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1 COMPLAINTS

Since 7 June 2019, the Office of the Chancellor of Justice has received several complaints concerning women and children in the Al Hol prison camp in Syria who are Finnish citizens or who otherwise have or would have the right to reside in Finland. In some of the complaints, the actions of the Finnish government and/or Prime Minister Antti Rinne, Minister for Foreign Affairs Pekka Haavisto and Minister of the Interior Maria Ohisalo are criticised because they are considered not to have taken actions to repatriate the above-mentioned individuals, as required by Finnish legislation, international obligations, that are binding on Finland, and the Consular Services Act. In some of the complaints in this category, the Chancellor of Justice is requested to take actions regarding this matter (first complaint category). In addition, in some of the complaints belonging to this category, a public official of the Ministry for Foreign Affairs was criticised for not having provided “decisions on the matter” when asked to do so.

Furthermore, in some of the complaints, it is stated that the President of the Republic, Government or the above-mentioned ministers and Members of Parliament would have, in this connection, protected terrorists and that the people in the camp should not be allowed to enter Finland in order to ensure internal safety (second complaint category).

On 2 August, the Parliamentary Ombudsman has transferred several complaints concerning this particular matter to the Office of the Chancellor of Justice for processing. The Ombudsman is processing one complaint related to the same issue.

2 OBTAINING INFORMATION

The Office of the Chancellor of Justice has obtained more detailed information on the situation from the Ministry for Foreign Affairs, Ministry of the Interior and the Finnish Security Intelligence Service. In addition, a report to the Parliamentary Ombudsman concerning the above-mentioned matter, dated 18 September 2019, has been available.

3 DECISION

3.1 Limiting the processing of complaints

The claims presented in the complaints belonging to the second complaint category had not been specified at all, and there are also otherwise no grounds to suspect such conduct in the case of those under my supervisory authority. Furthermore, the conduct of Members of Parliament is not within the scope of my supervisory authority. These complaints could not result in any actions by me. Moreover, I do not investigate the complaint belonging to the first complaint category for those parts that criticise a public official of the Ministry for Foreign Affairs for not providing decisions regarding a matter as requested. For this part, the complaint is so unspecified that it could not be investigated.

By contrast, in the first complaint category, it is demanded that the Government take actions in order to repatriate the women and children in the camp and/or the Government or ministers are criticised for not taking such actions. In some complaints, the specific demand was that negotiations be started with the Syrian Democratic Forces (SDF) supervising the camp and repatriation flights be organised. In this respect, the question is whether the Government and its ministers should have taken the actions demanded in the complaints. Regarding this, I state the following:

3.2 Situation in Syria

Based on the available information, a few dozen women and children who are Finnish citizens or who have earlier resided in Finland based on a residence permit are currently in the camp or otherwise in the area. The situation is evolving in this regard as well, in addition to which it is difficult to verify identities. Based on the information that was obtained, the circumstances in the camp are extremely poor and pose a threat to the health and possibly even the life of those currently in the camp. For example, according to the bulletin published by UNICEF on 19 July 2019, the humanitarian situation is very poor, and for many children, the situation is graver because they have been abused or forced to fight and engage in extreme violence (<https://www.unicef.org/press-releases/unwanted-exploited-and-abused-tens-thousands-children-al-hol-camp-and-several-parts>). According to the information received by telephone from the Ministry for Foreign Affairs on 9 August 2019, the circumstances in the camp would be partly improving. The Médecins sans Frontières organisation has also, on 30 September 2019, released information on the violence occurring in the camp (<https://www.msf.org/women-treated-gunshot-wounds-amidst-violence-and-unrest-al-hol-camp-syria>).

Furthermore, regarding this matter, there are no indications that there are any parties who would in practice be capable of enforcing the rights of a child, such as those set out in the UN Convention on the Rights of the Child, or that a functioning child welfare system would even exist in the area.

3.3 The capability of Finnish authorities to take actions in the area and information on the situation of some other countries

According to the appendix to the decree of the President of the Republic concerning the locations of Finland's foreign representation and the organising of consular services, the consular services in Syria are provided by Finland's embassy in Turkey.

Based on the information that was received, Finland's mission cannot provide the usual consular services in the area due to the situation prevailing there. According to the travel advice bulletin concerning Syria (22 March 2019), the country suffers from severe acts of violence, and the bulletin states that people in the area should leave immediately. Furthermore, the bulletin states that the Finnish employees of the embassy of Finland in Damascus have left the country. The Ministry for Foreign Affairs processes any entry and visa matters concerning Syria in the embassy of Finland in Ankara. The embassy of Finland is not capable of providing consular services to people in Syria or assistance should there be a need to organise evacuation. The recommendation to leave the country was first stated in a travel advice bulletin in July 2011. Starting from January 2012, it has been stated that the embassy has limited capability to provide consular services or to assist people leave the country. In January 2013, it was stated that the embassy is not capable to assist in case there would be a need to organise evacuation. In February 2014, it was also stated that no other consular services can be provided to people residing in Syria.

The camp is maintained by the Kurdish Government, even though the camp is located in Syrian territory. For this reason, Finnish authorities do not have access to the diplomatic channels usually available in relation to another country. According to information in the media, some countries have repatriated at least orphans from the camp. There are also international organisations operating in the area.

In July, a court in Germany (Verwaltungsgericht Berlin 10 July 2019), made a decision concerning a family, according to which German authorities must initiate the checking of the identities of the mother and children, provide travel documents and, provided that their identities are verified, bring them to Germany. According to the decision, it is not impossible to bring people back and, in relation to this, cooperation with the organisations operating in the area is mentioned.

In April 2019, the highest administrative court in France (Conseil d'Etat) deemed that the consideration of repatriation requests is not under the authority of the court. The decision dated 23 April 2019 states that the requests mean that the state would get involved in the matter with foreign authorities in foreign territory in order to arrange its citizens to be returned to France or that it would carry out measures to ensure their return from an area that is not within the scope of the sovereignty of France. The requested actions, which cannot be carried out merely by providing travel documents, would require negotiations to be started with foreign authorities or interventions in a foreign territory. According to the court, it is not possible to separate these from the management of the international relationships of France. For this reason, the court was unable to consider the matter.

Based on the available information, the Government and the authorities under it have, for a long time already, been investigating the possible actions and methods regarding the matter, and they will continue to do so. To my knowledge, the situation is constantly changing in this respect as well. Concerning this, any detailed information is deemed confidential information,

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as set out in section 24, subsection 1, paragraph 2 of the Act on the Openness of Government Activities.

3.3 Key provisions

3.3.1 Constitution of Finland

Under section 2, subsection 3 of the Constitution of Finland, the exercise of public powers shall be based on an Act. In all public activity, the law shall be strictly observed.

Under section 6, subsection 3 of the Constitution of Finland, children shall be treated equally and as individuals and they shall be allowed to influence matters pertaining to themselves to a degree corresponding to their level of development.

Under section 7, subsection 1 of the Constitution, everyone has the right to life, personal liberty, integrity and security.

Under section 9, subsection 3 of the Constitution, Finnish citizens shall not be prevented from entering Finland or deported or extradited or transferred from Finland to another country against their will. However, it may be laid down by an Act that due to a criminal act, for the purpose of legal proceedings, or in order to enforce a decision concerning the custody or care of a child, a Finnish citizen can be extradited or transferred to a country in which his or her human rights and legal protection are guaranteed.

Section 10, subsection 1 of the Constitution guarantees private life, honour and the sanctity of the home for everyone. Detailed provisions on the protection of personal data are laid down by an Act.

Under section 22 of the Constitution of Finland, public authorities shall guarantee the observance of basic rights and human rights.

According to section 108, subsection 1 of the Constitution of Finland, it is the duty of the Chancellor of Justice to oversee the lawfulness of the official acts of the Government and the President of the Republic. The Chancellor of Justice must also ensure that the courts of law, other authorities and civil servants, public employees and other persons, when performing a public task, obey the law and fulfil their obligations. In the performance of his or her duties, the Chancellor of Justice monitors the implementation of basic rights and liberties and human rights.

3.3.2 European Convention on Human Rights (ECHR) and its Additional Protocol 4

Under Article 1 of the ECHR, the high contracting parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of the Convention.

Under Article 2, paragraph 1 of the ECHR, everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

Under Article 8 of the ECHR, everyone has the right to respect for his private and family life, his home and his correspondence (paragraph 1).

There shall be no interference from a public authority with the exercise of this right except such as is in accordance with the law 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 for the protection of the rights and freedoms of others (paragraph 2).

Under Article 3 of the Additional Protocol 4 of the ECHR, no one shall be deprived of the right to enter the territory of the state of which he is a national.

3.3.3 Convention on the Rights of the Child

Under Article 2, paragraph 1 of the Convention, States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his or her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.

Under Article 3 of the Convention, in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration (paragraph 1).

States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her. To this end, States Parties shall take all appropriate legislative and administrative measures (paragraph 2).

Under Article 6 of the Convention, States Parties recognize that every child has the inherent right to life (paragraph 1).

States Parties shall ensure to the maximum extent possible the survival and development of the child (paragraph 2).

Under Article 9 of the Convention, States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child (paragraph 1).

Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child's place of residence.

In any proceedings pursuant to paragraph 1, all interested parties shall be given an opportunity to participate in the proceedings and make their views known (paragraph 2).

States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests (paragraph 3).

Where such separation results from any action initiated by a State Party, such as the detention, imprisonment, exile, deportation or death (including death arising from any cause while the person is in the custody of the State) of one or both parents of the child, that State Party shall,

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upon request, provide the parents, the child or, if appropriate, another member of the family with the essential information concerning the whereabouts of the absent member(s) of the family unless the provision of the information would be detrimental to the well-being of the child. States Parties shall further ensure that the submission of such a request shall of itself entail no adverse consequences for the person(s) concerned (paragraph 4).

Under Article 19, paragraph 1 of the Convention, States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

Under Article 24, paragraph 1 of the Convention, States Parties recognize the right of the child to the enjoyment of the highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health. States Parties shall strive to ensure that no child is deprived of his or her right of access to such health care services.

Under Article 37 of the Convention, States Parties shall ensure that

a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment.

Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age;

b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so. Every child shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

Under Article 38, paragraph 4 of the Convention, in accordance with their obligations under international humanitarian law to protect the civilian population, States Parties shall take all feasible measures to ensure protection and care of children who are affected by an armed conflict.

Under Article 39, States Parties shall take all appropriate measures to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts. Such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.

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3.3.4 Consular Services Act

As specified in chapter 1, section 1 of the Consular Services Act, the Act lays down provisions on the consular functions referred to in Article 5 of the Vienna Convention on Consular Relations (Finnish Treaty Series 50/1980) which may be exercised by diplomatic and consular missions that are part of the Finnish foreign service (missions) for the purpose of providing assistance to persons or entities or overseeing their interests and rights, and the exercise of which falls within the competence of the foreign affairs administration under this Act or other legislation (consular services).

Under chapter 1, section 2, subsection 1 of the Consular Services Act, Consular services under this Act may be provided for Finnish entities or persons who are Finnish citizens, or for foreign citizens residing permanently in Finland who have the right or have been granted a permit to reside or work permanently, or in a comparable manner, in Finland.

Under chapter 2, section 9 of the Consular Services Act, consular services under this Act and other legislation shall be provided by embassies, legations, consulates-general, consulates, vice-consulates and consular agencies. The provision of all or part of the consular services of a particular mission by a mission other than that which would otherwise be competent to provide the services may be provided by presidential decree. Services for persons in distress and other similar consular services shall, however, be provided by the relevant mission at the time in question in regard to the seriousness and urgency of the situation (subsection 1).

Where consular services are needed in a country which is not part of the consular district of any mission, the Ministry for Foreign Affairs shall determine the provision of those services (subsection 2).

The Ministry for Foreign Affairs may provide consular services that do not require service provision within the State concerned and that are otherwise suitable for provision by the Ministry. Further provisions on the consular services provided by the Ministry for Foreign Affairs may be given by presidential decree (subsection 3).

Under chapter 3, section 11 of the Consular Services Act, consular services provided for in this chapter may be afforded to persons referred to in section 2, subsection 1 and to unrepresented citizens of the European Union who are temporarily residing abroad within the consular district of a mission and whom the mission has found to be in distress because of illness, injury, accident, crime or other comparable reason.

Under chapter 3, section 12, subsection 1 of the Consular Services Act, a mission shall advise and assist a person in distress as necessary in obtaining medical treatment, arranging repatriation, obtaining legal assistance, reporting an offence and obtaining any other necessary help required by the situation. (8 February 2019/174)

Under chapter 4, section 15 of the Consular Services Act, in the event or threat of a major accident, natural disaster, environmental accident, war, civil war or other crisis situation, a mission or the Ministry for Foreign Affairs may, to protect personal safety, assist persons referred to in section 2, subsection 1 and unrepresented citizens of the European Union, as well as their accompanying family members regardless of their nationality, residing within the consular district.

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Under chapter 4, section 16 of the Consular Services Act, a mission may provide assistance in arranging the evacuation of a person from a crisis area to the closest safe area or to his or her home country, when this is necessary to ensure the personal safety of the person (subsection 1).

The evacuation or repatriation of a person shall only be arranged with his or her consent (subsection 2).

Under chapter 4, section 17 of the Consular Services Act, in considering the nature and extent of assistance measures referred to in sections 15 and 16 above and in implementing such measures, account shall be taken of the particular crisis situation, other circumstances, any measures taken by other Nordic countries or Member States of the European Union and the actual capability of the mission to provide assistance.

3.3.5 Government Rules of Procedure

Under section 13, subsection 5 of the Government Rules of Procedure, the mandate of the Ministry for Foreign Affairs shall cover: the protection of the interests and rights of Finnish citizens, provision of consular services and corresponding other official services abroad.

3.4 Evaluation

Firstly, I would like to say that this is a judicially complex situation. In addition, the factual background situation is constantly changing, as stated above.

Under section 9, subsection 3 of the Constitution of Finland, Finnish citizens shall not be prevented from entering Finland. In legal literature, this has been interpreted to mean that “a Finnish passport, for example, may not be set as a precondition for a person to enter Finland, provided that it can be established that the person in question is a Finnish citizen (Hallberg et al.: *Perusoikeudet*. Helsinki 2011, p. 356). Arbitrary revoking of citizenship may be a violation of Article 3 of the Additional Protocol 4 of the ECHR (Pellonpää: *Euroopan ihmisoikeussopimus*. Helsinki 2005, p. 590–591).

Secondly, based on the above information, the content of the basic rights and human rights in question therefore does not seem to be the provision of active help with entering the country but mainly refraining from taking measures that would prevent it. Therefore, an obligation to actively organise repatriation cannot be imposed on authorities based on these basic rights and human rights, at least not in a situation like the one now being discussed. I would like to state here that neither does the preamble of the Consular Services Act (Government Proposal 283/1998 vp) refer to this basic right.

Thirdly, in general, the basic rights and human rights laid down in the Constitution of Finland apply to authorities primarily within the Finnish territory. The legislative materials for the update of basic rights state that “basic rights would be extended to apply, as a general rule, not only to Finnish citizens but also to all other individuals *within the jurisdiction of Finland*” (Government Proposal 309/1993 vp, p 2, italics added). However, this does not mean that Finnish authorities should not comply with Finnish legislation and the international agreements binding on Finland to the extent possible even in cases where the measures of authorities, or the effects of such measures, would extend beyond the state borders. In legal literature, it has been deemed that “regarding the state of Finland, an individual may, in principle and even abroad, invoke the basic rights ensured by the Constitution of Finland, although some basic rights – in particular, economic, social and cultural rights –

may, due to their nature, be limited to apply to the Finnish territory only (Hallberg et al. *Perusoikeudet*. Helsinki 2011, p. 133). An example given for this is a citizen's right to vote regardless of whether they are residing or staying in Finland.

Similarly, the main international obligations, the Convention on the Rights of the Child and the European Convention on Human Rights impose obligations on a state primarily on the state's own territory. The jurisdiction referred to in Article 1 of the ECHR (jurisdiction in French) covers "first and foremost" the territory of the state. A state can be held responsible for events taking place outside its own territory only on an exceptional basis. (Pellonpää: *Euroopan ihmisoikeussopimus*. Helsinki 2005, p. 15). The European Court of Human Rights has deemed that "as to the "ordinary meaning" of the relevant term, the jurisdictional competence of a State is primarily territorial. While international law does not exclude a state's exercise of jurisdiction extra-territorially, the suggested bases of such jurisdiction (including nationality, flag, diplomatic and consular relations, effect, protection, passive personality and universality) are, as a general rule, defined and limited by the sovereign territorial rights of the other relevant states (case *Bankovic*, 12 December 2001, paragraph 59; regarding the scope of jurisdiction, see also, for example, case *Ilascu* 8 July 2004, paragraphs 331–352 and case *Al Skeini*, paragraphs 131–140). Regarding Article 2 of the Convention on the Rights of the Child, it has been deemed that the following is emphasised: "all rights of the child must be applied *to all children staying in the state*, including visitors [---]" (Lapsen oikeuksien sopimuksen käsikirja. Helsinki 2011, p. 30, italics added).

The current situation does not seem to involve such exceptional circumstances in which Finnish authorities would exercise jurisdiction extending outside the borders of Finland, as in the above-mentioned case law.

In its observations concerning at least Belgium, the UN Committee on the Rights of the Child has, however, recommended that Belgium facilitate the repatriation of all Belgian children from the conflict area and, when possible, the repatriation of their families (CRC//C/BEL/CO/5–6, paragraph 50).

In this regard, I would like to note that a state is responsible for supervising the interests and rights of its citizens in a foreign country. This is based on international common law, which has been codified in the Vienna Convention on Diplomatic Relations and the Vienna Convention on Consular Relations (Government Proposal 283/1998 vp, p. 23). In its committee report, the Foreign Affairs Committee has stated that "the more obvious it is that an individual is subject to measures violating the conventions on human rights, the lower should the threshold for providing consular services be" (Report by the Foreign Affairs Committee 24/1998 vp). In the Government Rules of Procedure, the Ministry for Foreign Affairs has been tasked with the supervision of the interests and rights of Finnish citizens and the provision of consular services and other equivalent governmental services abroad. The explanatory memorandum states that "the intention regarding the wording of the rule was to emphasise the responsibility of the administration of foreign affairs to supervise the interests and rights of Finnish citizens abroad".

In general, the intention was that "the consular services provided by the administration of foreign affairs will mainly be provided to Finnish citizens who are staying abroad temporarily" (p. 9). In addition, foreign citizens referred to in section 2, subsection 1 of the Act are, in principle, entitled to the same services as Finnish citizens, and the same prerequisites concerning the availability of services, such as the temporary nature of their stay, apply to them (p. 28). The limitation concerning the temporary nature of the stay is included in some provisions (chapter 3, sections 11 and 12), whereas some provisions include no such restrictions, for example,

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chapter 4, sections 15 and 16 concerning services provided in crises. According to my understanding, sections 11 and 12 of the Consular Services Act are not applicable in this situation because the individuals in the area are not temporarily residing outside Finland.

Even in those respects that sections 15 and 16 of chapter 4 of the Act might be applied to the situation, I would like to state that the Act provides the administration of foreign affairs considerable discretion regarding the need to take measures in each situation and regarding the nature of such measures. This is apparent from both the wording of the provisions (“may assist”) and from section 17, which allows several different factors to be taken into account when considering the provision and extent of the assistance referred to in sections 15 and 16. In addition, it is stated in the rationale for the Act that “the chapter would not include provisions on assistance measures other than evacuation and repatriation. Actual crises, risk of crises and all measures that are required cannot be anticipated through legislation. Diplomatic missions must be provided with discretion regarding the nature and extent of measures required by a crisis or the risk of a crisis. This applies to discretion concerning, for example, the decision on whether the diplomatic mission will help its citizens in order to organise evacuation or repatriation. According to the section, when considering the nature and extent of assistance measures and in implementing such measures, account shall be taken of the particular crisis situation, other circumstances, any measures taken by other Nordic countries or Member States of the European Union and the actual capability of the mission to provide assistance” (Government Proposal 283/1998, vp, p. 39, with, pursuant to section 15, the Ministry for Foreign Affairs being also a competent authority to provide the assistance referred to in the provision).

I would like to state that it is also of significance that the Ministry for Foreign Affairs has specifically instructed, already years ago, that individuals should leave the territory and that no consular services are available.

In my opinion, at least no general obligation to repatriate from the camp all Finnish citizens or individuals having resided in Finland based on a residence permit can be deemed to be imposed on the administration of foreign affairs under the Act in question, especially when taking into account the considerations related to basic rights and human rights, which are discussed later in relation to this matter. The Act in question, mainly section 9 and the provisions of chapter 4, under which the actual service provider (a ministry or diplomatic mission) remains, however, somewhat unclear, would together with section 13 of the Government Rules of Procedure seem to provide the Ministry for Foreign Affairs (and a diplomatic mission, should one be operating in the area) with authority to take assistance measures.

Fourthly, I would like to state that one aspect of the issue involves the fundamental basic rights and human rights of those in the camp, with these rights having been severely compromised due to the circumstances in the camp. Special focus is on children, who have ended up in the camp through no fault of their own and whose right to life and other basic rights and human rights are the issue here. Under section 22 of the Constitution of Finland, the obligation of public authorities is to guarantee the observance of basic rights and human rights, as specified above, to the extent possible in the circumstances related to the matter. In my opinion, the above-mentioned obligation, when read together with section 7, subsection 1 of the Constitution and Article 6 of the Convention on the Rights of the Child, support the conclusion that authorities should strive to repatriate at least children. However, it must be stated here that in legal literature, it has been deemed that “section 22 of the Constitution of Finland seems to be at such a general level that, considering the prevailing mandatory prosecution principle, failing to consider it cannot easily be used as the legal basis for sanctions pursuant to legislation concerning civil servants. Similarly, the parties exercising the highest judicial control (Chancellor of

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Justice, Parliamentary Ombudsman, sections 108 and 109 of the Constitution of Finland), who are tasked specifically with the control of the implementation of basic rights and human rights, cannot easily merely refer to section 22 of the Constitution of Finland as the sole basis for their sanctions [---]" (Saraviita: Perustuslaki. Helsinki 2011, p. 294).

The repatriation of children alone involves judicially difficult aspects. This is related, in particular, to the fact that under section 2, subsection 3 of the Constitution of Finland, the exercising of public authority must be based on legislation. If it is in practice at all possible that only children are assisted to leave the camp, either by Finnish authorities or upon their request, for example, with the help of the Kurdish government or an international organisation operating in the area, it must be asked based on which legislation could the children be separated from their guardians in this situation. According to my understanding, in a situation like this, this might result – depending on the guardian's consent or the lack of it – in a measure similar to taking a child into care against a person's will, with Finnish authorities having at least contributed to the measure. In practice, conducting an investigation concerning the need for child welfare, as specified in section 17 of the Child Welfare Act, through executive assistance or by a representative of the administration of foreign affairs, as well as standard executive assistance based on international agreements on child welfare or international common law, are not possible because the area is not administered by a state to whose authorities letters of request could be sent, and the area has no functioning child welfare system. Syria, not to mention the Kurdish government, is not a party to the Hague Convention on the International Protection of Children (Finnish Treaty Series 8–9/2011). For this reason, these questions are not discussed in this resolution in more detail.

The Constitutional Law Committee has stated that “the taking of a child into care is interfering heavily in the personal freedom ensured under section 7, subsection 1 of the Constitution of Finland, as well as in the protection of private and family life specified in section 10, subsection 1 of the Constitution of Finland. On the other hand, under the proposed regulation, the execution of taking a child into care can only take place for extremely weighty reasons, which, from the perspective of the system of fundamental rights, are first and foremost related to the need for the special protection needs of children, as well as to sections 7 and 19 of the Constitution of Finland concerning the right to life, personal liberty, integrity, security and necessary care (Constitutional Law Committee 58/2006 vp)”. In Finnish legislation, the prerequisites and courses of action concerning the taking of a child into care are provided in the Child Welfare Act, and it is my understanding that the provisions of the Act in question or the related provisions in the Convention on the Rights of the Child cannot be complied with, at least not fully, in a situation like this and on the territory of a foreign state. In addition, there is the question of what weight should be given to a consent for taking a child into care when provided by a guardian under the circumstances in the camp. From this perspective, the judicially clear approach would be that the repatriation of both children and their guardians is attempted, with any measures required by the laws of Finland to be taken after repatriation. However, there are serious problems even with this kind of an approach.

Regarding the situation of the children and the dangers they are exposed to, statements such as the following have been made:

“Children have travelled to the combat areas with their parents, and there are also children who have been born there. These children have not been able to influence on the decision to travel. Children are always loyal to their parents, even when the parents are not acting in accordance with the best interest of the child. At an international level, it is known that some of the parents staying in the area have voluntarily put even very small children into conflict training, in which

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children are desensitised to violence and cruelty. Children are raised to support the ideology of the terrorist organisation and desensitised to violence as a part of everyday life. Boys even younger than 10 years old are in great danger of ending up as child soldiers. The risk for girls is child marriage. As part of their upbringing, children are made to execute physical punishments and they are utilised in the organisation's propaganda and as suicide bombers (Proposal on the organisation of cooperation between authorities concerning measures related to people returning from combat areas" (Publication of the Ministry of the Interior 11/2017, p. 22).

According to my understanding, the adults in the camp have entered the area while being fully aware of the prevailing circumstances and the extremely significant risks to the key basic rights and human rights of children in particular. In my opinion, this is significant when assessing whether there would be a legal basis for the repatriation or attempted repatriation of a child without the consent of the guardian.

In a Supreme Court Decision (2008:93), the limits to be set for the actions taken by guardians have been assessed as follows: "Article 8 of the European Convention on Human Rights, as well as the national provisions on fundamental rights protect, on one hand, the individual, including children as individuals and, on the other hand, the family and family life, with the guardians' right to make decisions concerning minors being related to that. The above-mentioned needs for protection may, in individual cases, be contradictory. In the current practice of interpretation by the European Court of Human Rights, it has thus been stated that the rights of a guardian cannot be unlimited, and it is the task of the public authority to protect a child from any misuse of a guardian's position (Nielsen against Denmark, 28 November 1988, A 144, paragraph 72 of the judgement). When reconciling the rights of a child and their guardians, the best interest of the child is a primary consideration, which can supersede the interests of parents. For this reason, the protection of family life does not give guardians the right to take actions that endanger the health and development of a child (Johansen against Norway, 7 August 1996, Reports 1996-III, paragraph 78 of the judgement; Scozzari and Giunta against Italy, 13 July 2000, Reports 2000-VIII, paragraph 169 of the judgement)" (paragraph 15 of the judgement). In this connection, I would like to state that the rationale for section 6, subsection 3 of the Constitution of Finland states that "on the other hand, children are legally incompetent and therefore need special protection and care as a group that is more vulnerable than the adult population. The provision thus provides a foundation for the positive special treatment of children, which is required to ensure children equality in relation to the adult population" (Government Proposal 309/1993 vp. p. 45).

It must also be emphasised that the issue involves the repatriation-related security threats, which justifiably can be said to exist according to the information I have received. Under section 22 of the Constitution of Finland, authorities are also obligated to act so that the security of those residing in Finland is not at risk. Under section 7, subsection 1 of the Constitution of Finland, everyone has the right to life, personal liberty, integrity and security. The rationale for the provision states that "the specific reference to security highlights the public authority's positive obligations to take actions in order to protect the members of society from crime and other unlawful acts targeted at them, whether the offenders are parties exercising public authority or private parties" (Government Proposal 309/1993 vp, p. 47). According to the information I received, the repatriation of adults, in particular, may result in a situation in which the basic rights and human rights of other people residing in Finland are compromised. On the other hand, there are also risks that are related to "people staying in the combat area or moving to a new conflict area in masses" (Proposal on the organisation of cooperation between authorities concerning measures related to people returning from combat areas. Publication No 11/2017 of the Ministry of the Interior, p. 19).

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Based on the above information and considering the difficult circumstances in the camp, I find that in this extremely exceptional situation, it would be very difficult, from the perspective of legality control, to deem reprehensible even such actions by authorities that would involve, when possible in practice, attempts to repatriate a child in order to enforce the fundamental right protected under section 7 of the Constitution of Finland and Article 6 of the Convention on the Rights of the Child based on case-specific assessment and even without the consent of the guardian.

It must be acknowledged that when taking such measures, the procedural provisions laid down in Article 9 of the Convention on the Rights of the Child and the basic rights and human rights of guardians may be left without significance. In addition, it is possible that separating a child from their guardian could cause the child even more suffering. Furthermore, it must be stated that separating a child from their guardian in connection with repatriation would be based directly and in an exceptional manner on the Constitution of Finland.

However, the key point is that staying in the camp is not, in my opinion, in the best interest of a child. According to the Government Proposal concerning the Child Welfare Act (Government Proposal 252/2006 vp. p. 41), the key content and objectives of the Convention on the Rights of the Child are summarised to three key concepts: provision, protection and participation, which impose an obligation to ensure children and young people 1) a share of the resources of society (provision), 2) the right to protection and care (protection) and 3) the right to participate in decision-making in issues concerning them and the right to be a part of society (participation). According to my understanding, the key rights, such as the right to life and health, are seriously compromised, and I believe that some of the objectives cannot be fulfilled at all under the circumstances in the camp.

I am of the opinion that in this situation, the requirement level to be set for the Government and authorities concerning actions related to the reconciling and enforcing of the basic rights and human rights of various individuals cannot be the same as when operating within a state. The situation must be understood so that the effective legislation on child welfare does not fully cover this particular situation. Under these circumstances and based on the available information, normal negotiation measures and other actions, even when the aim is to repatriate only children, cannot easily be unlawful.

Fifthly, I would like to state that the question is not only the authorities' actual capability to take actions but it is also related to the balancing of basic rights and human rights, which is very difficult and on which it is not possible to take a stand solely through means of judicial control. This is due to the fact that the extent to which the security threats caused by repatriated adults could be controlled with reasonable efforts must be considered. This issue cannot be resolved and assessed through judicial control. Furthermore, measures of judicial control cannot be used to assess the extent to which Finnish authorities in general are actually able, without compromising the safety of authorities, to repatriate or contribute to the repatriation of individuals in the camp, to verify the identity of the individuals who would be repatriated and to clarify whether a person is within the personal scope of application concerning the Consular Services Act.

The European Court of Human Rights has not required that a state is always obligated to take all possible actions to safeguard the life of an individual even within the state's own territory. Referring to, among other things, operative choices in terms of priorities and resources, the ECHR deemed that such a positive obligation to take actions must be interpreted in a manner

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that does not impose an impossible or disproportionate burden on authorities (case Osman, judgement 28 October 1998, paragraph 116). According to the Court, when considering the existence of a state's positive obligation to take measures, attention must be paid to fair balance, which must be found between the general interest of society and the interests of an individual (case Özgür Gündem, judgement 16 March 2000, paragraph 43).

Sixth, I emphasise that this is a situation taking place outside the state borders, in which Finnish authorities, according to my understanding, cannot interfere without conforming to the requirements set by the parties administering the camp and/or to requirements set by other parties. Under these circumstances, the wide discretion of competent authorities is underlined concerning the possible measures that can be taken in this matter. The Chancellor of Justice has no authority to order authorities to take any specific measures, nor is it the duty of the Chancellor of Justice.

3.5 Conclusion

My legal assessment is that basic rights and human rights, especially section 7 of the Constitution of Finland, Article 3, paragraph 1 and Article 6 of the Convention on the Rights of a Child, and the obligation to protect such rights, as laid down in section 22 of the Constitution of Finland, are in favour of the Government attempting to repatriate, in accordance with international laws and pursuant to and within the scope of their powers under the Consular Services Act, at least children who are Finnish citizens and children with a comparable status. However, I would like to state that the legal assessment has limited importance in the current situation because the actual options available to authorities regarding the taking of measures are, as presented above, different compared to a situation taking place within a state. Based on the available information, the Government has investigated and will investigate the options and prerequisites regarding actions related to this matter. It is my opinion that I have no reason to suspect that any parties under my supervisory authority have acted in an unlawful manner or in a manner that is not in accordance with their official duty. For this reason, I have not taken any actions as a result of the complaints.

My response will be submitted to the Prime Minister's Office, the Ministry for Foreign Affairs, the Ministry of the Interior and the Ministry of Social Affairs and Health.

Chancellor of Justice

Tuomas Pöysti

Senior Legal Adviser

Laura Pyökäri

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