



**UNHCR Observations on amendments to the Danish Aliens Act as set out in
Lovforslag nr. L 62**

**Lov om ændring af udlændingeloven
(Håndtering af flygtninge- og migrantsituationen)**

I. Introduction

1. As the agency entrusted by the United Nations General Assembly with the mandate to provide international protection to refugees and, together with governments, to seek permanent solutions to the problems of refugees,¹ UNHCR has a direct interest in laws and regulations relating to 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[.]”.² UNHCR’s supervisory responsibility is reiterated in Article 35 of the 1951 Convention and in Article II of the 1967 Protocol relating to the Status of Refugees (hereafter collectively referred to as the “1951 Convention”) according to which State parties undertake to “co-operate with the Office of the United Nations High Commissioner for Refugees [...] in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of the Convention”. It has also been reflected in European Union law, including by way of a general reference to the 1951 Convention in Article 78(1) of the Treaty on the Functioning of the European Union (hereafter “TFEU”).³
2. UNHCR’s supervisory responsibility is exercised in part by the issuance of interpretative guidelines on the meaning of provisions and terms contained in the 1951 Convention,⁴ as well as by providing comments on legislative and policy proposals impacting on the protection and durable solutions of its persons of concern.

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

² *Ibid.*, para. 8(a).

³ European Union, *Consolidated version of the Treaty on the Functioning of the European Union*, 13 December 2007, OJ C 115/47 of 9.05.2008, available at: <http://www.unhcr.org/refworld/docid/4b17a07e2.html>.

⁴ 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>.

II. General Observations

3. When the need for European States to demonstrate international solidarity is greater than ever, UNHCR regrets that the Government of Denmark has introduced several legislative amendments that restrict the asylum space in the country. In UNHCR's view, the measures adopted send negative signals to other European countries, whom UNHCR also calls upon to provide international protection and sustainable integration opportunities to persons in need of such. UNHCR thus continues to urge the Government of Denmark to uphold its long tradition of providing durable solutions to those in need of international protection, and to lead by example in upholding European Union principles and values based on human rights, democracy values and international solidarity.
4. It is in this context that the UNHCR Regional Representation for Northern Europe (RRNE) would like to share its observations on the amendments to the Danish *Aliens Act* that entered into force on 20 November 2015, as set out in the legislative proposal no. L 62. It is UNHCR's understanding that these amendments were introduced to more efficiently manage the registration of asylum-seekers and the processing of their applications in light of an increasing number of asylum-seekers arriving to Europe and Denmark. Pursuant to its mandate and Article 35 in the 1951 Convention, UNHCR shares these observations even though the amendments set out in L 62 have already been adopted and entered into force. For the future, UNHCR kindly requests the Danish government to share any and all legal proposals impacting UNHCR's persons of concern prior to their adoption, in order to enable the Office to submit its comments in a timely manner.

II. General Observations

5. At the outset, UNHCR acknowledges that Denmark has a legitimate interest in controlling the entry of foreigners at its border, and for taking measures to ensure that claims for international protection that are clearly abusive or manifestly unfounded can be processed in an accelerated manner. UNHCR also supports States' implementation of effective return policies for people who are found not to be in need of international protection. Such individuals, who also cannot benefit from alternative legal ways of regularizing their stay, should be assisted to return quickly to their home countries, in a manner which fully respects their human rights. Nonetheless, adequate safeguards are needed for ensuring that the basic human rights of asylum-seekers are respected and that, for example, detention is only used as a measure of last resort.

III. Subject-specific comments

a. Increased use of detention and suspension of an automatic review of detention orders

6. According to Article 36 in the Danish *Aliens Act*, an asylum-seeker can be detained if s/he does not assist the authorities in substantiating the asylum application, if the application is reasonably expected to be assessed in accelerated procedures ("manifestly unfounded" or pursuant to the Dublin Regulation) or if the person refuses to stay at a place designated by the authorities. The legality of the detention is to be assessed by a court of law within 72 hours and a lawyer is to be appointed to the

asylum-seeker. Any detention can only be extended four weeks at a time and can never exceed 12 months in total.

7. Through the adoption of L 62 and the addition of a paragraph in Article 36, the Danish Police now also have the right to detain an asylum-seeker in the context of his/her arrival to Denmark, for the purpose of “verifying his/her identity, conduct registration and establish the basis for his/her application”.
8. Furthermore, the L 62, as adopted, gives the Ministry of Immigration, Integration and Housing the right to declare “special circumstances”, during which some of the most fundamental detention safeguards are temporarily suspended. A declaration of “special circumstances” is to be publically announced before its implementation, and the consequent measures are primarily intended to apply during a period of 14 days, with the possibility of extension.
9. The explanatory memorandum to L 62 outlines that during periods of high numbers of asylum-seekers arriving, it may become impossible to abide by the safeguards normally governing the use of detention, as it is simply not possible to provide court hearings within 72 hours to large numbers of detained asylum-seekers. Instead, the hearing will take place “as soon as possible” and only at the request of the applicant. In this context, courts only assess the legality of the detention, and do not rule on the duration of its possible extension. Following a decision on the legality of detention in a particular case, there is no right for another review within four weeks.

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10. The fundamental rights of liberty and security of person are expressed in all the major international and regional human rights instruments, and are essential components of legal systems built on the rule of law⁵. The Universal Declaration of Human Rights⁶, (Articles 3 and 9), the European Convention on Human Rights⁷ (Article 5) and the EU Charter of Fundamental Rights⁸ (Article 6) all contain provisions in this regard. The Executive Committee of the High Commissioner’s Programme (ExCom) has addressed on a number of occasions the detention of asylum-seekers⁹. These rights apply in principle to all human beings, regardless of their immigration, refugee, asylum-seeker or other status. The basic tenets are, that seeking asylum should not

⁵ UN High Commissioner for Refugees (UNHCR), *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, available at: <http://www.refworld.org/docid/503489533b8.html>, page 13.

⁶UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948, 217 A (III), available at: <http://www.refworld.org/docid/3ae6b3712c.html>

⁷ 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>

⁸ European Union, *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02, available at: <http://www.refworld.org/docid/3ae6b3b70.html>

⁹See, UNHCR ExCom, *Conclusion on Detention of Refugees and Asylum-Seekers*, No. 44 (XXXVII) –1986, para. (b), available at: <http://www.unhcr.org/refworld/docid/3ae68c43c0.html>. See also in particular, UNHCR ExCom, Nos. 55 (XL) – 1989, para (g); 85 (XLIX) –1998, paras. (cc), (dd) and (ee); and 89 (LI) –2000, third paragraph, all available at: <http://www.unhcr.org/3d4ab3ff2.html>.

be seen as an unlawful act, and that detention is an exceptional measure that should be used as a measure of last resort.

11. UNHCR nonetheless agrees that detention can be justified to secure public order in certain situations; however, such detention must not be arbitrary, and can only be applied where it pursues a legitimate purpose and has been determined to be both necessary and proportionate in each individual case. In this respect, it is permissible to detain an asylum-seeker for a limited initial period for the purpose of recording, within the context of a preliminary interview, the elements of their claim to international protection. However, such detention can only be justified where that information could not be obtained in the absence of detention.¹⁰ Hence, the general principle of proportionality requires that a balance be struck between the importance of respecting the rights to liberty and security of person and freedom of movement, and the public policy objectives of limiting or denying these rights. The authorities must not take any action exceeding that which is strictly necessary to achieve the pursued purpose in the individual case. The necessity and proportionality tests further require an assessment of whether there were less restrictive or coercive measures (that is, alternatives to detention) that could have been applied to the individual concerned and which would be effective in the individual case¹¹.
12. In view of the aforementioned standards and principles, UNHCR is concerned about the risks of a higher degree of arbitrariness with regards to detention, during a time period where influx is high. In this regard, it needs to be ensured that the purpose of the detention is indeed only to protect public order, and not, for example, to facilitate administrative expediency. In this context, UNHCR wishes to recall that, according to the UN Human Rights Committee¹², administrative expediency is not a legitimate purpose for detaining people in light of the serious consequences it has for a human being.
13. The implementation of procedural safeguards is particularly important in situations when the ability to assess the necessity and proportionality of detention in each individual case may be challenging. UNHCR is thus of the view that every asylum-seeker should have a right to be brought promptly before a judicial or other independent authority to have his/her detention decision reviewed. This review should ideally be automatic, and take place in the first instance within 24-48 hours of the initial decision to hold the asylum-seeker. The reviewing body must be independent of the initial detaining authority, and possess the power to order release or to vary any conditions of release. Good practice indicates that following an initial judicial confirmation of the right to detain, review would take place every seven days

¹⁰ UN High Commissioner for Refugees (UNHCR), *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, available at: <http://www.refworld.org/docid/503489533b8.html>, page 18.

¹¹ UN High Commissioner for Refugees (UNHCR), *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, available at: <http://www.refworld.org/docid/503489533b8.html>, page 21.

¹² See UN Human Rights Committee (HRC), *CCPR General Comment No. 15: The Position of Aliens Under the Covenant*, 11 April 1986, available at: <http://www.refworld.org/docid/45139acfc.html>.

until the one month mark and thereafter every month until the maximum period set by law is reached.¹³

14. UNHCR is also concerned about subjecting the provision of basic human rights, such as a hearing on the legality of detention, to the request of the individual. Deviating from the absolute requirement of a hearing within a specified period of time may present unnecessary challenges in interpreting and subsequently deciding whether an official request for a hearing has indeed been presented by the individual. Such a situation could also lead to arbitrariness, in that during times of high influx, decisions might be taken in haste, and the need for an automatic review of the legality of detention by an independent court of law be more important than ever.
15. In sum, UNHCR is concerned about the possibility to suspend the application of important safeguards governing the use of detention in “special circumstances”, which has been introduced through law Proposal L 62. UNHCR also stresses the importance of assessing the necessity and proportionality of detention in each individual case, including when used to verify identity, conduct registration and establish the basis for an asylum application, in order to avoid arbitrary detention and ensure that detention is only used as a measure of last resort.

b. Prohibition of cross-border carriers to enter Denmark

16. The L 62, as adopted gives the Danish Police the right to temporarily suspend the activities of a cross-border carrier bringing passengers to Denmark.¹⁴

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17. UNHCR has provided comments to the Danish authorities in the context of planned intra-Schengen border controls, and has emphasized the importance of access to territory in order to safeguard the universal right to apply for asylum¹⁵.
18. Sanctions against transport companies for carrying undocumented or inadequately documented persons have been introduced by many European States since the 1980s. UNHCR notes that these measures serve the same aim, namely, to prevent persons lacking valid travel documents from reaching Denmark in order to apply for asylum. Hence, the fundamental concern which UNHCR has consistently voiced on this issue, namely that carrier sanctions may prevent individuals in need of international protection from entering and seeking asylum in prospective countries, is relevant.

¹³ UN High Commissioner for Refugees (UNHCR), *Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention*, 2012, p. 27, available at: <http://www.refworld.org/docid/503489533b8.html>.

¹⁴ The carrier is, if considered feasible during times of possible urgency, to be given the right to in writing give a statement regarding its views on the measures.

¹⁵ Comments by the United Nations High Commissioner for Refugees (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*), Sagsnr. 2015-1423, 11 December 2015, available at: http://www.unhcr-northerneurope.org/fileadmin/user_upload/Documents/PDF/Denmark/DEN_Law_Proposal_on_Carrier_Sanctions_-_Final.pdf.

19. UNHCR agrees that while everyone has the right to seek asylum from persecution, there is no unfettered right to choose one's country of asylum.¹⁶ The intentions of an asylum-seeker, however, ought to be taken into account to the extent possible.¹⁷ The international protection framework gives States a degree of flexibility to insist that asylum-seekers make their asylum applications in the first safe country of asylum they arrive to, however, there is no absolute rule that they must always apply in a safe first country of asylum.
20. The European Union Dublin III Regulation¹⁸ establishes criteria and mechanisms for determining which Member State is responsible for examining an application for international protection. The national asylum system accordingly provides for a procedure for determining which country within the EU is responsible for examining an asylum application and for the transfer of applicants to the country determined to be responsible. UNHCR would like to reiterate the importance of adhering to the Dublin system as the currently existing framework for allocating responsibility within the EU for the examination of applications for international protection. In order to exercise their right to seek asylum, asylum-seekers need to have access to territory and for asylum procedures to be fair and efficient.
21. Hence, in UNHCR's view, the temporary halting of carriers crossing the border into Denmark could have the effect of preventing individuals from exercising the right to seek asylum. Such measures risk being inconsistent with the obligations of EU Member States according to the Schengen Border Code and other international obligations, including the Universal Declaration of Human Rights, the 1951 Convention and regional instruments such as the EU Charter of Fundamental Human Rights.¹⁹ While acknowledging the challenges currently faced in Europe in establishing a functioning distribution key, including operational hotspots, and that the Dublin system is not fully working the way it is foreseen, UNHCR urged the Government of Denmark to adhere to its international obligations, existing mechanisms and to contribute to a European solution built on trust, solidarity and responsibility sharing.

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¹⁶ UNHCR, *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers*, May 2013, para. 3(a), available at: <http://www.refworld.org/docid/51af82794.html>.

¹⁷ UNHCR, *Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary Movements of Refugees and Asylum-Seekers (Lisbon Expert Roundtable, 9-10 December 2002)*, February 2003, available at: <http://www.unhcr.org/refworld/docid/3fe9981e4.html>, para. 11; UNHCR Executive Committee Conclusion No. 15 (XXX) (Refugees without an Asylum Country) (1979), paras. (h)(iii) and (h)(iv).

¹⁸ 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>.

¹⁹ European Union: *Charter of Fundamental Rights of the European Union*, 26 October 2012, 2012/C 326/02, available at: <http://www.refworld.org/docid/3ae6b3b70.html>, Article 18.

