

Finland - Supreme Administrative Court, 25 April 2013, KHO:2013:78

Country of Decision:

Finland

Country of Applicant:

Somalia

Date of Decision:

25-04-2013

Citation:

KHO:2013:78

Court Name:

Supreme Administrative Court

Keywords:Freedom of movement (right to)
Return**Relevant Legislative Provisions:**European Union Law

Headnote:

According to section 51(1) of the Aliens Act, a foreigner living in Finland without a residence document will be granted a temporary residence document in a situation where he/she cannot be refouled. In this case, it was considered whether a foreigner should be granted a residence document if he/she could voluntarily go back.

Facts:

The Immigration Service rejected A's application for international protection and a residence document on 2.7.2010 and decided to refoul A to Somalia (Somaliland). A appealed to the Helsinki Administrative Court which rejected the appeal on 28.10.2011. The Supreme Administrative Court did not grant leave to appeal. On 28.10.2011, A made a new application for international protection and applied for a residence document based on Section 51(1) of the Aliens

Act in order to prevent refoulment.

The Helsinki Police Force's Immigration Police made a statement to the Immigration Service on 21.11.2011 that A had not been refouled yet and that no asylum seeker who had been refused asylum had been refouled to Somaliland. The Police Force had no connections with Somaliland's authorities, nor did the police know whether the Somaliland authorities accept citizens who have been refouled or repatriated.

On 21.3.2012 the Immigration Service rejected A's renewal application for international protection and a residence document and decided to refoul him/her to Somalia (Somaliland).

According to section 51 of the Aliens Act, a temporary residence permit is granted to a foreigner staying in Finland if he/she cannot be refouled to his/her country of origin or country of habitual residence because of his/her temporary health problems or because it is not, in reality, possible to refoul him/her. According to a Government Bill on this section (HE 28/2003 vp), refoulment may be impossible because of lack of transport links, lack of travel documents or because the receiving authorities take a negative view to receiving the person, or for some other comparable reason.

According to the Immigration Service, the interpretation of section 51 of the Aliens Act in accordance with the Government Bill is not in accordance with the EU Returns Directive (Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals). Since the entry into force of the directive, voluntary return is the primary method of return.

If a foreigner who has been given a return decision which is enforceable by law has a chance of returning independently or through an IOM voluntary programme, he/she is not granted a residence document as per section 51 of the Aliens Act. A residence document is not granted even if the police cannot forcibly return him/her.

A appealed to the Helsinki Administrative Court. The Administrative Court rejected A's challenge to the decision of the Immigration Service of 21.3.2012.

The Administrative Court took the view that, notwithstanding that the Police Force would not return A, he/she had the opportunity to return to his/her country of origin independently or, for instance, through the IOM. Two people had returned to Somaliland through IOM by 31.7.2012. There was no evidence to suggest that the Appellant had in reality no chance of returning to his/her country of origin.

The Administrative Court took the view that A's refusal to return voluntarily was not a situation in which he/she should have been granted a temporary residence document as specified in section 51 of the Aliens Act. The Administrative Court took the view that A could be refouled to his/her country of origin, Somalia (Somaliland), and imposed a two year entry ban.

A appealed to the Supreme Administrative Court.

Decision & Reasoning:

The Supreme Administrative Court dismissed the appeal for international protection and a residence document based on compassionate grounds. The Supreme Administrative Court considered section 51 of the Aliens Act only in relation to the residence document. According to the legislative history, the purpose of section 51 of the Aliens Act is to prevent the creation of an intermediate status for a person in a situation where he/she cannot in fact be returned. A temporary residence document makes it possible to legalise an illegal foreigner's stay. The

Supreme Administrative Court took the view that section 51 of the Aliens Act embodies section 9 of the Constitution on freedom of movement in accordance with the appropriate treatment of a foreigner under Article 14(2) of the Returns Directive as specified in Section 5 of Aliens Act.

The Supreme Administrative Court took the view that the nature of a residence document as specified in Section 51 of Aliens Act is a temporary and time-limited. Its validity is dependent on the prevention of actual removal. It delays refoulement but does not have any effect on a negative judgment refusing international protection and a residence document. If the conditions for granting a time-limited residence permit still prevail, based on section 54(5) of the Aliens Act, after a two year stay a continuous residence permit is granted.

The Immigration Service took the view that after the entry into force of the Returns Directive, section 5 of the Aliens Act should be interpreted differently from previously. Article 288(3) of the Treaty on the Functioning of the European Union, leaves it to national authorities to determine the manner and methods by which it implements its obligations. According to the jurisprudence of the CJEU, the directive can be directly effective or through transposition. . In Finland, the Returns Directive is transposed unchanged by section 51 of the Aliens Act. However, with the entry into force, section 147a was added regarding voluntary return.

The Return Directive created common principles and procedures methods for the Union regarding return to their country of origin of third country nationals illegally staying in the country. It cannot be derived from the interpretation of the concept of return that third country nationals illegally staying in the country have obligations, such as an obligation to state-created voluntary return system to return to their country of origin.

As a basic principle of international law, a foreigner has no general right to settle in another country. It is illegal for a person denied asylum or a residence document to stay in the country and thus he/she should leave the country. He/she can be forcibly removed once the return decision has become enforceable. With the entry into force of the Return Directive, the only change was that, under section 147a, a foreigner can voluntarily return within a certain period of time without being refouled.

When legislating section 51 of the Aliens Act, the relevance of voluntary return was not assessed. With the entry into force of the Returns Directive, the relevance of voluntary return remained unclear in relation to section 51 of the Aliens Act. The wording of section 51 of the Aliens Act obliges the authorities to grant a temporary residence permit in a situation where in reality a forcible return is not possible.

Although the aim of the Returns Directive is to promote voluntary return as a preferred form of leaving the country, no importance should be given to it when assessing if a person can in reality be refouled. If a foreigner cannot be forcibly removed within a reasonable time, a temporary residence document should be granted regardless of the fact that he/she could voluntarily return to the said country.

By April 2013, the first decision relating to A's return (25.2.2011) had been enforceable for approximately 20 months. In reality, at no point had there been any attempts to forcibly return A. In a statement to the Immigration Service dated 21.12.2011, the Police stated that there had been no refoulements to Somalia (Somaliland). The above shows that in reality A's forcible return had not been possible.

Outcome:

The Supreme Administrative Court overturned the decisions of the Immigration Service and the Administrative Court and returned the case to the Immigration Service for review. The Supreme Administrative Court took the view that A should be granted a temporary residence document until such time that a forcible return is possible in reality.

Attachment(s):

 [KHO 2013 78.pdf](#)[1]

Other sources cited:

Cooperation Agreement between the Somaliland Ministry of Resettlement, Rehabilitation and Reintegration and the Immigration Service on voluntary returns (25.1.2012)

Government Bill to the Parliament on the Aliens Act and some other acts relating to it (28/2003 vp)

National / Other Legislative Provisions:

[TFEU - Art 288](#) [2]

[Finland - Aliens Act - Section 5](#) [3]

[Finland - Aliens Act - Section 33](#) [4]

[Finland - Aliens Act - Section 51](#) [5]

[Finland - Aliens Act - Section 54](#) [6]

[Finland - Aliens Act - Section 147a](#) [7]

[Finland - Aliens Act - Section 151](#) [8]

[Finland - Aliens Act - Section 196](#) [9]

[Finland - Aliens Act - Section 200](#) [10]

[Finland - Aliens Act - Section 201](#) [11]

[Finland - Constitution - Section 9](#) [12]

Links:

[1] <https://www.asylumlawdatabase.eu/sites/default/files/aldfiles/KHO%202013%2078.pdf>

[2] <https://www.asylumlawdatabase.eu/en/taxonomy/term/2463>

[3] <https://www.asylumlawdatabase.eu/en/taxonomy/term/7928>

[4] <https://www.asylumlawdatabase.eu/en/taxonomy/term/7929>

[5] <https://www.asylumlawdatabase.eu/en/taxonomy/term/7930>

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[7] <https://www.asylumlawdatabase.eu/en/taxonomy/term/7932>

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