

Ref: CommHR/MoF/sf 071-2024

Mr Jussi Halla-aho
Speaker of the Parliament of Finland

Mr Mauri Peltokangas
Chair of the Administrative Committee

Mr Heikki Vestman
Chair of the Constitutional Law Committee

Mr Kimmo Kiljunen
Chair of the Foreign Affairs Committee

Strasbourg, 11 June 2024

Dear Speaker, dear Committee Chairpersons,

My mandate is to foster the effective observance of human rights in the 46 member states of the Council of Europe. An important part of my work is to engage in dialogue with the governments and parliaments of member states, and to assist them in addressing possible human rights shortcomings in their laws and practices. In this context, I am writing to you about the draft Act on Temporary Measures to Combat Instrumentalised Migration, currently before the Parliament. Having already raised my concerns with the authorities, I wish to take the opportunity to continue that dialogue through this letter. My comments are with regard to the English translation of the draft Act that your government kindly shared with my Office.

I understand that the draft Act lays down provisions on the conditions under which the government could decide to restrict the reception of applications for international protection in an area along and in the proximity of Finland's border. This would be the case where it was known, or there were reasonable grounds to suspect, that a foreign state was seeking to exert influence on Finland by exploiting migrants, where those efforts were considered to seriously endanger the sovereignty or national security of Finland, and the measures were considered necessary, in order to safeguard against such endangerment (section 3 of the draft Act). Such measures, valid for up to one month at a time, would allow the relevant authorities to refuse entry to a migrant, and/or have them removed from the country, without being able to make an application for international protection.

Those removed would be guided to move to a place where applications for international protection are being received, and exceptions would be applied in limited circumstances, based on case-by-case assessments made by border guards, where this was necessary to safeguard the rights of a child, a person with disabilities, or another person in a particularly vulnerable position, or where it is evident that the person would face a real risk of being subjected to the death penalty, torture, or other inhuman and degrading treatment in the state from which they arrived (section 5). In situations of forcible entry into the country through violence, or where there is a large number of persons, there may be refusal of entry without any such case-by-case assessment for exceptional cases (section 6).

Human rights implications

I acknowledge the challenges presented by instrumentalisation of migration by other states. Such actions are to be condemned: they exploit vulnerable migrants, putting them in a situation of great precarity or even a humanitarian or human rights emergency, while placing potentially significant burdens on receiving states.

At the same time, I note that, according to the government's own analysis, the proposed law raises a number of significant human rights concerns, including with regard to the principle of non-refoulement, collective expulsion, and effective remedies, among others. The European Court of Human Rights (the Court) has made clear that the problems which states may encounter in managing migratory flows or

in the reception of asylum seekers cannot justify having recourse to practices which are not compatible with the European Convention on Human Rights (ECHR - see, for example, *Hirsi Jamaa and Others v. Italy* and *N.D. and N.T. v. Spain*). This is also reflected in Resolution 2404 (2021) of the Parliamentary Assembly of the Council of Europe on Instrumentalised migration pressure on the borders of Latvia, Lithuania and Poland with Belarus. As such, states can and must find solutions to these challenges that are fully aligned with their international and human rights obligations.

Prohibition of refoulement

The prohibition of refoulement, encompassed by Articles 2 (right to life) and 3 (prohibition of torture, inhuman or degrading treatment) ECHR, is absolute (see, for example, *Soering v. the UK*). It is not subject to limitations clauses (including in relation to national security) and cannot be derogated from, even in terms of an emergency threatening the life of a nation. This absolute prohibition also applies irrespective of the conduct of the people involved (*Chahal v. the UK*). This would clearly also include the act of crossing a border in an irregular manner. Ensuring an appropriate examination of any risks faced upon return is therefore a crucial safeguard to uphold this prohibition.

The safeguards under the draft Act, notably a case-by-case assessment of vulnerability, appear to me inadequate to prevent refoulement in all cases. There is a clear risk that those who are not immediately recognisable as a minor, as a person with a disability or as otherwise being particularly vulnerable, would be unable to benefit from this provision. Furthermore, it may be doubted whether border guards can have the competence and ability to make such a difficult assessment on the spot. It is also unclear how an assessment would be carried out by border guards as to whether it is “evident” that a person faces a real risk of being subjected to the death penalty, torture, or other treatment violating human dignity. It appears highly doubtful that this could be adequately assessed in the manner proposed. At any rate, this would leave at risk of refoulement those persons who may face violations of Articles 2 and 3 ECHR in Russia, but for whom this is not immediately “evident” in the border guards’ assessment.

I note that the draft Act’s provisions on guiding persons to move to a place where they can apply for asylum also do not provide an adequate safeguard against refoulement, since this would be preceded by a summary return. Such a return could amount to refoulement from the moment that the person involved is removed across the border. The Court has recognised that return to a third country where there are insufficient guarantees against denial of access to an adequate asylum procedure, protecting the returned person against onward refoulement to their country of origin, would be incompatible with Article 3 ECHR (*Ilias and Ahmed v. Hungary*). But other immediate risks could also arise, such as in the case of inhuman or degrading treatment at the hands of the authorities on the other side of the border, due to detention or reception conditions in the third country, or if those returned are left in an acute humanitarian emergency situation.

In view of the above, it is my assessment that issues of refoulement would clearly arise if the draft Act were to be passed and implemented as it is currently foreseen in the government proposal.

Prohibition of collective expulsion

I am concerned that the draft Act may also result in violations of the prohibition of collective expulsion under Article 4 of Protocol No. 4 ECHR. As a general principle, this prohibition requires that persons are accorded a genuine and effective opportunity to submit reasons against their return, and to have those individually and appropriately examined (*Khlaifia and Others v. Italy*). While the Court has allowed the forgoing of this in very specific situations (*N.D. and N.T. v. Spain*), this is subject to a number of conditions, which seem in principle impossible to meet in the situation at hand. For example, the Court requires that states ensure “genuine and effective access” to legal means of entry, including the possibility to claim asylum. Such an opportunity would be denied, however, if the measures under the draft Act encompassed large areas or even the entire land border, leaving only sea- and airports open for asylum applications. As these sea- and airports are practically impossible to reach for asylum seekers who find themselves at the land border on the Russian side, genuine and effective access would be illusory in such a case. At any rate, the Court recognises that persons making an unauthorised crossing may be able to present cogent reasons for not having made use of legal means of entry, which should be taken into consideration. A blanket application of summary returns (apart from some exceptions discussed above) under the draft Act would also make assessment of any such cogent reasons impossible. It should furthermore be considered, in my view, that situations of instrumentalisation provide a very specific context, where a third state may use misinformation, manipulation or even threats to direct asylum seekers and migrants to a Council of Europe member

state's border. In such a situation it must be questioned whether persons crossing irregularly have deliberately put themselves in this situation, or whether they arrive there due to the actions of the third country, and could therefore be seen as victims of exploitation. This further calls into question the appropriateness of applying the criteria set out in the case of *N.D. and N.T.*, which are predicated on the "culpable conduct" of individuals for their irregular crossing.

Even in cases where the proposed summary returns would not be in violation of the prohibition of collective expulsions, the Court has stressed that this must be without prejudice to the state's absolute non-refoulement obligations under Articles 2 and 3 ECHR (*N.D. and N.T. v. Spain*), which I have covered above. As such, in practice, a proper individual examination of the situation of persons found to have crossed the border irregularly will remain necessary, to ensure that the Finnish authorities do not violate their human rights obligations.

Effective remedies

Summary returns across the border, especially in combination with the lack of means to legally enter the country later, may also systematically deprive individuals of the possibility of accessing effective remedies, which is a right guaranteed under Article 13 ECHR. While the draft Act states that individuals should be provided with written confirmation of their expulsion, it may be practically impossible for them to access judicial proceedings in Finland to challenge this decision, including with relevant legal and linguistic assistance. In this respect, I also note that section 4 of the draft Act explicitly states that removal from the country cannot be appealed.

Necessity and national security

I note that the government proposal relies heavily on national security grounds. As indicated, such grounds can never be invoked to justify refoulement. However, as regards some other rights at stake, where the ground of national security might play a role in their limitation, I wish to underline the following. While member states are given a certain margin of appreciation with regard to the restriction of certain rights on grounds of national security, invocation of national security cannot be used as a *carte blanche*. I am concerned, in particular, that the exact nature of the national security threat, triggering the proposed measures within the draft Act, does not appear to be clearly defined. Nor does the precise threshold at which national security would be considered to be seriously endangered, or when other measures would be considered insufficient to safeguard it. It also appears unclear to what extent the reasoning and evidence behind these conclusions would be made available, in order to enable public and judicial scrutiny.

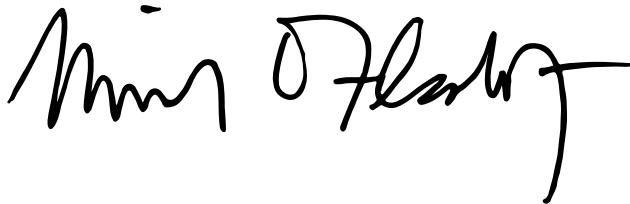
As the government proposal indicates, the availability of effective alternatives is a key consideration to determining the proportionality of a measure. While being cognisant of the work that Finland has already carried out in analysing alternatives to the temporary measures in the draft Act, I must urge a continued, concerted search for measures that are effective in safeguarding against instrumentalised migration, while also fully aligning with international human rights obligations. In this regard, I note that the Finnish authorities could simply take the practical measure of ensuring that persons found at the border are promptly transported across Finnish territory to a place where their situation can be appropriately assessed by staff with sufficient expertise, and in the presence of adequate legal and linguistic support, among other things. This would avoid the situation of authorities having to make difficult decisions in a potentially chaotic situation at the border, allow for the necessary human rights safeguards to be observed, and provide an opportunity to meet the humanitarian needs of those at the border, including in relation to any medical issues. I also point to the fact that UNHCR has, in a Press Release dated 22 May 2024, made important recommendations on alternative measures, including the strengthening of fair and efficient asylum procedures. More broadly, however, it is my view that it is a fallacy to assume that the relationship between human rights and national security is a zero-sum game. Rather, human rights-compliant national securities are the more effective ones.

I conclude by noting that this legislative initiative, if adopted, could be replicated by other states, including those with a less developed practice of upholding human rights. I therefore fear that it could set a destabilising precedent, at a time when the global asylum system is already under great pressure and subject to significant backlash, and weakening the very values which states, that seek to instrumentalise migration, wish to undermine.

In light of the foregoing, I respectfully ask members of the Parliament to refrain from adopting the draft Act, as tabled, and engage with national and international partners, on responding to the challenges of instrumentalisation of migrants by other states.

I would be grateful if you could ensure that all members of your respective committees and of the Parliament receive a copy of this letter. I stand ready to continue our constructive dialogue on this and other human rights issues in Finland.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Michael O'Flaherty". The signature is fluid and cursive, with a long horizontal stroke extending to the right from the end of the name.

Michael O'Flaherty