

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

### **Lov om ændring af udlændingeloven (Øget kontrol på udlændingeområdet) Law amending the Aliens Act (Increased control in the field of immigration)**

#### **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 25 September 2017 to further amend the Danish Aliens Act (hereafter referred to as the Proposal).<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.

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<sup>1</sup> 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](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>.

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.<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 principal aim of Part 3 of the Proposal<sup>9</sup> is to prevent the misuse of travel documents,<sup>10</sup> and to adopt concrete measures for the authorities to deal with situations when an alien has lost his or her travel documents more than once within the validity period of maximum 10 years. The Proposal states that it is currently “too easy” to simply request a new travel document referring to document loss, and that the system is therefore susceptible to misuse. While acknowledging that it is not possible to determine the extent of misuse of travel documents in general, the Government assesses that the misuse of travel documents issued by Denmark is more prevalent among aliens, either through sale of document or through so called “look-alike” use.<sup>11</sup>
6. Currently, a person granted international protection in Denmark has the right to have an official travel document issued, of which there are two kinds, depending on the type of protection granted.<sup>12</sup> A refugee granted Refugee Convention status in accordance with the Danish Aliens Act article 7:1 may have a Convention Travel Document (CTD) issued, which allows travelling in the Schengen area without a visa and only bans traveling to the home country. Beneficiaries of subsidiary protection, in accordance with the Danish Aliens Act article 7:2 or 3, may have an aliens passport issued. The latter requires a visa prior to traveling, also within the Schengen area.
7. Under current rules, a new travel document will be issued when a previous document has been lost. In order to obtain a Danish travel document the alien must deposit his or her national travel document. Issuance of a Danish travel document may be refused in accordance with the 1951 Convention article 28<sup>13</sup>. Refusal of a Danish travel document may be appealed to the Refugees Appeals Board<sup>14</sup>. Furthermore, a travel document may be valid for up to 10 years<sup>15</sup>.

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

<sup>9</sup> Proposal available (in Danish) on; <http://prodstoragehoeringspo.blob.core.windows.net/9ef9ed28-1b15-45bb-bc9e-d3d660f5fc84/Udkast%20til%20lov%20om%20%C3%B8get%20kontrol.pdf>

<sup>10</sup> Convention Travel Documents (CTDs) and Aliens Passports

<sup>11</sup> The Proposal, pages 11 and 12

<sup>12</sup> See the Danish Aliens Act Art. 39:5

<sup>13</sup> Refusal of both CTDs and Aliens passports are proposed to be covered by the new Article 39:6 in the Aliens Act, which in turn refers to the reasons for refusal as outlined in the 1951 Convention article 28.

<sup>14</sup> Aliens other than beneficiaries of international protection may submit an appeal to the Immigration Appeals Board.

<sup>15</sup> A travel document issued to an individual without permanent residence permit is valid for the duration of the residence period plus six months

8. In order to address the misuse referred to above, the Proposal wishes to introduce an amendment to article 39 in The Danish Aliens Act.<sup>16</sup> Through this amendment, the rules governing refusal of travel documents is also promoted from decree level into primary legislation. The new paragraph 6 in Article 39 can be summarized in the following;

*Issuance of a travel document to an alien, may be refused, unless excusable reasons exist, if the applicant, repeatedly within the past years, has been issued a travel document due to loss of the previous one. If issuance is refused due to loss, the alien's right to a travel document will be suspended for a period of five years, unless specific and special circumstances can be shown.*

Article 39:6 also proposes the following passage, thus adding "reputation of state" as a basis for refusing issuance of travel documents;

*Issuance of a travel document may be refused when it is deemed necessary due to national security, public order or the reputation of state.*<sup>17</sup>

9. The Proposal also introduces the possibility to bar the use of an already issued Danish travel document under two different scenarios. Firstly, if it is known that the person is in possession of also a valid national passport, and at the same time does not deposit one of the documents.<sup>18</sup> Furthermore, barring the use may also come into play if the alien is confirmed as having left Denmark.<sup>19</sup> In both these scenarios, there is no avenue for appealing the decision.
10. In addition to the proposals pertaining to misuse of travel documents, the Proposal also introduces an amendment to the Danish Aliens Act article 40:1, allowing sanctions for refusing to assist authorities in providing information on another person's asylum claim. Refusal to assist may carry a fine or imprisonment for up to a year.

### III. OBSERVATIONS

#### **Reasons for refusal of CTDs and the five year ban**

11. Referring to current Danish legislation, the Proposal defines the term "*necessary due to national security*" as referring to crimes covered by the Danish Criminal Act, chapters 12 and 13, including crimes against the independency of state or its security, and terrorism<sup>20</sup>. "*Public order*" is defined as other serious crimes not covered by chapter 12 and 13 of the Danish Criminal Act, but still seen as a serious threat to the public order without being a threat to national security. The Proposal further states that, if it is evident that an alien has misused or attempted to misuse a travel document once, the refusal to reissue a travel document is possible on public order grounds.

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<sup>16</sup> The Proposal is available at: <http://prodstoragehoeringspo.blob.core.windows.net/9ef9ed28-1b15-45bb-bc9e-d3d660f5fc84/Udkast%20til%20lov%20om%20%C3%B8get%20kontrol.pdf>

<sup>17</sup> 39 :6 in its entirety (in Danish) reads: "Udstedelse af særlig rejselegitimation til udlændinge kan, medmindre der foreligger særlige omstændigheder nægtes, hvis ansøgeren gentagen gange inden for de seneste år har fået udstedt ny rejselegitimation i tilfælde af, at rejselegitimationen er bortkommet, eller hvis det skønnes nødvendigt af hensyn til den nationale sikkerhed, den offentlige orden eller statens omdømme."

<sup>18</sup> Proposed Article 39:7.

<sup>19</sup> Defined in Danish as "opgivet sin bopæl". In this regard, the proposal only refers to those with an aliens travel document (not CTDs), see page 16 of the Proposal.

<sup>20</sup> The Proposal, p. 14.

12. As referred to above, in addition to national security and public order grounds, the Proposal now aims to add the term "reputation of state" as a reason for refusing issuance of a CTD. This term is defined in the Proposal as meaning "situations where it might be assumed that the alien by his/her actions will be able to harm Denmark's relationship with other countries".<sup>21</sup> UNHCR notes that the Proposal does not make any additional attempts to define the scope of the term, nor to indicate the reasons for its introduction.
13. The Proposal further states that in order to substantiate misuse, it will be sufficient that an alien "twice within a period of five years has been issued a new travel document due to loss". The Government recognizes that the ban may hinder the right to a family life, education or work, wherefore the Proposal under Article 39:6 allows for a temporary travel document to be issued for specific trips abroad but only under special circumstances, such as severe illness etc. The Proposal also does not specify when the five year ban period would start.
14. The Proposal states that the issuance of a travel document may nevertheless be the outcome, if "special circumstances" exist. "Special circumstances" may refer to situations where the alien can show that the loss of travel document happen due to fire or theft. In the context of theft, the theft would have to have been reported to the police, who subsequently locates the stolen passport. Here UNHCR notes that the Proposal suggests a shift in the burden of proof in the context, in that it is up to the alien to rebut a presumption of misuse.

#### **UNHCR observations**

15. UNHCR welcomes the decision of the Government to include the legislation pertaining to refusal of issuance of travel documents in primary legislation, and wishes to note the following;
16. Article 28, paragraph 1, of the 1951 Convention, requires Contracting States to issue CTDs to refugees lawfully in their territory. CTDs may also be issued to refugees in the territory who are not lawfully staying, whether their presence in the country is illegal or purely temporary.<sup>22</sup> Article 28 provides that the Contracting States are obliged to give "sympathetic consideration" to any application by a refugee for travel documents unless compelling reasons of national security or public order otherwise require. As a general rule, a Contracting State must issue a refugee with a CTD and not with any other document such as a foreign resident's passport.<sup>23</sup>
17. UNHCR wishes to add that the lawful exception to the requirement that Contracting States issue a CTD to refugees lawfully staying in their territory ("unless compelling reasons of national security or public order otherwise require") should be interpreted and applied restrictively, and only concern grave and exceptional circumstances.<sup>24</sup>
18. UNHCR recalls that international norms on treaty interpretation provide that a treaty shall be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in the context and in the light of its object and

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<sup>21</sup> The Proposal, p. 14.

<sup>22</sup> UNHCR, *The Refugee Convention, 1951: The Travaux préparatoires analysed with a Commentary by Dr. Paul Weis*, 1990, p.195, <http://www.refworld.org/docid/53e1dd114.html>.

<sup>23</sup> *Ibid.*, p. 194.

<sup>24</sup> UNHCR, *Guide for Issuing Machine Readable Convention Travel Documents for Refugees and Stateless Persons*, jointly published by UNHCR and the ICAO, October 2013, para. 28, <http://www.refworld.org/docid/52b166a34.html>.

purpose.”<sup>25</sup> UNHCR regrets that the Proposal does not assess whether or to what extent this has been abided by.

19. Furthermore, the preparatory works regarding Article 28 stressed that the word “compelling” was to be understood as a restriction upon the words “reasons of national security or public order”. Thus, not any grounds of national security or public order may be invoked but only compelling grounds.<sup>26</sup> The exception must be interpreted narrowly, and not every case which would ordinarily fall under the latter concept would therefore justify a refusal of a travel document, but only reasons of a very serious character.<sup>27</sup>
20. Also the finding of the CJEU in *H.T. v Land Baden-Württemberg* supports UNHCR’s interpretation that only offences such as those enlisted in Article 83(1) of the TFEU may justify a State’s refusal to issue a CTD to a refugee and respect the principle of proportionality. Although the judgment focuses on the concept of “compelling reasons of national security or public order” in Article 24(1) of the Qualification Directive (QD),<sup>28</sup> one must bear in mind that the residence permit of Article 24 QD is of the same nature as the travel document of Article 25 QD, i.e. it documents and provides for the administration of a pre-existing entitlement. Moreover, the exception in both provisions is worded in identical terms, i.e. making reference to “compelling reasons of national security or public order”.
21. With regards to the five-year ban, the preparatory works of the 1951 Convention discusses a possibility for temporary discontinuance of the issuance of travel documents under certain limited circumstances, and concludes that a discontinuance could only come into play under the same exceptions (*national security or public order*) as outlined in Article 28, and could not lead to a categorical refusal. The temporary discontinuance of issuance would also no longer be necessary once the considerations which had led to suspend the issue of travel documents had ceased to hold.<sup>29</sup> UNHCR therefore wishes to strongly emphasize that the mere loss of a travel document cannot be seen to equate (or be presumed to represent) misuse of that document.
22. UNHCR wishes to further add that travel documents are an essential means for the exercise of the fundamental human right to freedom of movement. Restrictions on the freedom of movement of refugees, such as refusal of exit and refusal to issue travel documents, may disproportionately interfere not only with their right to freedom of movement guaranteed by Article 12 of the ICCPR and Article 2 of Protocol no. 4 of the ECHR, but also with the right to respect for family life and private life provided under Article 8 of the ECHR.

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<sup>25</sup> United Nations, *Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations*, 12 March 1986, <http://www.refworld.org/docid/3ae6b3924.html>

<sup>26</sup> UNHCR, *The Refugee Convention, 1951: The Travaux préparatoires analysed with a Commentary by Dr. Paul Weis*, 1990, p.194, <http://www.refworld.org/docid/53e1dd114.html>

<sup>27</sup> UNHCR, *Note on Travel Documents for Refugees*, 30 August 1978, EC/SCP/10, <http://www.refworld.org/docid/3ae68cce14.html>, para. 16; see also Jens Vedsted-Hansen in Zimmerman, A *commentary*, p. 1206.

<sup>28</sup> European Union: Council of the European Union, Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted, 30 September 2004, OJ L. 304/12-304/23; 30.9.2004, 2004/83/EC, available at: <http://www.refworld.org/docid/4157e75e4.html>

<sup>29</sup> UNHCR, *The Refugee Convention, 1951: The Travaux préparatoires analysed with a Commentary by Dr. Paul Weis*, 1990, p.194, <http://www.refworld.org/docid/53e1dd114.html>

23. Based on the above outlined, UNHCR views the refusal on ground of “state reputation” as arbitrary and as contravening the clear terms of the 1951 Convention, in light of the exhaustive nature of the refusal grounds already outlined therein. Noting the obligatory nature of Article 28 (“States shall”) and the above outlined, UNHCR also perceives the five-year ban as contrary to the 1951 Convention.

#### **The barring of use of already issued documents**

24. As mentioned above in paragraph 9, the Proposal wishes to give the Danish Immigration Service (DIS) the right to bar the use of already issued Danish travel documents in two scenarios.<sup>30</sup> The Proposal states that the Danish authorities have a legitimate reason for knowing and controlling the identity of aliens traveling to or from Denmark as well as for those in Denmark.

#### **UNHCR Observations**

25. In the context of barring use of an aliens passport when the person is deemed as having left the country, the Proposal submits that a ban will only be issued in accordance with objective criteria, i.e. de-registration from the Danish Social Register (DSR)<sup>31</sup>. As UNHCR understands the procedures in the context, the decision to de-register a person from the DSR may be done by any authority in Denmark, in theory as a consequence of small omissions from the alien, such as not appearing at a particular meeting with authorities, registering a new address in time etc.
26. Given the consequences to the freedom of movement of the persons concerned, UNHCR recommends any barring of use of document to be governed by clear and exhaustive criteria, and that any decision to bar the use of a travel document be subject to effective remedies. UNHCR also recommends that the criteria of having left the country for good in the context would be based on an active proclamation by the alien.

#### **Sanctions regarding testimony duty in the context of another person’s asylum claim**

27. The present Danish Aliens Act, article 40:1, states that an alien must supply authorities with the necessary information to assess his/her asylum claim and that non-compliance with the obligation may be sanctioned. The Article also obliges “others, who may be in a position to provide information for the processing of the claim”, to supply information to the authorities if so requested. If the asylum-seeker does not comply with the obligation, a fine or imprisonment for up to a year may be given.<sup>32</sup> The Proposal now wishes to broaden the scope of the sanctions, so that also “others” in the context of the Article could be sanctioned for non-compliance.

#### **UNHCR Observations**

28. UNHCR presumes that the information the “others” would provide, would be used in the holistic credibility assessment of the asylum-seekers’ claim, and UNHCR therefore wishes to briefly state the following;
29. UNHCR acknowledges the concrete challenges in establishing the facts when assessing claims for international protection. While it is UNHCR’s view that all

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<sup>30</sup> The latter only applies to aliens passports (not CTDs) and is not applicable to stateless individuals

<sup>31</sup> In Danish “Folkeregisteret”, see the Proposal page 16.

<sup>32</sup> The Proposal, p. 19

available information in a particular application must be considered holistically, as would appear to be the main aim for the proposed measure, UNHCR is concerned that in doing so, the confidential character of an asylum application may be undermined. Therefore, UNHCR would like to draw the Danish Government's attention to the need to respect a number of procedural safeguards when using information from individuals other than the asylum-seeker;

30. As regards the question of whether the credibility of one applicant's statements (including a child's statements) can be checked against the statements of another applicant (including the parents or other siblings) and lead to a negative credibility finding for one or both applicants, UNHCR's suggested approach would be to take into account two principles: the shared duty of the decision-maker and the applicant to ascertain and evaluate all relevant facts, and, for that purpose, to clarify incomplete or contradictory statements relating to the material elements of a claim, including when such statements come from other applicants; and the obligation to respect the confidentiality regarding the identity of each applicant.

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

UNHCR recommends the Government of Denmark to:

- i. Refrain from introducing a five-year ban based on a presumption of misuse in the context of travel document loss, as any such ban could only be of a temporary nature and based on the same exhaustive and compelling reasons as for refusal under Article 28 of the 1951.
- ii. Refrain from introducing "reputation of state" as a reason for refusing the issuance of travel documents, as this would violate the clear terms of the 1951 Convention Article 28. Issuance under Article 28 is a mandatory obligation of host States unless compelling reasons apply, which are to be interpreted in a strict and exceptional manner
- iii. Ensure confidentiality for any asylum-seeker/refugee in the context of the amendments to Article 40:1.

**UNHCR Regional Representation for Northern Europe**  
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