

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

Lov om ændring af udlændingeloven (Skærpelse af muligheden for at opnå tidsubegrænset opholdstilladelse for udlændinge, der aktivt har modarbejdet afklaringen af deres identitet i forbindelse med ansøgning om opholdstilladelse her i landet)

I. INTRODUCTION

1. The UNHCR Regional Representation for Northern Europe (hereafter “RRNE”) is grateful to the Ministry of Immigration and Integration for the invitation to express its views on the law proposal dated 19 August 2017 to further amend the Danish Aliens Act (hereafter referred to as the Proposal).¹
2. As the agency entrusted by the United Nations General Assembly with the mandate to provide international protection to refugees and, together with governments, seek permanent solutions to the problems of refugees,² UNHCR has a direct interest in law and policy proposals in the field of asylum. 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[.]”.³ UNHCR’s supervisory responsibility is reiterated in Article 35 of the 1951 Convention⁴ and in Article II of the 1967 Protocol relating to the Status of Refugees⁵ (hereafter collectively referred to as the “1951 Convention”).⁶
3. UNHCR’s supervisory responsibility is exercised in part by the issuance of interpretative guidelines on the meaning of provisions and terms contained in international refugee instruments, in particular the 1951 Convention. Such guidelines are included in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status (hereafter “UNHCR Handbook”) and subsequent Guidelines on International Protection.⁷ UNHCR also fulfils its supervisory responsibility by providing comments on legislative and policy proposals impacting on the protection and durable solutions of its persons of concern.

¹ English translation (2013 version, thus not including subsequent amendments) available at: https://www.nyidanmark.dk/NR/rdonlyres/2A42ECC8-1CF5-4A8A-89AC-8D3D75EF3E17/0/aliens_consolidation_act_863_250613.pdf (hereafter “Aliens Act”).

² 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> (hereafter “UNHCR Statute”).

³ *Ibid.*, para. 8(a).

⁴ UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: <http://www.refworld.org/docid/3be01b964.html>.

⁵ UN General Assembly, Protocol Relating to the Status of Refugees, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267, available at: <http://www.refworld.org/docid/3ae6b3ae4.html>.

⁶ According to Article 35 (1) of the 1951 Convention, UNHCR has the “duty of supervising the application of the provisions of the 1951 Convention”.

⁷ 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>.

4. The following comments are based on international protection standards set out in the 1951 Convention, in international human rights law, on Conclusions on International Protection of the UNHCR Executive Committee (hereafter “ExCom”), and on UNHCR guidelines. While neither UNHCR ExCom Conclusions nor UNHCR guidelines are binding on States, they contribute to the formulation of *opinio juris* by setting out standards of treatment and approaches to interpretation which illustrate States’ sense of legal obligation towards asylum-seekers and refugees.⁸ As a member of the UNHCR ExCom since its inception in 1951, Denmark has contributed extensively to the development of the Conclusions on International Protection, adopted unanimously by the ExCom.

II. THE PROPOSAL

5. The principal aim of the Proposal is to provide concrete means for the authorities to deal with situations where an asylum-seeker provides false information regarding his/her identity to the authorities during the asylum procedures, but where the authorities are nevertheless obliged to grant asylum to the applicant due to the objective need for international protection. According to the Proposal, such individuals, who deliberately hinder the clarification of their identity vis-à-vis the Danish authorities, are not wanted in Denmark and should therefore never be entitled to permanent residence in the country (nor as a consequence, subsequent naturalization).
6. Currently, a person granted international protection in Denmark has a right to apply for permanent residence after 8 years of legal residence in the country (in exceptional cases already after 4 years). In addition to the residency requirement, the person also has to fulfill additional criteria in order to be eligible, such as proven Danish skills, not receiving unemployment benefits, no criminal record etc.⁹ The Proposal has no intention to alter these requirements. Thus, in addition to the eligibility requirements already in place, the Proposal now wishes to remove the right to permanent residence permits for individuals who have deliberately hindered the clarification of their identities during the asylum procedures.
7. The core of the Proposal can be summarized by translating the proposed new Article 11:16 in the Danish Aliens Act, which states: **“An alien, who has deliberately hindered the clarification of his/her identity in connection with applying for a residence permit in the country, cannot be granted a permanent residence permit, save for in special circumstances”**.¹⁰
8. The Proposal defines *identity* as comprising name, date of birth (age), country of birth and citizenship. Concrete examples where an individual can be seen as *deliberately hindering the clarification* presented in the Proposal include cases where the person has presented a false passport, ID document or birth certificate, or has presented ID documents belonging to another person. “Deliberately hindered” may also consist of deliberate non-truthful explanations (e.g. answers to questions), lies and omissions pertaining to identity, refusals to answer questions and/or refusals to present

⁸ Goodwin Gill/McAdam, *The Refugee in International Law*, Oxford University Press, 2007, p. 217.

⁹ Aliens Act Article 11, and also clearly outlined in; UN High Commissioner for Refugees (UNHCR), UNHCR Observations on the proposed amendments to the Danish Aliens legislation: Udkast til forslag til lov om ændring af udlændingeloven (Skærpe af reglerne om tidsbegrænset opholdstilladelse), 3 February 2017, available at: <http://www.refworld.org/docid/589492a24.html>

¹⁰ In Danish: “En udlænding, der aktivt har modarbejdet afklaringen af sin identitet i forbindelse med en ansøgning om opholdstilladelse her i landet, kan ikke meddeles tidsbegrænset opholdstilladelse, medmindre der foreligger ganske særlige grunde.” The Proposal is available at: <http://prodstoragehoeringspo.blob.core.windows.net/83486f7e-8bd8-4bcb-a186-e71e48ccbffb/Udkast%20til%20lovforslag.pdf>

documentation and/or obtaining documentation which could easily be requested from the home country. The Proposal emphasizes that it is important that a foreigner provides a truthful account and participates in the process of clarification of identity and background, as is also already required by Article 40 of the Aliens Act.

9. The Proposal also recognizes that the “deliberate hindering” may be excused, under “special circumstances”. This may be the case where a refugee on her/his own initiative, having initially hindered the clarification, informs the authorities of his/her correct identity.

III. OBSERVATIONS

General observations

10. The ultimate goal of international protection is to achieve long-term, durable solutions for refugees¹¹. This was acknowledged at the highest political level in the 2016 New York Declaration for Refugees and Migrants¹², which expressed a commitment to find long-term and sustainable solutions and to “invest in building human capital, self-reliance and transferable skills as an essential step towards enabling long-term solutions.” Moreover, the Executive Committee (ExCom) of UNHCR called on States in 2005 to support refugees’ ability to attain local integration through the timely grant of a secure legal status and residence rights, and to facilitate their naturalization. ExCom has thus recognized that short-term residence permits and frequent reviews thereof are counter-productive.
11. UNHCR regrets that the Proposal does not include an in-depth assessment of the proportionality of the consequences of the Proposal. As elaborated below, UNHCR is concerned that the Proposal may unduly penalize individuals in need of international protection and bar them for an unlimited period from a concrete durable solution, for not being able to present credible identity documents or for not being able to provide a detailed account regarding the lack of the same. Lack of credibility in this context could in UNHCR’s view lead to a negative credibility finding in the holistic assessment of the refugee claim, but should not lead to a possible life-time of uncertainty for a refugee proven to be in need of international protection.¹³
12. The consequences of Proposal would be to the detriment of refugees’ sense of security, which international protection is intended to provide. Given that obtaining permanent residence is also a prerequisite for eventually obtaining Danish citizenship, UNHCR does not consider the consequences to be commensurate with the offense committed.
13. UNHCR also finds that the scope and procedures pertaining to the “special circumstances” under Article 16:11 are unclear. The Proposal indicates that the applicant has a possibility to subsequently rectify a finding that s/he has “deliberately hindered the clarification” of his/her identity if a credible explanation regarding the reasons for this is produced. It remains unclear however, at what point this assessment

¹¹ UNHCR, ExCom Conclusion No. 104, Conclusion on Local Integration No. 104 (LVI) – 2005, available at: <http://www.unhcr.org/excom/exconc/4357a91b2/conclusion-local-integration.html>

¹² UN General Assembly, New York Declaration for Refugees and Migrants: resolution / adopted by the General Assembly, 3 October 2016, A/RES/71/1, available at: <http://www.refworld.org/docid/57ceb74a.html>, para 13(d) and 10.

¹³ See also: UN High Commissioner for Refugees (UNHCR), Self-Study Module 2: Refugee Status Determination. Identifying Who is a Refugee, 1 September 2005, section 5.3.1.2. on page 120, available at: <http://www.refworld.org/docid/43141f5d4.html>

will be made, by whom, and whether this is a separate decision that can be appealed to an independent appeal body.

Access to permanent residence for beneficiaries of international protection

14. Firstly, UNHCR wishes to reiterate its views on the rules governing the granting of permanent residence permits in Denmark in general.¹⁴ UNHCR remains of the view that individuals granted international protection should have facilitated access to a concrete durable solution in the country of asylum, and that the current combined requirements of 8 years of residency, language skills and employment etc. are very difficult for many refugees and other beneficiaries of international protection to meet. UNHCR finds that an exemption to the numerous requirements should be made for beneficiaries of international protection, due to their vulnerable situation and need for social and emotional stability.
15. UNHCR wishes to add that the timely grant of a secure legal status and residency rights are essential factors in the integration process and may negatively impact on the mental and physical wellbeing of persons granted international protection, especially those who are survivors of violence, torture and/or have specific needs.¹⁵ UNHCR has observed that the duration of residence permits has a considerable impact on refugees' abilities to integrate, and that short-term residence permits can be detrimental to refugees' security and stability.¹⁶ In order to take account of the special position of refugees, UNHCR therefore recommends that permanent residence should be granted, at the latest, after a three year residence period, and that this timeframe should also apply to beneficiaries of subsidiary protection statuses. While acknowledging that Denmark has opted out of the EU *acquis* on asylum, UNHCR wishes to note that it has reiterated this recommendation in commentaries to the EU *acquis*, for example in relation to the minimum three-year residence period established by the EU Qualification Directive.¹⁷
16. The UNHCR ExCom, of which Denmark is a member, has also referred to the progressive realization of rights and affirmed "*the particular importance of the legal dimension of integration, which entails the host State granting refugees a secure legal status and a progressively wider range of rights and entitlements that are broadly commensurate with those enjoyed by its citizens and, over time, the possibility of naturalizing*" [emphasis added].¹⁸ In UNHCR's view, the current proposal will yet again facilitate a "retrogression" rather than a progressive realization of rights, as it intends

¹⁴ UNHCR has provided comments twice on restrictions on permanent residence in Denmark during the past two years; UN High Commissioner for Refugees (UNHCR), *UNHCR Observations on the proposed amendments to the Danish Aliens legislation*, L 87, 6 January 2016, page 7, available at: <http://www.refworld.org/docid/5694ed3a4.html> and UN High Commissioner for Refugees (UNHCR), *UNHCR Observations on the proposed amendments to the Danish Aliens legislation: Udkast til forslag til lov om ændring af udlændingeloven (Skærpelse af reglerne om tidsbegrænset opholdstilladelse)*, 3 February 2017, available at: <http://www.refworld.org/docid/589492a24.html>

¹⁵ UNHCR Executive Committee, Conclusion No. 104, para. (j), UNHCR, *Thematic Compilation of Executive Committee Conclusions*, August 2009, 4th edition, <http://www.refworld.org/docid/4a7c4b882.htm>

¹⁶ UNHCR, *Note on the Integration of Refugees in the European Union*, para. 18, May 2007, available at: <http://www.refworld.org/docid/463b24d52.html>.

¹⁷ UNHCR comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted (COM(2009)551, 21 October 2009), available at: <http://www.unhcr.org/4c5037f99.pdf>

¹⁸ UNHCR, *Conclusion on Local Integration*, 7 October 2005, No. 104 (LVI) - 2005, para (l), available at: <http://www.refworld.org/docid/4357a91b2.html>.

to further complicate access to permanent residence for beneficiaries of international protection.

The “deliberate hindering of the clarification” pertaining specifically to age and date of birth

17. Due to their young age, dependency and relative immaturity, children should enjoy specific procedural and evidentiary safeguards to ensure that fair refugee status determination decisions are reached with respect to their claims.¹⁹ Children cannot be expected to provide adult-like accounts of their experiences. Some children may omit or distort vital information or be unable to differentiate the imagined from reality. They also may experience difficulty relating to abstract notions, such as time or distance. Thus, what might constitute a lie in the case of an adult might not necessarily be a lie in the case of a child.²⁰ Interviewers and decision-makers also need to be cognizant of the wide variation in the amount and type of information parents in different cultures share with their children, sometimes depending on birth order or gender.²¹
18. UNHCR is therefore particularly concerned about the consequences of the Proposal with regards to age and date of birth. According to the Proposal, an applicant claiming to be 15 years of age for example, would be seen as “hindering the clarification of his/her identity” if the age assessment conducted in the asylum procedures and “other information related to the case” indicate that the person is in fact an adult.²²
19. Firstly, UNHCR wishes to emphasize that medical age assessments are not to be considered a reliable means of establishing an individual’s biological age. Most experts agree that age assessment is not a determination of chronological age but an estimated guess. Scientific methods currently available, including medical examinations based on dental or wrist bone x-rays, can only estimate age. Hence, there will always be a margin of error.²³ When there is doubt of the results of the age assessment and/or its methodology, a holistic and multi-disciplinary (medical, social, cultural, psychological) age assessment should be conducted as part of the enhanced Best Interest Assessment, including the views of the child, in order to produce a reasoned and documented decision. In addition in UNHCR’s view, as age is not calculated in the same way universally or given the same degree of importance, caution also needs to be exercised in making adverse inferences of credibility where cultural or country standards appear to lower or raise a child’s age. Children also need to be given clear information about the purpose and process of the age-assessment procedure (and the consequences in the context of this Proposal) in a language they understand. Also, the margin of appreciation inherent to all age assessment methods needs to be applied in such a manner that, in case of uncertainty, the individual will be considered a child.²⁴

¹⁹ UN High Commissioner for Refugees (UNHCR), Guidelines on International Protection No. 8: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees, 22 December 2009, HCR/GIP/09/08, para.65, available at: <http://www.refworld.org/docid/4b2f4f6d2.html>

²⁰ *Ibid* para. 72

²¹ UN High Commissioner for Refugees (UNHCR), The Heart of the Matter - Assessing Credibility when Children Apply for Asylum in the European Union , December 2014, page 71, available at: <http://www.refworld.org/docid/55014f434.html>

²² Page 20 of the Proposal.

²³ Separated Children in Europe Programme, Position Paper on Age Assessment in the Context of Separated Children in Europe, 2012, page 8, available at: <http://www.refworld.org/docid/4ff535f52.html>

²⁴ UNHCR Guidelines on Child Asylum Claims, para. 75.

20. Secondly, although the burden of proof usually is shared between the examiner and the applicant in adult claims, it may be necessary for an examiner to assume a greater burden of proof in children's claims, especially if the child concerned is unaccompanied.²⁵ Even in adult claims, the ECtHR recognizes that the benefit of the doubt shall be given to the applicant, quoting UNHCR's Handbook.²⁶ If the facts of the case cannot be ascertained and/or the child is incapable of fully articulating his/her claim, the examiner needs to make a decision on the basis of all known circumstances, which may call for a liberal application of the benefit of the doubt. Similarly, the child should be given the benefit of the doubt should there be some concern regarding the credibility of parts of his/her claim.²⁷
21. It is also of fundamental importance that an asylum-seeking child be treated as a child. Child witnesses are afforded extensive protections in other areas of law. Unaccompanied, asylum-seeking children are arguably in an even more precarious situation than children involved in other legal processes: they are in a strange environment, dependent on the intermediary of an interpreter, and taking part in a complex procedure that will determine their future. The 'shared duty' needs to be understood from this perspective.²⁸

The wide discretion of the Proposal

22. As the consequences of the Proposal on the affected individuals may be life-long, UNHCR wants to emphasize the importance of clearly limiting the scope of the proposed articles as outlined in the Proposal. Both key elements of the proposed Article 11:16 ("identity" and "deliberately hindered") remain defined in the detailed explanations to the Proposal in a way leaving room for interpretation.
23. UNHCR acknowledges that claimants for international protection have obligations and a duty to cooperate, and is not opposed to administrative sanctions for non-compliance. In UNHCR's view, the proposal should provide an exhaustive list of administrative sanctions for non-compliance, which would constitute an effective, proportionate and dissuasive incentive for persons to provide their "identity", but limited to sanctions during the asylum process itself.²⁹
24. The definition of identity in the detailed explanations to the Proposal refers to be "aiming at"³⁰ comprising name, date of birth (age), country of birth and citizenship. In order to clearly limit the scope of the Article in question, and given the severe consequences of being deemed as applicants "deliberately hindering clarification", UNHCR recommends to make the definition in the sentence exhaustive. In the same spirit and as a direct consequence, UNHCR also recommends the removal of the

²⁵ *Ibid*, para. 73

²⁶ In *J.K. and Others v. Sweden*, Application no. 59166/12, Council of Europe: European Court of Human Rights, 23 August 2016, available at: <http://www.refworld.org/cases,ECHR,57bc18e34.htm>, the ECtHR concluded that both Article 4(5) of the QD (recast) and UNHCR's Handbook recognise "explicitly or implicitly, that the benefit of the doubt should be granted in favour of an individual seeking international protection." (para. 97). In conclusion, the Court held that "[t]he lack of direct documentary evidence thus cannot be decisive per se." (para. 92).

²⁷ *Ibid*

²⁸ UN High Commissioner for Refugees (UNHCR), *The Heart of the Matter - Assessing Credibility when Children Apply for Asylum in the European Union*, December 2014, p. 139, available at: <http://www.refworld.org/docid/55014f434.html>

²⁹ See UNHCR comments Com (2016), 272 (Eurodac)

³⁰ Danish: "*tilsigtes*", page 11, second paragraph of the Proposal.

“etc.”³¹ in the context of the reference to untruthful testimonies and using the same exhaustive identity definition in that context.

25. The Proposal also gives concrete examples of what would and would not constitute “deliberately hindered”.³² UNHCR appreciates that the Proposal makes an attempt to concretely exemplify for purposes of clarity, but notes that the Proposal at the same time concludes that the assessment would always be done on a case-by-case basis. In addition, noting in particular the examples pertaining to minors³³ as cases in point, the difference between being perceived as “deliberately hindering” or not appears unclear, and the assessment in the context may in UNHCR’s view, to an unreasonable extent, depend on the individual skills of the particular interviewer, interpreter and the ability of the particular applicant to elaborate on his/her testimony.
26. In the light of the aforementioned, UNHCR wishes to strongly re-emphasize the disproportional consequences of the Proposal, especially given the lack of clarity and wide discretion with regards to what constitutes “deliberately hindered”.

IV. CONCLUDING RECOMMENDATIONS

UNHCR recommends the Government of Denmark to:

- i. Refrain from adopting the proposed measures and instead consider granting beneficiaries of international protection an exemption from the numerous requirements for obtaining permanent residence, taking into account their vulnerable situation.
- ii. In the context of the proposed Aliens Act 16:11;
 - Provide a clear, exhaustive definition of the term *identity*, in order to limit the possible scope of application as far as possible.
 - Exercise utmost caution when assessing whether a minor applicant may have “deliberately hindered the clarification” of his/her identity, as further emphasized in paragraphs 15-19 above, including an explicit counseling requirement through a specialist and using age-appropriate techniques to obtain compliance;
 - Clearly define the procedures, timelines and relevant actors involved with regards to applying the “special circumstances” as outlined in Article 16:11.

UNHCR Regional Representation for Northern Europe
Stockholm, 18 September 2017

³¹ Danish: “mv.”; page 11, sixth paragraph of the Proposal in the sentence; “Endvidere kan en udlænding anses for aktivt at have modarbejdet afklaringen af egen identitet, når det kan godtgøres, at den pågældende forklarer usandt om sit navn, sin alder, sin nationalitet mv.”

³² Pages 20-21 of the Proposal

³³ The example when a minor **has** deliberately hindered the clarification on page 20, sixth paragraph of the Proposal, and the example where the minor **has not** deliberately hindered the clarification on page 21, fourth paragraph of the Proposal.