UNHCR
The UN
Refugee Agency

UNHCR's Comments on the proposed amendments to the Danish Aliens Act

Denmark is proposing a number of amendments to the Aliens Act (Forslag til Lov om ændring af udlændingeloven).

The United Nations High Commissioner for Refugees (UNHCR) is entrusted by the United Nations General Assembly with the responsibility for providing international protection to refugees, and for seeking permanent solutions for the problem of refugees. 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", which includes supervision of national legislation, and proposed amendments thereto, of signatory countries regulating the application of the 1951 Convention relating to the Status of Refugees. UNHCR's supervisory responsibility under its Statute is reiterated in Article 35 of the 1951 Convention and Article II of the 1967 Protocol relating to the Status of Refugees. The Office therefore appreciates the opportunity to provide comments on the proposed amendments to the Aliens Act.

PROPOSED AMENDMENTS IN REGARD TO UN AND EU SANCTIONS LISTS

Section 10, paragraph 5 of the proposal provides that an alien who is subject to restrictive measures regarding entry and transit as decided by the UN or/and the EU [the *motivation* refers to the consolidated list of the United Nations Security Council Committee established pursuant to resolution 1267 (1999) (hereinafter the UN SC sanction list) and the Council Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat terrorism as well as the consolidated list of persons, groups and entities subject to EU financial sanctions (hereinafter commonly referred to as the EU sanction lists)], will not be granted a residence permit, namely based on section 7 (Convention refugee or protection (de facto) status), unless there are specific reasons supporting the granting of (such) a residence permit.

Moreover, section 19, paragraph 3 of the proposal states that a temporary or permanent residence permit may be revoked if the alien is subject to restrictive measures regarding entry and transit as decided by the UN or/and the EU [who is on the UN SC or/and EU sanction lists] and/or if he or she is on the SIS II alert list (not being a national of a Schengen country and in accordance with Article 25 Schengen Convention) or if the holder is reported as undesirable because of circumstances which could lead to expulsion under Chapter IV of the Aliens Act.

Section 19, paragraph 7, new item of the proposal provides that in decisions on the revocation of temporary or permanent residence permits due to the

alien being subject to restrictive measures regarding entry and transit as decided by the UN or/and the EU [UN SC or/and EU sanction lists] or because an SIS II alert has been issued, Section 26, paragraph 2 applies correspondingly. Section 26(2) of the Consolidated Aliens Act states that an alien must be expelled (…) unless the circumstances mentioned in paragraph 1 constitute a decisive argument against doing so.

Section 32, paragraph 8 of the proposal provides that an alien who is subject to restrictive measures regarding entry and transit as decided by the UN or/and the EU [who is on the UN SC or/and EU sanction lists] is prohibited from re-entering Denmark. The prohibition of entry does not apply once the restrictive EU/UN measures cease or if the alien has been granted a residence permit on special grounds.

Section 58g, paragraph 2 of the proposal states that the National Police Commissioner can enter an alien who is subject to restrictive measures regarding entry and transit as decided by the UN or/and the EU [who is on the UN/EU sanction lists] into the SIS II as a undesirable person (Schengen/SIS II alert) unless he or she is a national of a Schengen country.

UNHCR's COMMENTS

1. General comments

The amendments mentioned above provide for a number of restrictions (no permission to enter or re-enter Denmark, no issuance of a residence permit, revocation of residence permit and expulsion as well as SIS II alert) for persons who are "subject to restrictive measures regarding entry and transit as decided by the UN or/and the EU" ("restriktive foranstaltninger i form af begrænsninger med hensyn til indrejse og gennemrejse besluttet af De Forenede Nationer eller Den Europæiske Union"). The *motivation* refers to the consolidated list of the United Nations Security Council Committee established pursuant to resolution 1267 and the European Council Common Position 2001/931/CFSP of 27 December 2001 on the application of specific measures to combat terrorism ('EU terrorist list') as well as to the consolidated list of persons, groups and entities subject to EU financial sanctions *as examples* of restrictive measures by the UN and the EU.

The open wording gives considerable discretion to the authorities in the application of restrictions such as denial of entry, revocation of residence permits (including based on an individual's refugee status) or expulsion and re-entry. These decisions can have potentially serious consequences for the concerned individual. A more defined and exhaustive definition of "restrictive measures regarding entry and transit as decided by the UN or/and the EU" in the Aliens Act would offer clearer guidance from the law makers to the authorities and provide for sufficient legal certainty. UNHCR therefore recommends to describe in the relevant provisions, in a more defined and exhaustive manner, what is meant by restrictive measures as decided by the UN and the EU.

2. Access to the asylum procedure and non-refoulement at the border

Two of the main cornerstones and most fundamental obligations for States deriving from international refugee law are (1) the admission to the territory and non-rejection at the borders and (2) the admission into due procedures. Access for asylum seeking individuals to the territory of States where their protection needs can be assessed properly is essential for a fair and efficient asylum system and the best quality asylum system will only be able to provide international protection to persons fleeing persecution if the asylum procedure remains accessible.

The UNHCR Handbook provides that an applicant should be permitted to remain in the country pending a decision on his or her initial request by the competent authority, unless it has been established by that authority that his or her request is clearly abusive. The applicant should also be permitted to remain in the country while an appeal to a higher administrative authority or to the courts is pending.[1]

If an applicant is not permitted to await the outcome of an appeal or even the first instance decision in the territory of the country in which he seeks asylum or if he or she is simply not given access to the asylum procedure, the remedy against the first instance decision, the possible positive but still pending asylum decision or the right to seek asylum as such, in practice, will be most of the time ineffective. In that respect, the possibility to enter and stay in the country until an asylum decision has been taken can serve as a critical safeguard, given the potentially serious consequences of lacking access to an (fair and efficient) asylum procedure or of an erroneous decision. To give access to the asylum procedure and to enable the asylum seeking person to wait for the outcome of the decision is often essential to ensure respect for the principle of non-refoulement.

It is UNHCR's understanding that Section 48a Aliens Act also applies to persons on the UN/EU sanction lists if they apply for asylum. Section 48a(1) provides that the Danish Immigration Service can decide to refuse entry to an alien, among other reasons, based on Section 28 Aliens Act which states, namely, that an alien prohibited from entry with no visa and a non-Schengen national with a Schengen alert (SIS II alert) can be prohibited to enter Denmark. UNHCR understands that this may include persons subject to restrictive measures by the UN or EU (i.e. who are on one of the UN/EU sanction lists). Section 48a(2) provides that an asylum application "will not be examined until the Danish Immigration Service has decided to refrain from refusal of entry, expulsion transfer or retransfer and return" according to Section 48a(1).

Crucially, Section 48a(1) second part provides that "[r]eturn under the first sentence thereof may not be effected to a country where the alien will be at risk of the death penalty or of being subjected to torture or inhuman or degrading treatment or punishment, or where there is not protection against return to such country."

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[1] UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees*, (September 1979) 1 January 1992, paragraph 192 (vii).
Online: UNHCR Refworld, available at: http://www.unhcr.org/refworld/docid/3ae6b3314.html

Related to the above, UNHCR notes that the reference to “special grounds” (“særlige grunde”) in Section 32 provides for exceptions to the rule that a person on the UN or/and EU sanction lists cannot re-enter and reside in Denmark and that no (temporary) residence permit will be issued. At the same time no explicit reference to asylum seekers or Section 48a is made.

UNHCR’s understanding is that persons who are seeking asylum, as a rule, as being exempt from not being allowed to enter (or re-enter) and reside in Denmark as long as their claim is pending which should include the appeal procedure. Exceptions to this principle should only be permitted in precisely defined cases, where there is clearly abusive behaviour on the part of an applicant, or where the unfoundedness of a claim is manifest. Here, the automatic application of suspensive effect (as defined in Executive Committee Conclusion No. 30 (XXXIV) of 1983) could be lifted. In that regard UNHCR would like to emphasise that the fact as such that an applicant is on the UN SC or/and EU sanction lists is not rendering his or her asylum claim clearly abusive.

Moreover, UNHCR has long taken the position that national procedures for determination of refugee status may usefully provide for dealing in an accelerated procedure with manifestly unfounded applications for refugee status or asylum. These procedures should, however, include certain procedural safeguards regardless of whether the claim is presented at the border or within the territory. These guarantees should also be applied to pre-admission/screening procedures at the border. Furthermore, these guarantees should be respected in procedures dealing with first country of asylum cases (for procedural guarantees see UNHCR's Position on Manifestly Unfounded Applications for Asylum, adopted by the Ministers of the Members States of the European Communities responsible for Immigration in London on 30 November - 1 December 1992).

3. Counter-terrorism and responses in international refugee law

Acts of terrorism and refugee law

Bearing in mind that there is, as yet, no internationally accepted legal definition of terrorism, the international refugee protection regime, if applied judiciously, provides for principled, fair and practical legal responses when one is faced with the challenge of abiding to international obligations, in particular from international refugee law, while countering terrorism. These include the due determination of refugee status, the granting of that status only upon clearly established criteria, the exclusion from that status of those who have committed war crimes, crimes against humanity or serious non-political crimes outside the country of refuge and the cancellation of the status of those who subsequently exhibit odious intentions or purposes and the ability of States to remove from their territories such persons under due process. In short, the existing legal framework made available through the 1951 Refugee Convention provides for an adequate legal response to address questions related to acts of terrorism while ensuring that persons fleeing from persecution obtain international protection.

Refugee criteria and persons linked to terrorism

In various cases, consideration of the exclusion clauses will not be necessary in relation to terrorist suspects as their fear will be of legitimate *prosecution* for criminal acts as opposed to *persecution* for a 1951 Convention reason.

Exclusion

Where an individual has committed terrorist acts as defined within the international instruments (such as the 1979 International Convention against the Taking of Hostages or the 1999 International Convention for the Suppression of the Financing of Terrorism to name two examples)[2] and a risk of *persecution* is at issue, the person may be excludable from refugee status. In these circumstances, the basis for exclusion under Article 1F will depend on the act in question and all surrounding circumstances. In each and every case, individual responsibility must be established, that is, the individual must have committed the act of terrorism or knowingly made a substantial contribution to it. This remains the case even when membership of the organisation in question is itself unlawful in the country of origin or refuge.

The fact that an individual may be on a list of terrorist suspects or associated with a proscribed terrorist organisation should trigger consideration of the exclusion clauses. Depending on the organisation, exclusion may be presumed but, importantly, it does not mean exclusion is inevitable.

In many cases, Article 1F(b) is applicable as violent acts of terrorism are likely to fail the predominance test used to determine whether the crime is political. Moreover, if one of the international treaties has abolished the political offence exemption in relation to extradition for the act in question, this would suggest that the crime is non-political for the purposes of Article 1F(b). It is not, however, a case of deeming all terrorist acts to be non-political but of judging the individual act in question against the Article 1F(b) criteria.

Although providing funds to "terrorist groups" is generally a criminal offence, such activities may not necessarily reach the gravity required to fall under Article 1F(b). The particulars of the specific crime need to be looked at – if the amounts concerned are small and given on a sporadic basis, the offence may not meet the required level of seriousness. On the other hand, a regular contributor of large sums to a terrorist organisation may well be guilty of a serious non-political crime. Apart from constituting an excludable crime in itself, financing may also lead to individual responsibility for other terrorist crimes. For example, where a person has consistently provided large sums to a group in full knowledge of its violent aims, that person may be considered to be liable for violent acts carried out by the group as his or her monetary assistance has substantially contributed to such activities.

While Article 1F(b) is of most relevance in connection with terrorism, in certain circumstances a terrorist act may well fall within Article 1F(a), for example as a crime against humanity. In exceptional circumstances, the leaders of terrorist organizations carrying out particularly heinous acts of international terrorism

[2] For a comprehensive list see 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, Annex D. Online: UNHCR Refworld, available at: http://www.unhcr.org/refworld/docid/3f5857d24.html.

which involve serious threats to international peace and security may be considered to fall within the scope of Article 1F(c).

In the international community's efforts to combat acts of terrorism it is important that unwarranted associations between terrorists and refugees/asylum-seekers are avoided. Moreover, definitions of terrorist crimes adopted on the international, regional and national level will need to be extremely precise to ensure that the "terrorist" label is not abused for political ends, for example to prohibit the legitimate activities of political opponents. Such definitions may influence the interpretation of the exclusion clauses and, if distorted for political ends, could lead to the improper exclusion of certain individuals. Indeed, unwarranted applications of the "terrorist" label could trigger recriminations amounting to persecution against an individual.

Conclusions and recommendations

Scope of proposed Section 10(5): Taking all of the above into account, UNHCR would like to highlight that if the proposed Section 10(5) i.e. that mere fact that a person figures on one or more of the UN/EU sanction list was meant to be a stand-alone ground for not granting refugee status, this would be of serious concern to UNHCR. As explained above, the fact that an individual may be on a list of terrorist suspects or associated with a proscribed terrorist organisation should trigger consideration of the exclusion clauses. Depending on the organisation, exclusion may be presumed but, importantly, it does not mean exclusion is inevitable.

If relevant facts become known after protection status was granted: General principles of administrative law allow for the cancellation of refugee status where it is subsequently revealed that the basis for such a decision was absent in the first place, either because the applicant did not meet the inclusion criteria or because one of the exclusion clauses would have applied at the time of decision-making had all the facts been known. Cancellation is, however, not related to a person's conduct post determination. It is important therefore to differentiate between cancellation of refugee status on the basis of exclusion and expulsion or withdrawal of protection from *non-refoulement* under Articles 32 and 33(2) of the 1951 Convention. The former rectifies a mistaken grant of refugee status, while the latter provisions govern the treatment of those properly recognised as refugees.

Scope of proposed Section 19(3): If Section 19(3) of the proposal, i.e. that mere fact that a person figures on one or more of the UN/EU sanction list, was meant to provide for a stand-alone ground for the revocation of a residence permit granted on the basis of refugee or protection (de facto) status (Section 7), this would be reason for grave concern to UNHCR. As pointed out in the paragraph before, general principles of administrative law allow for the cancellation of refugee status where it is subsequently revealed that one of the exclusion clauses would have applied at the time of decision-making had all the facts been known. Moreover, as mentioned before as well, the fact that an individual may be on a list of terrorist suspects or associated with a proscribed terrorist organisation should trigger consideration of the exclusion clauses. Depending on the organisation, exclusion may be presumed but, importantly, it does not mean exclusion is inevitable.

The existing legal framework of the 1951 Refugee Convention provides for the necessary legal instruments to address questions related to terrorism while making available international protection to those who need it. UNHCR's understanding of the proposed Section 10(5) (in particular considering the last part of the proposed Section 10(5), which states that a residence may be issued if there are specific reasons supporting the granting of a residence permit) and Section 19(3) is, that the fact alone that a person is subject to UN/EU sanctions i.e. figuring on one or more of the UN/EU sanction lists does not provide for a stand-alone ground to exclude a person from or cancel his or her refugee status. However, it may trigger exclusion considerations or cancellation procedures based on exclusion grounds as provided for in Article 1 F. If these do not apply, the person may be granted refugee/protection status. This case, we understand, would fall under "specific reasons" supporting the granting of a residence permit as provided for in the last part of the proposed Section 10(5).

UNHCR therefore recommends to explicitly refer in the proposed Section 10(5) to Section 10(1) and to clarify in the proposed Section 19(3) that if an individual is on one of more of the UN/EU sanction lists, her or she may be subjected to cancellations procedures based on exclusion grounds as namely provided for in Article 1 F as referred to in Section 10(1)(iii) Aliens Act.

4. Expulsion and non-refoulement

Section 19, paragraph 7, new item of the proposal provides that a person on the UN/EU sanction lists, once his or her residence permit has been revoked, she or he has to be expelled [Section 26(2)] unless the circumstances mentioned in Section 26(1) constitute a decisive argument against doing so.

According to the 1951 Refugee Convention asylum seekers and refugees must conform to the laws and regulations of the country of asylum as set out in Article 2 of the 1951 Convention and if they commit crimes are liable to criminal prosecution. The 1951 Convention foresees that such refugees can be subject to expulsion proceedings in accordance with Article 32 and, in exceptional cases, to removal under Article 33(2). In that respect, and as already mentioned earlier, it is important to differentiate between cancellation of refugee status on the basis of exclusion or withdrawal of protection from *non-refoulement* under Articles 32 and 33(2) of the 1951 Convention. The former rectifies a mistaken grant of refugee status, while the latter provisions govern the treatment of those properly recognised as refugees.

When considering the revocation of the residence permit and expulsion of a person on the UN/EU sanction list without having the conditions for canceling his or her refugee status (see above) being fulfilled, Article 32 and 33 of the 1951 Refugee Convention continue to apply. The principle of *non-refoulement,* codified in Article 33(1) of the 1951 Refugee Convention is of central importance to the international refugee protection regime. It is a fundamental obligation of States Parties to the 1951 Convention and/or its 1967 Protocol to which no reservation is allowed. Article 33(2) allows for an exception to this obligation in two limited circumstances, one of which is related to refugees who pose "a danger to the security of the country in which [they are]," that is, the country of refuge; while the other relates to refugees who, having been

convicted by a final judgment of a particularly serious crime, constitute a danger to the community of that country. For further background on the application of Article 33(2) see UNHCR *Advisory Opinion on the Scope of the National Security Exception Under Article 33(2).*[3] Additionally, UNHCR would like to lay emphasis on Article 3 of the European Convention of Human Rights and other international human rights obligations which may be relevant if a person is to be expelled.

Conclusions and recommendations

In brief, UNHCR would like to recall that to persons, including those who figure on one or more of the UN/EU sanction lists, who were not excluded from refugee status or whose refugee status was not cancelled based on exclusion grounds, Article 32(1) and 33(1) of the 1951 Refugee Convention continue to apply. However, even a person with refugee status, including one on a UN/EU sanction list, can be expelled according to the 1951 Refugee Convention, if her or she poses a danger to the security of the country of refuge or if her or she has been convicted by a final judgment of a particularly serious crime and constitutes a danger to the community of the country of asylum (Article 32(2) and 33(2) as reflected in Section 10(1) Aliens Act).

5. Data protection and sharing

Sharing of (personal) information/data of an alien with prosecution authorities: Section 45c of the proposal gives the Danish Immigration Service, the Ministry of Refugee, Immigration and Integration Affairs, the Refugee Appeals Board and the county government offices (Section 46c) the authority to share information about an alien's case(s) with the prosecution authorities, to the extent the information may be relevant for the prosecution authority to identify and/or prosecute persons (paragraph 2) or for the identification of victims or witnesses to a specific crime (paragraph 3), if the investigation concerns crimes punishable with six years or more, regardless of whether they are committed in or outside Denmark.

The proposed Section 45c allows authorities involved in the asylum procedure to share information about, among other aliens, an asylum seeker's or a refugee's case with prosecution authorities "to the extent the information may be relevant for the prosecution authorities". The wording indicates that information should be shared only to the extent necessary. While such a phrasing of the provision can serve as an useful guiding principle for data sharing it remains highly vague on the question what concrete information from an alien's, namely a refugee's or asylum seeker's case, can be shared. A specific reference to existing legal data protection standards in Danish law is critical. From an UNHCR perspective especially important is that safeguards are in place which ensure that information about an asylum seeker's case are not shared, namely in extraditions procedures (for instance if rogatory letters were sent following an international arrest warrant), with the authorities of the country of origin as long as the asylum decision is pending and at no time

[3] UNHCR *Advisory Opinion on the Scope of the National Security Exception Under Article 33(2) of the 1951 Convention Relating to the Status of Refugees*, 6 January 2006. Online: UNHCR Refworld, available at: http://www.unhcr.org/refworld/docid/43de2da94.html.

when the case concerns a person who is considered to be in need of international protection.

6. Conclusions

UNHCR acknowledges the challenges states are faced with when designing counter-terrorism strategies and measures while respecting and preserving the asylum space and the rights of asylum-seekers and refugees. Non-rejection at the border, access to the asylum procedure, fair and efficient refugee status determination and the assurance of basic standards of treatment, above all protection against forcible return to a territory where refugees and asylum-seekers might face persecution (non-refoulement) remain the four cornerstones of refugee protection. All these are essential features of an asylum system which help to minimize the risk of refoulement. Within this framework international refugee law - most importantly the 1951 Refugee Convention and the 1967 Protocol - provides for adequate legal responses to the challenges linked to terrorism.

Based on the reasoning above, UNHCR:

- Strongly recommends to describe in the Aliens Act in a more defined and exhaustive manner what is meant by restrictive measures as decided by the UN and the EU ("restriktive foranstaltninger i form af begrænsninger med hensyn til indrejse og gennemrejse besluttet af De Forenede Nationer eller Den Europæiske Union").

- Has pointed out that the fact alone that a person is subject to UN/EU restrictive measures i.e. is figuring on one or more of the UN/EU sanction lists does not provide for a stand-alone ground to [proposed Section 10(5)] exclude a person from or [proposed Section 19(3)] cancel his or her refugee status. However, it may trigger exclusion considerations (Article 1 F) including cancellation procedures if facts leading possibly to exclusion become known after refugee status was granted.

- Recommends to explicitly refer in the proposed Section 10(5) to Section 10(1)(iii).

- To spell out more clearly in the proposed Section 19(3) that if an individual is on one or more of the UN/EU sanction lists, he or she may be subjected to cancellations procedures (his or her residence permit granted according to Section 7 Aliens Act may be revoked) based on exclusion grounds as provided for in Article 1 F of the 1951 Refugee Convention as referred to in Section 10(1)(iii) Aliens Act.

- Recalls that to persons, including those who figure on one or more of the UN/EU sanction lists, who were not excluded from refugee status or whose refugee status was not cancelled based on exclusion grounds, Article 32(1) and 33(1) of the 1951 Refugee Convention continue to apply.

- Would like to remind that a person granted refugee status, including one on a UN/EU sanction list, can be, according to the 1951 Refugee Convention, expelled in exceptional circumstances that is if he or she poses a danger to

the security of the country of refuge or if he or she has been convicted by a final judgment of a particularly serious crime and constitutes a danger to the community of the country of asylum.

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September 2008