Of citizen's rights and wrongs of the state

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“A Human Rights based consciousness needs to supersede legal technocracy to avoid the wrongs of deporting family members.”

If grandmother Eveline Fadayel’s deportation goes ahead as planned, Saturday 13 June will be a shameful day for Finland: shameful because Finland will present itself as failing to act on its Human Rights obligations by virtue of blind adherence to the letter of the law.

Intended amendments to the Aliens’ Act to allow elderly family members such as Fadayel and Russian grandmother Irina Antonova to stay in Finland with their families on humanitarian grounds have been delayed due to unspecified technocratic reasons. In consequence the Police, on the principle of ‘equal treatment before the law’, will expedite the court’s decision and see through deportation of both women within the next two weeks. There seems no room for Human Rights based discretion to delay, suspend or challenge the order. So, in the name of the law alone but against the better interest of the social good, two elderly people will be torn from their families and homes and forcibly deported. It is something that no-one, not even the government, wants to see happen. It may be legal but it is clearly not right.

But does it need to be the case? Finland ratified the Council of Europe’s Convention for the Protection of Human Rights twenty years ago on 10 May 1990. It entered into force the same day. Article 8 of those Convention Rights secures the right to respect for family life. To quote the right in full for the sake of clarity: Everyone has the right to respect for his private and family life, his home and his correspondence. Where is Finland’s respect for this right in the case of Eveline Fadayel? It seems somehow eclipsed by a fixation on the law itself.

In a democracy, all actions rightly require a basis in law. Yet Article 8 qualifies the fundamental right to family and home by making it quite clear that it can only be interfered with by public authorities under very strict circumstances, none of which conceivably apply in the cases of Fadayel or Antonova. Article 8’s qualifying statement to the basic right opens by declaring: There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law... This is the ‘basis in law’ principle for all public actions that would otherwise interfere with a citizen’s European Convention Rights.

The Police will, of course, be within the law to carry out deportation on the order of the court, just as the court decision on behalf of the immigration authorities was undoubtedly made in accordance with the strict letter of the law. But it is not enough for the actions of the authorities to simply be lawful when it comes to engaging Human Rights. As a High Contracting Party, a country’s obligations to the Convention Rights are not removed simply because its actions that interfere with those rights are technically lawful. There is more to consider before it can act, namely the principle of ‘necessity’ for reasons further specified in the article’s qualifying statement, which continues:
... and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or the protection of the rights and freedoms of others.

These are known as ‘legitimating reasons’ by which a public authority can properly ‘engage’ a Convention Right without breaching it. But where in that list of legitimating reasons is elderly grandmother Eveline Fadayel? How were any of these issues considered by the immigration authorities or the courts as the ‘necessary’ purpose of making their lawful order for her to leave the country? For by obvious implication it means forcing her to leave her family and home here in Finland and therefore a clear failure to respect her rights under Article 8 and breach of it as a ratified Convention Right. I am not aware of any report in the media discussion about either of the grandmothers in question posing any such threats. All we have is a technical basis in law but no legitimate reason to interfere with right to family.

The Police claim the principle of equality before the law. Quite. By international law, the Convention Right to family and home under Article 8 applies equally to all persons under Finland’s jurisdiction (by virtue of Article 1), including Eveline Fadayel & Irina Antonova, not to mention their children and grandchildren. So why is compliance with the principles and detail of the European Convention on Human Rights not being met with the same rigor and zeal as the law’s technical application? Surely there is no need to wait for amendment to immigration law. One only has to stand by the Convention Rights already signed to, ratified and in force for the last 20 years. Sorry to say it, but it would seem that compliance to European Convention Rights is not at the forefront of legal thinking in Finland.

Deportation of an elderly woman to a far away country beyond reach of her children, grandchildren and what has become her only home represents a severe interference with Article 8. Regardless of legal technicalities and arguments about having to obey legal orders, it breaches a fundamental right. So why do the Police, at their highest level, not have discretion to simply refuse to carry it out on the humanitarian grounds clearly laid down in the Convention, or at least suspend acting on it until the matter is resolved? Surely the Police, as the public authority acting on behalf of the state, have an equal if not overriding obligation toward the Convention Rights the state has signed to? For in practice, who actually protects the individual’s fundamental rights against those institutions charged with enforcing the law if not the law enforcers themselves? The Convention Rights are already there and have been in force in Finland for over 20 years. Surely one does not have to wait for changes in the law to uphold them when the case presents itself, otherwise they are utterly meaningless.

Reading of Fadayel’s case on Monday 24th May moved me to write along these lines to the Helsingin Sanomat editorial the next day. At the time of revising the article for Helsinki Times (Friday 28th) I am yet to hear if HS will publish it. This article itself will only appear on Thursday 3rd June. Meanwhile Fadayel’s deportation remains set for ten days hence on June 13th. I also wrote to Mr. Eero Lamberg, the lawyer acting for Fadayel, asking if an Article 8 based appeal has been considered. On Thursday I posted these same considerations to the National Police Commissioner and Minister Astrid Thors. One can only wait now.
But surely the police, in a democratic society, need to be able to exercise operational discretion based on the ethical framework provided by the Convention Rights. At the very least, under their highest authority, they could insist that the court demonstrate how a controversial order complies with the Convention Rights it engages and refuse to act until satisfied it does. That would be the ‘ingraining of democracy into policing’ that is often spoken of around Europe’s police. A focus on changes to immigration law simply misses the point for these deportation cases. For the Convention’s test question of ‘necessity’ for any interference to have ‘legitimate purpose’ regardless of ‘basis in law’ would still remain.

In a democratic society, the Police are the last stop of state action. Without them, nothing happens to the citizen by force. Finland, under the European Convention, has secured the basic rights and freedoms of individuals under its jurisdiction equally, whether migrant status or not. So if we want those rights to be actively protected the Police themselves need discretion to act as the last line of their defence before dutifully enforcing laws that would otherwise trample over them. This applies as much to Eveline Fadayel and her right to family and home as it does to anyone else living in Finland. Why deport someone simply because the law says you can? Human Rights based discretion is surely the better part of democratic law enforcement and democratic policing. All it requires is Human Rights based consciousness in order to make it happen.

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