must be due to the fact that a siren of a police car was heard nearby. It is highly probable that the arrest operation could have been completed without the use of weapons if Savage had not done what he did when the soldiers approached him, which could have been caused by the sounds of shots fired in the incident in which McCann and Farrell were the victims. It is entirely possible that he would have been arrested without shots being fired" – *McCann and Others v. the United Kingdom*, (App. no. 18984/91), 27. 9. 1995, paras. 19–20.

[53] *Ibid.*, paras. 21–23.

[54] *Ibid.*, para. 24.

Their final conclusion was that the process in front of the European Court did not prove the presence of such failures in the way in which the operation of arrest was planned and carried out, which would justify the conclusion of the majority that the force that was exerted towards the suspects was not proportional to the goal of protecting innocent individuals from illegal violence. In the Joint Dissenting Opinion, the judges took the position that lethal force that was used, given the circumstances of this case, was absolutely necessary for the accomplishment of the stated goal and the United Kingdom did not violate its obligations from Article 2 of the ECHR.

The Court's decision did not divide just the acting judges but legal experts as well. While the majority of authors agree with the position according to which

> "...British authorities were obligated, following the obligation to respect the suspects' right to life, to be more cautions in evaluating the information that they possessed before conveying it to soldiers who had been trained to shoot with the intention to kill",[55]

there are also those who criticize this verdict. The reasons that they cite are mostly related to the ones that were stated in the Joint Dissenting Opinion.

THE IMPACT OF THE CASE *McCann and Others v. the United Kingdom* ON SUBSEQUENT DEVELOPMENT OF JUDICIAL PRACTICE

The standards that were developed in this case have later been applied in the practice of the Court, thus contributing to its development. In the case *Andronicou and Constantinou v. Cyprus,*[56] the Court expanded the domain of the application of the rules about the necessity of caring about the right to life during the planning and control of operations of the security organs in cases involving terrorists. In this case, the standard of sincere conviction was used again because the Court accepted that the members of the special operations units

> "...sincerely believed that ... it was necessary to kill him in order to save the life of Elsie Constantinou and others and it was necessary to shoot multiple times in order to remove the possibility that he would reach for a weapon."[57]

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[55] Risius, G. (2000). Impact of judicial decisions on armed forces. *Military Law and War review,* 39 (1–4), 350.

[56] *Andronicou and Constantinou v. Cyprus,* (App. no. 25052/94), 9. 10. 1997.

[57] *Ibid.*, para. 192.

Like in the McCann case, the Court showed an understanding for the difficult position of the members of the MMAD unit and emphasized

> "...that the subsequent, deliberated estimate of the situation cannot be compared to the one that they had to make in a state of emotional agitation during a unique and unprecedented operation of saving lives"[58].

The position of the Court is that the members of security organs had the right to shoot and undertake all the measures which they sincerely and reasonably believed were necessary to eliminate every risk for their lives and the life of the hostage woman.[59]

The standards applied in *McCann and Others v. the United Kingdom* were upgraded through numerous cases that involved the conflicts of the rebels and the members of the organs of the Turkish state in Northern Turkey. That way, in the verdict, *Güleç v. Turkey*[60], the Court emphasized that

> "...even though the use of force could be justified in this specific case by Article 2, paragraph 2, line c of the ECHR, a balance has to be struck between the prescribed goal and the means to achieve it."[61]

In the case, *Ergi v. Turkey*[62], it was emphasized that the responsibility of the state exists even when the security organs do not undertake all the precautionary measures during the selection of means and methods for the execution of a security operation in order to avoid or minimize civilian losses.[63] A. Mowbray considers this case exceptionally important because it shows the evolution of the positive obligation of the state to act with a proper degree of care when it comes to the planning and control of the operations of the members of their security organs. According to this author:

> "...this verdict clearly elaborates on the need of the national authorities to pay attention to the threats for innocent bystanders coming both from individuals who are suspected terrorists or criminals and the members of security units. The authorities have to develop and implement plans so as to undertake all reasonable precautionary measures with the aim of avoiding or minimizing civilian losses. These requirements are strict, but bearing in

[58] *Andronicou and Constantinou v. Cyprus,* (App. no. 25052/94), 9. 10. 1997..

[59] The Court also highlighted that from all the shots that were fired, only two actually hit Elsie even though the precision of their aiming was constrained by the fact that Lefteris held onto Elsie placing her at risk. This fact suggested that they were careful to protect Elsie and undertook the necessary measures to save her life while avoiding to place their own lives at risk. – *Ibid.*.

[60] *Güleç v. Turkey*, (App. no. 54/1997/838/1044), 27. 7. 1998.

[61] *Ibid.*, para. 71.

[62] *Ergi v. Turkey*, (App. no. 66/1997/850/1057), 28. 7. 1998.

[63] *Ibid.*, para.79.

> mind the significance of the right to life and professionalism that is justifiably expected from security units in the democratic countries of Europe, it is clear that they represent crucial elements of the positive obligation under consideration".[64]

In this context, the verdicts pertaining to the cases from the conflicts in Chechnya are also interesting. Bearing in mind the high degree of disproportionality in the use of force, in the verdict, *Isayeva, Yusupova and Bazayeva v. Russia,*[65] the Court concluded that

> "...even if we accepted the claim that the military wanted to accomplish a legitimate goal, the Court does not accept that the operation was planned and executed with the required care for the lives of civilians"[66].

The Strasbourg judges reached the same conclusion in the case *Isayeva v. Russia*.[67]

Through an analysis of the more recent practice of the Court, we obtain the same impression – the case *McCann and Others v. the United Kingdom* and the standards that were established in it represent the role model with respect to developing positive obligations of countries in planning, executing and controlling operations involving security organs. Even though the domain of application of these obligations was considerably expanded over time,[68] the foundations that were set by establishing the adequate positive obligations of the signatory states of the ECHR remain firm. They represent the basis for further evolution of these obligations and the source of inspiration for future interpretations of the ECHR.

CONCLUSION

The case that was analyzed caused great controversies and divided both legal practitioners and legal theoreticians. While one camp argued that the Court went too far with this verdict and tied the hands of the security organs with its demands in a way that made it more difficult to carry out the operations

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[64] Mowbray, A. (2004). *The Development of Positive Obligations Under the European Convention on Human Rights by the European Court of Human Rights*. Oxford: Hart Publishing, 13.

[65] *Isayeva, Yusupova and Bazayeva v. Russia*, (App. nos. 57947/00, 57948/00 и 57949/00), 24. 2. 2005.

[66] *Ibid.*, para. 199.

[67] *Isayeva v. Russia*, (App. no. 57950/00), 24. 2. 2005.

[68] See: *Akpinar and Altun v. Turkey*, (App. no. 56760/00), 27. 2. 2007. and *Bitiyeva and X v. Russia*, (App. no. 57953/00 and 37392/03), 21. 6. 2007.

in their line of work, others praised the courage of the majority of judges to place the right to life on the pedestal it deserves.

We agree with the assessment given by A. Mowbray that by reaching this verdict in the case *McCann and Others v. the United Kingdom* the foundation was set for the readiness of the court to examine the level of attention that the authorities of the signatory states devoted to planning and executing the operations of their security organs.[69]

Therefore, despite the test of time, this verdict is one of the most significant ones when it comes to the evolution of the interpretation of the rights granted in the ECHR and the subsequent development of the Court praxis pertaining to the protection of the right to life.

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