

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

### **Lov om ændring af udlændingeloven (Mulighed for i en krisesituation at afvise asylansøgere ved grænsen)**

#### **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 January 2017 to further amend the Danish Aliens Act.<sup>1</sup>
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,<sup>2</sup> 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[.]”<sup>3</sup> UNHCR’s supervisory responsibility is reiterated in Article 35 of the 1951 Convention<sup>4</sup> and in Article II of the 1967 Protocol relating to the Status of Refugees<sup>5</sup> (hereafter collectively referred to as the “1951 Convention”).<sup>6</sup>
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.<sup>7</sup> 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.
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

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<sup>1</sup> English translation (2013 version) available at: [https://www.nyidanmark.dk/NR/rdonlyres/2A42ECC8-1CF5-4A8A-89AC-8D3D75EF3E17/0/aliens\\_consolidation\\_act\\_863\\_250613.pdf](https://www.nyidanmark.dk/NR/rdonlyres/2A42ECC8-1CF5-4A8A-89AC-8D3D75EF3E17/0/aliens_consolidation_act_863_250613.pdf) (hereafter “Aliens Act”).

<sup>2</sup> 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”).

<sup>3</sup> *Ibid.*, para. 8(a).

<sup>4</sup> 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>.

<sup>5</sup> 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>.

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

<sup>7</sup> 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>.

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.<sup>8</sup> 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 Proposal notes that Denmark in the autumn of 2015 experienced a historically high number of arrivals of refugees and migrants. It further observes that while the Dublin system of the European Union (hereafter "EU") is, at this time, generally functioning, one must ensure that Denmark does not find itself again in a situation such as in late 2015. According to the Proposal, the possibility to introduce an "emergency brake" during times of high influx to prevent asylum-seekers,<sup>9</sup> coming through another country covered by the Dublin Regulation, from entering Denmark should be considered.<sup>10</sup> Such suspension of the system would only be put into practice through a separate decision by the Ministry of Immigration and Integration, and only for a maximum period of four weeks. The decision can be extended for another four weeks at a time, however, the Proposal is silent as to how many times it can be extended.
6. A precondition for activating the "emergency brake", according to the Proposal, is the existence of a "crisis situation" where the Dublin system still functions formally, but according to the Danish Government, is not working in reality. The Proposal also states that in "extraordinary situations" with "fundamentally changed circumstances", Denmark would not be obliged to follow the procedures of the Dublin regulation, according to the *clausula rebus sic stantibus* in public international law.<sup>11</sup> Whether the Dublin system can be considered as having ceased to function will depend on a concrete assessment based on a range of circumstances, according to the Proposal. The Proposal acknowledges the difficulties in identifying the criteria for this assessment specifically with regard to the number of States who would have to disregard the Dublin Regulation in order for the brake to be activated.<sup>12</sup>
7. The Proposal adds that there is no established procedure for the EC to determine whether the Dublin system has ceased to function. Also, according to EU law, there is

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

<sup>9</sup> Individuals applying for asylum, and thereby claiming to be in need of protection in accordance with Article 7 of the Danish Aliens Act.

<sup>10</sup> European Union: Council of the European Union, Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), 29 June 2013, OJ L. 180/31-180/59; 29.6.2013, (EU)No 604/2013, available at: <http://www.refworld.org/docid/51d298f04.html>. European Union, Consolidated version of the Treaty on the Functioning of the European Union, 13 December 2007, 2008/C 115/01, available at: <http://www.refworld.org/docid/4b17a07e2.html>. Denmark is bound by the Dublin regulation through; European Union, *Agreement between the European Community and the Kingdom of Denmark on the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in Denmark or any other Member State of the European Union and 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention*, 8 March 2006, available at: <http://www.refworld.org/docid/4729a57f2.html>. As the agreement was based on the Dublin II, Denmark later notified acceptance of also the amended Dublin III.

<sup>11</sup> Proposal, p. 12, section 2.4.1.

<sup>12</sup> Proposal, p. 13, section 2.4.1.

no formal procedure for alternative arrangements in case of collapse of the Dublin system.

8. The Proposal also provides that authority will be delegated to the Police to issue written refusal (Danish term “afvisning”) decisions based on Article 28 of the Danish Aliens Act at the border. The proposal provides for the possibility to appeal the refusal decision to the Danish Immigration Board (“Udlændingenævnet”). This appeal will not have suspensive effect, however, and the applicant will not have a right to remain on Danish territory during the appeal. UNHCR understands that under the Proposal, the Danish Immigration Service (hereafter “DIS”) will not have a role in this process and neither responsibilities under the Dublin regulation nor the refugee claim of the applicant will be assessed.
9. The Proposal further claims that State parties to the 1951 Convention are not obliged to process an asylum application nor are they obliged to grant asylum. It states that a precondition for the Proposal is that a foreigner who applies for international protection cannot be returned to a Dublin country in which the foreigner last resided before coming to Denmark, where there are substantial grounds for considering that there is a systemic failure in the asylum system and reception conditions in the other Dublin country. The Proposal underlines that any refusal decision will take into consideration Denmark’s *non-refoulement* obligations, international obligations in general and also possible deficiencies in the asylum system of the country of return.

### III. OBSERVATIONS

10. In UNHCR’s understanding, the Danish Government intends to prevent asylum-seekers from entering Denmark through another Dublin country, thus deviating from the mechanisms for determining the responsibility for an asylum application under the Dublin Regulation. UNHCR wishes to underline that the Dublin Regulation continues to apply and is still in force, and recalls the importance of adhering to the Dublin system as the established mechanism for allocating responsibility for the examination of applications for international protection.<sup>13</sup>
11. UNHCR recalls that the European Commission (hereafter “EC”) is responsible for ensuring that Community law is correctly applied. It must be noted that infringement procedures may be initiated by the EC against Member States who fail to comply with their obligations under EU law pursuant to Article 258 of the Treaty of the Functioning of the European Union (ex Article 226 TEC).<sup>14</sup>

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<sup>13</sup> See e.g. UNHCR, Observations by the UNHCR Regional Representation for Northern Europe on the draft Law proposal to introduce carrier sanctions during temporary intra-Schengen border controls in Denmark (Lov om ændring af udlændingeloven (Transportøransvar i forbindelse med midlertidig grænsekontrol ved indre Schengengrænser)), 11 December 2015, available at: <http://www.refworld.org/docid/581322027.html>, para. 15. See also, UNHCR, UNHCR Observations on the proposed amendments to the Norwegian Immigration Act and Regulation: Høring – Endringer i utlendingslovgivningen (Innstramninger II), 12 February 2016, available at: <http://www.refworld.org/docid/56c1c6714.html>, paras. 21-22.

<sup>14</sup> European Union, Consolidated version of the Treaty on the Functioning of the European Union, 13 December 2007, 2008/C 115/01, available at: <http://www.refworld.org/docid/4b17a07e2.html>. Denmark is bound by the Dublin regulation through; European Union, *Agreement between the European Community and the Kingdom of Denmark on the criteria and mechanisms for establishing the State responsible for examining a request for asylum lodged in Denmark or any other Member State of the European Union and ‘Eurodac’ for the comparison of fingerprints for the effective application of the Dublin Convention*, 8 March 2006, available at: <http://www.refworld.org/docid/4729a57f2.html>. As the agreement was based on the Dublin II, Denmark later notified acceptance of also the amended Dublin III.

12. With respect to a State's possibilities to not follow its treaty obligations, UNHCR wishes to refer to Article 62 of the Vienna Convention on the Law of Treaties (hereafter "VCLT"<sup>15</sup>), which sets out the criteria for when fundamental changes can be invoked as a ground for terminating or withdrawing from a treaty.<sup>16</sup> The two conditions of fundamental change and radical transformation contained in Article 62 indicate the exceptional nature of the *clausula rebus sic stantibus*. As noted by the International Court of Justice (hereafter "ICJ"), "the stability of treaty relations requires that the plea of fundamental change of circumstances be applied only in exceptional cases".<sup>17</sup> The ICJ has acknowledged that the same objective can be achieved through collaboration and agreement with the other countries concerned rather than through unilateral action by a State.<sup>18</sup> It has further underlined that "The change must have increased the burden of the obligations to be executed to the extent of rendering the performance something essentially different from that originally undertaken."<sup>19</sup>
13. As the ICJ so far has never considered the criteria in Article 62 to be fulfilled, including in situations of major societal change<sup>20</sup> and changes affecting vital interests of the State,<sup>21</sup> it is difficult to contemplate the possibility that a situation of high influx of asylum-seekers would meet this test. The Court of Justice of the European Union (hereafter "CJEU") has for its part accepted only once that the fundamental change criteria was met, as a result of the conflict in former Yugoslavia.<sup>22</sup> UNHCR notes with concern the absence of strict criteria and threshold, and the wide margin of discretion, given under the Proposal to the Danish Government in determining whether to activate the "emergency brake", that is, whether the Dublin system has collapsed.
14. UNHCR is further concerned that the proposed measures will not allow asylum-seekers to exercise their right to seek asylum<sup>23</sup> and the proposal raises issues of good faith application of international obligations. According to basic principles of international refugee law, asylum-seekers need to have access to territory in order to exercise their right to apply for asylum. In this respect, UNHCR reiterates that the *non-*

<sup>15</sup> United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, available at: <http://www.refworld.org/docid/3ae6b3a10.html>.

<sup>16</sup> Article 62 of the VCLT states that "1. A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless: (a) the existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and 22 (b) the effect of the change is radically to transform the extent of obligations still to be performed under the treaty. 2. A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty: (a) if the treaty establishes a boundary; or (b) if the fundamental change is the result of a breach by the party invoking it either of an obligation under the treaty or of any other international obligation owed to any other party to the treaty. 3. If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty."

<sup>17</sup> See, *Gabcikovo-Nagymaros Project (Hungary v Slovakia)*, International Court of Justice, judgment of 25 September 1997, available at: <http://www.icj-cij.org/docket/files/92/7375.pdf>, para. 104.

<sup>18</sup> *Fisheries Jurisdiction Case (Federal Republic of Germany v. Iceland)*, Jurisdiction of the Court, International Court of Justice, Judgment of 2 February 1973, para. 42.

<sup>19</sup> *Fisheries Jurisdiction Case*, para. 43.

<sup>20</sup> *Gabcikovo-Nagymaros Project*.

<sup>21</sup> *Fisheries Jurisdiction case*.

<sup>22</sup> European Union, Case C-162/96, Reference to the Court under Article 177 of the EC Treaty by the Bundesfinanzhof for a preliminary ruling in the proceedings pending before that court between A. Racke GmbH & Co. and Hauptzollamt Mainz, Judgment of the Court, 16 June 1998, available at: <http://curia.europa.eu/juris/document/document.jsf?jsessionid=9ea7d2dc30d59cbf9bd6892a491eb121fc8dc5df23d1.e34KaxiLc3qMb40Rch0SaxyKch10?text=&docid=43934&pageIndex=0&doclang=en&mode=lst&dir=&cc=first&part=1&cid=767363>.

<sup>23</sup> UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), available at: <http://www.refworld.org/docid/3ae6b3712c>, Article 14.

*refoulement* obligation contained in Article 33 of the 1951 Convention, has been interpreted to encompass not only a prohibition of returning an asylum-seeker to a country where his or her life or freedom would be threatened for reasons of one or more of the 1951 Convention grounds, but also that asylum-seekers should have access to a procedure in which the risk of *refoulement* can be assessed.<sup>24</sup> Refusal at the border could also lead to indirect *refoulement* and thus possible violation of Article 3 of the European Convention on Human Rights.<sup>25</sup>

15. Furthermore, under the Dublin Regulation, Denmark has an obligation to determine which State participating in the Dublin system is responsible for the examination of asylum applications of individuals arriving to its territory, including those arriving from other Dublin countries. It may well be that Denmark is responsible for examining the asylum application even though the applicant has, for example, arrived via Germany. Asylum-seekers may, *inter alia*, have a right to have their application processed in a particular state depending on where they have family relations.<sup>26</sup> By not applying the Dublin Regulation, therefore, Denmark may violate the principles of *non-refoulement* and family unity.
16. The test of “systemic failure of the asylum system and reception conditions in the other Dublin country” as proposed by the Danish Government is misguided in UNHCR’s view. It is worth noting that since the Proposal was presented, the CJEU has reversed its jurisprudence and clarified that a foreigner cannot be returned to a Dublin country, where, based on individual circumstances, there are substantial grounds for considering that there is a *risk of ill-treatment*.
17. With respect to the assignment to the police of delegated authority of issuing decisions at border areas, UNHCR wishes to reiterate its recommendation to have one competent determining authority with responsibility for all asylum proceedings, including interviewing applicants for international protection at the admissibility stage and in accelerated procedures, as well as for taking decisions on the granting or refusal of admissibility or international protection. UNHCR firmly believes that all of these tasks should be performed by a single central authority, that is, the DIS, in line with the guidance in UNHCR’s ExCom Conclusion No. 8.<sup>27</sup>
18. Although Denmark is not bound by the EU asylum *acquis*, it should be noted with regard to admissibility interviews, that Article 34(2) of the recast Asylum Procedures Directive of the European Union<sup>28</sup> contains an exception to the general rule, which allows Member States to provide that the personnel of other authorities than the determining authority, such as the police, conducts the personal interview on the admissibility of the application for international protection. Nonetheless, Article 34(2)

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<sup>24</sup> Zimmerman, *The 1951 Convention relating to the Status of refugees and its 1967 Protocol, A Commentary*, Oxford University Press, 2011, p. 1360, at 82; p. 1371 p. 117; p. 1375, at 127. See also, *The Scope and Content of the Principle of Non-Refoulement: Opinion*, Cambridge University Press, June 2003, available at <http://www.refworld.org/docid/470a33af0.html>; UNHCR, *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection*, 2003, available at: <http://www.refworld.org/docid/4bed15822.html>.

<sup>25</sup> Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, 4 November 1950, ETS 5, available at: <http://www.refworld.org/docid/3ae6b3b04.html>.

<sup>26</sup> Dublin Regulation, Articles 9, 10 and 11.

<sup>27</sup> UNHCR, *Determination of Refugee Status*, 12 October 1977, No. 8 (XXVIII) - 1977, para. (e) (iii), available at: <http://www.refworld.org/docid/3ae68c6e4.html>.

<sup>28</sup> European Union: Council of the European Union, *Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)*, 29 June 2013, OJ L. 180/60 -180/95; 29.6.2013, 2013/32/EU, available at: <http://www.refworld.org/docid/51d29b224.html>.

further provides that in such cases, Member States shall ensure that the personnel of those authorities who conduct the interview receive in advance the necessary basic training in particular with respect to international human rights law, the EU asylum *acquis* and interview techniques.

#### **IV. CONCLUDING RECOMMENDATIONS**

19. UNHCR finds the proposed measures problematic, not only from a refugee and human rights law perspective, but also as the effects of the Proposal may be chaos and possible security risks. In view of the above, UNHCR recommends the Government of Denmark to:

- i. Abstain from adopting the proposed measures as a way to shift the responsibility to other countries bound by the Dublin Regulation through which the asylum-seeker may have passed;
- ii. Adhere to the Dublin Regulation, and to fully apply its provisions concerning the rights of asylum-seekers. In order for asylum-seekers to be able to exercise their right to seek asylum and for these procedures to be fair and efficient, they need to have access to territory and asylum procedures;
- iii. Assign one central determining authority, i.e. the Danish Immigration Service, as responsible for interviewing applicants for international protection and for taking decisions on their claim, including within admissibility and accelerated asylum procedures.

**UNHCR Regional Representation for Northern Europe**  
Stockholm, 22 February 2017