Imprisonment of Non-Nationals: Do Recent Amendments to the Norwegian Immigration Act *Comply With Human Rights and Moral Standards?*

Bente Puntervold Bø*

Introduction

The title for this article is formulated with a question mark to underline the complexity of the subject, and to point out that my intention in this article is not to give final answers, but to focus upon the possible dilemmas regarding human rights and principles of morality embedded in some of the rules regarding imprisonment of non-nationals. I will discuss this topic by focusing upon some of the recent amendments to the *Norwegian Immigration Act*, dealing with conditions for imprisonment of non-nationals.

In my opinion, these rules, which came into effect on 1 January 2000, raise legal as well as moral concerns which need to be focused upon. Such a discussion was practically absent from the political debate when the new amendments were discussed and adopted by the Norwegian Parliament in April 1999 (Bill No.17 (1998-99)/Ot.prp.nr.17(1998-99)), in spite of the fact that a new Act with the explicit purpose of strengthening the human rights position in Norwegian law, had been passed by Parliament a year earlier (Lov av 21.mai 1999 om styrking av menneskerettighetenes stilling i norsk rett/ Act concerning the strengthening of the position of human rights in Norwegian law).

The European Convention on Human Rights (ECHR 1950) and the two UN Human Rights Conventions from 1966 (CCPR and CSCR), long ago ratified by Norway, were incorperated in Norwegian legislation by this Act and were therefore just as legally binding as other Norwegian laws. I will therefore, in the discussion which follows, use the relevant articles of the 1950 European Convention on Human Rights and the 1966 UN Convention on Civil and Political Rights as 'yard sticks' for compliance with human rights standards. In the last part of the article, the conditions for imprisonment will be discussed within a moral frame of reference.

---

* Bente Puntervold Bø is Associate Professor at the Oslo University College. This article is a revised and enlarged version of one of the lectures presented in connection with my doctoral disputation at the University of Oslo in March 2001. I am grateful for valuable comments from Professor Philippe Gerard, Facultes Universitaires Saint-Louis, Brussels and researcher Gro Nystuen at The Institute of Human Rights, Oslo.

It may also be mentioned that it is stated as a general principle in section 4 of the *Norwegian Immigration Act*, that this Act shall be interpreted in accordance with human rights standards when these are to the advantage of foreign citizens. It is therefore extremely relevant to apply human rights standards to the rules of the *Immigration Act*.

I have chosen to concentrate on the rules dealing with the conditions for imprisonment of foreign citizens. Recent amendments to the *Norwegian Immigration Act* appear to widen the legal scope for arrest and imprisonment of non-nationals. Imprisonment is a grave infringement on the personal liberty of the individual affected; it is therefore of great importance that such serious sanctions are applied with caution and reluctance.

In this article, it is the grounds for imprisonment, as they are stated in the Immigration Act, which will be focused upon. In the first part of the article these rules will be discussed in relation to the human rights standards for imprisonment in the European Convention. In the second part of the article, these rules will be related to principles of morality normally recognised in democratic societies.

Conditions For Imprisonment In The *Norwegian Immigration Act*

The following four rules in the *Norwegian Immigration Act* will be focused upon (see attachment at the end of this article for the legal text of these rules):

1. It is stated in **section 37.1** of the *Norwegian Immigration Act*, that it is a legal duty for foreign nationals to cooperate to clarify their correct identity. In the same section it is further said that *lack of such cooperation may lead to imprisonment* (section 37.6).
2. In **section 41.5** of the *Immigration Act* it is stated that *foreign nationals who must leave the country*, after their applications for asylum or residence have been turned down, may be *arrested and imprisoned to ensure implementation.*
3. According to **section 41.8**, *foreign citizens may be imprisoned before the final decision that they must leave the country has been made.* As it says in the statute: 'when any case which may lead to such a decision is being dealt with'.
4. In the new version of **section 41.4** of the *Norwegian Immigration Act*, it is now stated that *the decision to apply coercive measures to non-nationals who must leave Norway, may also be based on the general experience of the police with similar cases.* It is stated explicitly, both in the legal proposal from the Ministry of Justice and in the comments from the Standing Committe on Justice in Parliament, that imprisonment is among the measures which might be applied by reference to such general grounds.

Why Are These Rules Problematic?

These provisions in the *Immigration Act* raise important questions concerning standards of justice and the rule of law, which need to be discussed:

1. Firstly, there is reason to ask whether imprisonment based on the suspicion that the foreign national has not given the immigration authorities correct information about his/her identity, is an acceptable grounds for imprisonment according to human rights standards.
2. Secondly, may imprisonment, according to human rights, be applied as a preventive measure, to prevent foreign nationals whose applications for residence or asylum have been finally rejected, from 'going underground' instead of leaving the country?

3. Thirdly, is imprisonment before the case has been finally decided upon acceptable from a human rights perspective, in order to prevent asylum seekers or other non-nationals from 'disappearing' when or if the decision is negative and they must leave the country?
4. Fourth, may negative sanctions, including imprisonment, be justified if it is based, not on the previous or present acts of the person in question, but on the general experience of the police with other persons of the same nationality as the person in question? Or, does imprisonment on such grounds amount to discrimination according to human rights standards?

A Discussion of These Rules in a Human Rights Perspective

I will not claim to answer these questions conclusively but instead attempt to locate some possible conflicts in this field of law between domestic legislation for the purpose of immigration control, and human rights standards as they have been stated in the relevant provisions.

In the European Convention on Human Rights, Article 5(1), the situations giving rise to acceptable grounds for imprisonment are listed. The object of this Article is to protect the right to liberty and security of the person by ensuring that no one is dispossessed of his liberty in an arbitrary fashion. To be lawful, imprisonment or detention must follow procedures described by law and be in accordance with the purpose of law. It may further only be applied in a limited set of situations. The acceptable grounds for imprisonment, according to Article 5(1) of the ECHR, are the following circumstances:

(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

Imprisonment is further considered to be 'arbitrary', and thereby unacceptable, if it is not proportionate to the purpose. There must, in other words, be a proper balance between the negative sanction and the importance of what one will accomplish by the use of imprisonment.

It is important to note that it is said explicitly in both of the two often cited commentaries to the European Convention (Lorentzen et al 1994:102; Harris et al 1995:97), that all kinds of detention by the state are controlled by Article 5 of the European Convention. The same barriers apply also in situations where imprisonment is called 'detention' or arrest, and whether it is regarded as 'punishment' or not. From this we may conclude that the previously referred to prohibitions against the use of imprisonment in Article 5, apply to the *Norwegian Immigration Act* as well.

The question I want to raise in this part of the article, is whether the Norwegian grounds for imprisonment, as they are given in the rules cited above, are in compliance with these human rights standards. In the second part of the article, I will focus upon the concerns of morality raised by these rules.

Question 1: Suspicion concerning false information as grounds for imprisonment?

The first question to be discussed may be formulated as follows: Is suspicion concerning the correctness of the information given by foreign nationals about their identity, or lack of cooperation to reveal their correct identity, a sufficient and acceptable reason for imprisonment, according to these human rights standards?

We have just seen that Article 5(1)b permits the arrest or imprisonment of a person for 'non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law'. The issue at stake, in the cases we deal with here, is the correct identity of the alien (usually an asylum seeker). No court order has normally been issued in these cases, but the legal obligation of the alien to 'cooperate' with the immigration authorities to 'clarify' his/her correct identity is, as we have seen, stated in section 37.1 of the *Norwegian Immigration Act*. The obligation to cooperate to clarify one's identity is in other words 'lawful', and lack of cooperation may lead to imprisonment (section 37.6).

In the situations we are dealing with here, the foreign nationals may insist that they have informed the police of their correct identity. They may therefore claim that they have not 'failed to comply with a legal obligation'. The problem arises because the information given by the foreign citizen, usually an asylum seeker, is either not trusted by the police or the alien is not able to produce sufficient evidence to support the correctness of the given information. The question is whether these cases may rightly be defined as situations of 'non-compliance' and 'lack of cooperation' to secure the fulfilment of the obligation.

According to Harris, O'Boyle and Warbrick's commentary to the ECHR (1995:112), the obligation in question must be 'a specific and concrete obligation which he has until then failed to satisfy'.

The question is whether it may rightly be said that the foreign citizen /the asylum seeker in such a situation has failed to satisfy the obligation to inform the police, as long as the immigration authorities have been informed by the alien; the problem arises because the police question the correctness of the given information. It is questionable whether one might say that the alien in this situation has 'failed to satisfy a specific and concrete obligation', which is the requirement which must be met in order to justify imprisonment.

We have further seen that imprisonment may be applied to 'secure the fulfilment' of the obligation prescribed in the law (Article 5(1)b). It is reasonable to ask whether imprisonment of the mistrusted foreign national is a suitable measure to obtain what the immigration authorities consider to be the correct information about the identity of the person in question. If it is questionable whether imprisonment is a suitable measure to obtain such information, this remedy does not meet the requirement of Article 5(1)b of the European Convention. From the *Engels* case, one may draw the conclusion that Article 5(1)b should be interpreted in a restrictive way.[1]

---

1 In a case from 1976, the European Court of Human Rights found that the Dutch authorities had violated Article 5(1) of the Convention because a young man was held in arrest as a disciplinary penalty during his compulsory military service for reasons not among those listed in the European Convention as acceptable grounds for imprisonment, and exceeding the 24 hours time limit stipulated in the *Netherlands Military Discipline Act*.

One may add that some of these identity problems are caused by the lack of legal access to the asylum determination procedures in 'safe' countries. We know that visa applicants who are assumed to be potential asylum seekers get their visa applications rejected; legal access is thereby denied. To reach the asylum determination procedures in Western Europe, asylum seekers buy passports and visa stamps issued to others (often citizens in states less likely to be labelled 'asylum producing countries'), or the asylum seekers arrive without identification papers by the help of human traffickers. The use of false documents or unauthorised border crossing are normally the only means available for asylum seekers who want to present their claims for asylum in a European state. Professional traffickers threaten their 'customers' if the traffickers themselves, their helpers or the travel routes are identified. These circumstances might explain why asylum seekers in such situations are afraid to reveal their secrets and might appear 'unwilling to cooperate'. It may further be taken into account that asylum seekers may be fleeing persecution from oppressive regimes in their home countries. Mistrust and fear of authority figures and interrogation scenarios should be expected and might be another reason for their reluctance to give detailed information about themselves.

Question 2: May imprisonment be used as a preventive measure?

We have seen that foreign citizens who have had their plea for asylum or residence finally rejected, may, according to section 41.5 in the *Norwegian Immigration Act*, be imprisoned at the same time as the final decision is announced to them, if it is considered necessary to avoid their 'going underground' or hiding in churches instead of leaving the country. Imprisonment is in these cases used as a preventive measure. The person imprisoned has not committed any crime or broken the law, he/she is under suspicion of planning to evade the order to leave the country, and is for that reason arrested.

The Court in Strasbourg, making judgements on the application of the European Convention, has underlined that the general rule is that detention may *not* be used as a preventive measure (*Guzzardi v Italy* at 100 and *Lawless v Ireland* at 51), this 'would be inconsistent with the rule of law', to cite from a case dealing with this issue (Harris et al 1995:117).

Only in what is termed certain 'limited circumstances of a pressing nature', may short-term detention be in compliance with Article 5(1)b if it is considered 'necessary to make the execution of an obligation effective at the time that it arises' (Harris et al 1995:114). The Commission states that only if the fulfilment of the obligation in question is a 'matter of immediate necessity', and if 'no other means for securing fulfilment is reasonably practicable', may imprisonment as a preventive measure be justified under Article 5(1)b (Harris et al 1995:114). Acts of terrorism are referred to as the kind of situations 'of a pressing nature' which would justify the use of detention as a preventive measure.

The question is whether foreign citizens who have got their applications rejected and must leave the country, might rightly be characterised as representing circumstances of 'a pressing nature'. It is difficult to see that the fulfilment of the alien's obligation to leave the country within the given time limit, is a 'matter of immediate necessity'. We must keep in mind that the Strasbourg court has given a very restrictive interpretation of the use of detention as a preventive measure.

We may in other words conclude that the general rule is that the use of imprisonment or detention as preventive measures are only justified in extraordinary situations, to prevent serious crimes from happening.

Another ECHR article may also be relevant in this connection, as we have seen that it is stated in section 5(1)c that detention of a person is justified 'when it is reasonably considered necessary to prevent his committing an offence'. As Harris et al points out, this may look as authorising a general power of preventive detention (1995:117). This is nevertheless not the interpretation of the Strasbourg court; in the case *Lawless v Ireland* the court underlined that Article 5(1)c only justifies preventive detention if the purpose is to 'bring the person before the competent legal authority', that is to initiate criminal proceedings. The fact that the Irish government argued that the person in question was an IRA activist and that they wanted to prevent the commission of criminal acts, did not justify imprisonment as a preventive measure.

We have seen that according to section 41.5 of the *Norwegian Immigration Act*, non-nationals may be imprisoned to prevent them ignoring the decision of the immigration authorities to leave the country. So far we have discussed this rule in relation to Article 5(1)b and c, while another ECHR article, namely Article 5(1)f, may be the most relevant one. In Article 5(1)f, it is stated that it is lawful to arrest or imprison a person 'against whom action is being taken with a view to deportation or extradition' (in Norwegian 'utlevering' og 'utvisning'). It may look like this formulation justifies imprisonment when foreign nationals must leave the country, if there is reason to believe that this order will not be respected.

The terminology is the key issue here: When asylum seekers or other non-nationals get their applications for asylum or residence turned down by the Norwegian authorities, they are told that they '*must leave the realm*'. This is also the phrase used in the *Norwegian Immigration Act*, section 41. It is important to note that according to the Norwegian legal terminology, the phrase 'must leave the realm' is *not* equivalent to the legal terms deportation or extradition. These concepts are only applied in the Norwegian terminology if the foreign citizen has committed a crime or broken rules of the *Immigration Act* which may lead to punishment.

I am aware of the fact that other states may apply the term expulsion or extradition differently and in a less restrictive manner, including a much wider range of situations when foreigners are ordered to leave the territory of the state in question. As we have seen, as long as a 'procedure of deportation or extradition is in progress', Article 5(1)f justifies detention. The Strasbourg court has declared that it is their general view that imprisonment in cases of expulsion is acceptable (*Chahal v United Kingdom* and the recent *Conka v Belgium*), even if one has no reason to think that the foreign citizens will try to evade the expulsion order. (Note the difference from the grounds required to use imprisonment as a preventive measure according to Article 5(1)c, where it is stated that there must be 'reasonable suspicion' that the person has committed the offence in question.)

The issue at stake here is the compatibility of the *Norwegian Immmigration Act* to Article 5(1) of ECHR. One may argue that as long as the phrase ('must leave the realm') is used both in section 41.5 of the *Norwegian Immigration Act* and in the letter of rejection to the aliens; and as long as this concept does not have the same legal meaning in Norwegian law as the more 'serious' terms 'expulsion' and 'deportation' which are the concepts applied in Article 5(1)f, then the requirements to justify detention have not been met.

Question 3: May imprisonment be applied before the case has been finally decided upon?

We have already seen that asylum seekers and other foreign nationals may be held in prison in the time period between the final rejection of their applications to stay in Norway, and the date of departure (section 41.5 of the *Norwegian Immigration Act*). We will now turn to section 41.8 of the *Immigration Act*, which says that imprisonment may also be applied while such a case is in progress ('når det verserer slik sak'). Imprisonment may in other words be applied as a control measure, *before* the case has been finally decided, to prevent aliens from 'evading the order', when, or if, it is announced that they must leave the country.

It is important to note that no obligation to leave the country exists before the application for a permit to remain in Norway has been finally decided upon. According to section 41.8 of the *Immigration Act*, the alien may nevertheless be arrested while the application or appeal to remain is still being treated, to prevent the person from trying to 'disappear' before departure can be arranged. (The formulation used in section 41.8 could easily give the impression that the outcome of the case is given and that the treatment of the case is regarded as a formality only; it seems like a negative decision is more or less taken for granted.)

May such grounds for imprisonment be justified according to Article 5(1) of the ECHR? In a case treated by the Strasbourg Court in 1989 (*Clulla v Italy* at 36), it was stated that: 'Article 5(1)b cannot justify detention that may be connected with an obligation, but that occurs before the obligation arises' (cited from Harris et al 1995:115). In the *Clulla* case referred to above, detention was put into effect prior to the decision imposing an obligation restricting freedom of movement. The general rule is in other words that imprisonment or detention is *not* acceptable in such situations.

In the field of immigration control, the matter is nevertheless not so obvious. To discuss this question, it seems necessary to consider the difference between what is defined as *deprivation of liberty*, which is the issue at stake in ECHR Article 5(1), and *restrictions of liberty*, which is the issue treated in Article 2 of Protocol no.4. In the *Amuur* case, which concerns Somali asylum seekers, the ECHR recognised the legitimacy of the confinement of asylum seekers to international transit zones, provided the asylum seekers had access to the asylum determination procedures and their cases were terminated within a reasonable time limit. If these requirements were met, confinement to the transit zones was defined as dealing with restrictions of liberty, *not* deprivation of liberty. In the *Amuur* case, the French authorities had not met the above mentioned requirements, and for this reason the confinement of the asylum seekers to prison like conditions at the airport, was regarded as a case of deprivation of liberty, and as such in conflict with Article 5(1) of the ECHR.

In the *Norwegian Immigration Act* section 41.5, 'imprisonment' is listed among the control measures which might be applied to foreign citizens while their applications for asylum or residency are treated, to prevent non-nationals from 'going underground' once a negative decision is announced. Imprisonment is under such circumstances used as a preventive measure. In the previous discussion in this article, we have seen that the court has declared that the general rule is that imprisonment shall not be used as a preventive measure (*Guzzardi v Italy* at 100 and *Lawless v Ireland* at 51). We have further seen that the general rule is that Article 5(1)b cannot justify the use of negative sanctions, including imprisonment, 'that occurs *before* the obligation arises' (*Clulla v Italy* at 36). We nevertheless find that in the field of immigration control, these general rule of law principles are put aside: as long as the claims for asylum or residency are being treated in the regular determination procedures, imprisonment may be used as a preventive measure and the

applicant may be arrested before the obligation to leave the country has occurred. It follows from the judgement in the *Amuur* case, that section 41.8 of the *Norwegian Immigration Act* is not in conflict with the acceptable grounds for imprisonment listed in Article 5(1) of the ECHR on this point, provided the case is given a satisfactory legal treatment.

In the *Amuur* case, we saw that confinement of asylum seekers to airport prisons while their asylum claims are treated, is defined as 'restrictions of liberty', not 'deprivation of liberty', thereby falling outside the scope of the protective measures of Article 5(1) of the ECHR. By redefining legal concepts in this manner, we find that rule of law principles generally observed are not legally binding vis a vis non-nationals. The universality of human rights is thereby undermined. It is regrettable that the European Convention of Human Rights accepts grounds for imprisonment of non-nationals which are in conflict with the general conditions otherwise required. It is an important task to remove such serious deficiences from the human rights instruments.

Question 4: Is imprisonment on general grounds acceptable from a human rights perspective, or is this a case of discrimination?

We have seen that it is said in the recent amendments to the *Immigration Act* (sections 41.4 and 41.5 with references to sections 37c and d), that the decision to imprison a particular foreign citizen who must leave the country, may also be based on the previous experience the police might have had with other persons, in this case with persons who have 'disappeared' or 'gone underground', when they were supposed to leave the country.

In the legal proposition, the Ministry of Justice refers to 'the experience of the police with foreign citizens *of the same nationality*', as grounds which might justify imprisonment of an individual in these kinds of situations (Bill No.17(1998-99):70/ Ot.prp.nr.17 (1998-99):70). In other words, it is stated explicitly by the Ministry of Justice, that imprisonment is not restricted to grounds relating to the foreign national's personal conduct, but may also be justified by the behaviour of other persons of the same nationality as the person in question.

In the circumstances referred to in these sections of the *Norwegian Immigration Act*, imprisonment is used as a preventive measure (to avoid evasion of the order to leave the country).

We have already seen that it is unacceptable, except in situations where serious crimes may be prevented, to use imprisonment as a preventive measure. The Strasbourg Court has nevertheless accepted that detention may be used as a preventive measure in cases of deportation and expulsion. We have previously argued that according to Norwegian legal terminology, a distinction is made between cases of expulsion and deportation on the one hand, and the order to leave the country on the other hand. We have for this reason argued that it is questionable whether the use of imprisonment in these cases which, according to the Norwegian authorities, are not regarded as cases of expulsion or deportation, is in compliance with Article 5(1) of the ECHR.

The particular issue we want to discuss here is whether it is acceptable, from a human rights perspective, to rely on the experience of the authorities with the *nationality group* as such, when decisions to imprison non-nationals before departure, are made.

It is an important rule of law that an individual assessment of the case shall take place before negative sanctions are applied. It is taken for granted that the individual assessment of the case implies that decisions are based on information about the particular individual in question, and not on statistical or other group based information, which is the case here.

Equality of treatment is another important rule of law in our legal tradition. It is reasonable to ask whether imprisonment on 'collective grounds' meet these rule of law requirements, or whether this amounts to discrimination according to human rights standards.

To discuss this question, we might start by looking at the principle of 'fair trial' in Article 6 of the European Convention, which shall be applied, according to Article 14 of the same convention: 'without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth *or other status*'.

This means that in a court trial, an individual shall not be given differential negative treatment because of his race, religion, social category, or other categorical distinctions, such as nationality. It is important that the so-called 'banned distinctions' are open-ended in this human rights article.

In the cases we are dealing with here, the negative treatment, in this case imprisonment, is applied according to the immigration authorities' prior experience with members of the same social category as the alien in question. It is in other words the categorical distinction of the non-national, which is decisive for the decision to imprison him. The sanction is *not*, on the other hand, the outcome of a court trial; it follows that imprisonment in these circumstances is not regarded as 'punishment' in a legal sense. For that reason one may question whether the 'fair trial' principles of Article 6 of the European Convention apply.

I find reason to add that one should be aware of the tendency to limit the scope of the legal safeguards in the human rights conventions by applying sanctions outside the judiciary system. Negative sanctions applied outside the courtroom are not 'punishment' in a legal sense but 'coercive measures', and thereby not protected by the 'fair trial' principles of Article 6 of the European Convention. For the affected parties imprisonment is a grave infringement on their personal liberty, regardless of whether it is called a coercive measure or punishment.

For the above mentioned reasons, it may be more relevant to turn to the 1966 UN International Convention on Civil and Political Rights (CCPR). In Article 26, it is stated that unequal treatment 'before the law' is prohibited: 'All persons are equal before the law and are entitled without any discrimination to the equal protection of the law.'

To meet the anti-discrimination requirements of these human rights conventions, the law must be 'colour blind'. We have seen that the new formulations of section 41 in the *Norwegian Immigration Act* legalise imprisonment based on the nationality of the person affected. It is difficult to understand that imprisonment based on the experience of the police with other persons from the same nationality group as the individual in question, is compatible with the 'equal protection of the law' principle in Article 26 above. As long as nationality or other group characteristics are made decisive for the application of the negative sanctions, individuals of different nationalities or other social categories, are not given equal treatment. To meet the equality requirement, sanctions must be based on the acts and trustworthyness of each individual, and not on the previous acts of countrymen. The recent amendments to section 41 of the *Norwegian Immigration Act* do not meet this requirement. Imprisonment based on what we may call 'collective grounds', appear to be in conflict with the anti-discrimination standards of the human rights conventions. The rise of the 'racial profiling' of Arabs in the US since September 11 symbolises in this connection a frightening development in the direction of more 'group convictions', thereby undermining the core issue in the human rights instruments: the protection of the individual unconditioned by group membership.

Principles of Morality and the Imprisonment of Non-Nationals

Earlier in our Western culture, and in some cultures even today, the kinship group must take the responsibility and the blame for the unacceptable acts of the individual. This is for instance the case in the blood revenge traditions. In modern times in our part of the world, this collectivistic conception of morality has been replaced by an individualistic approach, emphasising that the individual's responsibility is restricted to his or her own acts only. It is an important principle of justice in our Western moral and legal tradition that men and women are judged on the basis of their individual acts and abilities, that is, according to acts they have actually performed. They should not be held responsible for the acts of others.

It follows that it is considered a requirement of democracy that men and women are judged as individuals, and not on the basis of their nationality, religion or other group characteristics; while a society where people's fate is based on their race, ethnic group or other categorical distinctions is discredited. It is a fundamental moral premise that a person should not be punished, nor given credit for something that he or she cannot change or control.

When foreign citizens risk imprisonment because other persons of the same nationality or social category have evaded the order to leave the country, they are *not* judged on the basis of their own acts or traits, but treated negatively on the basis of morally invalid distinctions, precisely because the prior acts of one's countrymen are outside the control of a given individual. The reference by the immigration authorities to their general experience with certain nationality groups, does in other words not provide a morally valid justification for imprisonment. In these cases, the immigration authorities apply negative sanctions on 'collective' grounds. One may ask whether the Norwegian authorities, by the use of these kind of justifications for imprisonment, have taken a step backwards in time to an earlier kind of legal thinking.

Equality of treatment is regarded as a fundamental moral principle in the Western world today. The idea of 'equality' in this connection means that individuals should be treated alike in similar circumstances and for every difference in the way they are treated, some morally valid reason or principle of differentiation must be given. Group-based differential treatment is incompatible with the equality of treatment requirement: if membership in certain social categories like race, gender or nationality determines whether or not the individual is given favourable treatment or not, equality of treatment is not realised between the social categories. Those who are classified as the disfavoured categories, cannot resist that label by their own acts or merits.

This is precisely what takes place when foreign citizens risk imprisonment based on the reference to their nationality. Such a practice is contrary to the fundamental weight given to equal opportunities and individual consideration in other connections.

Another aspect may be added: group-based or statistical discrimination has a stigmatising effect. When imprisonment is based on the experiences of the immigration authorities with certain nationalities and groups, it follows that these groups are stigmatised in the eyes of the public. Foreign citizens from certain countries are by this 'collective approach' labelled as not trustworthy.

We may question the moral validity of group-based differential treatment for another reason as well: it leads to false predictions of behaviour for many of the affected individuals. If we relate this to our present topic, we find that the immigration authorities have experienced that some nationalities are more likely to evade the order to leave the country than other groups. It is in this connection important to note that those who 'go

underground', nevertheless only constitute a minority of the nationality group in question. It follows that the imprisonment of many of the non-nationals will be based on 'false predictions' concerning these individuals' intentions to evade the order to leave Norway. An unknown number of the imprisoned foreigners are falsely accused of intending to 'disappear' if they are not held in prison. The authorities' 'general experience' is in other words an unreliable method of identifying the individuals who are likely to 'go underground'. It is morally unacceptable that the decision to imprison an individual is based on such insecure factual grounds, taking into account the grave infringement of the liberty of that person by such a measure.

Conclusion

Even though a brief discussion does not allow a final conclusion on such a complicated topic, one may nevertheless argue that it is questionable whether the cited provisions of the *Norwegian Immigration Act* are in accordance with human rights obligations. Because of the importance of this matter, this topic ought to be investigated further. The provisions we have discussed give further reason to ask whether there is a lower threshold for imprisonment of non-nationals than citizens, in domestic legislation. It is regrettable if the efficiency of immigration control is given such a high priority that considerations of justice and rule of law which are normally respected, are overruled. In my opinion, this seems to be the case in the examples referred to in this article.

This examination of the detention policies of states to non-nationals demonstrate two things:

Firstly, there are some serious deficiencies in domestic legislation compared to the standards set forward in human rights conventions like the ECHR. When this is the case, domestic legislation must be brought in accordance with the human rights requirements of the conventions. This is the sole responsibility of the ratifying state (whether the application of the rules is in accordance with the human rights requirements is another issue).

Secondly, as this article demonstrates regarding policies of detention, we find that the European Convention on Human Rights accepts a lower standard regarding rule of law principles for non-nationals than for nationals on certain issues. When this is the case, the universality of human rights are jeopardised. So that the protection by human rights conventions is not conditioned by citizenship, such serious defects of the human rights instruments must be removed.

Appendix: The Legal Text of the Rules Referred to in the Article

Section 37: 'At the time of entry and until such time as his presumed correct identity has been registered, any foreign national has a duty to co-operate in clarifying his identiy to the extent that any such authority as mentioned in section 5 third paragraph so requires. The authority concerned may also subsequently impose such a duty on a foreign national if there is reason to suppose that the identity registered is not the correct identity. The King issues by regulations further rules concerning what foreign nationals may be required to do in order to fulfil this duty.'

Section 37.6: 'If a foreign national refuses to state his identity, or there are reasonable grounds for suspicion that any foreign national has given a false identity, the foreign national may be required to report or to stay in a particular place. If such an obligation is not complied with or is deemed to be clearly insufficient, the foreign national may be arrested and remanded in custody, cf. section 37 d. The total period of custody may not exceed 12 weeks unless there are special grounds. The King may by regulations issue further rules.'

Section 41.4: 'Such impositions as mentioned in the third paragraph of this section may only be levied where there is particular reason to fear that the foreign national will evade implementation. In the assessment thereof general experience of evasion may also be ascribed weight.'

Section 41.5: 'Where it is necessary in order to ensure implementation, the foreign national may be arrested and remanded in custody pursuant to the rules in section 37 c third paragraph, cf. section 37 d.'

Section 41.8: 'Such coercive measures as are mentioned in the third and fifth paragraphs of this section may be applied when any decision which means that a foreign national must leave the realm has been made, and when any case which may lead to such a decision is being dealt with.'

LIST OF CASES (Treated By The Strasbourg Court):

Engels and others v the Netherlands 08.06.76.

Guzzardi v Italy A39 para 100 – 1980.

Lawless v Ireland A3 para 51 – 1961.

Chahal v the United Kingdom 15.11.1966.

Conka v Belgium 05.02.2002.

Amuur v France 25.06.1966.

Clulla v Italy A148 para 36 – 1989.

REFERENCES

The 1998 *Norwegian Immigration Act* (Lov om untlendingers adgang til riket og deres opphold her av 24.juni 1988) with alterations of April 1999, announced in Ot.prp.no17 (1998-99).

The 1999 Act Concerning Strengthening the Position of Human Rights in Norwegian Law (Lov om styrking av menneskerettighetenes stilling I norsk rett av 21.mai 1999).

The 1950 European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR 1950).

The 1966 United Nations International Covenant on Civil and Political Rights (CCPR 1966).

The 1966 United Nations Covenant on Economic, Social and Cultural Rights (CECR 1966).

Lorentntzen, P, Rehof, L A & Trier, T (1994) *Den Europæiske Menneskeretskonvensjon med kommentarer*, Jurist – og Økonomforbundets Forlag, Copenhagen.

Harris, O'Boyle & Warbrick (1995) *Law of the European Convention on Human Rights*. Butterworths, London.