



COMMISSIONER FOR HUMAN RIGHTS

COUNCIL OF EUROPE



Strasbourg, 16 June 2008

CommDH(2008)15
Original version

**Opinion of the Commissioner for Human Rights
regarding family visits to persons deprived of their liberty**

Introduction

1. By letter dated 11 April 2008, the Registry of the International Criminal Court sought the views of the Council of Europe Commissioner for Human Rights, Mr. Thomas Hammarberg, regarding “family visits to persons deprived of their freedom”.

2. Established in 1999 by decision of the Committee of Ministers of the Council of Europe¹, the institution of the Commissioner is a non judicial, independent body that is not entitled to deal with individual complaints. The main objectives of the work of the Commissioner for Human Rights (“the Commissioner”) are:

- foster the effective observance and enjoyment of human rights;
- assist member states in the implementation of Council of Europe human rights standards;
- identify possible shortcomings in the law and practice concerning human rights;
- promote education in and awareness of human rights in member states;
- facilitate the activities of national ombudspersons and other human rights structures; and
- provide advice and information regarding the protection of human rights.

3. The Commissioner’s current activities aimed at fulfilling these objectives can be divided into four major interdependent categories: a system of regular country visits and reports; thematic work; promotion of national human rights structures; and protection of human rights defenders. Country visits constitute a key dimension of the Commissioner’s work. As it is spelled out in Article 3 of his terms of reference:

The Commissioner shall:

a. promote education in and awareness of human rights in the member States;

b. contribute to the promotion of the effective observance and full enjoyment of human rights in the member States;

e. 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, promote the effective implementation of these standards by member States and assist them, with their agreement, in their efforts to remedy such shortcomings”; (emphasis added).

4. This mandate means that the Commissioner, beyond, the mere indication of shortcomings, is expected to enter into dialogue with the governments of the member states. The Commissioner does not deliver legally binding judgments on whether or not human rights obligations have been breached. Rather, he acts as a bridge between the Council of Europe and its member States. In particular, the Commissioner assists the various authorities of member states in adopting reform measures for the implementation of the European Convention on Human Rights (“ECHR”) and other Council of Europe instruments.

5. Thus, the Commissioner seeks to engage member states in a permanent dialogue and does so by regular country visits to assess the human rights situation. The visits typically include meetings with the highest representatives of government, parliament, the judiciary, as well as leading members of human rights protection institutions and the civil society. The Commissioner’s visits always include visits to prisons, police stations, detentions centres (including psychiatric hospitals and asylum-seekers centres). The places of deprivation of liberty and the conditions of detention constitute an issue of priority for the Commissioner, as they are an area with particular human rights relevance.

¹ Resolution (99)50 on the Council of Europe Commissioner for Human Rights adopted by the Committee of Ministers of the Council of Europe on 7 May 1999 at its 104th Session, Budapest.

Building on the findings of his visits, as well as of the case-law of the European Court of Human Rights ("the Court") and the reports of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment ("CPT") and other international mechanisms, the Commissioner assist the authorities in improving the situation by providing concrete proposals and sharing good practices².

6. The Commissioner addresses issues related to conditions of detention also in the context of his work with national human rights structures ("NHRs"), i.e. ombudsmen and national human rights institutions for the protection of human rights. Recently, he has organised a colloquy³ on the European and UN requirements concerning the implementation of national prevention mechanisms, as envisaged by the Optional Protocol to the UN Convention against torture ("OPCAT"), as well as on the possible national responses and their interaction with the existing national institutions. Furthermore, a workshop was organised by the Office of the Commissioner for specialised staff of NHRs on "*Rights of persons deprived of their liberty : The role of national human rights structures which are OPCAT mechanisms and of those which are not*".⁴

7. In the context of his longstanding focus on the conditions of detention, the Commissioner addressed also the issue of the contacts of the detainees with their family. Relevant international and European standards serve as a reference for his evaluation of the situation in member states, which is complemented by the humanitarian and pragmatic approach of the Commissioner.

8. In this specific field, the Commissioner takes particular inspiration from the case-law of the Court, the Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules⁵ and the CPT standards⁶. In particular, the Commissioner refers in his work to the Court's interpretation of Article 8 of the ECHR (right to respect for private and family life). As the Court has stated "*while detention is by its very nature a limitation on private and family life, it is an essential part of a prisoner's right to respect for family life that prison authorities assist in maintaining effective contact with his or her close family members*"⁷. At the same time, the Court recognises that some measure of control of prisoners' contacts with the outside world is called for and is not of itself incompatible with the Convention: "*The Court reiterates that when assessing the obligations imposed on Contracting States by Article 8 in relation to prison visits, regard must be had to the ordinary and reasonable requirements of imprisonment and to the resultant degree of discretion which the national authorities must be allowed in regulating a prisoner's contact with his family*"⁸. Thus, restrictions for the interests of national security or to prevent disorder and crime may be considered necessary in a democratic society⁹: Such restrictions as limitations on the number of family visits, supervision of those visits and, if so justified by the nature of the offence, subjection of a detainee to a special prison regime or special arrangements for visits constitute an interference with the rights under Article 8 but are not, by themselves, in breach of that provision¹⁰. However, given the importance of the right at

² See also in this respect, the relevant Viewpoint by the Commissioner "*Prisoners should be treated with dignity*" (05/03/2007; http://www.coe.int/t/commissioner/Viewpoints/070305_en.asp).

³ http://www.coe.int/t/commissioner/News/2008/080118OPCAT_en.asp

⁴ Padua 9-10 April 2008; Workshop organised within frame of the Joint European Union – Council of Europe Programme "Setting up an active network of independent non judicial human rights structures", referred as "The Peer-to-Peer Project". This programme aims at setting up an active network of independent non-judicial National Human Rights Structures (NHRs) compliant with the Paris Principles, with special focus on non EU member States; <http://wcd.coe.int/ViewDoc.jsp?id=1308803&Site=CommDH&BackColorInternet=FEC65B&BackColorIntraNet=FEC65B&BackColorLogged=FFC679>

⁵ Adopted by the Committee of Ministers on 11 January 2006 at the 952nd meeting of the Ministers' Deputies. See "*contact with the outside world* (paras 24.1-24.12) and *infants* (paras 36.1-36.3).

⁶ CPT standards ("*Substantive*" sections of the CPT's Annual General Reports), CPT/Inf/E (2002)1, Rev 2006.

⁷ E.g. *Aliev v. Ukraine*, 29 April 2003, Application No. 41220/98, para. 187.

⁸ E.g. *Dikme v. Turkey*, 11 July 2000, Application No. 20869/92, para. 117.

⁹ Article 8 para 2 of the ECHR ; E.g. *Van Der Ven v. the Netherlands*, 4 February 2003, Application No. 50901/99, para. 72.

¹⁰ E.g. *Messina v. Italy* (no. 2), 28 September 2000, Application No.25498/94.

stake, the Court operates a very careful assessment of the restrictive measures undertaken. The latter should obey to the principle of proportionality: *“the measure in question [should not reduce] the applicant's family life to a degree that can be justified neither by the inherent limitations involved in detention nor by the pursuance of the legitimate aim relied on by the Government”*.¹¹

Opinion¹²

I. General remarks

9. The present opinion is built on the most relevant findings of the Commissioner's country visits on this topic.¹³ The Commissioner takes the view that a successful policy on detention should entail measures to facilitate prevention, rehabilitation and social integration of people in difficulty. In this context, key institutions of socialisation, such as the family, should be actively involved. These requirements and the respect for family ties are essential elements of a policy of detention in line with international human rights standards.

II. The principle: the positive influence of family visits on detainees

10. Family visits are vital to the well-being of prisoners and an important part of any prison regime. Their positive influence on detainees make prisons easier places to manage, whilst the preservation of meaningful ties with the outside world greatly facilitates reintegration upon release. The spouses and children of detainees also have their own right to maintain family ties¹⁴.

11. The Commissioner challenged the system of prior authorisation for family visits. He stressed that it should also be made easier for prisoners to receive family visits. *“The system that applies in most Council of Europe member states is that there is a presumption of authorisation; in other words, visits are considered to be authorised but may be restricted by order of a judge or the authorities”*.¹⁵

12. Visit restrictions for persons still under judicial investigation are understandable¹⁶. However, the restrictions in question should be imposed for as long as they are strictly necessary for an adequate investigation¹⁷:

“Persons detained on remand may, in accordance with the law, have their rights to receive visitors and maintain contacts, even with other detained persons, significantly restricted.

It is to be noted that domestic legislation does not fix a maximum duration for these restrictions, such that there exists a risk of a de facto isolation, which, with the exception of contact with one's lawyer, can in certain instances continue for quite some time. I was led to believe, as a result of my discussions with the Minister of Justice, that there were plans to limit the maximum duration of these restrictions or to take their imposition and length into account when considering the imputation of the pre-trial detention period to the sentence itself.

¹¹ *Ferla v. Poland*, 20 May 2008, Application No. 55470/00, para 48; the judgment will become final in the circumstances set out in Article 44 para. 2 of the ECHR.

¹² Under Article 8 para 1 of the Commissioner's terms of reference.

¹³ All country reports can be found at : http://www.coe.int/t/commissioner/Activities/visits_en.asp

¹⁴ Report by the Commissioner for Human Rights, on his visit to the United-Kingdom, 4 – 12 November 2004, CommDH(2005)6, para. 130.

¹⁵ Report by the Commissioner for Human Rights on his visits to the Russian Federation ,15 to 30 July 2004 , 19 to 29 September 2004 , CommDH(2005)2, para. 153.

¹⁶ Report by the Commissioner for Human Rights on the effective respect for human rights in France following his visit from 5 to 21 September 2005, CommDH (2006)2, para. 87.

¹⁷ Report by the Commissioner for Human Rights on his visit to Norway, 2-4 April 2001, CommDH(2001)4, para. 2.1.

The potentially harmful psychological consequences of such isolation were confirmed to me during my visit to the Bredtveit prison, where I spoke with a woman who had suffered such restrictions for the last six weeks. During this period she had been denied the right to see her husband and her young children; her sole human contact being with her guards. It is, indeed, usual, when mental deterioration results, for the prison authorities to contact the police and to encourage them to speed up the processing of the case or, sometimes, to demand of the judicial authorities that the restrictions be relaxed. Nonetheless, it seems to me preferable, rather than reach this stage, to ensure that in each individual case the restrictions in questions are imposed only for so long as they are strictly necessary for an adequate investigation.”

III. The consequence: detention in locations not too far from the families

13. The rehabilitation of convicted persons should be the objective of prison policy. An effective rehabilitation policy must include efforts to preserve ties and contacts with the outside world whenever someone is imprisoned, and especially family ties. It is important that every means should be employed to ensure that people deprived of their liberty do not feel completely cut off from their family and friends (unless the interests of the investigation so require)¹⁸. Thus preference must be given to the serving of sentences at establishments offering the most facilities for attaining this target, and in this context, proximity to detainees’ families and places of origin can and must be a factor to be taken into account by the responsible authorities.

Extract from the report on the visit to France¹⁹:

“The first is to do everything possible to ensure that persons serving a final sentence are held in places close to the homes of their family and friends in order to help maintain links. Unfortunately, it would seem that this is not always one of the prison administration’s main objectives. During our visits to several establishments, we heard complaints about placement policy, which some people even described as arbitrary. For example, we heard that prisoners who had committed disciplinary offences were frequently transferred from one establishment to another. These transfers were described to us as disguised punishments. They have very harsh consequences for prisoners because they help to sever the already fragile links with their family and friends. Another problem mentioned to me arouses a great deal of concern. It is to do with the recent adoption of the so-called “Perben II” law, to which I have already referred. One of the measures provided for under this law is the setting up of interregional centres of competence. This means designating courts responsible for handling cases according to their specific nature. Cases are now grouped together and referred to the competent court. The risk in this situation is that prisoners will be sent far from their homes. Everything should be done, therefore, to safeguard prisoners’ rights. At the same time, it is clear that family links are likely to be further weakened if prisoners are taken far from their homes.”

¹⁸ Report the Commissioner for Human Rights on the effective respect for human rights in France, para. 107.

¹⁹ Report the Commissioner for Human Rights on the effective respect for human rights in France, paras 108-109.

Extract from the report on the visit to Azerbaijan²⁰:

“The possibility of receiving visits deserves particular attention. In Gobustan, prisoners are only allowed short-term visits four times a year and a long-term visit, once a year. The CPT had already recommended an increase in the number of visits in the 2004 report. The Commissioner was told that all the prisoners have visitors but due to the remoteness of the facility, the authorities should provide a mode of transport to ensure that the families are able to pay their periodic visits. These visits represent the only social contact with the outside world. The number of visits can increase upon good behaviour but the visits are still quite infrequent.”

Extract from the memorandum on the follow-up visit to Denmark²¹:

“The situation of Greenlanders detained in Denmark

Three years ago the Commissioner was concerned by the fact that Greenland had no institution capable of hosting prisoners who have committed serious offences and are in need of psychological treatment under the safe custody regime. As a result convicts from Greenland had to be held in Denmark, far away from their friends and family. The Commissioner recommended to provide the necessary infrastructure and resources in Greenland. His concerns were shared by a number of interlocutors in the Danish authorities and his recommendation basically accepted.

At the Herstedvester prison the delegation was informed of the special measures taken to try to compensate for the distance that separates the Greenlanders detained there from their homeland and their family and found that the living conditions offered to them were as good as could be under the given circumstances. The delegation was also informed that the Parliament would discuss the issue in October 2007 in order to find a solution to the difficulties faced in setting-up an adequate establishment in Greenland, namely the need for adequate funds and the lack of qualified professionals available in Greenland or willing to move there. There was, however, an issue of financial burden-sharing between the Danish and the Greenlandic authorities.

The Commissioner understands the serious difficulties to build a highly specialized institution with the necessary infrastructure and resources for criminals in need of psychological treatment in Greenland. However, he reaffirms his predecessor’s recommendation to set up such an institution. Therefore, he invites the Danish Government and, possibly, the authorities of Greenland to explore the possibility of setting incentives to attract professionals to Greenland and to find ways to allocate adequate funds for the building and the running of the institution.”

IV. The facilities provided for family visits

14. In light of the above-mentioned principles, the Commissioner has stressed that every effort should be made to ensure that prisoners are able to receive visits under the best possible conditions.

²⁰ Report the Commissioner for Human Rights on his visit to Azerbaijan, 3-7 September 2007, CommDH(2008)2, para. 50.

²¹ Memorandum to the Danish Government. Assessment of the progress made in implementing the 2004 recommendations of the Council of Europe Commissioner for Human Rights, CommDH(2007)11, paras 58-60.

Extract from the report on the visit to the United-Kingdom:

"[I] was struck by the fact that no provision is made in British prisons for private visits. All contact takes place in rooms typically full of other prisoners also receiving visits and under the supervision of prison staff. Whenever I raised this issue, however, I had the distinct impression of having touched upon a taboo, as though the possibility of a detainee spending a private hour with their partner, with all its likely consequences, was simply not to be contemplated. It seems to me that the benefits of such intimacy should outweigh any residual embarrassment. Relationships already under considerable strain might, as a result, be more easily maintained with the attendant benefits on resettlement, and the tensions of prisoners eased, making prison populations easier to manage. Such visits would, moreover, be equally beneficial to the maintenance of ties with children, for whom crowded rooms and the impossibility of quiet intimacy with their parent is particularly distressing.

This kind of visiting arrangement already exists elsewhere in Europe. In [Spain], for instance, prisoners who are denied home leave may receive one intimate visit of up to three hours per month in a private room out of the sight and hearing of staff. Certain Scandinavian countries and the Russian Federation offer similar arrangements. I am not sure whether a demonstrable human right is at issue here, but I do believe that good sense, and common humanity, plead very much in favour of intimate visits and I would strongly encourage their adoption in the UK."²²

Extract from the report on the visit to France:

"I should also like to draw the attention of the French authorities to the fact that France is lagging behind in the implementation of "family life units". These are areas within establishments for sentenced prisoners that resemble hotel rooms and enable families to be reunited for periods of a day or more. This particular way of organising visits, which enables spouses and children to preserve their private life despite the imprisonment of a family member, is very important and becoming increasingly widespread in most Council of Europe member states. In my opinion, it is a very good means of preserving families, preventing them from breaking up and encouraging the rehabilitation of prisoners, who will know that someone is waiting for them.

Furthermore, it is a further and by no means negligible step towards respect for human dignity. On my visit to Lannemezan prison, an establishment designed for prisoners serving long sentences, I was shocked to see the conditions in which the prisoners receive visits from their spouses, children or other family members. I saw a room divided into small compartments by pieces of cloth and by other makeshift means to allow a minimum of privacy to family members coming from all over France and unable to travel on a regular basis. These images unfortunately reflect the scant attention paid by the state to this important aspect of the lives of divided families."²³

15. Particular attention is paid to the situation of children of detainees²⁴ who should not be deprived of their right to maintain contact with their detained parent. The Commissioner welcomes the fact that women can keep their infants with them within the institution. The fact that women can stay in contact with their children is positive and represents a step forward towards reintegration, which is the

²² Paras 131-132.

²³ Paras 110-111.

²⁴ See also a very thorough study prepared by the Scotland's Commissioner for Children and Young People, "Not Seen. Not Heard. Not Guilty. The Rights and Status of the Children of Prisoners in Scotland, 7 February 2008, can be found at: http://www.sccyp.org.uk/admin/04policy/files/spo_064941Children%20of%20Prisoners%20Summary%2020080207.pdf

ultimate goal of the judicial system²⁵. As the Commissioner has stressed: *“Although prison is no place for a child to spend the first years of its life, it is also clear that it is precisely at this very young age that children most need their mothers. I believe that in such cases, if family circumstances do not allow for an alternative accepted by the mother and suitable for the child, it is better that the mother and baby/infant should stay together in the short term.”*²⁶

16. Another category of people who are particularly in need of preserving family ties are minors. The Commissioner is keen in monitoring the juvenile justice system and detention of minors and considers of paramount importance parents visits and overnight stay when necessary.²⁷ He also thinks that the conditions in detention centres for minors should not be “prison-like” and should allow for the enjoyment of a normal family life. In this respect, the Commissioner also notes that the European Prison Rules will be complemented by the European rules for juvenile offenders that the Committee of Ministers of the Council of Europe is expected to adopt in the course of 2008.

²⁵Report by the Commissioner for Human Rights on his visit to Ukraine, 10 – 17 December 2006 , CommDH (2007)15, para. 51; Report by the Commissioner for Human Rights on his visit to Armenia, 7 – 11 October 2007, CommDH(2008)4, para 73.

²⁶ Report by the Commissioner for Human Rights on his visit to Spain, 10 – 19 March 2005, CommDH(2005)8, para. 40.

²⁷ Report by the Commissioner for Human Rights on his visit to Ireland, 26-30 November 2007, CommDH(2008)9, para. 71.