

**EUROPEAN COURT OF HUMAN RIGHTS  
COUR EUROPÉENNE DES DROITS DE L'HOMME**

4 June 2010

**FOURTH SECTION**

Application no. 30815/09  
by D.H.  
against Finland  
lodged on 12 June 2009

**STATEMENT OF FACTS**

**THE FACTS**

The applicant is a Somali national who was born in 1992 and lives currently in Finland. He is represented before the Court by Ms Laura Tarvainen, a lawyer practising in Oulu.

**A. The circumstances of the case**

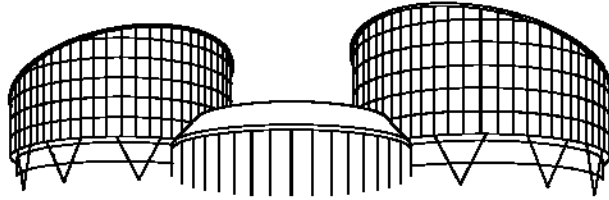
The facts of the case, as submitted by the applicant, may be summarised as follows.

*The applicant's reasons for leaving Somalia*

The applicant is from Mogadishu. His family could no longer live safely in that town. The administrative structures had fallen apart and the situation had become chaotic. The applicant was forced to join the armed forces. His life was thereby put at serious risk as the Ethiopian troops were targeting young soldiers, in particular, to capture them or kill them.

*The applicant's account concerning his stay in Italy*

In November 2007 the applicant arrived in Europe by boat from Libya, along with other asylum seekers. The Italian authorities intercepted the passengers at sea. They were fingerprinted and taken to Sicily. The applicant submitted to the authorities his name and date of birth, thus indicating that he was a minor. He was first held in a small room and then taken out with the others. They were fingerprinted again by force. The applicant, who was in poor health, asked the Italian authorities for help, but did not receive any. There was no interpreter available either. After a few days in Sicily, the applicant and all the others who had arrived on the boat were taken to Rome and left there to manage on their own. The applicant went to a church with some other Somali boys. They were allowed to stay there for a few days, after which they were put on the



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streets. The applicant heard about a place where one free meal was served per day. It took him four hours to walk there and back each day, but that was the only way he could obtain any food. He slept on the streets and, occasionally, at the train station. He was constantly hungry and cold. Living on the street was also unsafe. He was subjected to physical abuse and humiliating treatment many times. On one occasion a bystander called an ambulance and the applicant was taken to a hospital. He was turned back on the streets the following day. One day an unknown man came up to the applicant and offered him and some other Somali boys work in a vineyard, which they accepted. As compensation, they were given food but no money, as initially promised. When they asked about their wages, they were beaten up.

The applicant continued to live on the streets. One day an African man offered him work. His task was to deliver a certain bag from Rome to Napoli three times a week. He was given train tickets, breakfast and 100 dollars per month in payment. He had been working for some three months, when a Somali woman asked him why he was associating with that man. Having learned about the nature of the applicant's activities, the woman suggested that they open the bag and see what was inside. It turned out that the bag contained drugs. The woman warned the applicant that his work was very dangerous and he might end up in prison, if the authorities caught him. The woman bought the applicant a train ticket to Milan and he left Rome.

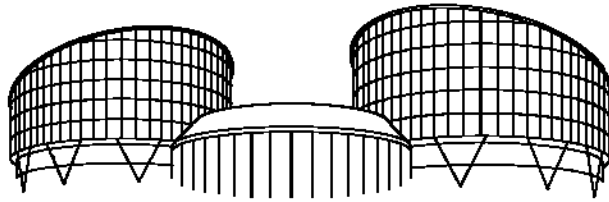
In Milan the applicant also lived on the streets. One day a Somali man came to him and advised him to go to the police for help. The applicant did so and waited for the whole day until a police officer came and took him to a small room at the police station. Instead of helping him, the police officer kicked the applicant and beat him with a truncheon. He threatened the applicant that if he ever showed up at the police station again, he would receive the same treatment. The applicant found himself on the streets again, begging for money to buy food. Eventually, a trafficker arranged his journey to Finland.

### *Asylum proceedings in Finland*

The applicant arrived in Finland on 20 October 2008 and sought asylum on that same day. Since he was a minor, he was appointed a representative to exercise guardian's rights in matters pertaining to his person and assets, among other tasks. He was also represented by a lawyer. The immigration authorities ran a check in the Eurodac and noted that the applicant had been registered in Italy on 4 November 2007 for illegal entry and on 23 November 2007 as an asylum seeker. The applicant's counsel submitted a request that his asylum claim be dealt with by the Finnish authorities having regard to the inhuman conditions for asylum seekers in Italy.

On 30 December 2008 the Finnish Immigration Service (*Maahanmuuttovirasto, Migrationsverket*, hereinafter "the FIS") requested the Italian authorities to take the applicant back by virtue of Article 16 § 1 (c) of the Dublin Regulation. On 10 March 2009 Italy acceded to that request.

On 27 April 2009 the FIS issued its decision. Relying on the Dublin Regulation, it dismissed the application without examining its merits. It found that the Italian authorities were responsible for the examination of the applicant's asylum claim and ordered his removal to Italy. In its reasons the FIS stated that differences in reception and detention conditions, work opportunities and social benefits between the receiving States was not a sufficient reason to examine a claim in another State. As a signatory to the Dublin Regulation, Italy had undertaken to observe the rights and principles acknowledged, in particular, in the Charter of Fundamental Rights of the European Union. It also referred to Article 6 of the Dublin Regulation in stating that if a minor applicant did not have family members in another country, his application was to be examined in that State



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where he had first sought asylum. Taking into account all relevant circumstances as a whole, the FIS considered that the applicant's removal to Italy was not in breach of Article 3 of the Convention or Section 9(4) of the Finnish Constitution, nor was he at risk of *refoulement* contrary to Section 147 of the Aliens Act.

On 2 June 2009 the decision was served on the applicant in his native language and in the presence of his representative. At the same time he was informed of his right to appeal against it to the Administrative Court (*hallinto-oikeus, förvaltningsdomstolen*). He was also informed that the decision was directly enforceable, unless the court ruled otherwise, and that he was entitled to request the court to suspend his removal.

On the same day the applicant appealed submitting, in particular, that having regard to his age, mental condition and the circumstances as a whole, he was to be regarded as a vulnerable person. He also claimed that the immigration authorities had not given him adequate opportunity to participate in the proceedings and it had based the decision on insufficient information. Furthermore, the FIS had on 23 April 2009 informed the applicant that his application would be examined in Finland, thus giving him false hope. The applicant requested that his removal to Italy be suspended.

On 12 June 2009 the applicant lodged an application with the Strasbourg Court, along with a request to stay his removal to Italy. According to the applicant, the Administrative Court had refused him the interim measure requested and the police was planning to remove him on 17 June 2009. A medical certificate was attached to the application indicating that the applicant suffered from post-traumatic stress syndrome and acute symptoms of anxiety and depression. According to that certificate, his condition resulted partly from his past experiences in Somalia but also from later events. It was specifically noted that the applicant's medical condition had been negatively affected by the "withdrawal of the promise" to examine his asylum claim in Finland. In the doctor's opinion, the applicant was in need of long-term support.

On 12 June 2009 the President of the Chamber acceded to the above request indicating to the Government of Finland, under Rule 39 of the Rules of Court, that the applicant should not be removed to Italy until further notice.

On 15 September 2009 the Administrative Court dismissed the applicant's appeal, upholding the immigration authority's decision. Having regard to the reasons given by the FIS and the relevant circumstances as a whole, the court found no reason to prevent the applicants' removal to Italy. It also noted the Strasbourg Court's interim measure and found that there was no reason to grant a stay on the applicant's removal.

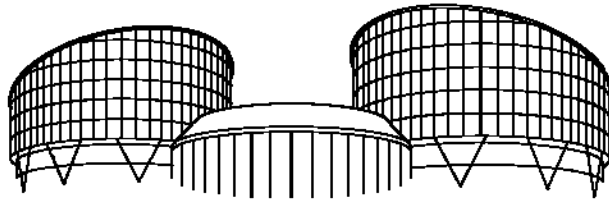
On 3 February 2010 the Supreme Administrative Court (*korkein hallinto-oikeus, högsta förvaltningsdomstolen*) refused the applicant leave to appeal.

### **B. Relevant domestic law and practice**

Section 9(4) of the Constitution (*Suomen perustuslaki, Finlands grundlag*; Act no. 1/1999) reads:

"The right of foreigners to enter Finland and to remain in the country is regulated by an Act. A foreigner shall not be deported, extradited or returned to another country, if in consequence he or she is in danger of a death sentence, torture or other treatment violating human dignity."

The relevant provisions concerning asylum procedure are set out in the Aliens Act (*ulkomaalaislaki, utlänningslagen*; Act no. 301/2004, with later amendments). Such claims are at the first instance examined by the Finnish Immigration Service, which also has the competence to give a removal order. In cases where the Dublin Regulation is applicable, the law provides for an accelerated procedure. A removal order in those cases is subject to direct enforcement after the service of the decision on the applicant. An appeal, with no



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suspensive effect, may be lodged with the Administrative Court within 30 days of the service of the immigration authority's decision. The court may grant a stay on the removal. It may do so at the applicant's request or of its own motion. Further appeal lies to the Supreme Administrative Court, provided that leave to appeal is granted. That court may also indicate interim measures (Sections 67, 103 (1)(2), 152, 193, 196, 201).

As to the removal of asylum seekers, section 146 of the Aliens Act provides, as far as relevant, the following:

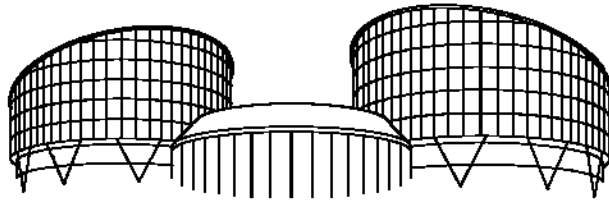
“When considering refusal of entry... account must be taken of the facts on which the decision is based and the facts and circumstances otherwise affecting the matter as a whole. When considering the matter, particular attention must be paid to the best interest of the children and the protection of family life. ...” (Act no. 380/2006)

Regarding minors, in particular, Section 6 of the Act provides:

“In any decisions issued under this Act that concern a child under eighteen years of age, special attention shall be paid to the best interest of the child and to circumstances related to the child's development and health.”

The Finnish Ombudsman for Minorities in 2010 published a survey entitled “*The Best Interest of the Child in Asylum and Refugee Procedures in Finland*”. The survey gives a comprehensive overview of various aspects of asylum proceedings, including the procedure under the Dublin Regulation. It includes, *inter alia*, the following findings and recommendations:

“Asylum decisions on minor applicants who have arrived unaccompanied during the period 1 January – 30 September 2009 either reflect the difficulty of assessing a child's best interests or a complete lack of any such assessment. In the Dublin procedure the Immigration Service generally dismisses an application for asylum without examination in substance and returns the child under the Regulation determining responsibility to the other Member State in which the child first submitted an application for asylum. Whilst this decision is being drafted, the child's best interests are not normally assessed. The decision simply refers to the fact that the “The Immigration Service, in making its decision to return the applicant, has taken account of all the relevant factors and circumstances affecting the case in their entirety”. Or it will state that differences in reception conditions do not constitute grounds for an application to be taken up for examination in substance, and the child's best interests are referred to in the decisions only casually and even then mainly only as follows: “The Immigration Service, in making its decision to return the applicant, has taken account of all the relevant factors and circumstances affecting the case in their entirety, such as the length and purpose of stay of the applicant, the applicant's ties to Finland and the best interests of the child”. At best the child's best interests are only assessed in individual cases, such as when, for example, it is considered to be in the child's best interests that the applicants grow up in familiar surroundings where they had already lived for two years before coming to Finland. In situations where a minor claims to have been a victim of a crime or exploitation in an earlier EU country, the Immigration Service has been of the view that the applicant needs to contact the authorities in the country concerned and that this is not grounds for the examination in substance of an application in Finland. As a general rule, physical or psychological symptoms, homelessness or lack of income are not grounds for the examination in substance of an application in Finland, as the Immigration Service considers that a child can obtain the relevant services in the EU country responsible for processing the application. A number of applications concerned, for example, children who had been living on the street



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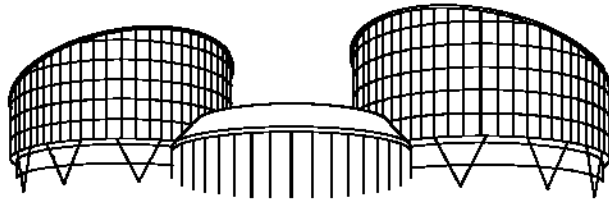
or been victims of abuse, or they had physical or psychological problems, and they were returned to the other EU Member State. There are no follow-up systems in place in Finland to monitor children and their situation when they are returned to another country. (Page 64 of the English version)

It is furthermore evident from the asylum applications processed in the period 1 January – 31 June 2009 that the Immigration Service does not generally assess or identify victims of human trafficking among unaccompanied minor applicants, especially if a child has applied for asylum in another EU Member State before their arrival in Finland. Among the asylum applications in 2009 there were several unaccompanied minor applicants who had been victims of violence, had been living on the streets without access to any reception facilities, and without social security or food, or had been threatened or coerced by criminals in the country in which they had applied for asylum for the first time. Among the applications there was also a minor who had been subject to attempted coercion into military service in his own country. Even so, these children were returned, or the intention was to return them, to the country with responsibility for their asylum application under the Regulation on determining the Member State responsible for examining an asylum application without any examination in substance of their application or consideration of the possibility of granting a residence permit on the grounds that the applicant was a victim of human trafficking, or an assessment of the risk of victimisation. (Page 65)

Developments in legislation on asylum and foreigners have been informed by a desire to restrict applicant numbers and control immigration, and the best interests of children have not been assessed separately in any legislative reforms. Finland should place more emphasis on its obligation under the Convention on the Rights of the Child, in that, in all its legislative work on children, their best interests are made a priority, and an assessment of the child's best interests should be included when legislation is being drafted. At present in Finland children in asylum policy and asylum decisions are primarily treated as asylum seekers in the same way as adults, and the fact that they are children is only of secondary importance. Nevertheless, children need special protection and attention, and their best interests should always be made a priority. (Page 80)

Section 4(a) of the Child Welfare Act serves as a good reference when considering the best interests of the child in asylum cases. An assessment can be made of such matters as the conditions in which the child would live in Finland and the conditions to which he or she would be subject in the other state if refused entry to Finland. The assessment might also consider what would not be in the child's best interests. Sending the child to a Member State where he or she would have to live on the street, has been or is in danger of becoming a victim of violence and exploitation, will not have access to accommodation or the opportunity to attend school – none of these circumstances are in the child's best interests and all violate the child's right to freedom, opportunities for development, safety and security, social welfare and medical assistance, all of which are safeguarded by several international agreements. In such cases the child's application can be examined in substance in Finland on grounds of his or her best interests, and this should be notified to the country with responsibility for the application. (Page 94)

As regards an asylum case and victimisation or the risk of victimisation the children themselves are the only source of information. That is why great importance must be attached to the unaccompanied minor's story in any assessment and decision with respect to the child's best interests and the examination in substance of the asylum application. The child's account must not be ignored simply because another EU Member State says



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that its reception facilities are adequate. The assessment must take account of both the fact that there has been a case of human trafficking and the risk that there might be one. Indications that the child has been victimised may, for example, include violence inflicted on the child, threats from criminals, enforced labour, sexual or other forms of exploitation or violence, or enforced recruitment into an army. The child might also have been victimised as a result of conditions at the reception centre, when, for example, he or she has not been given proper accommodation. When the risk of being victimised is being assessed, indicators could be the child's especially vulnerable position as a minor, as a person travelling alone, without anywhere to live, the possibility for access to reception facilities, etc. In practice, on the basis of the information available at the moment, unaccompanied minor asylum seekers should not be returned to Italy, Greece or Malta under the Regulation on determining the state responsible for examining an asylum application. In these countries children have been victimised specifically due to unsatisfactory reception conditions.” (Pages 98 and 99)

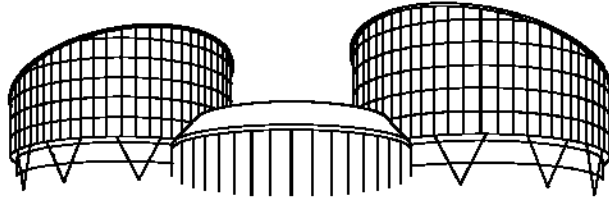
### **B. Relevant international legal instruments**

Article 3(1) of the United Nations 1989 Convention on the Rights of the Child provides that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration. In paragraph 13 of his Guidelines on International Protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees the United Nations High Commissioner for Refugees (UNHCR) states the following:

“A contemporary and child-sensitive understanding of persecution encompasses many types of human rights violations, including violations of child-specific rights. In determining the persecutory character of an act inflicted against a child, it is essential to analyse the standards of the [1989 Convention of the Rights of the Child, hereafter “the CRC”] and other relevant international human rights instruments applicable to children. Children are entitled to a range of child-specific rights set forth in the CRC which recognize their young age and dependency and are fundamental to their protection, development and survival. These rights include, but are not limited to, the following: the right not to be separated from parents (Article 9); protection from all forms of physical and mental violence, abuse, neglect, and exploitation (Article 19); protection from traditional practices prejudicial to the health of children (Article 24); a standard of living adequate for the child's development (Article 27); the right not to be detained or imprisoned unless as a measure of last resort (Article 37); and protection from under-age recruitment (Article 38). The CRC also recognizes the right of refugee children and children seeking refugee status to appropriate protection and humanitarian assistance in the enjoyment of applicable rights set forth in the CRC and in other international human rights or humanitarian instruments (Article 22).”

Reference is also made to the following:

- Council Regulation (EC) No 343/2003 of 18 February 2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national (“the Dublin Regulation”).
- Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status; and



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- Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers.

The latter requires that Member States ensure a dignified standard of living to all asylum-seekers, paying specific attention to the situation of applicants with special needs or who are detained. It regulates matters such as the provision of information, documentation, freedom of movement, healthcare, accommodation, schooling of minors, access to the labour market and to vocational training. It also covers standards for persons with special needs, minors, unaccompanied children and victims of torture.

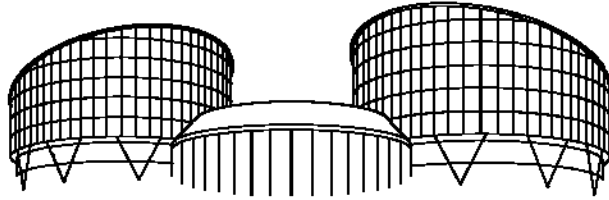
**C. Relevant objective information**

According to the Amnesty International Report 2009 concerning Italy, migrants and asylum-seekers without valid documentation, including pregnant women and families with children, were routinely detained upon arrival in detention centres before having the chance to apply for international protection. There were also continued allegations of torture and other ill-treatment by law enforcement officials, particularly towards migrants.

In his report on a visit to Italy on 13 to 15 January 2009 Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, takes note of the significant number of unaccompanied migrant children who enter the country in an irregular manner and reside in Italy, mostly in Rome. According to the report, many of these children are reportedly involved in irregular employment as well as begging, theft and sex work. Even though Italy has ratified all major international human rights treaties, including the UN Convention on the Rights of the Child, and despite the commendable efforts made by Italy in this domain, recent expert reports have highlighted a series of major shortcomings, such as delays in identifying the presence of unaccompanied migrant children in the country, long detention of non-EU unaccompanied migrant children in administrative detention centres, lack of adequate law and policy regarding guardianship and serious lack of homogeneity in the application of the law concerning unaccompanied migrant minors. These shortcomings compound the vulnerability of these children and make them easy prey to many kinds of exploitation and criminality.

**COMPLAINTS**

The applicant complains that his removal to Italy would subject him to a risk of inhuman and degrading treatment contrary to Article 3 of the Convention having regard, in particular, to the fact that he is an unaccompanied minor. He also complains under Article 13 of the Convention that, because his appeal against the immigration authority's decision did not have suspensive effect, he did not have an effective remedy in connection with his claim under Article 3.



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**QUESTIONS TO THE PARTIES**

**Factual question:**

How and to what extent have the Finnish authorities satisfied themselves that the reception conditions of the applicant, if removed to Italy, will comply with the Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum seekers having regard, in particular, to the fact that the applicant is an unaccompanied minor and to his account concerning his previous stay in Italy?

**Question on the merits:**

In the light of the applicant's claims and the documents which have been submitted, would he face a risk of being subjected to treatment in breach of Article 3 of the Convention if the removal order were enforced?