Human Rights in Context Jan 19

Home Curfew in the Context of COVID-19: Freedom-restricting or Liberty-depriving Measure?

Dr Liesbeth Todts*

The COVID-19 (corona) pandemic has the world firmly in its grip for almost two years. Numerous measures were and are imposed in the fight against the coronavirus that have or have had important consequences for our fundamental rights and freedoms, in particular our freedom of movement (see also here for an overview, §46 e.s.). These include obligations to stay at a certain place such as one's home, prohibitions or restrictions for certain places or areas, e.g. because they are closed down or only accessible with a health pass, but also

home curfews. Home curfews have been the subject of many debates, partly because they would concern an (impermissible) deprivation of one's liberty (see, e.g. the discussions in Belgium and the Netherlands).

This discussion has to do with the (difficult) distinction made at the European human rights level, between on the one hand a mere *restriction* upon the free movement and on the other hand a more far-going *deprivation* of liberty. The right to freedom of movement is anchored in Article 2 of the Fourth Protocol to the European Convention on Human Rights. It prohibits national authorities to restrict an individual's free movement in the given State, except under certain conditions (see infra). In addition, every individual also has the right not to arbitrarily lose all free movement and thus to be deprived of his or her liberty, as guaranteed via the right to liberty and security in Article 5 of the European Convention on Human Rights (ECHR). Thus, restraints of an individual's liberty can occur in various gradations, ranging from a restriction upon the free movement (Article 2 Fourth Protocol) to a deprivation of all liberty (Article 5 ECHR).

According to the European Court of Human Rights (ECtHR) a restriction of the free movement in the sense of Article 2 Fourth Protocol must be clearly distinguished from a deprivation of liberty within the meaning of Article 5 ECHR (see, e.g. *Guzzardi v. Italy*, §92; *Austin and Others v. United Kingdom* [GC], §55; *Nada v. Switzerland* [GC], §225; *de Tommaso v. Italy* [GC], §80). In practice, however, the boundary between those two concepts is not always clear, as I will illustrate hereafter. Nevertheless, this distinction has important legal consequences. A freedom-restricting measure is already possible when it respects the classic restriction

criteria. These include being in accordance with law and necessary in a democratic society in the interests of a legitimate aim, e.g. the protection of public order or health (Article 2, §3 Fourth Protocol), relevant for the COVID-19 pandemic. A deprivation of liberty is only possible in a limited number of cases listed in Article 5, §1 ECHR, which must be narrowly interpreted (see, e.g. *Winterwerp v. the Netherlands*, §37). An example is confinement to prevent the spreading of an infectious disease (e), e.g. in case of a pandemic. However, the ECtHR sets very strict conditions for the application for this deprivation ground, inter alia because the deprivation should only be the last resort in order to prevent the disease spreading(see, e.g. *Enhorn v. Sweden*). Its application is therefore by no means self-evident. Moreover, a number of procedural guarantees must be respected (Article 5, §§2-5 ECHR)

> The question then is whether a home curfew involves a restriction upon the free movement or a more far-going deprivation of liberty.

General principles applied by the Strasbourg Court to distinguish between freedom-restricting and liberty-depriving measures

The distinction between a freedom-restricting and liberty-depriving measure is not always an easy one to make. According to the ECtHR, the difference between the two concepts is not one of nature or substance, but rather one in degree or intensity (see, e.g. *Guzzardi*, cited above, §93). It appears from the Strasbourg Court's case law that the question whether or not a restriction concerns a deprivation of liberty strongly depends on the concrete circumstances of a given case (*Terhes v. Romania*, §38). This case-specific approach implies that it is very difficult to precisely indicate in a precise and abstract way where a restriction of liberty ends and where a deprivation of it begins. An assessment in concreto will therefore always be necessary.

Nevertheless, a number of guidelines (factors) can be derived from the Strasbourg Court's case law. For this blogpost, I will only focus on those factors relevant for assessing the liberty-depriving nature of a home curfew (see, for a more extended discussion the dissertation of Todts, Liesbeth, *Bestuurlijke en strafrechtelijke vrijheidsbeperkingen ter handhaving van de openbare orde,* Bruge, die Keure, 2021, pp.65-119).

Crucial is that, according to the Strasbourg Court, the starting point should always be the specific situation of the person concerned. A whole range of factors is then to be considered, such as the type, duration, effects

and manner of implementation of the restriction, as will also become clear hereafter (see, e.g. *Guzzardi*, cited above, §92; *Austin*, cited above, §57; *de Tommaso*, cited above, §80). Importantly, these principles also apply when restrictions are concerned with a more general application, e.g. national (corona) measures (cf. *Terhes*, cited above, §41).

It appears from the Strasbourg Court's case law that the type of a restriction, i.e. the extent to which an individual is restricted in his or her free movement, is central to whether a deprivation of liberty is involved. As such, the obligation to remain permanently at a certain place principally amounts to a deprivation of liberty. An example is detention in a prison cell, but Article 5 is certainly not limited to that and deprivation may take numerous other forms (*Guzzardi,* cited above, §95). As such, the Court has already accepted confinement in a hospital (*Nielsen v. Denmark*) or in a hotel (*Riera Blume and Others v. Spain*) as also falling within the scope of Article 5. Also confinement in one's own house in the form of a permanent or continuous house arrest principally involves a deprivation of liberty in the sense of this Article (see, e.g. *Buzadji v. Republic of Moldova* [GC], §104).

Other factors may also play a role, especially in less obvious situations than detention or confinement. The ECtHR then generally examines whether the overall situation of the person concerned is sufficiently comparable with the situation of, for instance, a person detained in prison, having regard at the effect of the restrictions imposed 'cumulatively and in combination'. The key case in this regard is *Guzzardi*, concerning a suspected member of the Italian mafia and therefore placed under special police supervision. This included the obligation to live on a a tiny fraction of a small island with only few opportunities for social contact combined with a number of additional restraints, such as almost permanent police supervision, severe (telephone) communication restrictions and a home curfew between 10pm and 7am. Although Guzzardi was not bound by any physical barrier as such, the combination of the imposed restrictions resembled detention in an (open) prison, thus invoking Article 5 (*Guzzardi*, cited above, §95).

Finally, the Strasbourg Court also seems to stress more and more the specific context and circumstances in which a restriction is imposed. The Court seems willing to take the context into account as a relevant factor when analysing the liberty-depriving nature of a restriction (see, e.g. *Austin*, cited above, §59). This is, however, not without criticism, as I will clarify below.

Application to home curfews in COVID-19 times

Although the ECtHR has not yet had to consider the qualification of a home curfew imposed in a COVID-19 context as a deprivation of liberty, the following considerations can be made.
First of all, the fact that a home curfew imposed as a corona measure will commonly have a more general, national application does not imply that the measure is inevitably to be considered as a deprivation of liberty. In such cases, too, the individual situation must be the starting point, as indicated above.

Additionally, home curfews must be clearly distinguished from forms of continuous house arrest. The latter require an individual to permanently stay at home and principally involve a deprivation of liberty, whereas home curfews principally require an individual to remain home *for only a certain period* (e.g. by night). This is already an indication that home curfews generally amount to only a restriction of liberty.

Inspiration can be found in the key case of *de Tommaso (Grand Chamber).* The applicant was suspected of criminal conduct and therefore placed under special police supervision, including the obligation to stay in his own municipality and a number of other restraints, such as a home curfew between 10pm and 6am. Whilst he argued that this 8-hour home confinement amounts to 'house arrest' and hence a deprivation of liberty, the Grand Chamber compared his situation with the one in *Guzzardi* and did not accept this argument. The Court considered that the applicant was only required to remain home during the night and, having regard to the effects and manner of implementation of the measure, there were no added restrictions on his freedom to leave home during daytime. Consequently, the applicant was still able to have a social life and was therefore only restricted in his free movement (*de Tommaso*, cited above, §§88-89).

A similar reasoning can be found in *Trijonis (admissibility decision),* concerning a pre-trial measure for criminal conduct requiring the applicant to, e.g. remain home during weekends and from 7pm to 7am during weekdays. The applicant argued that this measure involved 'house arrest' and therefore a deprivation of liberty. The Strasbourg Court, however, considered the measure as being only a restriction of the free movement. It particularly referred to the fact that the applicant was for the remaining free hours 'allowed to spend time at work as well as at home' as he wished (*Trijonis v. Lithuania*). What appears to be decisive for the Court, reading this case together with the above case of *de Tommaso*, is whether the measure still enables an individual to leave the place of confinement, e.g. to go to work and to have social contacts, instead of really isolating him or her in that place, like continuous house arrest.

What is more, home curfew (corona) measures will often provide for several exceptions to the obligation to stay at home during the curfew period itself. Examples are exceptions for essential (work) trips and for urgent medical reasons (see, e.g. the corona curfew as it was applied in Belgium). This, too, is an indication that home

curfews generally involve only a restriction of the free movement. In this regard, we can refer to the recent decision of *Terhes,* albeit concerning the obligation to principally stay at home, both day and night, imposed in Romania as an emergency measure in the fight against COVID-19. The Court held that the measure could not be equated with house arrest and thus a deprivation of liberty, given the fact that the applicant was principally required to stay at home but that various exceptions were possible. The applicant was able to leave his home for various reasons at whatever time of day the situation required, even though he had to carry a document justifying for doing so (*Terhes*, cited above, §43).

In addition, also other implementation modalities of a home curfew may be relevant. In the above case of *Terhes,* for instance, the Strasbourg Court also referred to the fact that the measure in question was a general one, imposed on everyone, and that the applicant – unlike, e.g. in *Guzzardi* – was not subject to the same strict and permanent (individual) police supervision. Neither was he obliged to live in a restricted area or unable to establish social contact (§§42-43). The absence of (severe) enforcement and (rather) limited consequences may in turn confirm the freedom-restricting nature of a home curfew.

However, this is not to say that a home curfew can never amount to a *(de facto) deprivation of liberty*. It is not unconceivable that a curfew is combined with other far-going restrictions on an individual's free movement, such as additional (geographical) limitations on the free movement for the remaining free hours and severe restrictions on association and communication. These restrictions, 'combined and cumulatively', may amount to a situation sufficiently akin to the one of someone being imprisoned and thus being deprived of liberty, according to the Strasbourg Court's case law. In this connection, in my opinion, the opportunities created by the current electronic and digital society to communicate and engage at a distance may well play an important role (cf. a contrario the partly dissenting opinion of judge Pinto de Albuquerque in *de Tommaso,* cited above, §17).

One last remark should be made here, especially in view of the COVID-19 pandemic. It increasingly appears from the Strasbourg Court's case law that account should also be taken of the *specific context* in which a restriction is imposed when analysing whether it involves a deprivation of liberty. According to the Strasbourg Court, the requirement to take account of the type and manner of implementation of a restriction enables it to have regard to its specific context and circumstances. After all, situations commonly occur in modern society where the public may be called on to endure restrictions on the free movement in the interest of the common good. The Court has already accepted such commonly occurring restrictions as not involving a deprivation (see, e.g. *Austin*, cited above, §59; *de Tommaso*, cited above, §81).

The above may also be relevant in view of the specific COVID-19 context, in which restrictions are also imposed in the public interest. As such, in *Terhes*, cited above, the Strasbourg Court has already referred to the 'particular context' of the (corona) measure imposed when considering its liberty-depriving nature (§39). Similarly, at the national level, reference has already been made to this Strasbourg Court's case law in view of the qualification issue of a (corona) measure as a deprivation of liberty (see, e.g. the Belgian Constitutional Court concerning the isolation obligation of (potentially) infected persons, §§B.10.3-B.10.5).

However, it is not yet clear what consequences the Strasbourg Court attaches to this factor to assess the liberty-depriving character of a restriction. Moreover, this factor may have undesirable consequences, implying that, if a restriction serves a public-interest purpose, it does not involve a deprivation of liberty anymore. This leaves the door open for an extended application of the deprivation grounds in Article 5 ECHR (cf. the joint dissenting opinion of judges Tulkens, Spielmann and Garlicki in *Austin*, cited above, §7).

Conclusion

The question whether a home curfew is a restriction upon the free movement or a more far-going deprivation of liberty is not an easy one to answer. The distinction between those two concepts is not clear-cut, but rather implies a 'sliding scale', with on the one hand freedom-restricting measures and on the other hand liberty-depriving ones.

Clear is that a home curfew is a far-reaching restriction that may be at the boundary of a deprivation of liberty. It principally involves a freedom-restricting measure, given its temporary type, contrary to permanent house arrest. Nevertheless, account should also be taken of its concrete implementation and effects, which may in turn push the balance towards a (de facto) deprivation of liberty, e.g. in combination with other severe (association and communication) restrictions.

Finally, we argued that the specific (COVID-19) context of a home curfew should not play a role when considering its liberty-depriving nature. In general, the exact meaning of this criterion is not sure yet and it may have undesirable effects, broadening the scope of possible deprivations of liberty. A clearer, more convincing approach by the Strasbourg Court outside the context of a restriction would be welcome.

* **Dr Liesbeth Todts** is a postdoctoral researcher at the Centre for Government and Law (Hasselt University, Belgium) and is affiliated as a visiting professor or postdoctoral researcher at the Government and Law Unit

(University of Antwerp, Belgium). Additionally, she is a lawyer at Van Olmen & Wynant (Brussels, Belgium). Her current research interests include administrative law, criminal and administrative (public order) enforcement law and human rights law.

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