

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

30 August 2010

FOURTH SECTION

Application no. 37159/09
by H.A.U.
against Finland
lodged on 15 July 2009

STATEMENT OF FACTS

THE FACTS

The applicant is a Somali national who was born in 1993 and currently lives in Finland. He is represented before the Court by Mr Sampo Löf-Rezessy, a lawyer practising in Kouvola.

A. The circumstances of the case

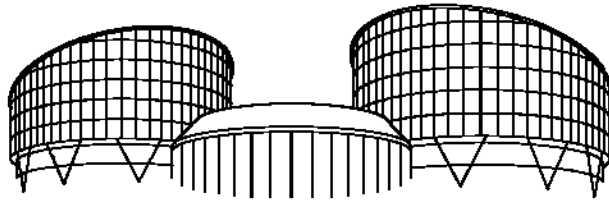
The facts of the case, as submitted by the applicant, may be summarised as follows.

The applicant arrived in Finland on 2 February 2009 from Sweden and sought asylum on that same day. Since he claimed to be a minor, a representative was appointed to exercise guardian's rights in matters pertaining to his person and assets, among other matters. He was also represented by counsel.

The immigration authorities ran a check in the Eurodac system and noted that the applicant had been recorded as having entered Italy illegally on 4 August 2008. The applicant's counsel requested that his asylum claim be dealt with by the Finnish authorities having regard to the applicant's age and his vulnerable position. According to the applicant, he had not been able to initiate asylum proceedings in Italy, nor had he been given any medical assistance.

On 4 March 2009 the Finnish Immigration Service (*Maahanmuuttovirasto, Migrationsverket*, hereinafter "the FIS") requested the Italian authorities to take the applicant back by virtue of Article 10 § 1 of the Dublin Regulation. On 29 April 2009 Italy acceded to that request. The FIS also submitted an inquiry as to the identity of the applicant. On 13 May 2009 it received a reply that, in Italy, the applicant had been registered under the name [O.J.A.], born in 1986.

On 9 June 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 noted that the applicant had claimed to be a minor. It found, however, that as the applicant had not produced an authentic official



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document whereby his identity could be verified, and as he had been registered as an adult in Italy, it was reasonable to determine his real age in conformity with the information he had himself submitted to the authorities upon his first entry on the territory of the Member States. The FIS further stated that the applicant had not submitted any evidence which would give reason to examine his application in Finland under Article 3 § 2 of the Dublin Regulation. As the applicant had not, according to his account, applied for asylum in Italy, the asylum proceedings had not been initiated and he had not been admitted to the reception services provided for asylum seekers. Once having lodged such an application, he or she had the right to have his or her asylum claim examined and the right to the same medical care services as Italian citizens, provided they registered with the National Healthcare Service. The FIS went on to state that differences in reception conditions between the receiving States were not a sufficient reason to examine a claim in another State. Taking into account all relevant circumstances, 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 14 July 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, invoking Article 3 § 2 of the Dublin Regulation. He submitted, in particular, that he had fled from the unstable situation in his home country and he had encountered various difficulties during his journey. In Italy, he had not been able to understand what was happening as no interpreter had been present. Subsequently, he had been taken to a reception facility for adults. There had been no asylum interview, no healthcare services, or other basic facilities. He had been subjected to violence in Italy but his requests for help from the authorities had been to no avail. He maintained that he was an unaccompanied minor and contended that the register entries regarding his age in Italy could not be considered reliable. He also feared *refoulement*, if returned to Italy. In his letter of appeal, the applicant also requested that the Administrative Court suspend his removal to Italy.

On 15 July 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 were planning to remove him on 20 July 2009.

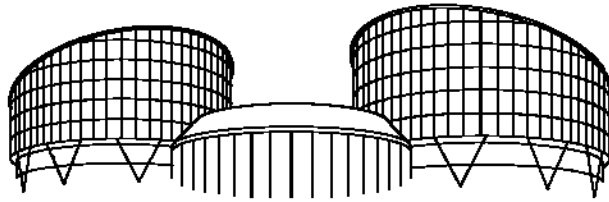
On the same day the President of the Section acceded to the above request indicating to the Government of Finland, under Rule 39 of the Rules of Court, that the applicant should not be removed to Italy until further notice.

On 11 December 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 applicant's removal to Italy. It also noted the Strasbourg Court's interim measure and found that there was no reason to grant a stay of the applicant's removal.

On 31 May 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:



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“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 examined in the first instance 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 the possibility of dismissing an application without an examination on the merits. A removal order given in that connection is subject to direct enforcement after the service of the decision on the applicant. An appeal, with no 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 of 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:

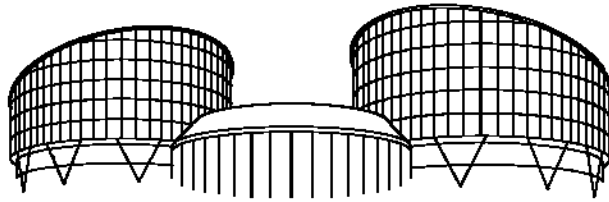
“In any decisions issued under this Act that concern a child under eighteen years of age, special attention shall be paid to the best interest of the child and to circumstances related to the child's development and health.”

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:

“...In general, minors seeking asylum do not have travel documents as they are usually required by the parties arranging their travel to Finland to destroy all documents before seeking asylum. In this case the child's personal details are entered as given by the child. ... (Page 33 of the English version).

Under the Convention on the Rights of the Child and Finnish national legislation, anyone under the age of 18 is a child. Whether or not an applicant is considered a minor or an adult is crucial in determining whether the child's best interests should be assessed in decisions on the applicant under the Convention. ... (Page 52)

At present there is no national legislation on age determination. Article 17(5) of the Asylum Procedures Directive allows the medical examination of unaccompanied minor asylum seekers to determine their age. Unaccompanied minors arriving to seek asylum do not normally have a passport or any other identity document that would reliably confirm their identity. Some child asylum seekers do not know their actual age. Some applicants are afraid to state their correct age for one reason or another. It is up to the police to decide



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whether or not they believe applicants when they state their age. If they do not believe a minor when he or she states his/her age, the consent of the applicant and his/her representative is sought in order to conduct an age determination examination. Children do not generally understand how significant age determination actually is for their asylum application and their rights. They think that they have to undergo age determination to be at all credible, and they do not understand that they in fact have the right to refuse. Although children are usually told that they have the right to refuse to undergo an age determination test, they nevertheless feel that they have to agree. In 2008 one applicant refused to be assessed in this way, after which the person was dealt with as someone who had attained the age of majority. In 2009 no one refused to undergo an age determination so far as is known. In individual cases the police have themselves made a rough estimation of an applicant's age simply by a visual assessment and then dealt with them as adults accordingly, even though the applicants have stated that they were minors. (Page 52)

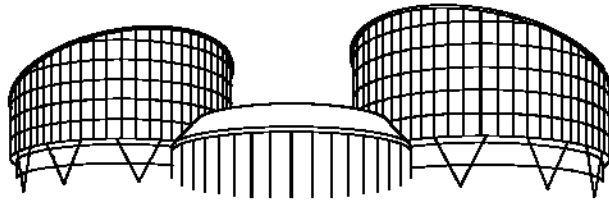
In Finland an age determination is carried out by means of an x-ray and a clinical examination mainly of the teeth and skeleton. ... (Page 53).

The age determination tests employed in Finland are a very accurate way to assess dental and skeletal maturity. However, measuring dental and skeletal maturity is not a foolproof method to determine a person's exact year or date of birth. An age determination test gives an estimate of the applicant's age based on the maturity of the teeth and bones compared to a certain control group. ... (Page 54)

Although an age determination is an estimate of the person's age, the medical opinion that is issued is normally treated by the other authorities as complete proof of the applicant's age. There are no official channels through which an asylum seeker may appeal against an age determination test or its interpretation. In the absence of legislation and proper guidelines, practices regarding how an applicant's date of birth is recorded following age determination also vary from one police department to another. ... (Page 54)

If a minor applicant had been recorded as having attained majority in another Member State in which he or she had applied for asylum before arriving in Finland, he or she has been deemed to be an adult in Finland, even if the child claimed to be a minor. Such children have no legal remedies at their disposal to prove their age or to correct any error made by the authority in the other country. In such cases, the Immigration Service will categorically confirm its interpretation of the other Member State's entry in the records as being accurate, and applicants have no right to demand or have an age determination test conducted or otherwise to dispute the age recorded for them. Many applicants say that their age was recorded wrongly because there was no interpreter there, or the authorities had recorded their age in the application totally arbitrarily, or the applicant him/herself had given the wrong age because of instructions or pressure from smugglers or other such individuals. (Page 59)

If age determination tests are to be conducted in future, they should cover a broader range of criteria and not simply rely on one test result. They should be carried out on the basis of a broad general evaluation, with the involvement of several experts in collaboration with those working with the child. They should take into account not only the medical assessments but also social, emotional and psychological indicators. Anyone assessed as an adult based on this multi-professional approach would be allowed to respond to the findings on the basis of which he or she is considered to have reached the age of majority. (Page 90)



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The amendment to the Aliens Act on the subject of age determination should add a clause stating that the applicant has a right to demand such a test. At present there is a serious problem with regard to legal protection in Dublin cases, for example, because the child has no right to his or her identity or any possibility to demand an age determination test. According to children's accounts, their age in Greece, Italy and Malta, for example, is recorded arbitrarily and based on a date of birth decided by the officials, where there has been no interpreter present or the applicant has not even been asked his or her date of birth. Despite this, however, in Finland an applicant's age is held to be that recorded in another Member State and the child has no legal protection as regards preserving his or her identity. Given that it is difficult to judge a person's age simply by a visual appraisal, there is an even greater case for the child having the right to demand and receive an age determination test to ensure his or her protection under the law. (Pages 90 and 91)

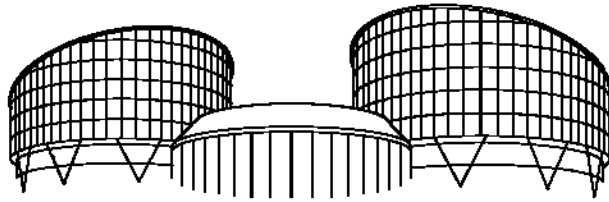
...on the basis of the information available at the moment, unaccompanied minor asylum seekers should not be returned to Italy, Greece or Malta under the Regulation on determining the state responsible for examining an asylum application. In these countries children have been victimised specifically due to unsatisfactory reception conditions.” (Page 99)

New provisions concerning age determination will be added to the Aliens Act by Act no. 549/2010, which will enter into force on 1 August 2010. According to those provisions a forensic age determination test may be conducted if there are apparent reasons to doubt the information given by an asylum seeker about his or her age. The procedure requires the applicant's approval, but the law does not provide for the possibility for that person to request such an examination to be conducted.

C. 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



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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
- 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.

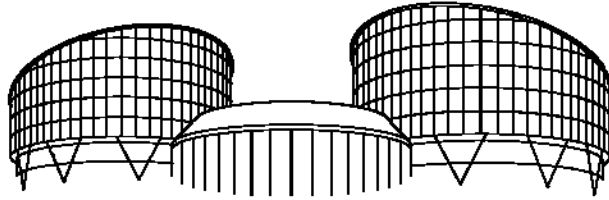
D. Relevant objective information

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 ill-treatment by law enforcement officials, particularly as regards 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, took 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 expose 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



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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.

QUESTIONS TO THE PARTIES

Factual questions:

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 claims to be an unaccompanied minor and to his account concerning his previous stay in Italy?

Having regard to the applicant's account concerning his age, what steps have the Government taken to ensure that he is over eighteen, as found by the Finnish Immigration Service? In particular, has an age determination of the applicant been conducted?

Question on the admissibility and merits of the complaint:

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