**OFFICE OF THE COMMISSIONER
FOR HUMAN RIGHTS**

**BUREAU DU COMMISSAIRE
AUX DROITS DE L´HOMME**

COUNCIL OF EUROPE CONSEIL DE L'EUROPE

Strasbourg, 17 October 2003

CommDH(2003)13
Original version

OPINION
OF THE COMMISSIONER FOR HUMAN RIGHTS, Mr ALVARO GIL-ROBLES

on certain aspects of the proposal by the Government of Finland for a new Aliens Act

F – 67075 Strasbourg Cedex, Fax : + 33 390 21 50 53, http://www.commissioner.coe.int, e-mail : commissioner.humanrights@coe.int

Introduction

1. On 24 September 2003, an informal meeting was held in Strasbourg between the Constitutional Law Committee of the Parliament of Finland and the Commissioner. The discussions focused on a proposal by the Government of Finland for a new Aliens Act[1]. Following this meeting, the Commissioner would like to offer some observations relating to the proposal, which might be useful in the further considerations of the draft Act. The present opinion by the Commissioner is submitted in accordance with Articles 3(e), 5 (1) and 8 (1) of Resolution (99) 50 of the Committee of Ministers on the Commissioner for Human Rights.[2]

2. The report the Commissioner for Human Rights published on his visit to Finland in 2001[3], addressed already certain issues relating to the Finnish Aliens Act, particularly to the provisions concerning the accelerated procedure under which some applications for international protection are considered.

3. While the Commissioner will limit his observations only to certain provisions included in the draft Act, certain observations of general nature are warranted.

4. The overall objectives of the proposal – the promotion of good governance and enhanced legal protection in matters relating to foreigners – are praiseworthy.

5. Also, the intentions to increase clarity of the legislation, and to include in the legislation provisions on matters that are currently regulated by administrative practice, are very important in terms of strengthening legal certainty.

6. The Commissioner also welcomes that the drafting process has been guided by provisions of international human rights instruments, including the European Convention on Human Rights and other Conventions adopted under the auspices of the Council of Europe, as well as by the jurisprudence of the European Court of Human Rights.

7. The initiative by the Constitutional Law Committee of the Finnish Parliament to meet and discuss the draft Act with the European Court of Human Rights, the United Nations High Commissioner for Refugees and the Commissioner, further demonstrates the importance attached by Finland to the international standards in this field.

8. In this opinion, the Commissioner would like to make certain proposals aimed at ensuring that the procedures envisaged for processing applications for international protection do not deviate from obligations arising from the European Convention on Human Rights.

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[1] Government Bill for the enactment of a new Aliens Act of 13 June 2003. (Available in Finnish and Swedish).

[2] Article 3(e) instructs the Commissioner to "identify possible shortcomings in the law and practice of member States concerning the compliance with human rights as embodied in the instruments of the Council of Europe". Article 5(1) states that "the Commissioner may act on any information relevant to the Commissioner's functions", including "information addressed to the Commissioner by governments, national parliaments, national ombudsmen or similar institutions in the field of human rights, individuals and organisations." In accordance with Article 8(1) "the Commissioner may issue recommendations, opinions and reports."

[3] Report by Mr. Alvaro Gil-Robles, Commissioner for Human Rights, on his visit to Finland 4 – 7 June 2001, for the Committee of Ministers and the Parliamentary Assembly, 19 September 2001, CommDH(2001)7.

Accelerated procedures and the European Convention on Human Rights

Background

9. According to the Government Bill, the provisions relating to international protection would remain largely unmodified, mainly because a reform of these provisions took place as recently as in year 2000. That reform introduced in the legislation the notion of an accelerated procedure and the concepts of safe country of origin, safe country of asylum and manifestly unfounded applications.

10. Chapter six of the new draft Act provides that a person seeking international protection can be granted asylum or a permission to stay on other protection grounds: a permission to stay may be granted to a foreigner who does not fulfil the criteria for receiving asylum, but who would be threatened in his or her country of origin with death penalty, torture or other inhuman or degrading treatment, or who cannot return to his or her home country due to an armed conflict or environmental disaster (article 88). In addition, a person can be granted a permission to stay on the ground that he/she is in need for temporary protection.

11. The draft law envisages an accelerated procedure in four different situations: 1) when the applicant arrives from a so-called safe country of origin or from a safe country of asylum ; 2) when the application is manifestly unfounded; 3) when the application is subject to the procedure set forth in the Dublin Convention and 4) when it involves the re-examination of the status.

12. It is stated in the Government Bill to the Parliament, that the objective of the 2000 amendments was to speed up the asylum procedures by reducing the number of unfounded applications.[4] It was further noted that, prior to the amendments, there had been several asylum seekers from EU candidate countries, such as Poland, the Czech Republic and Slovakia, but that the legislative amendment had had the desired effect of significantly decreasing the number of asylum-seekers from those countries. It therefore appears that, in addition to the objective of reducing the length of the procedures, the drafters were motivated by an assumption that all applications from certain countries are unfounded – an assumption that may not always be accurate.

13. In view of the Commissioner, reducing the length of the procedures for granting asylum is clearly a legitimate and desirable goal also from the point of view of the applicant. However, relying heavily on a presumption of abuse of the asylum system may compromise the objectivity and accuracy of the decision-making process. It has moreover the potential of stigmatising asylum-seekers in general and of reinforcing the negative stereotypes towards asylum-seekers among the public.

14. Even in generally safe democratic countries, there may well be situations where not all individuals or groups of individuals can be safe. For instance, a state may be unable to provide effective protection against certain acts by private persons, such as so-called honour killings mostly perpetrated by close family members of the victim, or against racist violence. In such

[4] Government Bill, op cit. in footnote 2, p. 99.

situations, it is not sufficient to assess merely the willingness of the country to provide protection against such acts, but also the real ability of the state to do so. Moreover, severe discrimination against one group of people may well reach the level justifying international protection, even if the majority population in the country generally enjoys effective human rights protection.

15. The Commissioner would therefore like to underline that no decision of return should be taken merely, or predominantly, on the basis of the general situation in a country.

The need to guarantee effective exercise of the right to be free from torture, and inhuman or degrading treatment

16. In view of the above, relying on the concepts of safe countries or a presumption of abuse, clearly carries the risk of denying genuine asylum-seekers the right to seek and enjoy asylum – a fundamental right which was guaranteed already in the 1948 Universal Declaration of Human Rights - and of violating the principle of non-refoulement guaranteed under the 1951 Convention on the Status of Refugees. From the point of view of the European Convention on Human Rights, it can jeopardize the effective enjoyment of the right to be free from torture, or inhuman or degrading treatment guaranteed in Article 3 of the Convention. The European Court on Human Rights has declared in several judgments that Article 3 implies the obligation not to expel a person to a country where he or she might be subjected to torture, or inhuman or degrading treatment.[5] The Commissioner appreciates that this is clearly recognised in the Constitution of Finland, which states that "[n]o alien may be expelled, extradited or returned if, on account of this, he/she risks the death penalty, torture or other degrading treatment." Accordingly, the draft Act stipulates that "a permission to stay may be granted to a foreigner who would be threatened in his or her country of origin by torture or other inhuman or degrading treatment".[6]

17. Article 3 of the European Convention is a non-derogable provision for which no exceptions are allowed under any circumstances. As the Court has noted, it enshrines one of the fundamental values of the democratic societies making up the Council of Europe.[7] It is therefore necessary to ensure that all possible safeguards are taken in order to prevent possible violations of this fundamental right, including by ensuring that procedures relating to entry and stay in a country do not jeopardize the effective exercise of this right.

The notion of torture and inhuman and degrading treatment

18. It is to be recalled that the prohibition of torture or degrading or inhuman treatment within the meaning of Article 3 of the European Convention is not limited to acts where pain or suffering is intentionally inflicted on a person. The concept is significantly wider than that, and this should be recognized by officials processing applications for international protection.

[5] See, e.g., Case of Conka v. Belgium, Application No. 51564/99, judgment of 5 February 2002, paragraphs 56 – 63; Chahal v. United Kingdom, Judgment of 15 November 1996, Appl. No. 22414/93.
[6] Article 88 of the draft Act, unofficial translation.
[7] Soering v. United Kingdom, para 88.

19. Guidance as to the interpretation of the meaning of Article 3 can be found in the jurisprudence of the European Court and the European Commission of Human Rights, which have considered claims of torture, or inhuman or degrading treatment or punishment in various contexts. In general terms, the Court has noted that:

> "The notion of inhuman treatment covers at least such treatment as deliberately causing severe suffering, mental or physical, which, in a particular situation, is unjustifiable. The word 'torture' is often used to describe inhuman treatment, which has a purpose, such as obtaining of information or confession, or the infliction of punishment, and is generally an aggravated form of inhuman treatment. Treatment or punishment of an individual may be said to be degrading if it grossly humiliates him before others or drives him to act against his will or conscience." [8]

20. Continued or severe discrimination on grounds such as race or ethnicity can amount to degrading treatment under Article 3, for reasons of being grossly humiliating. In the *East African Asians* case, the European Commission of Human Rights found racial discrimination to be degrading treatment contrary to Article 3 as "an interference with [the applicants'] human dignity".[9] The Commission noted, inter alia, that:

> "A measure which does not involve physical ill-treatment but which lowers a person in rank, position, reputation or character can constitute "degrading treatment" provided it attains a minimum level of severity"[10]

21. When observing the situation and treatment of certain minorities in Europe, most notably the Roma, it has become increasingly obvious to the Commissioner that, even in countries that are considered generally safe, there might be instances of discrimination of such severity as to amount to degrading treatment within the meaning of Article 3[11]. It is of great importance that such considerations are taken into account when deciding whether a person should be granted a permission to stay in a country on protection grounds.

22. Also, the person's medical state is relevant when considering the compatibility of an expulsion order with Article 3. The Court has noted that if a person is ill, his extradition or deportation may cause such suffering as to amount to inhuman treatment[12]. Also, the lack of access to proper medical care in the country or origin may amount to degrading treatment. In *Tanko v. Finland*, [13] the European Commission on Human Rights stated that it 'does not exclude that a lack of proper care in a case where someone is suffering from a serious illness could in certain circumstances amount to treatment contrary to Article 3".

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[88] The *First Greek Case*, Report of 5 November 1969, Yearbook 12, p. 186.
[9] European Commission on Human Rights, Decisions and Reports, 78-A, p. 62 (pp. 1 – 70).
[10] Ibid.
[11] See also the *Second report on Finland of the European Committee against Racism and Intolerance* which stated that : "ECRI stresses that the need to avoid building into the system procedures which could have a detrimental effect on the principle that each asylum application should be judged on an individual basis and not on the basis of assumptions about the situation of groups of persons in a given country. This is particularly pertinent in relation to the situation of Roma/Gypsies, given the well-documented cases of racism and violence suffered by members of the Roma/Gypsy community in a number of European countries." Doc. CRI (2002) 20, adopted on 14 December 2001 and made public on 23 July 2002.
[12] See *Bulus v. Sweden* No 9330/81, 35 DR 57 (1984); 39 DR 75 (1984) F Sett (mental illness).
[13] No 23634/94 (1994), unreported.

23. These examples, just to give a few, illustrate the diversity of the circumstances which may amount to inhumane or degrading treatment and thereby constitute prohibited grounds of expulsion.

24. The Court has noted that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. In *Ireland v. UK*, the Court stated that "the assessment of this minimum is, in the nature of things, relative: it depends on all the circumstances of the case, such as duration of the treatment, its physical or mental effects, and, in some cases, the sex, age and state of health of the victim."[14]

25. It follows from the above, that any assessment as to the possible applicability of Article 3 must be based on the individual circumstances of each case. This is why the concept of safe countries, if implemented without strict judicial and procedural safeguards, fits so poorly the with obligations arising from Article 3. These concepts are predominantly based on the general assessment of the situation in a given country and fail to give sufficient consideration to the fact that, even within generally safe countries, there might be individuals or groups of individuals who would risk to be subject to torture of inhuman or degrading treatment upon return. An applicant may find it difficult – or even impossible – to substantiate his claims under an accelerated procedure to which he or she might be subject to the basis of a safe country assumption. Accelerated procedures frequently involve quick interviews which tend to be insufficiently thorough for an appropriate assessment of all the facts pertaining to the situation of the individual.

Prohibition of collective expulsions

26. In situations where several persons originating from the same country are seeking international protection, relying on the assumption that the applications arrive from a safe country, may easily lead to collective expulsions, a practice prohibited under Protocol 4 to the European Convention of Human Rights. In the case of *Conka v. Belgium*, the European Court ruled that Belgium had violated the Convention, when expelling a group of 74 Slovak Romani asylum seekers. The Court noted that collective expulsion is to be understood as any measure compelling aliens, as a group, to leave a country, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual alien of the group. The Court noted that in this case, the procedure did not afford sufficient guarantees demonstrating that the personal circumstances of each of those concerned had been genuinely and individually taken into account. [15]

The procedure envisaged under the draft Aliens Act

27. Article 98 of the draft Aliens Act, which includes general provisions relating to the decision-making procedure on an application involving international protection, requires that the conditions are assessed in an individual manner, taking into consideration the description of the applicant about his or her circumstances in the country in question. According to the draft law, this important principle applies to both regular and accelerated procedures, however, in

[14] *Ireland v. United Kingdom*, Judgment of 18 January 1978, Series A. No. 25, para 162.
[15] Case of *Conka v. Belgium*, Application No. 51564/99, judgment of 5 February 2002, paragraphs 56 – 63.

the Commissioner's view, certain adjustments to the draft Act would be required in order to ensure that the effective application of this principle is not jeopardized in the latter situation.

28. With regard to situations where the concept of a "safe country of asylum" is applied, the draft Act provides that the application will not even be considered in its merits (art 103). Hence, although the person is must be interviewed, none of the personal circumstances of the individual will in fact be taken into consideration when deciding upon a refusal of entry. The Commissioner also finds that the definition of a 'safe country of asylum' is too vague in the draft Act (art 101). For instance, it does not contain a requirement of a guarantee from the third country that the application will be properly dealt with there, or even that the country allows the person to re-enter. This may easily lead to a situation where the person is sent from one country to another with no one taking the responsibility for processing the asylum claim. In the Commissioner's view, such an 'orbit situation' may in itself amount to degrading treatment in certain circumstances, for instance if the person is stuck at airport detention centers in successive countries for extended periods of time.

29. By definition, the assessment of "a safe country of origin" relies heavily on the general conditions of the country: 1) a stable and democratic society; 2) an independent and impartial judicial system and fair trial; and 3) whether the country has adhered to the principal international human rights conventions and respects them, and whether serious human rights violations have taken place in the country (art 100). Whilst the provision also requires that the country in question is safe for the individual concerned, the emphasis on the general conditions, as well as the fact that the decision must be taken under an accelerated procedure of seven days, may easily delude the decision making process. The risks of 'summary proceedings' are even higher if lists of "safe countries" are adopted. As noted above, it is also to be recalled that a risk of ill-treatment does not need to be attributable to the state, and therefore it is not sufficient to examine the actions of a state when assessing whether a country is safe or not. It is increasingly common that a person may be in need of international protection against a non-state actor in situations where the state is either unable or unwilling to provide protection. Such might be the case for instance if the police cannot afford effective protection against violent attacks by skinheads or neo-nazi groups.[16]

30. According to Article 101 of the draft Act, an application may be rejected as manifestly unfounded on a number of grounds, including where "the claims of the applicant are clearly not credible" (article 101, para. 1). Issues relating to credibility are difficult to determine and its assessment often involves a decree of subjectivity. In view of the Commissioner, the risks of making an inaccurate decision on the basis of credibility of the applicant are so significant that 'credibility' should not be a ground to declare a decision manifestly unfounded. Moreover, making an assessment about the credibility in a hasty manner undermines the well-established principle of giving the applicant the "benefit of the doubt". The 2000 Aliens Act

[16] In this context, the Commissioner would like to refer to the situation of a group of persons of Roma-descent from eastern Slovakia who sought asylum in Finland in 1999. According to the Finnish Refugee Board, many of the applicants gave account on maltreatment by skinheads. The accelerated procedures did not, however, allow adequate time to obtain medical certificates as evidence. Moreover, reportedly, the nurses working in Finnish reception centres had told researches from Amnesty International that they noticed unusually high rates of sterilisations among the women in this group. The asylum-seekers where, however, speedily returned. Subsequently, there have been allegations of forced or coerced sterilisations of Roma women in Eastern Slovakia, which could amount to inhuman or degrading treatment. See e.g. "Body and Soul" report, Centre for Reproductive Rights and Poradna organisation, 2003.

presently in force does not include the possibility of rejecting a claim as manifestly unfounded on the basis of credibility and hence the introduction of this provision might result in increasing the risks of denying protection for genuine refugees.[17]

31. Where the applicant has arrived from a safe country of asylum or a safe country of origin, the application must be processed within seven days from when the interview record was finalised and registered with the Directorate of Immigration. If the Directorate cannot process the application within the said time limit, the application may be considered as manifestly unfounded and dealt with accordingly. The draft Act does not envisage a specific timeframe for an accelerated procedure in situations where it is deemed manifestly unfounded. It has been brought to the attention of the Commissioner that there have been situations where a person had to wait for a decision for two years.

32. The assessment of a need for international protection is clearly a complicated procedure. For instance, as it is noted in the Government Bill, guidance can be found from the practice of international human rights monitoring bodies, including from the case-law of the European Court of Human Rights with regard to a threat of inhuman treatment. It also notes that the Convention on the Elimination of all Forms of Discrimination against Women must be taken into consideration in the assessment process. A thorough process frequently requires consultations with different organisations, which takes time. For making an appropriate analysis of an individual case in light of all these provisions and practices, the time frame of seven days given to the decision-makers seems to be insufficient. This is particularly the case given the limited resources available to the Directorate of Immigration.

The execution of a negative decision and the appeal procedure

33. According to the proposal, a decision on refusal of entry taken under an accelerated procedure can be executed within eight days from the date when the applicant was given notice of it. In the Commissioner's view, this timeframe is insufficient for the applicant to adequately prepare an appeal with the assistance of a legal representative and linguistic help. The applicant might also need to seek further evidence substantiating his claim, which may be impossible to obtain within such a short timeframe. Moreover, even if the applicant does not wish to make an appeal, eight days for arranging his or her departure may be extremely short, particularly in situations where the applicant has been waiting for the decision for a long time, in some cases up to one year, even in cases where the provision on manifestly unfounded application is applied[18].

34. Another problem relates to the effectiveness of the appeal procedure. According to the draft Act, the applicant has 30 days to appeal to the Administrative Court of Appeals of Helsinki against a negative decision. Despite the filing of an appeal, the person can be removed from Finland within the above-mentioned eight days period, unless the administrative court

[17] It is also to be recalled that the UNHCR Executive Committee Conclusion No 30 of 1998 does not contain such a ground for rejection.

[18] According to information received from the organisation providing legal aid to asylum-seekers, the average time for the decision making process is still one year and the introduction of an accelerated procedure has not had an effect on the average time.

otherwise decides[19]. This leads to a situation where a person can be removed from Finland even before he or she has lodged an appeal, or before the appeal has been considered. It is evident that a decision against removal by the appellate court has little, if any significance if the applicant has already been returned. Consequently, the right to appeal, as provided for in the current draft, seems ineffective.

35. The Commissioner raised concerns about this issue already during his visit to Finland in 2001, shortly after similar provisions had been included in the 2000 Aliens Act. Since the new proposal does not envisage changes in this respect, the Commissioner's observations of that time remain valid. The Commissioner would therefore like to reiterate the following comments that he made in the report on his visit to Finland[20]:

> "…regard should be *given* to the need for effective (and not just legally prescribed) availability of the right to a judicial remedy, within the meaning of Article 13 European Convention on Human Rights, when it is claimed that the competent authorities have infringed or are likely to infringe one of the rights secured by the ECHR. This right to an effective remedy must be granted to all those who wish to challenge a decision on refusal of entry or removal from the territory. Such an appeal should have the effect of suspending the execution of a deportation order at least where a possible violation of Articles 2 and 3 ECHR is alleged."

36. The Commissioner would also like to recall a recommendation of the Committee of Ministers relating to the right of rejected asylum-seekers to an effective remedy against decisions on expulsion, which states, inter alia, that "a remedy before a national authority is considered effective when…. the execution of the expulsion order is suspended until a decision under 2.2 is taken".[21]

37. In respect of other obligations relating to expulsion procedures, the Commissioner would like to refer to his Recommendation concerning the rights of aliens wishing to enter a Council of Europe Member State and the enforcement of expulsion orders.[22]

Commissioner's recommendations

As regards the accelerated procedures

38. Respect for the important principle of an individual approach, required by the European Convention on Human Rights, must be given full effect in each case. Even when arriving from a "safe country of origin" or a "safe country of asylum " the person applying for protection should be given the opportunity to be heard by a specialist and explain why, in his/her specific individual circumstances, the country concerned cannot be regarded as "safe" and these

[19] Under the law still in force in early 2000, all deportation orders had to be approved by the Administrative Court before they could be executed.

[20] Report by Mr Alvaro Gil-Robles, Commissioner for Human Rights, on his visit to Finland, 4 – 7 June 2001 for the Committee of Ministers and the Parliamentary Assembly, September 18 2001, CommDH(2001)7.

[21] Recommendation No. R (98) 13 of the Committee of Ministers to Member States on the Right of rejected asylum-seekers to an effective remedy against decisions on expulsions in the context of Article 3 of the European Convention on Human Rights, 18 September 1998.

[22] Recommendation of 19 September 2001, CommDH/Rec(2001)1.

considerations must be fully taken into consideration in the decision-making process. In particular, the Commissioner would like to make the following recommendations:

- It must be ensured that those conducting the interviews and making the decisions are acquainted with what might constitute torture or inhuman or degrading treatment and the manner in which interviews of possible victims should be coducted;

- The grounds for declaring an application "manifestly unfounded" and the definition of a "safe country of asylum" should be harmonised with the commitments undertaken by Finland within the Executive Committee of the UNHCR. This means, for instance, that credibility should not be a ground for declaring an application manifestly unfounded and that additional criteria would need to be added for the assessment of a 'safety' of a country;

- The timeframe of seven days for deciding upon applications involving "safe countries" should be extended to allow sufficient time to assess all facts pertaining to the case and to analyse them in light of international human rights obligations and information about the situation of the country;

- The timeframe of eight days for the execution of the decision on refusal of entry order should be extended in order to give sufficient time and facilities for the preparation of the applicant's appeal, including appropriate legal and linguistic assistance;

- It should be ensured that a decision on refusal of entry not be executed as long as the time limit for appeal is not exhausted;

- It should be ensured that the appeal be given an automatic effect of suspending the execution of the decision on refusal of entry, unless the court seized with the appeal decides otherwise.

As regards other matters relating to international protection

39. The criteria for granting asylum, as defined in draft Article 87, are identical to the definition of a refugee as contained in the 1951 United Nations Convention on the Status of Refugees. The Commissioner welcomes that in the Government proposal, it is explained that gender based persecution against women and persecution on grounds of sexual orientation can fall under the category of a 'membership in a particular social group'. It is important that this interpretation of the concept of a 'membership in a particular social group' be made widely known among those who make decisions on asylum applications, through for instance, administrative circulars or handbooks.

40. The Commissioner welcomes that the special situation of children is recognised in Article 6 of the draft law, which requires that the best interest of the child is taken into account and includes a provision on the right of the children to be heard whenever decisions affecting them are being made. It also requires that decisions concerning children are to be made promptly.

41. It is important that this general provision be given full effect in the detailed provisions of the law, particularly when it comes to separated children. In this context, the Commissioner recommends that:

- provisions on family reunification of separated children should give priority to family reunification in Finland if it is in the best interest of the child;

- under 18-years old siblings of a separated child should be considered as family members for the purposes of reunification;

- it should be ensured that separated children are not subject to accelerated procedures.

42. It has been brought to the attention of the Commissioner that the 1951 Convention refugee recognition rate is very low in Finland, varying from less than 0.2 to 1 percent. While the number of asylum-seekers having been granted a residence permit on other grounds of need of protection is significantly higher, it is to be recalled that the rights attached to such other protection statuses are lower than those afforded to recognised refugees. The Commissioner therefore underlines the importance of reassessing the very strict criteria which appear to be applied for granting the 1951 Convention refugee status.