Danish Refugee Council

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The European Parliament Committee on
Civil Liberties, Justice and Home Affairs

Lack of conformity between Danish asylum law and practice and international and European standards and obligations (rev.)

The Danish Refugee Council very much appreciate the initiative of the European Parliament Committee on Civil Liberties, Justice and Home Affairs to organise a visit to Denmark in order to ascertain the situation regarding the reception of asylum seekers in Denmark

A series of amendments to Danish asylum law since 2002 combined with what seems to be an increasingly more restrictive interpretation and application of the relevant provisions by the competent Danish asylum authorities have led to a situation where the level of protection of refugees and others in a similar situation has been considerably lowered over the last six years. In a number of aspects current asylum policy and practice must be considered to be in violation of Denmark's international obligations under, *inter alia*, the 1951 Refugee Convention, Article 3 of the European Convention on Human Rights and the Convention against Torture as these have been interpreted and applied by, inter alia, the UNHCR and the European Court on Human Rights.

Similarly, in a number of areas Danish standards are below the standards set by the relevant European directives and regulations within this field.

The *main* fields of concern which at numerous occasions have been stressed by the Danish Refugee Council, UNHCR and other organisations and experts operating within this field are listed below. The list is not exhaustive and should be complemented by the concerns raised and documented by Amnesty International and other organisations addressing this visit of the LIBE Committee to Denmark.

Interpretation and application of Article 1 A of the Refugee Convention and Article 3 of the European Convention on Human Rights.

Much points to the fact that the Danish Refugee Appeals Board applies a still more restrictive and questionnable interpretation and application of Article 1 A of the Refugee Convention (cf. Section 7(1) of the Danish Aliens Act) and Article 3 of the European Convention on Human Rights (cf. Section 7(1) of the Danish Aliens Act), the result of which is that it has become very difficult to obtain protection in Denmark.

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This has become very apparent with regard to the Iraqi asylum cases where the Board – against the very explicit advice of UNHCR to Denmark – continues rejecting the majority of the asylum applications of Iraqi asylum seekers originating from Southern or Central Iraq. The recognition rate for spontaneous applications lodged and determined in 2007 and 2008 seems to indicate a considerable raise in the number of Iraqis being granted protection. Those figures do however not present the very high rejection rate that applies to the high number of applications which have been lodged for the reopening of "old" cases during the same period of time. Rejections are even applied in the cases of persons belonging to religious or ethnic minorities in Central and Southern Iraq.

In particular the Refugee Board's requirement for a particular and "individualized" targetting seems to be in violation with Article 1A of the 1951 Convention and Article 3 of ECHR as those provisions are being interpreted by both the doctrine, UNHCR-guidelines and the rulings and case law of the European Court on Human Rights (e.g. in the case of Salah Sheekh v. The Netherlands; Appl. No. 1948/04)

Subsidiary protection

In 2002 the so-called *de facto* refugee status concept was abolished and replaced by a more narrowly defined protection status concept. Under section 7(2) of the Danish Aliens Act residence permit on basis of (subsidiary) protection need is granted to an alien "... if the alien risks the death penalty or being subjected to torture or inhuman or degrading or punishment in case of return to his country...".

According to the comments to the bill, the abolishment of the *de facto*-status was to have consequences for persons fleeing war and for persons who are traumatised due to previous persecution, but who would not risk any persecution on return in the future.

Refugees fleeing war and war-like situations

With direct reference to the comments to the bill abolishing the *de facto*-status concept, which are meant to provide authoritative guidance to the Danish decisions-makers, the Refugee Appeals Board, which is the final appeal instance in asylum cases, have rejected status and asylum to large groups of asylum seekers fleeing war and warlike situations, notably the Somalis and the Iraqis, and issued an order that they shall leave Denmark.

It should in this regard be noted that neither the Danish Aliens Act nor practice provides for subsidiary protection where serious harm consists of "serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict" as defined under Article 15 (c) of the EU Qualification Directive.

Iraqi asylum seekers from Southern and Central Iraq. Somali asylum seekers from Southern and Central Somalia

This policy and practice combined with the above restrictive interpretation and application of the refugee definition of the 1951 Refugee Convention and of ECHR Article 3, which has been critized by UNHCR , the Danish Refugee Council and other organisations for being at variance with Denmarks international obligations, has resulted in a situation where hundreds of asylum applications from Somalis originating from Central og South Somalia and Iraqis from Central and Southern Iraq have been rejected.

The Danish authorities have rejected to regulate their stay in Denmark despite the very clear and – as regard Iraqis – repeatedly updated recommendations from UNHCR that they be recognised as Convention refugees or, in the alternative, be granted subsidiary protection. The result and consequences of this strict policy is that they continue an irregulated and long stay under poor conditions in Danish asylum centres, subjected to ongoing so-called motivating measures (see below).

The Dublin II Regulation

As referred to in the documentation submitted by Amnesty International, Denmark is continuing to return Iraqis to Greece under the Dublin Regulation despite the various concerns that have been raised from many sides, including UNHCR that Iraqi returnees risk refoulement from Greece via Turkey.

The consequences of the anti-terror legislation for the protection of refugees in Denmark

As described by Amnesty International, "…an individual who faces expulsion on national security grounds has no right to challenge that decision in a court, no right to be told on what grounds they are suspected of posing a threat to national security, and no right to know on what grounds it has been decided that they can safely be removed to the country to which they are to be expelled. Nor has the lawyer of the person or the Danish Refugee Board the right to challenge the decision and are not informed about the reasons behind the decision that is taken by the Danish Security and Intelligence Service (PET). The Refugee Board has to decide whether this foreigner should be expelled or should be able to live in Denmark on a so called 'tolerated stay', if the expulsion is considered to be a violation of Denmark's international human rights obligations. The decision of the Board is however taken without their knowledge of the foreigners' risk of persecution, as they are not informed of why the Danish authorities consider these persons to be a threat to the Danish security. .." The Aliens Act excludes the grant of residence permit in those situations.

This legislation has been heavily criticized for not being in accordance with the rule of law and not living up to fundamental principles for fair and efficient asylum procedures.

Expulsion of refugees

2001 and 2006 amendments to section 22ff of the Aliens Act have provided authority to expel asylum seekers and refugees who have committed less serious criminal activities and goes beyond what is permitted by Article 32 of the 1951 Convention.

UNHCR and other organisations have criticized the Danish legislation insofar as the expulsion of a refugee entails that s(he) loses his/her refugee status/recognition as a refugee in Denmark. The cessation of refugee status is exhaustively regulated by Article 1C of the 1951 Convention. This provision does not allow for cessation of refugee status on the ground that a refugee has committed common crimes such as those which according to the proposed Danish legislation can lead to expulsion. Revocation, or withdrawal, of refugee status may be foreseen for refugees who engage in conduct coming within the scope of Article 1F(a) or 1F(c), provided that all the criteria for the application of either of these articles is met. While asylum could be withdrawn in cases where Articles 32 and 33(2) are applicable, the termination of "refugee status" would be at variance with the 1951 Convention unless, as noted above, the criteria of Articles 1C, 1F(a) and 1F(c) are met.

Similarly the provisions on expulsion are at variance with article 12(2) of the *EU Qualification Directive*.

Exclusion from residence permit and "tolerated stay" to refugees who have received an expulsion order

Moreover, the legislation is problematic insofar as it implies that those refugees who receive an expulsion order which - in keeping with the principle of *non-refoulement* – are not to be executed will merely be granted a so-called *tolerated stay* in Denmark, which exludes that person from most of the basic rights provided for under the Refugee Convention Articles 2ff.

While all refugees benefit from a number of core rights, additional entitlements accrue as a function of the nature and the duration of the attachment to the asylum state. In accordance with the preparatory works of the 1951 Refugee Convention it is the refugee's de facto circumstances which determine which level of attachment is satisfied. Whereas a removal order issued under a procedure that meets the requirements of the 1951 Convention may terminate the lawful stay and presence of the refugee, the *subsequent* officially tolerated, ongoing presence in a state party, whether or not there has been a formal declaration of for example a right of residence, will constitute a *lawful stay* in the host state. It would thus seem that a so-called tolerated stay in Denmark satisfies the criteria of attachment implied by the Convention's notion of lawful stay which in turn entitles refugees to a standard of treatment which goes well beyond protection against *refoulement*. Excluding refugees in this situation from the rights and the standard of treatment which are implied by a residence permit in accordance with Section 7 or 8 of the Aliens Act, is therefore at variance with Denmark's obligations under the 1951 Convention.

The provisions in section 10 of the Danish Aliens Act on exclusion from residence permit go moreover beyond the wording of Article 14 (4) of the *EU Qualification Directive*, concerning revocation etc.

At a press briefing on 5 May 2006, UNHCR stated:

> UNHCR regrets the adoption on Tuesday of new amendments to the Danish Immigration Act, which are not fully in line with the UN Refugee Convention. We have earlier submitted comments on the draft legislation.
> Under the Refugee Convention, there are clear restrictions on the expulsion of refugees, given the very serious consequences that they could face. We are therefore concerned that the new Danish legislation allows for expulsion for lesser, albeit serious, offences, such as tax evasion and vandalism.
> Likewise, we are worried that according to the new Danish legislation, the decision to expel a refugee also entails that he or she loses his or her refugee status, putting the person in a legal limbo.

Detention of asylum seekers

Under Sections 35, 36 and 37 of the Aliens Act asylum seekers and immigrants may be detained for reasons mentioned in the paper presented to the Committee by Amnesty International. The reason mainly applied for detaining asylum seekers under the Aliens Act, is that detention is necessary in order to ensure his or her presence for eventual deportation. There is no upper limit to the length of detention.

The Danish Refugee Council shares the serious concerns expressed by Amnesty International. There is a serious concern that many detentions may in fact be violating Article 5 of the European Convention on Human Rights insofar as they are either unnecessary as other less radical measures would prove sufficient, or they are being unnecessarily prolonged.

Reception conditions (other than detention)

Looked at *in isolation* the reception conditions which are in general offered at the Danish asylum centres must – with some notable exceptions, see listing below – probably be considered to be in accordance with international and European norms regulating this field, and probably also quite good compared to the situation in many other host countries. The reception conditions offered are however only geared at stays for a *limited period of time*.

There is a tension between the present reception conditions in Denmark and *Directive 2003/9 on minimum standards for the reception of asylum seekers* in relation to the following provisions:

Education
Children who have reached the age of 17 are not granted access to the education system under similar conditions as nationals of Denmark. They may participate in a particular "introduction scheme" for adults and, under certain conditions in Danish or English language tuition as well as introduction to Danish culture and social conditions.

Access to the labour market
Asylum seekers do not have access to the labour market in Denmark. The only exception which may (indirectly) occur in practice is if there is a general lack of qualified employees within a certain field of work in Denmark. An asylum seeker possessing those specific qualifications may lodge an application for - and be granted - work and residence permit on those grounds if he has been offered a job within this field.

Special needs, General principle (Article 17)
There are no provisions in Danish legislation to this account. On arrival, however, all asylum seekers undergo a medical check and, generally, medical or ordinary staff at the reception and accommodation centres, will pay particular attention to the psychological and physical health of vulnerable persons and seek to provide adequate counselling where possible. Rather than healing or rehabilitating, the treatment and counselling is merely sufficient to ease the situation of the particular person.

Access to rehabilitation services for minors who are victims of abuse, etc. (Article 18 (2))
Real rehabilitation services are not offered to these groups of minors. In particular unaccompanied minors will however receive relatively much attention and possible treatment/counselling in this regard as they live in a centre specifically designated for minors, where there is both more staff and the staff is specifically trained to deal with children and include a trained psychologist. Minors who are accompanied will, on the other hand, in practice be at risk of relative more neglect and of not being "seen" by staff at the ordinary accommodation centres.

Treatment of torture victims
Counselling easing the symptoms and effects of torture and other serious acts of violence will to a certain - limited extent - be offered to asylum seekers, but real and necessary treatment will normally not be offered to persons without proper residence permits.

Appeals
Decisions relating to reception conditions (all but detention) are mainly made by the Danish Immigration Service and may, in accordance with section 46 (2) of the Aliens Act be appealed to the Minister for Refugee, Immigration and Integration Affairs. In principle applicants may further lodge an appeal within the ordinary court system. In practice, however, this never (or extremely rarely) happens both because asylum seekers are normally not informed about this possibility and because, in practice, free legal aid would normally not be granted.

The situation of rejected asylum seekers who are unable to return to their country of origin

Asylum seekers whose applications for asylum or leave to remain on other grounds have been rejected are issued with an order to leave Denmark. If they do not leave voluntarily, the police are entitled to remove them to their country of origin by force.

Many rejected asylum seekers from Iraq, Central and Southern Somalia and some other specific groups have remained in Denmark for years as they cannot be returned by force because Denmark does not have the required agreement with the authorities of the countries of origin to accept rejectees who do not volonteer to go back.

"Motivating measures"

The largest groups in this regard are the Somalis and the Iraqis. Currently 376 rejected Iraqi asylum seekers and 54 rejected asylum seekers from Southern and Central Somalia are in this situation.

It is not possible to remove them by force because Denmark has not yet obtained a readmission agreement in this regard with their respective countries of origin. With regard to Iraq, the Iraqi authorities therefore only accept the return of own citizens who consent to go back and voluntarily sign applications for Iraqi travel documents. The only exception is Iraqis from Northern Iraq (KRG) with a criminal record in Denmark with regard to whom Denmark has entered a readmission agreement with the KRG authorities on forcible return. With regard to Somalia, there are no authorities to negotiate an readmission agreement, which for Denmark is a prerequisite for forcible return as there is a clear policy against "dumbing" illegal immigrants in their country of origin. In these cases, return is therefore only possible with the consent of the returnee.

In order to promote this consent, the Danish Aliens Act stipulates the application of so-called *"motivating measures"*, which among other things consist in deriving them of pocket money, removing them to the deportation centres of Sandholm and Avnstrup, requiring them to report to the police once or twice a week, where they are requested to explain why they have not yet returned to Iraq, etc.

The aim of those measures is to indirectly force the rejectees to consent to go back. It is however acknowledged, even by the authorities, that those measures do *not* have any effect on the numbers of voluntary returns. Many of especially the rejected Iraqi asylum seekers have been in Denmark since 2001 and spent most of the time as rejectees in the asylum centres.

Conclusions

- It is of serious concern when the authorities of a community founded on the rule of law make radical decisions which *both* are against the clear advice of UNHCR (who in accordance with Article 35 of the 1951 Convention has the competence to supervise the application of the Convention), *and* which they know that they can not enforce.

- It is of serious concern when the Danish authorities subsequently - by means of issuing an expulsion order and applying motivating measures - in fact *transfer* the responsibility for implementation and enforcement of negative decisions, which they neither can nor will enforce, to the rejected Iraqi asylum seekers themselves.

- It is furthermore of serious concern to the Danish Refugee Council that the long stay in asylum centres with status of rejected asylum seekers, subjected to the so-called motivating measures and without the right to work or to engage in other meaningfull activities, have had serious consequences for the mental health of a large number of asylum seekers, notably the Iraqis. The general reception conditions which, as stated above, in isolation may be seen as generally acceptable for shorter stays turn into undignified and humiliating treatment when being applied for years and years.

- The Danish authorities' main argument for maintaining the position not to grant residence permit to the rejectees is that they would be able to return to for example Iraq if they gave their consent to the issuing of an Iraqi travel document.
  When mirrored against the fact that UNHCR warns against return as this will involve a risk of persecution and against the fact that the authorities of the country of origin refuse to accept the return of rejectees who do not consent to go back, it becomes however apparent that this is indeed a "false" argument. The fear that the Iraqis have for returning to Iraq - the strength of which is clearly documented by the fact that they choose to remain in Denmark despite the application by the authorities of motivating measures and despite the serious effects that the long stays have had on the health of many - is based on exactly the same factual circumstances and information that has made UNHCR to insist on the existence of protection needs for this group.

- The same concerns are valid with regard to refugees whose applications for asylum have been rejected or whose residence permits have been revoked on expulsion grounds which go beyond what is permitted by Article 32 of the 1951 Convention. In keeping with the principle of *non-refoulement* – the decisions on expulsion are not being executed. Instead they will be granted a so-called *tolerated stay* in Denmark, which excludes them from most of the basic rights provided for under the Refugee Convention Articles 2ff.