

## **UNHCR Observations on the Proposal for amendments to the Danish Aliens Act (Amendment of the deportation rules and introduction of the rules on deportation of foreigners covered by EU rules)**

**[Forslag til Lov om ændring af udlændingeloven og forskellige andre love (Ændring af udvisningsreglerne samt indsættelse af reglerne om udvisning af udlændinge omfattet af EU reglerne)]**

### **I. Introduction**

1. The United Nations High Commissioner for Refugees (“UNHCR”) Representation for the Nordic and Baltic Countries (“RNB”) appreciates the invitation by the Government of Denmark to provide observations on the “Proposal for law on amendments to the Aliens Act (Amendment of the deportation rules and introduction of the rules on deportation of foreigners covered by EU rules)” [*Forslag til Lov om ændring af udlændingeloven og forskellige andre love (Ændring af udvisningsreglerne samt indsættelse af reglerne om udvisning af udlændinge omfattet af EU reglerne)*] - hereafter the “Proposal”.<sup>1</sup>
2. UNHCR has a direct interest in law proposals related to asylum, as the agency entrusted by the UN 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> Paragraph 8 of UNHCR’s Statute confers responsibility on UNHCR for supervising international conventions for the protection of refugees,<sup>3</sup> whereas the 1951 Convention relating to the Status of Refugees<sup>4</sup> and its 1967 Protocol (hereafter collectively referred to as “1951 Convention”) oblige State Parties to cooperate with UNHCR in the exercise of its mandate, in particular facilitating UNHCR’s duty of supervising the application of the provisions of the 1951 Convention (Article 35 of the 1951 Convention and Article II of the 1967 Protocol). This has also been reflected in European Union (“EU”) law, including by way of reference to the 1951 Convention in Article 78(1) of the Treaty on the Functioning of the EU. The UN General Assembly has also entrusted UNHCR with a global mandate to provide protection to stateless persons world-wide and for preventing and reducing statelessness.<sup>5</sup>

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<sup>1</sup> Full Proposal (in Danish) <https://prodstoragehoeringspo.blob.core.windows.net/82ca6e1f-d33f-41af-8840-ddf1046b646c/Udkast%20til%20lovforslag%20ændring%20af%20udvisningsreglerne%20fremstilling%20nov%20.pdf>.

<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) <https://www.refworld.org/docid/3ae6b3628.html> (“the Statute”).

<sup>3</sup> Ibid, para. 8(a). According to para. 8(a) of the Statute, UNHCR is competent to supervise international conventions for the protection of refugees. The wording is open and flexible and does not restrict the scope of applicability of the UNHCR’s supervisory function to one or other specific international refugee convention. UNHCR is therefore competent qua its Statute to supervise all conventions relevant to refugee protection, UNHCR’s supervisory responsibility, October 2002 <http://www.refworld.org/docid/4fe405ef2.html>, pp. 7–8.

<sup>4</sup> UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations Treaty Series, No. 2545, vol. 189 <http://www.unhcr.org/refworld/docid/3be01b964.html>. According to Article 35 (1) of the 1951 Convention, UNHCR has the “duty of supervising the application of the provisions of the Convention”.

<sup>5</sup> UN General Assembly Resolution A/RES/50/152, 9 February 1996 <http://www.unhcr.org/refworld/docid/3b00f31d24.html>, reiterated in subsequent resolutions, including A/RES/61/137 of 25 January 2007 <http://www.unhcr.org/refworld/docid/45fa902d2.html>, A/RES/62/124 of 24 January 2008 <http://www.unhcr.org/refworld/docid/47b2fa642.html>, and A/RES/63/148 of 27 January 2009 <http://www.unhcr.org/refworld/docid/4989619e2.html>.

3. UNHCR’s observations are structured as follows: Section II sets out the scope of the Proposal, Section III sets out observations on Denmark’s obligations under international human rights and refugee law and special considerations for the protection of asylum-seekers and refugees, and Section IV sets out the conclusions.

## II. The Scope of the Proposal

4. The Proposal seeks to further tighten the deportation rules in the Danish Aliens Act concerning foreigners who have committed a crime - regardless of their length of stay in Denmark.<sup>6</sup> Foreigners who have committed crimes and are sentenced to an unconditional prison sentence must now always be deported, as long as the deportation is within the framework of Denmark’s international obligations.<sup>7</sup> The Proposal clearly states that its objective is to send a clear signal to foreigners who abuse their stay in Denmark and commit crimes – “they have no business in Danish society”.<sup>8</sup> A concrete assessment will still be undertaken to assess whether deportation in the individual case will conflict with Denmark’s international obligations.<sup>9</sup>
5. According to the Proposal, the length of an entry ban into Denmark following deportation will be increased from a minimum of four to six years. The Proposal also seeks to remove the “ladder system”, whereby the foreigner’s attachment to Denmark is weighed against the need to ensure public order and prevent crime in Danish society. The longer a foreigner has resided in Denmark, the more serious the crime must be before deportation can be considered. This would mean that the duration of the foreigner’s stay would no longer be a decisive factor for deportation.<sup>10</sup>
6. The analysis in the Proposal of its compliance with Denmark’s international obligations is largely confined to Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms<sup>11</sup> (“ECHR”) and the jurisprudence of the European Court of Human Rights (“ECtHR”). The Proposal acknowledges that the protection of a person’s right to private and family life must follow the conditions laid out in Article 8.2 of the ECHR, that is, to be in accordance with the law and when it is necessary in the interests of, *inter alia*, national security, public safety, or prevention of crime.<sup>12</sup>
7. UNHCR recognizes the legitimate security concerns of States and the need to uphold the rule of law in its society. These concerns were foreseen by the drafters of the 1951 Convention, and is precisely why they established that, in exceptional situations, some individuals do not need or deserve international protection or that, in certain exceptional cases, protection against non-refoulement may not be extended to an individual refugee. This will be further explained below.

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<sup>6</sup> Proposal, p. 10.

<sup>7</sup> Proposal, p. 10 and p. 24.

<sup>8</sup> Proposal, p. 10.

<sup>9</sup> Proposal, p. 24.

<sup>10</sup> Proposal, pp. 12-13.

<sup>11</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,

<https://treaties.un.org/doc/Publication/UNTS/Volume%20213/volume-213-I-2889-English.pdf>

<sup>12</sup> Proposal, p. 17.

### III. Observations

#### *Absence of analysis of the broader scope of Denmark's obligations under international refugee and human rights law*

8. In UNHCR's view, the Proposal does not sufficiently detail and elaborate on the proposed amendments to enable an informed assessment on the compliance with Denmark's international obligations under the 1951 Convention and other instruments relevant to refugee protection. Whilst UNHCR welcomes that the proposal states that an assessment will still be undertaken to assess whether deportation in the individual case will conflict with Denmark's international obligations, UNHCR is concerned that the Proposal almost exclusively considers Denmark's international obligations within the parameters of Article 8 of the ECHR, referring to it as the "legal limit"<sup>13</sup> in assessing the proportionality and necessity of deportation or expulsion of foreigners who have been sentenced to an unconditional prison sentence.<sup>14</sup> The Proposal remains silent on how the assessments will be undertaken in the case of deportation of foreigners who are 1951 Convention refugees or other beneficiaries of subsidiary protection under the Aliens Act, and who have committed crimes in Denmark.
9. The Proposal refers generally to foreigners who have committed crimes in Denmark. UNHCR understands this to include any asylum-seeker or refugee who has not acquired Danish citizenship, irrespective of whether they would be considered as Convention refugees or other beneficiary of subsidiary protection under the Danish Aliens Act. It therefore follows, that the Proposal should have contained an analysis of its international obligations under, *inter alia*, the 1951 Convention, including the principle of *non-refoulement* (see further below at paragraphs 19–21).
10. The Proposal does not duly consider or analyze the broader scope of Denmark's international obligations under other equally essential instruments. This does not allow for a conclusion on whether the Proposal is compliant with international refugee and human rights law.

#### *Situations in which refugee protection shall not be granted or shall be revoked*

11. In the context of international refugee protection, it is only in very exceptional situations where refugees and asylum-seekers who have committed crimes are considered as undeserving of international protection under the 1951 Convention. The nature and seriousness of the crime as well as when and where it was committed is of importance from a refugee law point of view.
12. Firstly, due consideration should be given to situations regulated under the exclusion clauses contained in Article 1F(a) and 1F(c) of the 1951 Convention, which concern certain acts considered so grave that they render the perpetrator undeserving of international

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<sup>13</sup> Proposal, pp. 10 and 23

<sup>14</sup> The Proposal for instance does not clarify whether Denmark intends to also consider the full scope of the so-called "Maslov" criteria stemming from the jurisprudence of the ECtHR, which includes, *inter alia*, the nature and seriousness of the crime committed, see *Maslov v. Austria (Grand Chamber)*, Application no. 1638/03, Council of Europe: European Court of Human Rights, 23 June 2008, <https://www.refworld.org/cases,ECHR,5852a8b97.html>.

protection as refugees, whenever and wherever they are committed.<sup>15</sup> These provisions relate to extremely serious acts – war crimes, crimes against humanity, crimes against peace and acts contrary to the purposes and principles of the United Nations. A person who has committed serious non-political crimes *outside the country of refuge* and *prior to arrival* to the country of asylum may be considered as undeserving of protection and may, during the adjudication of the asylum application, be excluded from refugee status under Article 1F(b). A person who has committed a ‘serious non-political crime’ therefore cannot be excluded from refugee status under Article 1F(b) in the case of crimes committed within and/or after admittance to the country of asylum.

13. The refugee framework should not stand in the way of serious criminals facing justice. However, this must be viewed in the context of the overriding humanitarian objective of the 1951 Convention. As with any exception to human rights guarantees, the exclusion clauses must be interpreted restrictively and should be used with great caution, especially when considering the serious possible consequences of exclusion for the individual.<sup>16</sup>
14. As part of the assessment of Article 1F, a proportionality test ought to be carried out, weighing the gravity of the offence for which the individual is responsible against the possible consequences of the person being excluded, including notably the degree of persecution feared.<sup>17</sup> The very serious crimes stated in Article 1F(a) and (c) – crimes against humanity, crimes against peace, and acts contrary to the purposes and principles of the United Nations are considered heinous enough to likely outweigh the degree of persecution feared.<sup>18</sup> Crimes falling on the lower end of the scale may not lead to the same conclusion. In all cases, a precautionary approach should apply with careful consideration of the individual facts of the case.
15. Secondly, in order to safeguard the integrity of asylum, refugee status already granted may be cancelled or revoked in line with certain procedural safeguards.<sup>19</sup> Legitimate cancellation of refugee status invalidates a refugee status recognition which should not have been granted in the first place. Such circumstances arise, for example, when the individual has committed fraud or misrepresented facts that had a causal link to their recognition as a refugee, or when the individual should have been excluded at the time of determination of their status. Revocation of refugee status applies when the individual commits crimes under Articles 1F(a), crimes against peace, war crimes, crimes against humanity, and Article 1F(c), acts contrary to the purposes and principles of the United Nations, including if committed in the country of asylum, after having been recognized as a refugee.

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<sup>15</sup> UNHCR, *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 4 September 2003, <https://www.refworld.org/docid/3f5857d24.html>, p. 3.

<sup>16</sup> *Ibid.*, page 3, para. 4; UNHCR, *Guidelines on International Protection No. 5: Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 4 September 2003, HCR/GIP/03/05, available at: <https://www.refworld.org/docid/3f5857684.html> p. 2, para. 2; UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status and Guidelines on International Protection Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, April 2019, HCR/1P/4/ENG/REV. 4, <https://www.refworld.org/docid/5cb474b27.html>, (“UNHCR, Handbook”), para. 149.

<sup>17</sup> UNHCR, *Background Note on the Application of the Exclusion Clauses: Article 1F of the 1951 Convention relating to the Status of Refugees*, 4 September 2003, <https://www.refworld.org/docid/3f5857d24.html>, p. 29, para. 78

<sup>18</sup> *Ibid.*, p. 29, para. 78.

<sup>19</sup> UNHCR, *Note on the Cancellation of Refugee Status*, 22 November 2004, <https://www.refworld.org/docid/41a5dfd94.html>.

*Obligations under Articles 32 and 33(2) of the 1951 Convention*

16. The principle of *non-refoulement* constitutes the cornerstone of international refugee protection.<sup>20</sup> It is enshrined in Article 33 of the 1951 Convention and applies to any person who is a refugee under the terms of Article 1A(2) of the 1951 Convention, and does not come within the scope of one of its exclusion provisions. The principle of *non-refoulement* is part of customary international law and is therefore binding on all States whether or not they are parties to the 1951 Convention.<sup>21</sup>
17. Article 32 of the 1951 Refugee Convention 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.
18. It is clear, 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, limited to (for example) activities directed at the overthrow of the Government of the host country. Similarly, the concept of “public order” in Article 32 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. In all cases, decisions to expel a refugee under Article 32 remain constrained by the principle of non-refoulement.<sup>22</sup>
19. There are certain limited circumstances in which an exception to the principle of non-refoulement under international refugee law may be permitted. Under Article 33(2) of the 1951 Refugee Convention, protection against non-refoulement may not be claimed by a refugee for whom there are reasonable grounds for regarding as a danger to national security or having been convicted by a final judgment of a particularly serious crime constitutes a danger to the community of that country.<sup>23</sup> The exceptions to the non-refoulement provision are to be interpreted restrictively in light of the serious situation to which a refugee is returned.

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<sup>20</sup> UNHCR, *Note on the Principle of Non-Refoulement*, November 1997, <https://www.refworld.org/docid/438c6d972.html>, section A.

<sup>21</sup> *Ibid.*, section B.

<sup>22</sup> UNHCR Observations on the proposed amendments to the Danish Aliens legislation, 31 October 2016, <https://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=5820867f4&skip=0&query=unhcr%20observations%20danish%20aliens%20act>

<sup>23</sup> See Article 33(2) of the 1951 Convention; UNHCR, *Note on the Principle of Non-Refoulement*, November 1997, <https://www.refworld.org/docid/438c6d972.html>, section F; UNHCR, *Note on Diplomatic Assurances and International Refugee Protection*, August 2006, <https://www.refworld.org/docid/44dc81164.html>, p. 5, para. 11; UNHCR, *The Refugee Convention, 1951: The Travaux préparatoires analysed with a Commentary by Dr. Paul Weis*, 1990, <https://www.refworld.org/docid/53e1dd114.html> see Article 33 commentary, starting at p. 232; UNHCR, *Handbook*, p. 36, para. 154.



20. For the “danger to the security of the country” exception to apply, the danger must be very serious, 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.
21. 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).<sup>24</sup>
22. These exceptions are not additional grounds for exclusion from refugee status and must be distinguished from the exclusion clauses contained in Article 1F of the 1951 Convention. A person expelled in line with the exception under Article 33(2) would still maintain refugee status. Article 33(2) permits States to remove a refugee from their territory where this is a necessary and proportionate means to protect their national security or their community. The application of the exception in Article 33(2) requires adequate procedural guarantees and strict compliance with due process of law. The due process safeguards applicable to expulsion, regulated in Article 32 of the 1951 Convention, must also be read into the application of the exceptions to *refoulement* in Article 33(2).<sup>25</sup>
23. UNHCR would like to emphasise that even in cases where an individual is excluded from refugee status or where protection against non-*refoulement* has been removed from him or her, this has no impact on the host State’s non-*refoulement* obligations under international human rights law, which permit no exceptions. The individual still benefits from protection against return to a country where they are at risk of ill-treatment by virtue of other international instruments, most notably Article 3 of the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment<sup>26</sup> (“CAT”). Article 3 of the CAT contains an absolute prohibition against the return of an individual to a country where there is a risk that they will be subjected to torture. Other international and regional instruments contain similar provisions.
24. In UNHCR’s understanding, the grounds for deportation of foreigners under the Proposal for amendments to the Danish Aliens Act are wider than the scope permissible under Articles 32 and 33(2) of the 1951 Convention. However, UNHCR is concerned that as the Proposal does not contain any detail on how assessments will be undertaken in the case of foreigners who are 1951 Convention refugees or other beneficiaries of subsidiary protection

<sup>24</sup> UNHCR Observations on the proposed amendments to the Danish Aliens legislation, 31 October 2016, <https://www.refworld.org/cgi-bin/texis/vtx/rwmain?page=search&docid=5820867f4&skip=0&query=unhcr%20observations%20danish%20aliens%20act>.

<sup>25</sup> Cambridge University Press, Sir Elihu Lauterpacht and Daniel Bethlehem, *The Scope and Content of the Principle of Non-Refoulement: Opinion*, June 2003, [www.refworld.org/docid/470a33af0.html](http://www.refworld.org/docid/470a33af0.html).

<sup>26</sup> 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, <https://treaties.un.org/doc/Publication/UNTS/Volume%201465/volume-1465-I-24841-English.pdf>.

under the Aliens Act, it is difficult to assess the Proposal's compliance with Denmark's obligations under the 1951 Refugee Convention.

#### **IV. Conclusions**

25. For reasons set out above, UNHCR strongly urges Denmark to carefully distinguish between 1) refugees and asylum-seekers as people who warrant special protection and consideration under international law, and 2) carefully assess the nature of crimes committed by refugees and asylum-seekers before deciding to expel the individual, within the framework and provisions and principles outlined and referred to above.
26. UNHCR regrets that the Proposal does not sufficiently detail and elaborate on the proposed amendments to enable an informed assessment on the compliance with Denmark's international obligations under the 1951 Convention and other instruments relevant to refugee protection. UNHCR thus recommends the Government of Denmark to undertake such an analysis, beyond considerations under Article 8 of the ECHR.
27. In conclusion, UNHCR strongly urges Denmark to give special consideration to refugees, asylum-seekers and other beneficiaries of subsidiary protection under the Danish Aliens Act, who constitute a clearly distinct group of individuals in contrast to other foreigners on Denmark's territory. Any decision to deport or expel this group of individuals when they have committed crimes and have been sentenced to an unconditional prison sentence, should be made in full compliance with Denmark's international obligations, for which a very restrictive and exceptional scope is provided under international refugee law.

**UNHCR Representation for the Nordic and Baltic Countries**

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