

**UNHCR Observations on the proposed amendments to the
Danish Aliens Act:**
**Lov om ændring af udlændingeloven (Midlertidig beskyttelsesstatus for visse
udlændinge samt afvisning af realitetsbehandling af asylansøgninger, når
ansøgeren har opnået beskyttelse i et andet EU-land mv.)**

I. Introduction

1. The UNHCR Regional Representation for Northern Europe (RRNE) is grateful to the Ministry of Justice of the Kingdom of Denmark for the invitation to submit its observations on the proposal dated 24 October 2014 to amend the Aliens Act (Sagsnr.2014-914-0040).
2. UNHCR however regrets the short deadline given by the Danish Government to comment on the law proposal, and may, if needed and feasible, provide additional comments and further elaborate any opinion provided in these observations.
3. UNHCR has a direct interest in law proposals in the field of asylum, 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 refugees¹. 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 relating to the Status of Refugees (“1951 Convention”), and in Article II of the 1967 Protocol relating to the Status of Refugees³. 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 (“TFEU”)⁴, as well as in Declaration 17 to the Treaty of Amsterdam, which provides that

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.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3ae6b3628> (“UNHCR Statute”).

² *Ibid.*, paragraph 8(a).

³ According to Article 35 (1) of the 1951 Convention, UNHCR has the “duty of supervising the application of the provisions of the 1951 Convention”.

⁴ 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>.

“consultations shall be established with the United Nations High Commissioner for Refugees ... on matters relating to asylum policy”⁵.

4. 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 (“UNHCR Handbook”) and subsequent Guidelines on International Protection.⁶ 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.

II. General Observations

5. As a general observation, UNHCR welcomes the Danish government’s affirmation of its intention to have a humane asylum policy and expression of the government’s view that Denmark should share the responsibility for the refugees in the world. UNHCR is also grateful for the generous financial contribution given by the government to the Syria regional response and Denmark’s reception of refugees from Syria, through the national asylum system as well as through the resettlement quota, as noted in the explanatory memorandum (*Bemærkninger til lovforslaget*). These concrete ways in which Denmark has exercised international solidarity and burden sharing in relation to the Syria displacement situation are extremely important, in that they directly help save lives and, at the same time, constitute signals of political support and solidarity to the neighbouring countries hosting some 95% of the refugees from Syria.
6. UNHCR therefore regrets that the Danish government is introducing a law proposal explicitly aimed at restricting the national asylum regime at this point in time, when the need for European States to exercise international solidarity and burden sharing is greater than ever. The number of persons forcibly displaced worldwide is the highest since World War II and 86% of the world’s refugees are living in developing countries. In numerous documents published and statements delivered over the past year, UNHCR has called on States to demonstrate the principle of international solidarity and burden sharing, set out in the preamble to the 1951 Convention and in numerous Executive Committee Conclusions, by, for example, creating legal alternatives to dangerous irregular movements, including resettlement, facilitated access to family reunion options and other forms of legal admission to Europe⁷. Introducing restrictions will not only impact on refugees’

⁵ European Union, *Declaration on Article 73k of the Treaty establishing the European Community*, OJ C 340/134 of 10.11.1997, available at:

<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:11997D/AFI/DCL/17:EN:HTML>.

⁶ UN High Commissioner for Refugees (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>.

⁷ See for example UN High Commissioner for Refugees (UNHCR), *Syrian Refugees in Europe: What Europe Can Do to Ensure Protection and Solidarity*, 11 July 2014, p. 12, available at: <http://www.refworld.org/docid/53b69f574.html> and UN High Commissioner for Refugees

ability to find a durable solution in Denmark and start the process of rehabilitation from the traumas of conflict and persecution, but will also send an unfortunate signal to both the neighboring countries which are struggling to cope as well as to other European countries which UNHCR are urging to uphold the right to asylum. UNHCR therefore urges the government to reconsider its intention to restrict the national asylum policy and instead lead by example in a European Union founded on human rights, democratic values and international solidarity.

III. Specific observations

Introduction of a temporary subsidiary protection status in § 7.3

7. It is proposed to introduce a new temporary subsidiary protection status in § 7.3 which stipulates that in cases covered by § 7.2, where the risk of death penalty or of being subjected to torture or inhuman or degrading treatment or punishment has its background in a particularly serious situation in the home country characterized by indiscriminate violence and attacks on civilians, a temporary residence permit will be granted.
8. The explanatory memorandum stipulates that the proposal does not expand the availability of protection in Denmark and that the starting point will continue to be that a situation of generalized violence and a mere possibility of harm, which follows from an unstable situation or one of generalized violence, will not in itself constitute a ground for protection. The explanatory memorandum further elaborates that eligibility for the temporary subsidiary protection status will require that the person meets the threshold of Article 3 in the European Convention on Human Rights ("ECHR"), like in cases falling under § 7.2. The difference between subsidiary protection (§ 7.2) and temporary subsidiary protection (§ 7.3) will depend on whether the person's **individual circumstances** provide for recognition under § 7.2, or whether there in the home country exist a particularly serious situation, which would allow for the temporary subsidiary protection status to be granted, pursuant to § 7.3. Persons fleeing situations of general violence as defined in the case of *Sufi and Elmi v. The United Kingdom* will in the future be granted temporary subsidiary protection under § 7.3, according to the explanatory memorandum.
9. As a starting point, UNHCR appreciates the fact that the government acknowledges that persons fleeing armed violence and conflict, including attacks on civilians, civilian objects and urban areas, are in need of international protection. UNHCR has previously identified this as a gap in the Danish international protection framework and observed that it has at times left individuals in need of international protection, who have not (according to Danish practice) been able to demonstrate an individual risk, in a limbo situation; these individuals have been unable to return due to a risk of *refoulement* but ineligible for a status and residence permit in Denmark.

(UNHCR), *International Protection Considerations with regard to people fleeing the Syrian Arab Republic, Update III*, 27 October 2014, paras. 33-36, available at: <http://www.refworld.org/docid/544e446d4.html>.

10. However, in regard to the use of the term “indiscriminate violence” (*vilkårlig voldsudøvelse*), UNHCR would first like to note that violence is only indiscriminate in that it does not differentiate between military objectives and civilians and civilian objects.⁸ Second, in UNHCR’s view, the notion of an “individual” threat should not lead to a higher threshold and a heavier burden of proof. Situations of generalized violence are characterized precisely by the indiscriminate and unpredictable nature of the risks civilians may face. At the same time, UNHCR agrees that such risks must be immediate and not merely be a remote possibility as, for example, when the conflict and the situation of generalized violence are located in a different part of the country concerned.
11. In terms of application of the protection statuses set out in § 7(1-3) UNHCR is of the firm view that many persons fleeing armed violence and conflict have a well-founded fear of being persecuted within the meaning of Article 1A(2) of the 1951 Convention. UNHCR would like to recall that the 1951 Convention is the primary instrument for the protection of refugees, and applied to those fleeing armed violence and conflict. There is nothing in the text, context or object and purpose of the 1951 Convention which hinders its application to armed conflict or other situations of violence. The 1951 Convention makes no distinction between refugees fleeing peacetime or wartime situations.⁹ In fact, whole communities may suffer or be at risk of persecution.¹⁰ Hence, there is no basis in the 1951 Convention for holding that in armed conflict or other situations of violence, an applicant needs to establish a risk of harm over and above that of others caught up in such situations (sometimes called a “differentiated risk”). Further, there is nothing in the text of the 1951 Convention to suggest that a refugee has to be singled out for persecution.¹¹
12. The Syria refugee situation is a case in point. As stated in the *International Protection Considerations with regard to people fleeing the Syrian Arab Republic, Update III*:

“UNHCR considers that most Syrians seeking international protection are likely to fulfill the requirements of the refugee definition contained in Article 1A(2) of the *1951 Convention relating to the Status of Refugees*, since they will have a well-founded fear of persecution linked to one of the Convention grounds. For many civilians who have fled Syria, the nexus to a 1951 Convention ground will lie in the direct or indirect, real or perceived association with one of the parties to the conflict. In order for an individual to meet the refugee criteria there is no requirement of having been individually targeted in the sense of having been “singled out” for persecution which already took place or being at risk thereof. Syrians and habitual residents of Syria who have fled may, for example, be at risk of

⁸ Forced Migration Review 47, *Refugee by association*, Blanche Tax, September 2014, available at: <http://www.fmreview.org/syria/tax>.

⁹ UNHCR, *Summary Conclusions on International Protection of Persons Fleeing Armed Conflict and Other Situations of Violence; Roundtable 13 and 14 September 2012, Cape Town, South Africa*, 20 December 2012, para. 6, available at: <http://www.unhcr.org/refworld/docid/50d32e5e2.html>.

¹⁰ *Ibid*, para. 8.

¹¹ *Ibid*, para. 9.

persecution for reason of an imputed political opinion because of who controls the neighbourhood or village where they used to live, or because they belong to a religious or ethnic minority that is associated or perceived to be associated with a particular party to the conflict. In this regard, UNHCR welcomes the increased granting of refugee status to asylum-seekers from Syria by EU Member States in 2014, in comparison to 2013, when most EU Member States predominantly granted subsidiary protection to Syrians."¹²

13. Hence, while UNHCR welcomes the creation of a legal obligation to grant subsidiary protection to those at risk of serious harm for reasons and in circumstances not necessarily covered by the 1951 Convention, it is important that measures to provide subsidiary protection are implemented with the objective of strengthening, not undermining, the existing global refugee protection regime. This presupposes that individuals who fulfill its criteria are granted Convention refugee status, rather than being accorded subsidiary protection.¹³ To this end, the refugee definition should be interpreted progressively and with the necessary flexibility to take changing forms of persecution into account.¹⁴ The subsidiary protection criteria contained or proposed to be included in § 7.2 and § 7.3 of the Danish Aliens Act would indicate a strong presumption for 1951 Convention refugee status in certain cases. For example, an act of torture perpetrated by State actors would normally be linked to a Convention ground. Only where torture is inflicted out of purely criminal motivation, and where no 1951 Convention ground is established, could this give rise to entitlement to subsidiary protection under Article 3 ECHR. Similarly, situations of armed conflict may well engender persecution linked to a Convention ground, for example, in the form of non-military acts of persecution by State and non-State actors or in the form of targeted military activities.¹⁵ This is confirmed by State practice and jurisprudence. The nexus with a Convention ground is very relevant in situations of systematic or generalized violations of human rights. It is only in situations where such violations have no link to a Convention ground that subsidiary forms of protection are required. A sequential assessment is therefore required, which presupposes that individuals who fulfill its criteria are granted Convention refugee status, rather than being accorded

¹² UN High Commissioner for Refugees (UNHCR), *International Protection Considerations with regard to people fleeing the Syrian Arab Republic, Update III*, 27 October 2014, para. 26, available at: <http://www.refworld.org/docid/544e446d4.html>.

¹³ UNHCR, *Summary Conclusions on International Protection of Persons Fleeing Armed Conflict and Other Situations of Violence; Roundtable 13 and 14 September 2012, Cape Town, South Africa*, 20 December 2012, <http://www.unhcr.org/refworld/docid/50d32e5e2.html>.

¹⁴ This has also been acknowledged by the Commission in the Explanatory Memorandum on the Guiding Principles of the proposed Directive, and on then proposed article 5(2), European Union: European Commission, *Explanatory Memorandum to proposed article 7, Explanatory Memorandum presented by the European Commission (COM(2001)510 final*, 12.9.2001, pages 5 and 13, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2001:0510:FIN:EN:PDF>.

¹⁵ See Explanatory Memorandum on proposed Article 11(2)(c), European Union: European Commission, *Explanatory Memorandum presented by the European Commission (COM(2001)510 final*, 12.9.2001, page 21, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2001:0510:FIN:EN:PDF>.

subsidiary protection.¹⁶ UNHCR understands, that the use of the term “subsidiary” in § 7 of the Aliens Act serves to ensure that subsidiary protection only comes into play after a negative decision on the application for refugee status.

14. UNHCR nonetheless recommends inserting a clarification to the effect that subsidiary protection should apply only if there is no link between the risk or threat of harm and any of the five Convention grounds (“... for reasons outside the scope of the refugee definition”). In addition, UNHCR would recommend that the Danish government gives the new status to be introduced the same wording as in Article 15 (c) of the recast EU Qualification Directive, in order to better complement the scope of the existing § 7.2.

Recommendations:

- UNHCR strongly advises against using the term “indiscriminate” violence and recommends highlighting in the explanatory memorandum to the law that there is no requirement in the 1951 Convention of having been individually targeted in the sense of having been “singled out” for persecution or of establishing a risk of harm over and above that of others caught up in such situations.
- UNHCR recommends inserting an explicit clarification in § 7 to the effect that subsidiary protection under § 7.2 and § 7.3 should apply only if there is no link between the risk or threat of harm and any of the five Convention grounds (“... for reasons outside the scope of the refugee definition”).
- UNHCR also recommends that the new status to be introduced is given the same wording as Article 15 (c) in the recast EU Qualification Directive, to better complement the protection provided under § 7.2.

Introduction of a one year temporary residency permit for persons granted the temporary subsidiary protection status

15. UNHCR notes with concern the proposal to issue those granted the new temporary subsidiary protection status under § 7.3 a one year residence permit, which can be renewed for two years, if it has been assessed that the general conditions in the home country continue to be of such a character that there is a continued need for international protection. Given the government’s intention to switch the granting of subsidiary protection under § 7.2 to temporary subsidiary protection under § 7.3 for persons fleeing indiscriminate violence, including situations as defined in the case of *Sufi and Elmi v. The United Kingdom*, UNHCR assumes that a considerable number of beneficiaries of international protection will hereafter receive residence permits only valid for one year.

¹⁶ UNHCR, *Summary Conclusions on International Protection of Persons Fleeing Armed Conflict and Other Situations of Violence; Roundtable 13 and 14 September 2012, Cape Town, South Africa*, 20 December 2012, <http://www.unhcr.org/refworld/docid/50d32e5e2.html>.

16. The explanatory memorandum states that the international protection needs of the group of persons who would be covered by the proposed § 7.3 are generally more temporary, as the protection need has its background in a general situation which will be subject to change. As the memorandum makes reference to the situation in Syria and the current practice of granting refugees from Syria either Convention status or subsidiary protection under § 7.2, UNHCR would like to recall that there is no political solution currently in sight to the crisis in Syria. As international efforts to find a political solution to the Syria situation have so far not been successful, the conflict, continues to cause further civilian casualties, displacement and destruction of the country's infrastructure.¹⁷ Hence, this assertion is not applicable in the case of Syria, and UNHCR has previously considered that there is no reason to expect the protection needs of subsidiary protection beneficiaries to be of shorter duration than the need for protection under the 1951 Convention¹⁸.
17. UNHCR regrets that the proposal aims at introducing restrictive migration measures directed at beneficiaries of international protection. In this regard, UNHCR would like to note that the specific situation of protection beneficiaries distinguishes them from other third country nationals. Refugees involuntarily move from one country to another. They have suffered the loss of protection by their own State and possible separation from family and community support. Many have experienced traumatic events in their country of origin and may therefore be in need of specialised care and counseling, as well as specific health services. These facts need to be taken into account in planning and implementing migration measures. Residence status is one of the main areas in which a differentiated approach between refugees and other migrants is called for.¹⁹
18. Access for subsidiary protection beneficiaries to similar rights as those of refugees is a significant element in facilitating their early participation and contribution to the host community,²⁰ including through the labour market. The timely grant of secure legal status and residency rights are essential factors in

¹⁷ UN High Commissioner for Refugees (UNHCR), *International Protection Considerations with regard to people fleeing the Syrian Arab Republic, Update III*, 27 October 2014, para. 2, available at: <http://www.refworld.org/docid/544e446d4.html>.

¹⁸ UN High Commissioner for Refugees (UNHCR), *UNHCR comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted (COM(2009)551, 21 October 2009)*, 29 July 2010, para. 8, available at: <http://www.refworld.org/docid/4c503db52.html>.

¹⁹ UN High Commissioner for Refugees (UNHCR), *Note on the Integration of Refugees in the European Union*, May 2007, available at: <http://www.refworld.org/docid/463b24d52.html>.

²⁰ UN High Commissioner for Refugees (UNHCR), *UNHCR comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted (COM(2009)551, 21 October 2009)*, para. 8, 29 July 2010, available at: <http://www.refworld.org/docid/4c503db52.html>.

the integration process²¹. In fact, providing an environment in which beneficiaries of international protection can attain self-reliance will help support the individual's achievement of any of the durable solutions, including voluntary repatriation should this become feasible.²² As with Convention refugees, UNHCR is of the view that the status of a beneficiary of subsidiary protection should not in principle be subject to frequent review to the detriment of his/her sense of security, which international protection is intended to provide.²³

19. UNHCR therefore takes this opportunity to urge the government to both review the current possibility of granting Convention refugees and beneficiaries of subsidiary protection (§ 7.2) residence permits of a shorter duration (2 years),²⁴ as well as the proposal to grant beneficiaries of the temporary subsidiary protection status (§ 7.3) one year permits. In UNHCR's view, Convention refugees as well as beneficiaries of subsidiary protection should be granted permanent residence either immediately or, at the latest, following expiry of the initial permit. Similar rights to long-term residence should also be accorded to family members.

Recommendations:

- UNHCR recommends reviewing the current possibility to grant Convention refugees and beneficiaries of subsidiary protection 2 year residence permits, and reconsidering the proposal to grant beneficiaries of temporary subsidiary protection (initially) a 1 year residence permit. In UNHCR's view, there is no verifiable reason to expect the need for subsidiary protection to be of shorter duration than the need for protection under the 1951 Convention. In recognition of this, UNHCR would recommend that the period of validity of residence permits provided to beneficiaries of subsidiary protection and temporary subsidiary protection be the same as that for 1951 Convention refugees.
- UNHCR moreover advises against frequent periodic reviews of individuals' international protection needs, as this is likely to undermine the individuals' sense of security, which is important for rehabilitation, and the ability to attain self-reliance; this in turn supports the attainment of any of the durable solutions including integration and voluntary repatriation.

²¹ UNHCR Executive Committee, Conclusion No. 104, para (j). UNHCR Executive Committee calls on States with developed asylum systems to support refugee's ability to integrate "through the timely grant of a secure legal status and residency rights, and/or to facilitate naturalization", available at <http://www.unhcr.org/4357a91b2.html>.

²² UN High Commissioner for Refugees (UNHCR), *Handbook for Self-Reliance*, August 2005, First edition, p. 7, available at: <http://www.refworld.org/docid/4a54bbf40.html>.

²³ *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, para 135, available at: <http://www.refworld.org/docid/4f33c8d92.html>.

Cambridge University Press, *Cessation of Refugee Protection*, June 2003, p. 515 "Refugees should be spared 'frequent review' of their continued eligibility, as this may undermine their 'sense of security'", available at: <http://www.refworld.org/docid/470a33bc0.html>.

²⁴ *Udlændingebekendtgørelsen* § 25.1. (Executive Order on Aliens' Access to Denmark (Aliens Order), available at: <https://www.retsinformation.dk/forms/R0710.aspx?id=162849>.

Procedural safeguards for the renewal of temporary residence permits

20. If the proposal to grant beneficiaries of temporary subsidiary protection status one year residence permits, that will only be renewed for a two year period if it is determined that the general conditions in the beneficiary's country of origin are such that s/he has a continued need for international protection, is retained, then it is critical that the review is conducted in a due process with adequate safeguards. In this context, it is critical to ensure that beneficiaries of the temporary subsidiary protection status are adequately informed about the procedure and which actions are required on their part, in order to ensure a fair and effective review. In this regard, UNHCR notes with concern that there is no recommendation in the proposal to provide beneficiaries a legal representative to assist with the application for an extension of the temporary subsidiary protection status. It is thus UNHCR's understanding that this will, similar to other cases, only be granted if the application is initially rejected and appealed to the Refugee Appeal Board.

Recommendation:

- As a non-renewal of the residence permit of a person in continued need of international protection can lead to a situation of *refoulement*, UNHCR would like to emphasize the need to ensure that all beneficiaries of temporary subsidiary protection are clearly informed about the criteria and procedure for renewal, that up to date country of origin information relevant for assessing continued international protection needs is used, and recommends that legal representation be provided at the outset.

Restrictions on family reunification rights for beneficiaries of the temporary subsidiary protection status

21. The law proposal introduces a new provisions under § 9 of the Aliens Act that will not allow refugees granted temporary subsidiary protection under § 7.3 the right to family reunification of their spouse, partner or minor child below 15 years, unless an extension of the temporary protection status has been granted. The explanatory memorandum states that an exemption to the latter will be made if this is required by Denmark's international obligations. The proposal does not address the situation of unaccompanied or separated children who have been granted the temporary subsidiary protection status, and would like to reunify in Denmark with their parents or other caregiver, and/or siblings.
22. Family unity is a fundamental and important right. Following separation caused by forced displacement such as from persecution and war, family reunification is often the only way to ensure respect for a refugee's right to family unity.²⁵ UNHCR considers that the humanitarian needs of persons benefiting from

²⁵ UN High Commissioner for Refugees (UNHCR), *Refugee Family Reunification. UNHCR's Response to the European Commission Green Paper on the Right to Family Reunification of Third Country Nationals Living in the European Union (Directive 2003/86/EC)*, February 2012, p. 3, available at: <http://www.refworld.org/docid/4f55e1cf2.html>.

subsidiary protection are not different from those of refugees, and differences in entitlements are therefore not justified in terms of the individual's flight experience and protection needs. There is thus no reason to distinguish between the two as regards their right to family life and access to family reunification.²⁶ The European Commission has made the same assertion²⁷ in its guidance on the application of the EU Directive on the right to family reunification²⁸. UNHCR therefore recommends States to provide beneficiaries of subsidiary protection access to family reunification under the same favourable rules as those applied to refugees.²⁹

23. Separation of family members during forced displacement and flight can have devastating consequences on peoples' well-being, as well as on their ability to rehabilitate from traumatic experiences of persecution and war and focus on learning a new language and adapting to the environment in their country of asylum³⁰. The UNHCR Executive Committee (ExCom) Conclusion No. 104 on local integration,³¹ which Denmark – as a member of ExCom – has participated in drafting, notes the potential role of family members in promoting the smoother and more rapid integration of refugee families given that they can reinforce the social support system of refugees. It is with this in mind that UNHCR advocates for family reunification mechanisms which are swift and efficient in order to bring families together as early as possible.
24. Delaying the possibility to initiate family reunification adds to a situation of further prolonged separation, which may have started many months or years earlier. The EU Directive on the right to family reunification contains favourable rules in respect of Convention refugees, which UNHCR is urging States to apply also to beneficiaries of subsidiary protection, for the reasons mentioned above and based on a recognition of the fact that beneficiaries of international protection cannot otherwise meet their family. The Court of Justice of the European Union

²⁶ *Ibid.*, p. 5.

²⁷ COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL on guidance for application of Directive 2003/86/EC on the right to family reunification, Brussels, 3.4.2014, COM(2014) 210 final, para. 6.2 "The Commission considers that the humanitarian protection needs of persons benefiting from subsidiary protection do not differ from those of refugees, and encourages MSs to adopt rules that grant similar rights to refugees and beneficiaries of temporary or subsidiary protection.", available at: http://ec.europa.eu/dqs/home-affairs/e-library/documents/policies/immigration/family-reunification/docs/guidance_for_application_of_directive_on_the_right_to_family_reunification_en.pdf

²⁸ European Union: Council of the European Union, *Council Directive 2003/86/EC of 22 September 2003 on the Right to Family Reunification*, 3 October 2003, OJ L. 251/12-251/18; 3.10.2003, 2003/86/EC, available at: <http://www.refworld.org/docid/3f8bb4a10.html>.

²⁹ UN High Commissioner for Refugees (UNHCR), *Refugee Family Reunification. UNHCR's Response to the European Commission Green Paper on the Right to Family Reunification of Third Country Nationals Living in the European Union (Directive 2003/86/EC)*, February 2012, p. 6, available at: <http://www.refworld.org/docid/4f55e1cf2.html>

³⁰ UN High Commissioner for Refugees (UNHCR), *A New Beginning: Refugee Integration in Sweden - It's about time!*, September 2013, available at: <http://www.refworld.org/docid/5295a60e4.html>.

³¹ UN High Commissioner for Refugees (UNHCR), *Conclusion on Local Integration*, 7 October 2005, No. 104 (LVI) - 2005, available at: <http://www.refworld.org/docid/4357a91b2.html>.

has also stressed that duration of residence in the EU Member States is only one of the factors that the MS must take into account when considering an application and that a waiting period cannot be imposed without taking into account, in specific cases, all the relevant factors, while having due regard to the best interests of minor children.³²

25. Specifically in regard to persons who have fled Syria, UNHCR has emphasized that it should be a priority to ensure that Syrians can join family members who are residing in European States. Experience of Syrian refugees has shown that this support can be critical for their rehabilitation, integration and well-being. UNHCR is therefore urging States to exercise flexibility in relation to family reunification requirements by assisting reunification, also with extended family and relatives, to simplify and expedite the family reunification process and to explore other avenues such as humanitarian admission to ensure families are not torn apart or separated for a long period of time.³³ As such, the approach reflects a critical form of international solidarity. Moreover, a pro-active approach to reunification could stop family members from embarking on risky boat or overland journeys with the goal of joining their family members who have found protection in Europe.
26. In relation to children, the right of the child to family life is protected under the Convention on the Rights of the Child ("CRC")³⁴, Article 16. The term "family" must be interpreted in a broad sense to include biological, adoptive or foster parents or, where applicable, the members of the extended family or community as provided for by local custom (Article 5).³⁵

³² COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN PARLIAMENT AND THE COUNCIL on guidance for application of Directive 2003/86/EC on the right to family reunification, Brussels, 3.4.2014, COM(2014) 210 final, p. 17.

³³ UN High Commissioner for Refugees (UNHCR), *Syrian Refugees in Europe: What Europe Can Do to Ensure Protection and Solidarity*, 11 July 2014, pp. 27-28, available at: <http://www.refworld.org/docid/53b69f574.html>. See also UN High Commissioner for Refugees (UNHCR), *International Protection Considerations with regard to people fleeing the Syrian Arab Republic, Update III*, 27 October 2014, para. 34, available at: <http://www.refworld.org/docid/544e446d4.html>.

³⁴ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: <http://www.refworld.org/docid/3ae6b38f0.html>.

³⁵ For UNHCR's position of the definition of family members see, *inter alia*: UNHCR, ExCom Conclusions Nos. 15 (1979), 24 (1981), 85 (1998) and 88 (1999), see footnote 10, UNHCR, *Note on Family Reunification*, 18 July 1983, available at: <http://www.unhcr.org/refworld/docid/3bd3f0fa4.html>; UNHCR, *Protecting the Family: Challenges in Implementing Policy in the Resettlement Context*, June 2001, available at: <http://www.unhcr.org/refworld/docid/4ae9aca12.html>; 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.unhcr.org/refworld/docid/4f33c8d92.html>; UNHCR, *UNHCR Resettlement Handbook*, July 2011, available at: <http://www.unhcr.org/refworld/docid/4ecb973c2.html>; Cambridge University Press, *Summary Conclusions: Family Unity*, June 2003, available at: <http://www.unhcr.org/refworld/docid/470a33bed.html>; UNHCR, *Family Protection Issues*, 4 June 1999, EC/49/SC/CRP.14, available at: <http://www.unhcr.org/refworld/docid/4ae9aca00.html>.

27. Preventing family separation and preserving family unity are important components of the child protection system, and are based on the right provided for in Article 9, para.1, of the CRC which requires "that a child shall not be separated from his or her parents against their will, except when [...] such separation is necessary for the best interests of the child". Furthermore, the child who is separated from one or both parents is entitled "to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests" (Article 9, para. 3). This also extends to any person holding custody rights, legal or customary primary caregivers, foster parents and persons with whom the child has a strong personal relationship.³⁶
28. The Committee on the Rights of the Child has specifically highlighted that, in order to pay full respect to the obligation of States under Article 9 of the Convention, all efforts should be made to return an unaccompanied or separated child to his or her parents except where further separation is necessary for the best interests of the child, taking full account of the right of the child to express his or her views. Family reunification in the country of origin is not in the best interests of the child and should therefore not be pursued where there is a "reasonable risk" that such a return would lead to the violation of fundamental human rights of the child. Such risk is indisputably documented in the granting of refugee status or in a decision of the competent authorities on the applicability of *non-refoulement* obligations. Whenever family reunification in the country of origin is not possible, States parties are particularly reminded that "applications by a child or his or her parents to enter or leave a State party for the purpose of family reunification shall be dealt with by States parties in a positive, humane and expeditious manner" and "shall entail no adverse consequences for the applicants and for the members of their family" (Article 10 (1)).³⁷ The Committee has further advised that when the child's relations with his or her parents are interrupted by migration (of the parents without the child, or of the child without his or her parents), preservation of the family unit should be taken into account when assessing the best interests of the child in decisions on family reunification.³⁸
29. The Committee's interpretation that non rights-based arguments, such as those relating to general migration control, cannot override best interests

³⁶ UN Committee on the Rights of the Child (CRC), *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, 29 May 2013, CRC /C/GC/14, para. 60, available at: <http://www.refworld.org/docid/51a84b5e4.html>.

³⁷ UN Committee on the Rights of the Child (CRC), *CRC General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6, paras. 81-83, available at: <http://www.refworld.org/docid/42dd174b4.html>.

³⁸ UN Committee on the Rights of the Child (CRC), *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, 29 May 2013, CRC /C/GC/14, para. 66, available at: <http://www.refworld.org/docid/51a84b5e4.html>

considerations,³⁹ can in UNHCR's view be extended to economic reasons which similarly cannot be a justification for separating a child from his or her parents.⁴⁰

30. UNHCR would like to take this opportunity to express its concern over the current legislation and practice, which denies children above 15 years the right to reunify with parents who have been granted international protection in Denmark. Dependency may usually be assumed to exist when a person is under the age of 18 years, but continues if the individual (over the age of 18) in question remains within the family unit and retains economic, social and emotional bonds. Dependency should be recognized if a person is disabled and incapable of self-support, either permanently or for a period expected to be of long duration. Other members of the household may also be dependents, such as grandparents, single/lone brothers, sisters, aunts, uncles, cousins, nieces, nephews, grandchildren; as well as individuals who are not biologically related but are cared for within the family unit.⁴¹

Recommendations:

- UNHCR recommends withdrawing the proposal to deny beneficiaries of temporary subsidiary protection and their family members family reunification during the first year on this status. Instead, UNHCR urges Denmark to facilitate family reunification for all beneficiaries of international protection in a pro-active manner, including for all children within the meaning of the Convention on the Rights of the Child and for extended family members of Syrians who have been granted some form of protection.
- UNHCR further recommends inserting an explicit reference to the best interests of the child principle in the Aliens Act.

Grounds for cessation of subsidiary protection (§ 7.2) and temporary subsidiary protection (§ 7.3)

31. Currently, § 19 (1) of the Aliens Act stipulates that "A *time-limited residence permit may be revoked if: (i) the basis of the application for the residence permit was not correct or is no longer present, including if the alien holds a residence permit under section 7 or 8, and the conditions constituting the basis of the residence permit have changed in such a manner that the alien no longer risks persecution*".

³⁹ UN Committee on the Rights of the Child (CRC), *CRC General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6, paras. 85, available at: <http://www.refworld.org/docid/42dd174b4.html>.

⁴⁰ UN Committee on the Rights of the Child (CRC), *General comment No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration (art. 3, para. 1)*, 29 May 2013, CRC /C/GC/14, para. 61, available at: <http://www.refworld.org/docid/51a84b5e4.html>.

⁴¹ UNHCR, *Resettlement Handbook*, p.178 and p. 273. See also: UN High Commissioner for Refugees (UNHCR), *Note on Family Reunification*, 18 July 1983, para. 5(b) and (c), available at: <http://www.refworld.org/docid/3bd3f0fa4.html>.

32. The law proposal provides that a specification be introduced in this provision, namely that it must be taken into account on which basis the residence permit has been granted. If a person has been granted Convention refugee status, then Article 1 C of the 1951 Convention applies. The explanatory memorandum further states that, as beneficiaries of subsidiary protection (§ 7.2) or temporary subsidiary protection (§ 7.3) do not fall under the 1951 Convention, it is not a precondition for withdrawal of their residence permit that fundamental, stable and durable changes in their home country has taken place.
33. UNHCR notes with concern the statement in the explanatory memorandum, that an improvement of the general conditions in the home country can lead to cessation regardless of whether the conditions – despite improvements – still are serious and must be regarded as **fragile and unpredictable**. Cessation will, however, require that the changes are not regarded as being of a completely temporary character.
34. Even though not binding on Denmark, UNHCR would nonetheless like to note that Article 16 of the recast EU Qualification Directive provides that a third-country national or stateless person shall cease to be eligible for subsidiary protection when the circumstances which led to the granting of subsidiary protection status have ceased to exist or have changed to such a degree that protection is no longer required. Article 16(2) further provides that Member States shall have regard to whether the change in circumstances is of such a significant and non-temporary nature that the person eligible for subsidiary protection no longer faces a real risk of serious harm. In addition, Article 16(3) contains the humanitarian clause, according to which beneficiaries of subsidiary protection who are able to invoke compelling reasons arising out of previous serious harm for refusing to avail himself or herself of the protection of the country of nationality should be exempted from cessation.
35. Furthermore, Article 19 of the recast EU Qualification Directive deals with the revocation, ending or refusal to renew the subsidiary protection status of third-country nationals or stateless persons who have ceased to be eligible for subsidiary protection in accordance with the aforementioned Article 16. In this context, UNHCR recalls the absolute prohibition binding States under Article 3 of the ECHR, and Article 19(2) of the EU Charter of Fundamental Rights to return, or cause to be returned, a person to a country where they would face torture or inhuman or degrading treatment.
36. In its comments to the proposal for a recast EU Qualification Directive, UNHCR recalled that developments which would appear to evidence significant and profound changes should be given time to consolidate before any decision on cessation is made.⁴² UNHCR's Executive Committee Conclusion No. 103 on complementary protection, which Denmark – as a member of ExCom – has

⁴² UN High Commissioner for Refugees (UNHCR), *UNHCR comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (COM(2009)554, 21 October 2009)*, August 2010, para. 7, available at: <http://www.refworld.org/docid/4c63ebd32.html>.

participated in drafting, further recommends that “where it is appropriate to consider the ending of complementary forms of protection, States adopt criteria which are objective and clearly and publicly enunciated; and *notes* that the doctrine and procedural standards developed in relation to the cessation clauses of Article 1C of the 1951 Convention may offer helpful guidance in this regard”.⁴³

37. In terms of procedural rights, whether international protection status has ceased should always be determined in a procedure in which the person concerned has an opportunity to bring forward any considerations and reasons to refute the applicability of the cessation clauses. The burden of proof that the criteria of the cessation provisions have been fully met lies with the country of asylum.⁴⁴

Recommendations:

- UNHCR recommends that the cessation clauses as set out in Article 1C of the 1951 Convention be used as the starting point for formulating criteria and benchmarks for the cessation of subsidiary protection statuses, and that in any case, the change of circumstances must be of a significant and non-temporary nature.
- UNHCR also recommends that beneficiaries of subsidiary protection who are able to invoke compelling reasons arising out of previous serious harm for refusing to avail himself or herself of the protection of the country of nationality should be exempted from cessation.
- UNHCR further strongly recommends setting out the procedural requirements, including in regard to the burden of proof which rests on the national authorities, in the legislation.

Processing of applications falling under the current § 7.3 concerning first country of asylum

38. The current § 7.3 stipulates that “A residence permit under subsections (1) and (2) can be refused if the alien has already obtained protection in another country, or if the alien has close ties with another country where the alien must be deemed to be able to obtain protection”. It follows from the *travaux préparatoires* to the Aliens Act that inclusion under § 7.1 and 2 must first be considered before a decision under § 7.3 can be made. It is UNHCR’s understanding that the first country of asylum notion in Danish legislation is a combined version of both the “first country of asylum” as well as the “safe third country” concepts frequently applied in national asylum procedures.

⁴³ UN High Commissioner for Refugees (UNHCR), *Conclusion on the Provision of International Protection Including Through Complementary Forms of Protection*, 7 October 2005, No. 103 (LVI) - 2005, available at: <http://www.refworld.org/docid/43576e292.html>.

⁴⁴ UN High Commissioner for Refugees (UNHCR), *UNHCR comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (COM(2009)554, 21 October 2009)*, August 2010, para. 33, available at: <http://www.refworld.org/docid/4c63ebd32.html>.

39. UNHCR would at the outset like to note that the causes of secondary movements of refugees are manifold and include, among other things, a lack of durable solutions, limited capacity to host refugees and a failure to provide protection in some third countries. Any assessment of whether a third country constitutes a first country of asylum requires a careful and individualised case-by-case examination of the conditions in that country and the individual circumstances of the refugee. As a general rule, the concept of first country of asylum is only relevant where a refugee has sought and received protection in that country.
40. The law proposal introduces a new § 7.4 with the first country of asylum notion, and stipulates that an application of the first country of asylum notion does not require that an assessment on inclusion under § 7 sections 1, 2 or 3 is made prior to applying § 7.4. It is UNHCR's understanding that the proposal to abolish the inclusion assessment - unless this would put the applicant at risk of *refoulement* - would be applied regardless of whether the applicant is considered to have obtained protection in another EU Member State or in a country outside the EU. UNHCR further notes that the proposal suggests that an inclusion assessment should still be possible, if the reason for applying for asylum exceptionally is decisive for assessing whether a country can be regarded as first country of asylum. This would be the case if available information suggests that an applicant with a certain asylum motive would be subjected to *refoulement*.
41. UNHCR regrets that the proposal does not seek to expand the criteria under the current §7.3, which should be considered when determining whether a country can be considered as a first country of asylum for a particular applicant. As the proposal to abolish the inclusion assessment is made with reference to Article 33 of the recast EU Asylum Procedures Directive⁴⁵ ("recast APD"), UNHCR would urge the government to also implement the minimum safeguards contained in Article 35 of the recast APD as well as those set out in Article 38(1) of the recast APD when applying the concept of the first country of asylum.
42. In addition, UNHCR would like to recall its recommendation to replace the term "*sufficient*" with "*effective*" protection in Article 35(b) of the recast APD, and its recommendation to use the criteria on "effective protection" set out in the Lisbon Conclusions.⁴⁶ Furthermore, protection in the first country of asylum under

⁴⁵ European Union: Council of the European Union, *Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)*, 29 June 2013, L 180/60, available at: <http://www.refworld.org/docid/51d29b224.html>.

⁴⁶ UN High Commissioner for Refugees (UNHCR), *UNHCR comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection (COM(2009)554, 21 October 2009)*, August 2010, para. 26, available at: <http://www.refworld.org/docid/4c63ebd32.html> and 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, at: <http://www.unhcr.org/refworld/docid/3fe9981e4.html>.

consideration should be effective and available in practice.⁴⁷ This is, *inter alia*, demonstrated by case law from the European Court of Human Rights, according to which the theoretical right to *non-refoulement* is not sufficient.⁴⁸ UNHCR moreover recommends that applicants for international protection should have – at substantial level - the possibility to rebut the presumption of safety.⁴⁹

43. Where UNHCR is engaged in refugee status determination under its mandate there is a presumption that the country should not be considered a “first country of asylum”.⁵⁰ UNHCR often undertakes such functions because the State has no capacity to conduct refugee status determination or to provide protection. The return of persons in need of international protection to such countries should therefore not be envisaged.
44. To the extent that the new § 7.4 is also intended to be applied as a safe third country notion in respect of applicants who have not yet obtained protection in a third country, UNHCR likewise recommends that the criteria set out in Article 38 of the recast APD are adopted.
45. Furthermore, UNHCR has in its Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers⁵¹ elaborated the following criteria that must be guaranteed before applying the safe third country notion. States must guarantee that each asylum-seeker:
 - will be individually assessed as to the appropriateness of the transfer, subject to procedural safeguards, prior to transfer.⁵² Pre-transfer assessments are particularly important for vulnerable groups, including unaccompanied and

⁴⁷ UN High Commissioner for Refugees (UNHCR), *UNHCR comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection* (COM(2009)554, 21 October 2009), August 2010, para. 26, available at: <http://www.refworld.org/docid/4c63ebd32.html>.

⁴⁸ See, *inter alia*, *Abdolkhani and Karimnia v. Turkey*, Appl. No. 30471/08, Council of Europe: European Court of Human Rights, 22 September 2009, para. 88, at: <http://www.unhcr.org/refworld/docid/4ab8a1a42.html> : “The Court reiterates in this connection that the indirect removal of an alien to an intermediary country does not affect the responsibility of the expelling Contracting State to ensure that he or she is not, as a result of its decision to expel, exposed to treatment contrary to Article 3 of the Convention.”

⁴⁹ UN High Commissioner for Refugees (UNHCR), *UNHCR comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards on procedures in Member States for granting and withdrawing international protection* (COM(2009)554, 21 October 2009), August 2010, para. 26, available at: <http://www.refworld.org/docid/4c63ebd32.html>.

⁵⁰ UN High Commissioner for Refugees (UNHCR), *Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice - Key Findings and Recommendations*, March 2010, p.282, available at: <http://www.refworld.org/docid/4bab55752.html>.

⁵¹ UN High Commissioner for Refugees (UNHCR), *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers*, May 2013, available at: <http://www.refworld.org/docid/51af82794.html>.

⁵² See, e.g., UN High Commissioner for Refugees, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)*, 31 May 2001, EC/GC/01/12, para. 13, available at: <http://www.unhcr.org/refworld/docid/3b36f2fca.html>.

separated children. The best interests of the child must be a primary consideration;⁵³

- will be admitted⁵⁴ to the proposed receiving State;
- will be protected against *refoulement*;
- will have access to fair and efficient procedures for the determination of refugee status and/or other forms of international protection;⁵⁵
- will be treated in accordance with accepted international standards (for example, appropriate reception arrangements; access to health, education and basic services; safeguards against arbitrary detention; persons with specific needs are identified and assisted); and
- if recognized as being in need of international protection, will be able to enjoy asylum and/or access a durable solution.⁵⁶

46. Where these guarantees cannot be agreed to or met, then transfer would not be appropriate.⁵⁷

47. States involved in bilateral or multilateral transfer arrangements of asylum-seekers and refugees should be parties to the 1951 Convention and/or its 1967 Protocol, or otherwise party to relevant refugee and human rights instruments. However, while being party to international and regional refugee and human rights instruments is an important indicator as to whether the receiving State meets the criteria outlined below, review of the actual practice of the State and its compliance with these instruments is an essential part of this assessment.⁵⁸

⁵³ See, e.g., Article 3, Convention on the Rights of the Child, 1577 U.N.T.S 3, entry into force 2 September 1990; UN High Commissioner for Refugees, *UNHCR Guidelines on Determining the Best Interests of the Child*, May 2008, available at: <http://www.unhcr.org/refworld/docid/48480c342.html>. See also, e.g., UN Committee on the Rights of the Child (CRC), *CRC General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside their Country of Origin*, 1 September 2005, CRC/GC/2005/6, available at: <http://www.refworld.org/docid/42dd174b4.html>.

⁵⁴ A precondition to the application of the first country of asylum concept in European Union law is that the designated first country of asylum will re-admit the applicant. See Article 35 of European Union: Council of the European Union, *Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast)*, 29 June 2013, L 180/60, available at: <http://www.refworld.org/docid/51d29b224.html>.

⁵⁵ ExCom Conclusion No. 8 (XXVIII) (Determination of Refugee Status) (1977); UN High Commissioner for Refugees, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)*, 31 May 2001, EC/GC/01/12, available at: <http://www.unhcr.org/refworld/docid/3b36f2fca.html>.

⁵⁶ See further, e.g., ExCom Conclusion No. 85 (XLIX) (Conclusion on International Protection) (1998), para. (aa); ExCom Conclusion No. 58 (XL) (Problem of Refugees and Asylum-Seekers who move in an irregular manner from a country in which they had already found protection) (1989), para. (f); UN High Commissioner for Refugees, *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>.

⁵⁷ UN High Commissioner for Refugees (UNHCR), *Guidance Note on bilateral and/or multilateral transfer arrangements of asylum-seekers*, May 2013, available at: <http://www.refworld.org/docid/51af82794.html>.

⁵⁸ UN High Commissioner for Refugees, *Summary Conclusions on the Concept of "Effective Protection" in the Context of Secondary Movements of Refugees and Asylum-Seekers (Lisbon*

48. UNHCR has with concern observed that according to the *travaux préparatoires* to the current § 7.3, as well as Danish asylum practice, “*ties with another country where the alien must be deemed to be able to obtain protection*” are considered established on the basis of a marriage with a national of that country. Potential family reunification is thereby considered equivalent to access to fair and efficient procedures for the determination of refugee status and/or other forms of international protection. A residence permit obtained through marriage presupposes in many countries (including Denmark) that a person remains in his or her marriage for several years before obtaining permanent residence permit. If the marriage between the refugee and the national in the first country of asylum is dissolved this may lead to *refoulement* to the country of origin.
49. UNHCR has also with concern observed that the first country of asylum notion is applied in cases where the concerned refugee has never physically been present in that country, and has therefore never sought and received protection in that country. The burden of establishing whether readmission is feasible is often put on the police responsible for sending the refugee to the first country of asylum, instead of being a part of the first country of asylum assessment. This can lead to a situation in which a person who has been determined to be in need of international protection (under § 7) is not granted a residence permit despite the fact that he or she is not being admitted to the proposed first country of asylum/safe third country.
50. The obligation to ensure that conditions in the receiving State meet the above mentioned requirements in practice rests with the transferring State, prior to entering into such arrangements.⁵⁹ As indicated above, it is not enough to merely assume that an asylum-seeker would be treated in conformity with these standards – either because the receiving State is a party to the 1951 Convention or other refugee or human rights instruments, or on the basis of an ongoing arrangement or past practice.⁶⁰ Regular monitoring and/or review by the

Expert Roundtable, 9-10 December 2002), February 2003, available at: <http://www.unhcr.org/refworld/docid/3fe9981e4.html>, para. 15(e). See also, e.g., *Hirsi Jamaa and Others v. Italy*, Application no. 27765/09, Council of Europe: European Court of Human Rights, 23 February 2012, available at: <http://www.unhcr.org/refworld/docid/4f4507942.html>; and *M.S.S. v. Belgium and Greece*, Application no. 30696/09, Council of Europe: European Court of Human Rights, 21 January 2011, available at: <http://www.unhcr.org/refworld/docid/4d39bc7f2>.

⁵⁹ See also Article 35 of the recast Asylum Procedures Directive, which contains the condition “provided that he or she will be readmitted to that country”.

⁶⁰ UN High Commissioner for Refugees, *Global Consultations on International Protection/Third Track: Asylum Processes (Fair and Efficient Asylum Procedures)*, 31 May 2001, EC/GC/01/12, available at: <http://www.unhcr.org/refworld/docid/3b36f2fca.html>, para. 14; UN High Commissioner for Refugees, *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.

15(e); *M.S.S. v. Belgium and Greece*, Application no. 30696/09, Council of Europe: European Court of Human Rights, 21 January 2011, available at: <http://www.unhcr.org/refworld/docid/4d39bc7f2>, para. 359.

transferring State of the transfers and the conditions in the receiving State would also be required to ensure they continue to meet international standards.⁶¹

Recommendations:

- UNHCR recommends revising the proposed § 7.4 to include the following criteria to be applied when considering to reject an application for international protection based on the first country of asylum notion:
 - (i) he or she has been recognized in the first country of asylum under consideration as a refugee and he or she can still avail himself/herself of that protection; or
 - (ii) he or she otherwise enjoys effective protection in that country, including benefiting from the principle of *non-refoulement*; and
 - (iii) his or her life and liberty are not threatened on account of race, religion, nationality, membership of a particular social group or political opinion; and
 - (iv) there is no risk of serious harm; and
 - (v) the principle of *non-refoulement* in accordance with the Geneva Convention is respected; and
 - (vi) the prohibition of removal, in violation of the right to freedom from torture and cruel, inhuman or degrading treatment as laid down in international law, is respected.

- UNHCR recommends adding the following criteria to be applied when to reject an application for international protection based on the first safe third country of asylum notion:
 - (i) he or she will be individually assessed as to the appropriateness of the transfer, subject to procedural safeguards, prior to transfer. Pre-transfer assessments are particularly important for vulnerable groups, including unaccompanied and separated children. The best interests of the child must be a primary consideration;
 - (ii) he or she will be admitted to the proposed receiving State;
 - (iii) he or she will be protected against *refoulement*;
 - (iv) he or she will have access to fair and efficient procedures for the determination of refugee status and/or other forms of international protection;
 - (v) he or she will be treated in accordance with accepted international standards (for example, appropriate reception arrangements; access to health, education and basic services; safeguards against arbitrary detention; persons with specific needs are identified and assisted); and
 - (vi) he or she if recognized as being in need of international protection, will be able to enjoy asylum and/or access a durable solution.

- UNHCR moreover recommends ensuring that applicants for international protection have – at substantial level - the possibility to rebut the presumption of safety of a proposed first country of asylum.

UNHCR Regional Representation for Northern Europe
Stockholm, November 2014

⁶¹ *M.S.S. v. Belgium and Greece*, Application no. 30696/09, Council of Europe: European Court of Human Rights, 21 January 2011, available at: <http://www.unhcr.org/refworld/docid/4d39bc72>.

Foreningen af Udlændingeretsadvokater

Den 11. november 2014

Justitsministeriet
Udlændingekontoret
Slotsholmsgade 10
1216 København K.

Høring over udkast til forslag til lov om ændring af udlændingeloven (Midlertidig beskyttelsesstatus for visse udlændinge mv.) - j.nr.: 2014-941-0040

Foreningen af Udlændingeretsadvokater (FAU) finder, at det foreliggende lovforslag på flere punkter lægger op til en markant forringelse af vilkårene for mennesker med et anerkendt behov for beskyttelse.

Vor forenings medlemmer har daglig kontakt med mange asylansøgere og oplever, hvordan usikkerheden om fremtiden er den største passiverende og sygeliggørende faktor for mennesker, der i forvejen er skrøbelige på grund af deres oplevelser i hjemlandet og ofte også under flugten.

En gennemførelse af forslaget nye bestemmelse i § 7 stk 3 om **midlertidig beskyttelsesstatus** vil derfor uvægerligt medføre øgede vanskeligheder og omkostninger ved integration af disse flygtninge allerede på grund af deres egen usikre situation. Vi gør opmærksom på, at der allerede ved nuværende lovs § 19 er mulighed for inddragelse af opholdstilladelse ved mere stabile forhold i hjemlandet.

Endvidere vil en gennemførelse af disse dele af lovforslaget nødvendiggøre omfattende ressourcer til sagsbehandling omkring forlængelse allerede et år efter meddelelse af den første opholdstilladelse.

En gennemførelse af forslaget nye bestemmelse i § 9 stk. 1 nr 2 litra c om **manglende adgang til familiesammenføring** indtil en forlængelse er opnået vil endvidere efter foreningens opfattelse være i strid med Den Europæiske Menneskeretskonventions (EMRK) artikel 8 om retten til et familieliv, ligesom den vil stride mod Børnekonventionen.

I bemærkningerne til lovforslaget oplistes en række hensyn, som indgår i Den Europæiske Menneskerettighedsdomstols (EMD) vurdering af om retten til et familieliv i henhold til konventionens art. 8 krænkes. De fleste af de nævnte hensyn er imidlertid væsentligst relevante i sager, hvor den herboende ikke har et beskyttelsesbehov. Her er der vid adgang til at begrænse indvandring under hensyntagen til det enkelte lands interesser, dog således at grundlæggende menneskeretlige principper om adgangen til et familieliv respekteres.

Derimod er for personer med et beskyttelsesbehov efter EMD's praksis især 2 hensyn relevante. Således tillægges baggrunden for familieadskillelsen og muligheden for at udøve familielivet andetsteds betydelig vægt.

Den personkreds, som vil blive omfattet af den foreslåede midlertidige beskyttelse, vil i sagens natur ikke kunne henvises til at udøve familielivet i hjemlandet. I langt de fleste tilfælde, vil familien heller ikke have mulighed for at udøve familielivet i nabolande/nærområdet, hvor de ofte henvises til at leve illegalt eller i bedste fald legalt - med begrænsede - eller ingen rettigheder i adgangen til sundhedsvæsen, skolegang, uddannelse, arbejde og et minimum af socialt sikkerhedsnet, såfremt de ikke vil være i stand til at klare sig selv.

Foreningen af Udlændingeretsadvokater


EMD's praksis – senest ved sagen Mugenzi v. France fra juli 2014 - fastslår således, at familiens enhed er en grundlæggende ret for flygtninge, og at familiesammenføring er fundamentalt for flygtninges mulighed for at genoptage et normalt liv. Af EMD's praksis følger endvidere, at staterne er underlagt en særlig forpligtelse til at etablere effektive og fleksible procedurer, der kan sikre flygtninge som særligt sårbare grupper retten til et familieliv.

Første asyllandsreglen foreslås ændret, således at der fremover skal ske afvisning, når ansøgeren har opnået beskyttelse i et andet EU-land. Forholdene for personer med beskyttelse i eksempelvis Italien og Bulgarien er meget ringe. Såvel UNHCR som Europarådets Menneskerettighedskommissær har beskrevet forholdene i Italien som særdeles problematiske. Flygtningenævnet har i et enkelt tilfælde fundet, at en person med en behandlingskrævende sygdom ikke kunne udsendes til Italien. FN's menneskerettighedskomite har i 6 sager anmodet Danmark om at standse planlagte udsendelser af børnefamilier til Italien. Danmark har i de nævnte tilfælde fulgt henstillingen, og disse børnefamilier opholder sig således i Danmark, indtil FN's Menneskerettighedskomite har taget stilling til spørgsmålet om hvorvidt de kan udsendes til Italien. Senest har EMD den 4. november 2014 i sagen Tarakhel mod Schweiz fundet, at det ville udgøre en krænkelse af EMRK's art. 3 at udsende en afghansk familie med 6 mindreårige børn til Italien, hvis ikke de svejtsiske myndigheder forinden havde fået individuelle garantier fra de italienske myndigheder om ville tage hånd om familien.

Samlet finder foreningen, at forslaget gennemførelse vil medføre, at Danmarks internationale omdømme vil lide skade og at der må forventes sager mod Danmark for overtrædelse af menneskerettighederne.

Foreningen af Udlændingeretsadvokater (FAU) kan i øvrigt tiltræde det meget detaljerede høringsvar af 7. ds., der foreligger fra Dansk Flygtningehjælp, og som grundigt gennemgår de mange alvorlige konsekvenser, såfremt lovforslaget gennemføres.

Med venlig hilsen
p.b.v.


Helge Nørrung
formand