



UNHCR's Comment to the proposed Law on Amendments to the Alien's Act L 69

National security measures and refugee protection

UNHCR acknowledges the challenges states are faced with in tackling terrorism and crime. According to the 1951 Convention relating to the Status of Refugees, asylum seekers and refugees must conform to the laws and regulations of the country of asylum as set out in Article 2 and therefore if they commit crimes, they are liable for criminal prosecution. The Convention prescribes that such refugees can be subject to expulsion proceedings in accordance with Article 32 and, in exceptional cases, to removal under Article 33(2). In that respect, it is important to differentiate between cancellation of refugee status on the basis of exclusion or withdrawal of protection from *non-refoulement* under Articles 32 and 33(2) of the 1951 Convention. The former rectifies a mistaken grant of refugee status, while the latter provisions govern the treatment of those properly recognized as refugees.

When considering measures, such as, the revocation of a residence permit and deciding on expulsion or giving a person tolerated stay without the conditions for canceling his or her refugee status being fulfilled, Article 32 and 33 of the 1951 Refugee Convention continue to apply.

The principle of *non-refoulement*, codified in Article 33(1) of the 1951 Refugee Convention is of central importance to the international refugee protection regime. It is a fundamental obligation of States Parties to the 1951 Convention and/or its 1967 Protocol to which no reservation is allowed. Article 33(2) allows for an exception to this obligation in two limited circumstances, one of which is related to refugees who pose "a danger to the security of the country in which [they are]," that is, the country of refuge; while the other relates to refugees who, having been convicted by a final judgment of a particularly serious crime, constitute a danger to the community of that country.

Thus, international refugee law allows for measures to address questions related to national security and/or serious criminal behavior. Expulsion may be the ultimate measure, which, however, only should be applied under stringent

conditions.¹ Other procedures to tackle national security questions should be guided by these same principles. Therefore, to deprive a refugee of refugee status due to national security concerns may conform with the 1951 Refugee Convention in exceptional circumstances. The danger to national security must have a certain level of severity in order to justify such a measure, there has to be reasonable grounds for considering that the individual concerned constitutes a serious danger to the security of the host country and, an assessment whether the measure and/or its application are *proportionate* to its objective must have been made.

It is however UNHCR's understanding that among the nineteen persons on tolerated stay, some have been convicted for minor offences, while others have served prison sentences for crimes such, as murder, and yet others have committed crimes against humanity and/or excludable crimes. The assessment of who constitutes a threat to national security and on what grounds should be further regulated in order to prevent discretionary decisions.

Freedom of movement / principle of ne bis in idem

UNHCR notes that it is proposed that refugees or asylum seekers who are to be expelled (*udvist*) due to crimes committed in Denmark, as well as, persons excluded according to Article 1F of the 1951 Convention, who do not return voluntarily and cannot be deported due to the principle of *non-refoulement* may be required to report in person to the police on a daily basis. They must further take up residence in a specific accommodation centre (§ 42a (8)), i.e. in Sandholm. Their freedom of movement is thus to a large extent confined.

Article 2 of Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto states that everyone lawfully within the territory of a State shall have the right to liberty of movement and freedom to choose his residence. The persons concerned in the present proposal do have these rights. Restrictions on the exercise of these rights may be made that pursue one or more of the legitimate aims set out in paragraph 3 of the said article – such as national security or public order – and are necessary in a democratic society, i.e. the restrictions have to be proportionate.

With regard to the proportionality requirement of the measures, the proposal states that in order to control the person's whereabouts in view of the fact that he/she shall be deported less intrusive measures may be taken. It is further stated that a measure initially considered proportionate may cease to be

¹ UNHCR *Advisory Opinion on the Scope of the National Security Exception 1951 Convention Relating to the Status of Refugees*, 6 January 2006. Online available at: <http://www.unhcr.org/refworld/docid/43de2da94.html>.

proportionate at a later point, e.g. if it becomes apparent that it is impossible to deport the person.

UNHCR would like to add that a duty to report to the police daily and to take up residence in Sandholm constitutes a severe restriction/violation of a person's freedom of movement. As the persons concerned have already served their sentence for the crimes committed, this means they would face double punishment, which is contrary to the fundamental legal principle *ne bis in idem* common to practically all national criminal justice orders.

Finally, UNHCR would like to emphasize that with regard to refugees who have committed crimes in Denmark but do not meet the very strict requirements for removal under Article 33 (2) of the 1951 Convention, the country of refuge [i.e. Denmark] is obliged to find a durable solution for the refugees concerned, including a regularized status in Denmark and, if they constitute a danger to national security and/or public order, treatment equal to the one of Danish citizens who constitute such a danger.

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