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INFRINGEMENT OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS BY BELGIUM

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The judgment in the case of Conka v. Belgium of 5 February 2002 by the European Court of Human Rights in Strasbourg whereby Belgium was founded guilty of infringing the European Convention on Human Rights, has much wider implications than one might think on a first reading.

This is not simply a condemnation of one member state (Belgium in this case), in isolation. Rather it is a message to all EU member states as well as the other signatories of the European Convention on Human Rights, that expulsion practices that are *tantamount* to *refoulement* are absolutely inadmissible. The ruling also calls upon European states to give deeper thought to the way in which they implement asylum procedures.

Principal facts of the Judgement Èonka v. Belgium (no. 51564/99)

The applicants, Ján Èonka and Mária Èonková and their children, Nad'a Èonková and Nikola Èonková, are Slovakian nationals of Romany origin.

In November 1998, they left Slovakia for Belgium, where they requested political asylum on the ground that they had been violently assaulted on several occasions by skinheads in Slovakia. On 18 June 1999, the Commissioner-General for Refugees and Stateless Persons upheld a decision of the Minister of the Interior declaring their applications for asylum inadmissible and the applicants were required to leave the territory within five days.

On 3 August 1999, the applicants lodged applications with the *Conseil d'État* for judicial review of the decision of 18 June 1999, and for a stay of execution under the ordinary procedure. They also applied for legal aid.

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On 23 September 1999, the *Conseil d'État* dismissed the applications for legal aid on the ground that they had not been accompanied by the requisite certificates and invited the applicants to pay the court fees within fifteen days.

In September 1999, the Ghent police sent a notice to a number of Slovakian Romany families, including the applicants, requiring them to report to the police station on 1 October 1999. The notice stated that their attendance was required to enable the files concerning their applications for asylum to be completed.

At the police station the applicants were served with a fresh order to leave the territory and a decision for their removal to Slovakia and their detention for that purpose. A Slovakian-speaking interpreter was present when they were arrested.

They were then taken with other Romany families to the Steenokkerzeel Closed Transit Centre, near Brussels. On 5 October 1999, they and some 70 other refugees of Romany origin whose requests for asylum had also been turned down were taken to Melsbroek military airport, and put on a plane for Slovakia.

The application was lodged with the Court on 4 October 1999, and declared partly admissible on 13 March 2001.

Relying on Articles 5 and 13 of the Convention and Article 4 of Protocol No. 4, the applicants complained, in particular, about the circumstances of their arrest and expulsion to Slovakia.

Decision of the Court

Following the highly criticised collective expulsion of the Slovak gypsies in October 1999, by its decision of 5 February 2002, in the case Conka v. Belgium, the European Court of Human Rights in Strasbourg condemned the Belgian state for:

- Arrests of persons carried out by abusive and fraudulent methods, even if these persons were in an irregular situation of stay (contrary to Article 5 of the European Convention of Human Rights)
- The de facto lack of access to an appeal mechanism in the Appeals Chamber against the decision of detention (contrariety in Article 5 § 1)

- The collective character of expulsion (contrary to Article 4 of the additional Protocol n° 4)
- The absence of the possibility of effective recourse in front of the *Conseil d'État*, including the procedure of suspension in extreme urgency, resulting from the absence of a legally envisaged suspensive effect. This is contrary to the requirements of Article 13 of the European Convention on Human Rights which calls for such guarantees, and not simply the goodwill or practical arrangements (refer to Article 13 jointly with Article 4 of Protocol n°4). The Court points out that Article 13 compels the States to organise their jurisdictions so as to enable them to fulfil the requirements of this provision.

The European Court of Human Rights in its judgment conferred in writing held:

unanimously, that there had been a violation of Article 5 § 1 (right to liberty and security) of the European Convention on Human Rights;

unanimously, that there had been a violation of Article 5 § 4 (right to take proceedings by which lawfulness of detention shall be decided);

by four votes to three, that there had been a violation of Article 4 of Protocol No. 4 (prohibition of the collective expulsion of aliens);

by four votes to three, that there had been a violation of Article 13 taken together with Article 4 of Protocol No. 4.

Under Article 41 (just satisfaction) of the Convention, the Court awarded the applicants 10,000 € for non-pecuniary damage and 9,000 € for legal costs and expenses.

Explanation of the Court's Decision

Article 5 § 1

Although the Court by no means excluded the legitimacy of the police using ploys in order, for instance, to counter criminal activities more effectively, acts in which the authorities sought to gain the trust of asylum-seekers with a view to arresting and subsequently deporting them may be found to contravene the general principles stated or implicit in the Convention.

In that regard, there was every reason to consider that while the wording of the notice was "unfortunate", it had not been the result of inadvertence; on the contrary, it had been deliberately chosen to secure the compliance of the largest possible number of recipients. It followed that, even as regards aliens who were in breach of the immigration rules, a conscious decision by the authorities to facilitate or improve the effectiveness of a planned operation for the expulsion of aliens by misleading them about the purpose of a notice so as to make it easier to deprive them of their liberty was not compatible with Article 5. Consequently, there had been a violation of Article 5 § 1.

Article 5 § 2

The Court observed that on their arrival at the police station the applicants had been informed of the reasons for their arrest and of the available remedies. A Slovakian-speaking interpreter had also been present. Even though those measures by themselves were not in practice sufficient to allow the applicants to exercise certain remedies, the information thus furnished to them nonetheless satisfied the requirements of Article 5 § 2. Consequently, there had been no violation of that provision.

Article 5 § 4

The Court identified a number of factors that undoubtedly had made an appeal to the committals division less accessible. These included the fact that the information on the available remedies handed to the applicants on their arrival at the police station had been printed in tiny characters, in a language they did not understand. Only one interpreter had been available to assist the large number of Romany families who attended the police station in understanding the verbal and written communications addressed to them. And although he had been present at the police station, the interpreter had not stayed with them at the closed centre. In those circumstances, the applicants had undoubtedly had little prospect of being able to contact a lawyer from the police station with the help of the interpreter and, although they could have contacted a lawyer by telephone from the closed centre, they would no longer have been able to call upon the interpreter’s services; despite those difficulties, the authorities had not offered any form of legal assistance at either the police station or the centre.

Furthermore – and this factor was decisive in the eyes of the Court – the applicants' lawyer had only been informed of the events taking place and of his clients' situation at 10.30 p.m. on Friday, 1 October 1999, such that any appeal to the committals division would have been pointless because, had he lodged an appeal with the division on 4 October, the case could not have been heard until 6 October, one day after the applicants' expulsion. Thus, the applicants' lawyer had been unable to lodge an appeal with the committals division. Consequently, there had been a violation of Article 5 § 4.

Article 4 of Protocol No. 4

The Court noted that the detention and deportation orders had been issued to enforce an order to leave the territory that had been made solely on the basis of section 7, paragraph 1, (2) of the Aliens Act, and the only reference to the personal circumstances of the applicants was to the fact that their stay in Belgium had exceeded three months. In particular, the document made no reference to their application for asylum or to the decisions on that issue. In those circumstances and in view of the large number of persons of the same origin who had suffered the same fate as the applicants, the Court considered that the procedure followed did not enable it to eliminate all doubt that the expulsion might have been collective.

That doubt was reinforced by a series of factors: firstly, prior to the applicants' deportation, the political authorities concerned had announced that there would be operations of that kind and given instructions to the relevant authorities for their implementation; secondly, all the aliens concerned had been required to report to the police station at the same time; thirdly, the orders served on them requiring them to leave the territory and for their arrest had been couched in identical terms; fourthly, it had been very difficult for the aliens to contact a lawyer; lastly, the asylum procedure had not been completed.

In short, at no stage in the period between the service of the notice on the aliens to report to the police station and their expulsion had the procedure afforded sufficient guarantees demonstrating that the personal circumstances of each of those concerned had been genuinely and individually taken into account. In conclusion, there had been a violation of Article 4 of Protocol No 4.

Article 13

In the instant case, the *Conseil d'État* had been called upon to examine the merits of the applicants' complaints in their application for judicial review. Having regard to the time which the examination of the case would take and the fact that they were under threat of expulsion, the applicants had also made an application for a stay of execution under the ordinary procedure, although the Government said that that procedure was ill-suited to the circumstances of the case. They considered that the applicants should have used the extremely urgent procedure.

The Court was bound to observe, however, that an application for a stay of execution under the ordinary procedure was one of the remedies that, according to the document setting out the Commissioner-General's decision of 18 June 1999, had been available to the applicants to challenge that decision. As, according to that decision, the applicants had had only five days in which to leave the national territory, an application for a stay under the ordinary procedure did not of itself have suspensive effect and the *Conseil d'État* had 45 days in which to decide such applications, the mere fact that that application had been mentioned as an available remedy had, to say the least, been liable to confuse the applicants.

An application for a stay of execution under the extremely urgent procedure was not suspensive either. In that connection, the Court pointed out that the requirements of Article 13, and of the other provisions of the Convention, took the form of a guarantee and not of a mere statement of intent or a practical arrangement. However, it appeared that the authorities were not required to defer execution of the deportation order while an application under the extremely urgent procedure was pending, not even for a minimum reasonable period to enable the *Conseil d'État* to decide the application. Further, the onus was in practice on the *Conseil d'État* to ascertain the authorities' intentions regarding the proposed expulsions and to act accordingly, but there did not appear to be any obligation on it to do so. Lastly, it was merely on the basis of internal directions that the registrar of the *Conseil d'État*, acting on the instructions of a judge, contacted the authorities for that purpose, and there was no indication of what the consequences might be should he fail to do so. Ultimately, the alien

had no guarantee that the *Conseil d'État* and the authorities would comply in every case with that practice, that the *Conseil d'État* would deliver its decision, or even hear the case, before his expulsion, or that the authorities would allow a minimum reasonable period of grace. Each of those factors made the implementation of the remedy too uncertain to enable the requirements of Article 13 to be satisfied. In conclusion, the applicants had not had a remedy available that satisfied the requirements of Article 13 to air their complaint under Article 4 of Protocol No. 4. Accordingly, there had been a violation of Article 13 of the Convention.

The consequences of this firm judgment must be drawn in a constructive direction:

- At the administrative level, it is prohibited to resort to fraudulent methods to carry out expulsion in a collective manner of persons in an irregular situation of stay. As reflected in the opinion of Judge Velaers: " *these people were not criminals (...) the action of the police force of Ghent was not within the framework of a penal mandate, but well within the framework of an administrative action of forced expulsion (...) In a State of rights, illegal persons are not without-rights. They must be able to trust the communications of the administrative authorities ...*"
- At the legislative level, there is a need for the improvement of the effectiveness of the recourse against an expulsion decision. To be effective this recourse must bear a legally recognised suspensive effect, so that the administration is juridically obliged to await the decision of the *Conseil d'État* before proceeding with the possible expulsion.

By way of conclusion *…*

A modification of the Belgian legislation is called for, so that it conforms to the international human rights obligations as well as the values set out in the Tampere Presidency Conclusions and the Charter of Fundamental Rights of the European Union. The introduction of a method of appeal bearing a suspensive effect has been part of the government's work programme underway to reform the current asylum procedure. The judgment by the Court of Human Rights calls

for a strong and democratic response by the Belgian State and other signatories of the European Convention on Human Rights.

It is of the utmost importance that the current EU member states respect the Human Rights Conventions and the values set out in Tampere and the above-mentioned Charter as the current EU member states should set the example to the candidate countries in the forthcoming enlargement. Respect of human rights conventions and guidelines is an explicit prerequisite for candidate countries to be eligible for the accession to the European Union.

ABOUT THE CEPS-SITRA NETWORK

CEPS, with financial assistance of the Finnish SITRA Foundation, embarked at the end of 2000 on a programme to examine the impact of Justice and Home Affairs acquis on an enlarged European Union, the implications for the candidate countries and for the states with which they share borders. **The aim of this programme is to help establish a better balance between civil liberties and security in an enlarged Europe**.

This project will lead to a series of policy recommendations that will promote cooperation in EU JHA in the context of an enlarged Europe as well as institutional developments for the medium- to long-term in areas such as a European Public Prosecutors Office, re-shaping Europol and a developed system of policing the external frontier (Euro Border Guard). These must be made within a balanced framework. **There are two key issues**:

First of all, to prevent the distortion of the agenda by "events" – some items are being accelerated and other marginalised. This risks upsetting the balance, carefully crafted by the Finnish Presidency, between freedom, security and justice. The current 'threat' is that security issues, at the expense of the others, will predominate after the catastrophic events of 11th September. These have resulted in a formidable political shock, which served as a catalyst to promote certain initiatives on the political agenda, such as the European arrest warrant, and a common definition of terrorism. The monitoring of items, which could be marginalised and the nature of the institutional/political blockages that could distort the Tampere agenda, is our priority.

Secondly, how to look beyond the Tampere agenda, both in terms of providing a flexible approach during the period of completion of the Tampere programme as well as what should come afterwards. Much detail remains to be filled in about rigid items on the Tampere agenda and CEPS will continue to work in three very important areas:

- Arrangements for managing and policing the external frontier
- Judicial co-operation leading to the development of a European Public Prosecutor
- Strengthening of Europol, particularly in the field of serious trans-frontier violence and moves towards a more federalised policing capacity

The CEPS-SITRA programme brings together a multi-disciplinary network of 20 experts drawn from EU member states, applicant countries as well as neighbouring states: the European University Institute in Florence, the Stefan Batory Foundation (Warsaw), European Academy of Law (ERA Trier), Academy of Sciences (Moscow), London School of Economics, International Office of Migration (Helsinki), Fondation Nationale des Sciences Politiques (CERI) in France, Universities of Budapest, Université Catholique de Louvain-la-Neuve, University of Lisbon (Autonoma), University of Nijmegen, University of Burgos, CEIFO in Stockholm, University of Tilberg and University of Vilnius, as well as members with practical judicial and legislative backgrounds.