

20. Nov. 2008 11:54

INTER COM JURISTS 0041 229793801

N° 4610 P. 2



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19 November 2008

Dear Minister,

L69: proposal on changes to the Danish Aliens Act

The International Commission of Jurists (ICJ) wishes to provide its comments on the proposed amendments to the Danish Aliens Act (L69), and their compatibility with the international human rights obligations of Denmark. The ICJ welcomes this opportunity to contribute to the Danish debate on the amendments, and to the wider debate on issues of human rights, national security and immigration law. Given the very short deadline for comments on the amendments however, at this stage the ICJ is able to present only brief observations.

The proposed amendments would impose additional stringent controls, in particular requirements to report to police and measures of enforcement for assigned residence, for a non-national who is the subject of a deportation order but who cannot be deported for reasons of *non-refoulement*. Under the proposals¹ such persons, unless there were specific reasons otherwise, would be required to report to the police at specific times, so as to ensure that the police know where they are residing; and would be required to reside in a specific assigned place (in practice the Sandholm immigration centre).² The Danish Immigration Service must also impose sufficient controls to ensure that the non-national resides in the assigned place.³ The penalty for non-compliance with these requirements is increased from four months to one year.⁴

¹ §1.1, amending §34.3

² §1.3 (new section 42a, 8)

³ §1.4 (new §42.9)

⁴ §1.7

The ICJ emphasises the paramount importance of protecting the absolute and non-derogable right to *non-refoulement* to face a real risk of torture, cruel, inhuman or degrading treatment, or other serious violation of human rights.⁵ The ICJ appreciates the attempts being made by the Danish government to provide for those who cannot be deported for reasons of *non-refoulement*, in ways that ensure full respect for human rights, whilst also addressing any national security concerns that there may be in individual cases. The ICJ is concerned, however, that the amendments' tightening of controls on those who cannot be deported for reasons of *non-refoulement*, may be subject to insufficient safeguards to ensure respect for private and family life (Article 8 European Convention on Human Rights (ECHR), Article 17 International Covenant on Civil and Political Rights (ICCPR)) and freedom of movement (Article 2 Protocol 4 ECHR, Article 12 ICCPR).

The ICJ recalls that rights to respect for private and family life apply to all those present in the territory, irrespective of nationality or of their immigration status⁶ and that any interference with such rights – for example where the non-national subject to the restrictions is required to reside in an immigration centre, and his or her family reside in the community – must be prescribed by law, serve a legitimate aim and be necessary and proportionate to that aim. Rights to freedom of movement, although expressly applicable under the ICCPR to those “lawfully resident in the territory” have been authoritatively affirmed as applying to those against whom a deportation order has been made, but who cannot be expelled for reasons of *non-refoulement*.⁷ Although the lawfulness of their presence on the territory may be subject to certain restrictions imposed, such restrictions must comply with principles of prescription by law, and necessity and proportionality to a legitimate aim as established in Article 12.3 ICCPR⁸ and Article 2 Protocol 4 ECHR.⁹

Measures restricting residence and requiring regular reporting to police may be justified in certain circumstances to protect vital public interests including national security, public safety or public order, the prevention of crime, or the protection of health or morals or of the rights of others.¹⁰ However, the right to freedom of movement will be violated where insufficient reasons are provided for a restriction¹¹ or there is not sufficient evidence that the restriction is necessary and proportionate in the particular case concerned,¹² having regard to the public interest at stake, or where the restriction is imposed for a longer period than is necessary in the particular case.¹³

In light of these principles, the ICJ wishes to raise the following concerns with the amendments:

1. The terms of the amendments, which create presumptions that residency and reporting requirements be imposed, unless there are specific reasons not to impose them, do not sufficiently ensure that any interference with freedom of movement, as well as with rights to private and family life that may be affected by the restrictions, will be necessary and

⁵ See International Commission of Jurists, *Berlin Declaration on Counter-terrorism, Human Rights and the Rule of Law*, principle 10, *Legal Commentary to the ICJ Berlin Declaration*, pp.93-95.

⁶ Article 1 ECHR; Article 2.1 ICCPR

⁷ *Celepli v Sweden* Communication No.456/1991, 2 August 1994

⁸ *Celepli v Sweden* Communication No.456/1991, 2 August 1994; *Karker v France*, Communication No.883/1998, 30 October 2000.

⁹ *Labita v Italy*, App. No.26772/95, Judgment of 6 April 2000, para.195.

¹⁰ European Court of Human Rights: *Labita v Italy*, op cit, para.195; *Raimondo v Italy*, Human rights Committee: *Celepli v Sweden*

¹¹ *Ackla v Togo*. Com No 505/1992, 10 April 1996, para.10.

¹² *Labita v Italy*, op cit, para.196-197.

¹³ *Luordo v Italy*, App. No. 32190/96

proportionate in each particular case. They leave open the possibility that any individual who is the subject of a deportation order but who cannot be deported for reasons of *non-refoulement* will be subject to these restrictions, irrespective of whether or to what extent that person poses concerns of national security or public safety, or whether the measures could be justified as necessary for the prevention of crime. **The ICJ therefore recommends that, in order to best ensure that principles of necessity and proportionality are respected, the presumptions in §1.1 and §1.3 should be reversed to state that residency and reporting requirements will be imposed where they are considered by the relevant authorities, on the basis of evidence available to them, to be necessary for reasons of national security, public safety or the prevention of crime, or the protection of the rights and freedoms of others. Where a decision is taken to impose such restrictions, reasons for the decision should be provided to the individual concerned; this would facilitate judicial review of the decision. Furthermore, the individual should be given the opportunity to make representations disputing the need for the restrictions, or addressing the particular impact they will have on his or her private and family life.**

2. The ICJ is concerned that the amendments do not include adequate safeguards against imposition of excessive reporting or enforcement measures, which could impose disproportionate restrictions on the right to freedom of movement. Although the explanatory report states that reporting must be on a daily basis, the amendments themselves leave open the possibility that reporting could be required more frequently than once a day. The extent of the enforcement measures permissible under §1.4 is also unclear. Care must be taken to ensure that the cumulative impact of the measures, in particular over a long period, does not take on a punitive character or amount to deprivation of liberty.¹⁴ **The ICJ recommends that it should be specified on the face of the legislation that the requirement to report will be the minimum necessary to ensure that the individual concerned resides at the assigned place of residence.**
3. A further concern is the potentially long duration of the restrictions permitted by the amendments, given that in many cases the risks preventing *refoulement* will remain for the long term. The longer the duration of restrictions on freedom of movement, the more difficult they will be to justify as necessary and proportionate.¹⁵ Similarly, long-term restrictions will lead to increasingly significant interferences with family and private life. The Bill does not impose any time limit on the restrictions or make express provision for regular review by the police or Immigration Service, although applications may be made for judicial review. **The ICJ recommends that the legislation should be time-limited and should expressly provide for frequent and regular review of the necessity and proportionality of residency and reporting requirements by the immigration service and police. These reviews should take into account any change in the circumstances of the individuals concerned, as well as the increased impact of the restrictions over time on the private and family life rights of the individuals concerned and their families, and the individuals concerned should be afforded the opportunity to make representations in advance of the review.**

¹⁴ *Guzzardi v Italy*, App. No.7367/76, Judgment of 6 November 1980, para.95.

¹⁵ *Luordo v Italy*, App. No. 32190/96, where a residency requirement lasting 14 years was found by the European Court of Human Rights to violate Article 2 Protocol 4 ECHR. In *Van den Dungen v The Netherlands*, App. No.22838/93, the limited duration of a restriction on movement was a factor in establishing the proportionality of the restriction on freedom of movement.

The ICJ appreciates this opportunity to raise its concerns regarding the Bill, and would be happy to engage in further discussions on these issues, or to contribute further comments as the consideration of the Bill progresses.

Yours sincerely



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Senior Legal Advisor