UNHCR Observations on the proposed amendments to the Danish Aliens legislation:

Udkast til forslag til lov om ændring af udlændingeloven (Ændring af udvisningsreglerne m.v.). (UIBM Id: 134226)

I. Introduction

1. The UNHCR Regional Representation for Northern Europe (hereafter "RRNE") is grateful to the Ministry of Immigration, Integration and Housing for the invitation to submit its observations on the above mentioned Proposal dated 3 October 2016, containing amendments to the Danish *Aliens Act* in respect of provisions relating to expulsion (hereafter "Proposal").

2. As the agency entrusted by the United Nations General Assembly with the mandate to provide international protection to refugees and, together with governments, to seek permanent solutions to the problems of refugees,[1] UNHCR has a direct interest in asylum laws. According to its Statute, UNHCR fulfils its mandate *inter alia* by "[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto[.]".[2] UNHCR's supervisory responsibility is reiterated in Article 35 of the 1951 Convention and in Article II of the 1967 Protocol relating to the Status of Refugees (hereafter collectively referred to as the "1951 Convention").[3] It has also been reflected in European Union law, including by way of a general reference to the 1951 Convention in Article 78(1) of the Treaty on the Functioning of the European Union (hereafter "TFEU").[4]

3. UNHCR's supervisory responsibility is exercised in part by the issuance of interpretative guidelines on the meaning of provisions and terms contained in the 1951 Convention,[5] as well as by providing comments on legislative and policy proposals impacting on the protection and durable solutions of refugees and others in need of international protection.

II. General Observations

4. UNHCR understands that the aim of the Proposal is to allow for the expulsion, to the greatest extent possible, of foreigners who have resorted to criminal activity in Denmark. This is proposed to be accomplished through inserting into the Danish Aliens Act, Article 26 (2) (and consequently also into Article 24 b (1) and (3)), the term "with certainty" *("med*

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1 UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), available at: http://www.refworld.org/docid/3ae6b3628.html ("UNHCR Statute").

2 *Ibid*.para. 8(a).

3 According to Article 35 (1) of the 1951 Convention, UNHCR has the "duty of supervising the application of the provisions of the 1951 Convention".

4 European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 13 December 2007, OJ C 115/47 of 9.05.2008, available at: http://www.unhcr.org/refworld/docid/4b17a07e2.html.

5 UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, December 2011, HCR/1P/4/ENG/REV. 3, available at: http://www.refworld.org/docid/4f33c8d92.html.

sikkerhed"), whereby the expulsion of a foreigner (including asylum-seekers and refugees) who has committed a crime would be the primary rule as long as the decision is not considered "with certainty to be in breach" of Denmark's international obligations, as opposed to the current wording "in breach of". The provisions relating to expulsion are outlined in Articles 22-26 of the Aliens Act. The circumstances under which an individual can be expelled on the grounds of criminal conduct depend on the length of stay in Denmark and the severity of the crime committed.

5. As any expulsion of asylum-seekers and refugees should be in line with international obligations, UNHCR welcomes that the Proposal emphasizes Danish obligations under various international treaties. UNHCR also welcomes that courts and administrative bodies must continue to take into consideration relevant jurisprudence by international and regional complaints mechanisms when assessing whether expulsion is lawful in the particular case. While extensively referring to the case-law of the European Court on Human Rights (hereafter "ECtHR"), the Proposal notes that there is limited jurisprudence available concerning Articles 32 and 33(2) of the 1951 Convention, which set out in which circumstances an asylum-seeker or refugee may be expelled from the country of asylum.

6. UNHCR is concerned that the proposed introduction of the term "with certainty", while not resulting in any amendments with regard to the grounds which may, under the relevant provisions of the Danish Aliens Act, give rise to expulsion of a foreigner, may nevertheless be interpreted as allowing for a greater degree of discretion or flexibility in determining whether or not the expulsion of such a person would be in keeping with Denmark's obligations under international law. If interpreted as permitting the expulsion of a refugee or asylum-seeker in circumstances which do not meet the criteria and requirements provided for in Article 32 or 33(2) of the 1951 Convention, this could result in instances of expulsion based on Articles 22-26 of the Danish Aliens Act being at variance with international law[6]. In the below, UNHCR will therefore elaborate on what needs to be taken into consideration when considering expulsion of a refugee or an asylum-seeker under the 1951 Convention.

III. Specific Observations

a. Scope of crimes which can lead to the expulsion of asylum-seekers and refugees under the 1951 Convention

7. In international refugee law, the expulsion of refugees is governed by Articles 32 and 33(2) of the 1951 Convention. In terms of the protection they afford, the two articles are closely interlinked and supplement each other. In UNHCR's understanding, the grounds for expulsion of foreigners under the Danish *Aliens Act* are wider than the scope permissible under Articles 32 and 33(2) of the 1951 Convention, although in cases concerning refugees or asylum-seekers, Article 26(2) of the Aliens Act requires the Danish authorities to ensure that expulsion is not applied in a manner that is inconsistent with international refugee and/or human rights law.

Expulsion under Article 32 of the 1951 Convention

8. Article 32 is intended to limit the right of States to expel refugees who are lawfully in the host country, both in terms of procedural safeguards as well as substantive grounds.[7]

[6] Articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT) set forth the basic rules of treaty interpretation. The most fundamental rule is articulated in Article 31(1): "A treaty shall be interpreted in good faith in accordance with the ordinary meaning given to the terms of the treaty in their context and in the light of its object and purpose."

[7] J. Hathaway, The Rights of Refugees under International Law, Cambridge University Press, Cambridge (2005), p. 694.

The words “lawfully in” included in Article 32 of the 1951 Convention implies that the refugee is present on the territory of the host country in an authorized manner, under applicable national legislation, even if the refugee is authorized to remain only on a temporary basis. UNHCR is of the view that Article 32 should be extended to asylum-seekers lawfully in the territory of a contracting State, including those who have entered the country illegally but have since entered the asylum procedures and may therefore be considered as “authorized” to be present in the territory of the country.

9. The provision prohibits the expulsion of refugees lawfully in the territory of a contracting State except on grounds of “national security” or “public order”. The contracting State is bound to ensure that any expulsion of a refugee lawfully in the territory takes place only in pursuance of a decision reached in accordance with due process of law.

10. With regard to the grounds for expulsion enumerated in Article 32, it transpires, from the discussions in the *Travaux Préparatoires*, that the drafters of the 1951 Convention intended the concepts of “national security” and “public order” to be given a narrow interpretation, given the severe consequences of expulsion for the refugee concerned:

    (i) Generally, a person may be said to commit an offence against “*national security*”, if he/she engages in activities directed at the overthrow of the Government of the host country, by external or internal force or other illegal means, or if he/she engages in activities directed against a foreign Government, which result in threats of intervention of a serious nature against the host Government. The concept of “*national security*” may be invoked in cases of acts of a rather serious nature threatening directly or indirectly the Government, integrity, independence or external peace of the host country.[8]

    (ii) The concept of “*public order*” was not intended to include broader expulsion grounds, which may be applicable to aliens in general, such as indigence, illness or mental and physical disability. Expulsion may be justified for reasons of public order if a refugee has committed or has been convicted of certain serious crimes, where such crimes are considered to be violations of public order in the host country. Yet, the concept of “public order” in Article 32 of the 1951 Convention does not automatically justify the expulsion of a refugee who has committed or has been convicted of a crime, however serious. The offence has to be sufficiently serious as to constitute a violation of public order and, consequently, a separate finding is required to the effect that the continued presence of the offender is prejudicial to the maintenance of public order of the host State.

11. When applying Article 32, the principle of proportionality must thus be observed, that is, the expulsion must be the appropriate measure in the particular circumstances. Similarly, the seriousness of the measure has to be weighed against the interest of public order and national security. Expulsion should be a measure of last resort and should be applied if it is the only practicable means of protecting the legitimate interests of the State. Article 32 is also restrained by the principle of *non-refoulement* under Article 33 of the 1951 Convention.

    Expulsion under Article 33(2) of the 1951 Convention

12. Article 33(1) of the 1951 Convention contains the principle of *non-refoulement*, which prohibits the expulsion or return of a refugee, whether lawfully in the territory of a

[8] Atle Grahl-Madsen, Commentary on the 1951 Refugee Convention (Articles 2-11, 13-37), published by UNHCR, Geneva 1997, Commentary to Article 32, p. 204, available at http://www.unhcr.org/refworld/docid/4785ee9d2.html.

contracting State or not, to the frontiers of territories where his/her life or freedom may be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion[9]. The principle of *non-refoulement* is the cornerstone of international refugee protection.

13. Exceptions to the principle of *non-refoulement* are contained in Article 33(2). The expulsion of refugees and asylum-seekers is permitted in the specific circumstances enumerated in Article 33(2), that is, in situations where "there are reasonable grounds for regarding [the refugee] as a danger to the security of the country in which he [she] is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country." The exceptions to the *non-refoulement* provision are to be interpreted restrictively in light of the serious situation to which a refugee is returned.

14. Moreover, in view of the serious consequences faced by a refugee returned to a country where s/he is in danger of persecution, the application of Article 33(2) requires a case-by-case assessment, taking into account individual circumstances as to whether there are reasonable grounds for regarding the refugee as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particular serious crime, constitutes a danger to the community of that country.

    (i) For the "*danger to the security of the country*" exception to apply, the danger must be very serious, rather than of a lesser order, and it must be a threat to the national security of the host country. Generally, the "danger to security of the country" exception may be invoked in cases of acts of a serious nature, which endanger directly or indirectly the constitution (Government), territorial integrity, independence or external peace of the host country.

    (ii) For the "*danger to the community"* exception to apply, not only must the refugee in question have been convicted of a crime of a very serious nature, but it must also be established that the refugee, in light of the crime and conviction, constitutes a very serious present or future danger to the community of the host country. The fact that a person has been convicted of a particularly serious crime does not of itself entail that he/she also meets the "danger to the community" requirement. Whether a person constitutes a "danger to the community" must be established in each individual case, and will depend on the nature and circumstances of the particular crime and other relevant factors (i.e. evidence or likelihood of recidivism).[10]

15. In view of its exceptional nature and by analogy with other restrictions on human rights, Article 33(2) has to be interpreted restrictively and with caution.[11] The removal of a refugee in application of one of the exceptions provided for in Article 33(2) of the 1951 Convention is thus lawful only if necessary and proportionate. This means that: (i) there must be a rational connection between the removal of the refugee and the elimination of the danger resulting from his/her presence for the security or community of the host country; (ii) *refoulement* must be the last possible resort for eliminating the danger to the

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[9] For a detailed analysis, see E. Lauterpacht and D. Bethlehem, "The scope and content of the principle of non-refoulement: Opinion", in E. Feller, V. Türk and F. Nicholson (eds.), Refugee Protection in International Law: UNHCR's Global Consultations on International Protection, Cambridge University Press, Cambridge (2003), pp. 87–177, available at http://www.unhcr.org/refworld/docid/470a33af0.html.

[10] For an analysis of the "danger to the community" exception under Article 33(2) of the 1951 Convention, see also UNHCR, Ahmed Ali v. Deborah Achim, Michael Chertoff, Secretary of the Department of Homeland Security, and Michael Mukasey, United States Attorney General. Brief of the Office of the United Nations High Commissioner for Refugees as Amicus Curiae in Support of Petitioner, No. 06-1346, 28 November 2007, available at: http://www.unhcr.org/refworld/docid/47503a952.html.

[11] E. Lauterpacht and D. Bethlehem, *supra*, paras. 158-159.

security or community of the host country (i.e. if less serious measures, including, for example, expulsion to a third country where there is no risk of persecution would be sufficient to remove the threat posed by the refugee to the security or the community of the host country, *refoulement* cannot be justified under Article 33(2)); and (iii) the danger for the host country must outweigh the risk of harm to the refugee as a result of *refoulement.*[12]

16. Additionally, UNHCR wishes to underline that the provisions of Article 33(2) of the 1951 Convention do not affect the host State's *non-refoulement* obligations under international human rights law, which permit no exceptions. More specifically, this includes the absolute prohibition against *refoulement* to a risk of torture and other cruel, inhuman or degrading treatment or punishment under international human rights law, contained in and developed under *inter alia* Article 3 of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, [13] Articles 6 and 7 of the International Covenant on Civil and Political Rights,[14] Article 3 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and 19(2) of the EU Charter of Fundamental Rights. This absolute prohibition prevails even in circumstances where the 1951 Convention is considered to be applicable. Accordingly, the ECtHR continuously held, since its judgment in Soering v. the United Kingdom[15] and reaffirmed in subsequent jurisprudence, including, for example, in the case of Saadi v Italy[16] that the prohibition of *refoulement* under Article 3 shall apply irrespective of the behaviour of the applicant.

Due process of law and access to an effective remedy

17. Article 33(2) of the 1951 Convention do not affect the host State's *non-refoulement* obligations under international human rights law.

18. Article 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms states that "Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority […]." The ECtHR has established extensive case law on the question of effective remedies. According to the ECtHR, "rigorous scrutiny" of an arguable claim is required because of the irreversible nature of the harm that might occur, in case of a risk of *refoulement* contrary to Article 3 of the ECHR[17]. The remedy must be effective in practice as well as in law. It must take the form of a guarantee, and not a mere statement of intent or a practical arrangement[18], and it must have automatic suspensive effect[19].

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12 UNHCR, Suresh and the Minister of Citizenship and Immigration, *supra,* paras. 74–84; see also E. Lauterpacht and D. Bethlehem, *supra*, paras. 177–179.

13 UN General Assembly, *Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, available at: http://www.refworld.org/docid/3ae6b3a94.html.

14 UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: http://www.refworld.org/docid/3ae6b3aa0.html.

15 Soering v. The United Kingdom, 14038/88, Council of Europe: European Court of Human Rights, 7 July 1989, para. 88, at: http://www.unhcr.org/refworld/docid/3ae6b6fec.html

16 Saadi v. Italy, Appl. No. 37201/06, Council of Europe: European Court of Human Rights, 28 February 2008, available at: http://www.refworld.org/docid/47c6882e2.html.

17 Jabari v. Turkey, Appl. No. 40035/98, ECtHR, 11 July 2000, para 50, at: http://www.unhcr.org/refworld/docid/3ae6b6dac.html

18 Conka v. Belgium, 51564/99, ECtHR, 5 February 2002, para 83, at: http://www.unhcr.org/refworld/docid/3e71fdfb4.html

19 Gebremedhin [Gaberamadhian] c. France, 25389/05, ECtHR, 10 October 2006, para 66, at: http://www.unhcr.org/refworld/docid/45d5c3642.html

19. In asylum and deportation cases, the ECtHR has stressed "the irreversible nature of the harm that might occur if the risk of torture or ill-treatment alleged [by the applicant] materialized"[20]. It has accordingly interpreted Article 13, in conjunction with Article 3, to require governments to suspend deportation proceedings pending "independent and rigorous scrutiny" of the applicant's claims[21]. Therefore, expulsion before a definitive decision on status may violate obligations under Articles 3 and 13 of ECHR[22].

20. The right to an effective remedy must include sufficient procedural safeguards also in case of matters related to national security. In Chahal v UK, the Court held that: "[…] there are techniques which can be employed which both accommodate legitimate security concerns about the nature and sources of intelligence information and yet accord the individual a substantial measure of procedural justice"[23].

21. In the case of Al-Nashif v Bulgaria[24] the Court further underlined that even where national security interests are at stake, some form of adversarial proceedings before an independent body competent to review the reasons for decision and the relevant evidence should be available. Furthermore, the individual must be able to challenge the executive's assessment of what poses a threat to national security.

UNHCR recommendations:

- UNHCR is of the opinion that the term "with certainty" has no bearing on Denmark's obligations under applicable international law, yet risks being misunderstood as potentially changing the criteria governing the grounds of expulsion and/or procedural safeguards which must be upheld, For this reason, UNHCR would recommend not to include them in Art 26(2) of the Aliens Law.
- Ensure that the termination of international protection is subject to adequate procedural guarantees and are in strict compliance with the due process of law.
- Interpret exceptions to international protection, including to the principle of non-*refoulement*, restrictively, in line with the general principle of limiting exceptions to human rights guarantees.
- Under the exceptional circumstances when protection against *refoulement* under Article 33 (2) may be withdrawn, to be consistent with the absolute prohibitions of *refoulement* in international human rights law, ensure that the removal or expulsion of the person concerned is prohibited when there are substantial grounds for believing that he or she will be at risk of being subjected to torture or other cruel or inhuman or degrading treatment or punishment.

UNHCR Regional Representation for Northern Europe
31 October 2016

[20] See Čonka, para. 79, footnote 59; Jabari, para. 50, footnote 58;
[21] See Baysakov; Bahaddar v. the Netherlands, ECtHR 19 February 1998, Appl. No. 25894/94.
[22] See ECtHR, Jabari, footnote 58, and subsequent case-law, especially, ECtHR, Gebremedhin, footnote 60, para. 67
[23] See Chahal, footnote 50, para 131.
[24] Al-Nashif v. Bulgaria, 50963/99, Council of Europe: European Court of Human Rights, 20 June 2002, available at: http://www.refworld.org/docid/468cbc9d0.html