

Brief



Udlændinge- og Integrationsministeriet

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Addendum to brief of 16 August 2018 regarding the processing of applications for Danish citizenship by naturalization from applicants covered by the UN Convention on the Reduction of Statelessness of 1961 (the 1961 Convention), who are under investigation for offences against national security or a criminal offence that can result in imprisonment for five years or more

1. Introduction and background

On 28 August 2018, Volker Türk acknowledged on behalf of UNHCR that the Ministry of Immigration and Integration's procedure described for the processing of applications for Danish citizenship by naturalization from applicants covered by the 1961 Convention, and who the PET (the Danish Security and Intelligence Service) assesses as a potential threat to national security, or who are provisionally charged or indicted for offences against national security or a criminal offence that can result in imprisonment for five years or more, is in line with the object and purpose of the 1961 Convention.

On 5 September 2018, the Danish Parliament's Naturalization Committee was briefed about the new procedure, which resulted in a number of questions.

There were a series of questions concerning a similar procedure in Norway, where there is a possibility to suspend the processing of applications in so far as the applicant in question is under investigation for offences against national security or a criminal offence that can result in imprisonment for five years or more.

Against this background, the Ministry of Immigration and Integration contacted the Norwegian authorities which confirmed this procedure. The Ministry of Immigration and Integration then launched a study of whether an expansion of the already approved Danish procedure would be in accordance with the 1961 Convention and Denmark's other international obligations.

The Ministry of Immigration and Integration assesses that the expansion of the procedure will not conflict with Denmark's international obligations, including the 1961 Convention.

The objective of this brief is to describe the procedure and the Ministry of Immigration and Integration's assessment of a number of relevant matters. It should be noted that this brief should be regarded as an addendum to the brief of 16 August 2018.

2. Follow-up to brief of 16 August 2018

At a meeting in the Ministry of Immigration and Integration on 8 April 2019, representatives from UNHCR in Stockholm asked some elaborating questions regarding the already approved brief of 16 August 2018.

Based on the questions, it is pointed out that the existing procedure merely postpones the time when a person receives a decision in their case concerning application for Danish citizenship by naturalization. The postponement happens with reference to the applicant potentially constituting a threat to national security or the applicant being provisionally charged or indicted for a crime against national security which may result in imprisonment for five years or more.

The procedure does not preclude stateless persons from applying for Danish citizenship, and the procedure also does not entail stateless persons receiving a refusal on their application in contravention of the provisions set out in the Statelessness Convention.

In connection with the Government's semi-annual bills on the granting of Danish nationality – the Ministry of Immigration and Integration will regularly and on its own initiative follow up on whether the applicant is still deemed to constitute a threat to national security or whether the applicant is still provisionally charged or indicted in a relevant criminal case.

If the Ministry of Immigration and Integration, on a case-by-case basis, finds that a decision should be made in the case out of consideration for the total case administration time, see also Article 10 of the Convention on Nationality on the processing of nationality applications within a reasonable time, the Ministry will present the case to the Danish Parliament's Committee on Naturalization without a recommendation but with an account of the relevant obligations under the Convention.

Whether an application is processed within a reasonable time according to Article 10 of the European Convention on Nationality is to be determined in the light of all the relevant circumstances in the specific case.

In such situations, it will be up to the Danish Parliament's Naturalization Committee to determine whether a decision is to be made in the case or the case should still be postponed awaiting a clarification of the application's situation.

If it is decided to postpone the decision in the case, the Ministry of Immigration and Integration will contact the Ministry of Justice to enquire whether the reason for the postponement may be communicated to the person concerned.

If it is found that communication of the reason for the postponement will hinder the work of the police or the PET, the information will not be communicated to the applicant. In such situations, the applicant will thus be told that the case is still being processed if they contact the Ministry of Immigration and Integration.

As regards safeguards in this connection, please refer to the brief of 16 August 2018, paragraph 3.

3. The proposed expansion of the procedure

The Danish Government does not wish to grant Danish citizenship to stateless persons covered by the 1961 Convention if the person in question is currently under investigation for offences against national security or a criminal offence that can result in imprisonment for five years or more.

The proposed expansion of the existing procedure entails that – in addition to the persons referred to in the brief of 16 August 2018 – the Ministry of Immigration and Integration will also postpone decisions in cases concerning applications from applicants covered by the 1961 Convention who are under investigation for offences against national security or a criminal offence that can result in imprisonment for five years or more.

The procedure entails that – prior to making the decision as to whether an applicant who is covered by the 1961 Convention is to be included in a future naturalization bill – the Ministry of Immigration and Integration must ask the Ministry of Justice whether the person in question is under investigation for offences against national security or a criminal offence that can result in imprisonment for five years or more. The Ministry of Justice will then – after having consulted the police and the PET – notify the Ministry of Immigration and Integration whether the person in question is being investigated for such offences.

If the Ministry of Justice states that the person in question is being investigated for the offences mentioned, the Government will postpone the processing of the application for as long as the investigation is ongoing.

In this connection, 'under investigation' should be understood as situations in which the police are suspecting a person of having committed a criminal offence. Danish law does not include a definition of when a case or person is 'under investigation'. However, it follows from section 742(2) of the Administration of Justice Act that the police will launch an investigation based on a complaint or at their own initiative when there is a reasonable presumption that a criminal offence subject to public prosecution has been committed. Moreover, it follows from section 744 of the Administration of Justice Act that the police must, as soon as possible, draw up a report on the interviews being made and on any other investigative measures unless information about them is available in another form.

Thus, it must be taken into account that from the time the police take investigative measures in a case, the case may be regarded as being 'under investigation'. Investigative measures may be interviews, ordinary surveillance, questioning at a crime scene, pat-down searches, crime scene investigation, identification parades, interception of communication, TV surveillance, forensic investigations and obtaining registry information, etc. Investigative measures may also be employed when there is not (yet) a suspect in the case. If one or more investigative measures are directed against one or more specific persons, it is found that the person may be considered 'under investigation' from this time.

4. Safeguards

In each individual case, the Ministry of Immigration and Integration will ask the Ministry of Justice whether the information that the person in question is under investigation may be communicated to the applicant in question or if this would constitute a hindrance to the investigation or potential danger to national security. If it is found that the information may be communicated, the Ministry of Immigration and Integration will inform the person in question that the Ministry has postponed its decision in the case and provide the reason for this.

If the information on the investigation cannot be communicated for investigation and security reasons, the person in question will not be informed of the postponement nor of the reason for it.

The procedure according to which the person concerned is not informed of the postponement is in line with the procedure for processing of applications for Danish citizenship by naturalization from applicants covered by the 1961 Convention, and who the PET assesses as a potential threat to national security, or who are provisionally charged or indicted for offences against national security or a criminal offence that can result in imprisonment for five years or more, and is in the assessment of the Government in line with the object and purpose of the 1961 Convention.

4.1. Controls on the Danish police

4.1.1. The police will launch an investigation based on a complaint or at their own initiative when there is a reasonable presumption that a criminal offence subject to public prosecution has been committed, see section 742(2) of the Administration of Justice Act.

During the investigation, the police may, among other things, interview suspects and non-suspects, but the police cannot order anyone to make a statement, and the police must not coerce someone to make a statement, see section 750, first

sentence, of the Administration of Justice Act. However, everyone is required to state their name, address and date of birth upon request, and failure to do so is punishable by a fine, see section 750, second and third sentences.

During a police investigation a suspect may under Danish criminal procedural law be subjected to a number of coercive measures.

If a number of conditions are met, the police may implement the following coercive measures without a prior court order:

- Interception in the secrecy of communications
- Surveillance
- Reading of information that is not publicly available in an information system
- Disruption of radio or tele communications
- Bodily intrusion, including the taking of fingerprints, body searches, taking of saliva or blood samples
- Searches
- Seizures and discovery of documents

It is possible to deviate from the requirement for prior judicial authorization if the purpose of the measure would be forfeited. In such situations, the police may implement the measure, and then – depending on the nature of the measure – the police must either at their own initiative or at the request of the suspect bring the matter before a court for approval. This must be done as soon as possible and within 24 hours.

The conditions for the police to implement the above-mentioned coercive measures depend on the intensity of the measure.

Some measures, such as surveillance, do not require that the person in question is a suspect. In such situations, requirements apply as to the importance of the measure to the investigation (significant or decisive) and to the nature of the offence, for example that it may lead to imprisonment of a certain duration.

Other measures are conditional upon a certain basis of suspicion, for example reasonable grounds or probable cause. This requirement is supplemented by requirements as to the measure's importance to the investigation (significant or decisive). In certain situations, there are also requirements as to the nature of the offence, for example that it must be an offence which is punishable by imprisonment of a certain duration.

In addition, the Administration of Justice Act contains specific rules on investigation of particularly serious crimes, such as wilful contraventions of Chapter 12 of the

Criminal Code (treason and other crimes against the State's independence and security) and Chapter 13 (crimes against the Constitution and the supreme authorities of the State, terrorism, etc.) based on which the police may implement coercive measures such as searches in relation to a suspect without informing the suspect of the measure. The requirement as to the type of crime in question is supplemented by requirements as to the measure's importance to the investigation. The courts decide whether such measures may be implemented.

Moreover, the police may decide to implement the following investigative measures in relation to suspects in criminal cases:

- Showing photos of suspects to persons outside the police
- Publication of descriptions
- Direct identification parades (physical presentation of suspects)
- Circulation of warrants on suspects wanted by the police

The suspect may file a complaint over the police's decision to the state prosecutor. The state prosecutor's decision may be brought before a court under section 63 of the Danish Constitution.

The conditions for the police being permitted to decide to implement the above-mentioned investigative measures depend on the intensity of the measure. In all situations, a certain basis of suspicion is required (reasonable grounds or probable cause), and it is also a requirement that the measure be decisive or significant for the investigation. In certain situations, there are also requirements as to the nature of the offence, for example that it must be an offence which is punishable by imprisonment of one year and six months or more.

When the police implement a measure in relation to a suspect, proportionality must be assessed in all situations as to the purpose and importance of the measure as opposed to the consideration for the suspect.

Pursuant to section 755(1) of the Administration of Justice Act, the police may arrest a person who is reasonably suspected of having committed a criminal offence which is subject to public prosecution if the arrest is deemed necessary to prevent further criminal offences, to secure the person's presence for the time being or to prevent the person's association with others.

Pursuant to section 758(2) of the Administration of Justice Act the police must inform the arrestee of the provisional charge and the time of the arrest as soon as possible. Within 24 hours of the arrest, the arrestee must – if they have not been released before that – be arraigned before a judge who is to make a decision as to the arrest.

A suspect will also be regarded as a provisionally charged person when there is specific reasonable suspicion that the person has committed a criminal offence. At that time, a number of legal safeguards apply for the provisionally charged person.

4.1.2. Pursuant to section 101(2) of the Administration of Justice Act, the state prosecutors have a general duty to oversee the police districts' conduct of prosecutions, including their application of intrusive measures in criminal procedure.

4.2. Natural persons' right to access to information

4.2.1. General rules

The Danish Act on the Processing of Personal Data by Law Enforcement Authorities implements the EU Directive 2016/680¹. It follows from the 2nd recital in the Directive that the principles of and rules on the protection of natural persons with regard to the processing of personal data apply to all natural persons, whatever their nationality or residence.

Pursuant to section 15 of the Danish Act on the Processing of Personal Data by Law Enforcement Authorities (the Act), a natural person has the right to obtain from the police confirmation as to whether or not personal data concerning him or her are being processed, and, where that is the case, access to the personal data.

However, pursuant to section 16 of the Act, the police may restrict, wholly or partly, the natural person's right of access to the extent that a partial or complete restriction is necessary and proportionate in order to avoid prejudicing the investigation of criminal offences.

Specifically in case of processing of personal data relating to an investigation of a criminal offence, section 18(3) of the Act states that the rules adopted in the Danish Administration of Justice Act apply instead of the data protection regime in the Act on the Processing of Personal Data by Law Enforcement Authorities.

The Administration of Justice Act does not provide a right to access to information to a suspect before the suspect has been charged with a criminal offence as this could compromise the investigation of criminal offences or procedures of the police.

Once the natural or legal person is charged with a criminal offence, the person obtains the right to information pursuant to section 729a – d of the Administration of Justice Act. Contrary to section 15 of the Act on the Processing of Personal Data by

¹ Directive (EU) 2016/680 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data by the competent authorities for the purposes of the prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and on the free movement of such data, and repealing Council Framework Decision 2008/977/JHA.

Law Enforcement Authorities, this right to information is not limited to access to personal data relating to the natural person (it has a broader scope and encompasses all the information that the police have provided in the specific case).

4.2.2. Special provisions regarding access to information from the PET

Pursuant to section 12(1) of the Danish Security and Intelligence Service Act, a physical or legal person does not have the right to insight into information that the PET processes about said person or the right to insight into whether the PET is processing information about said person.

However, under section 12(2) of the Danish Security and Intelligence Service Act, the PET may grant full or partial insight into information mentioned in section 12(1) of the Act if exceptional circumstances justify such insight. The rejection of an application for citizenship due to a threat assessment by the PET will not in itself justify full or partial insight.

Additionally, section 13(1) of the Danish Security and Intelligence Service Act states that a physical or legal person can request that the Danish Intelligence Oversight Board (the Oversight Board) investigate whether the PET is processing information about the person in question without justification. The Oversight Board ensures that this is not the case and then informs the person in question accordingly.

The procedural history of the Danish Security and Intelligence Service Act states that the notification by the Oversight Board must only imply that no unjustified processing of information about the person in question is taking place. Thus, it must not be expressly or implicitly stated that information has been processed or that justified processing of information is taking place.

Section 13(3) states that, if justified by exceptional circumstances, the Oversight Board may order the PET to grant full or partial insight into information mentioned in section 12(1). The order is legally binding for the PET.

The procedural history further states that section 13(2) – now section 13(3) – of the Danish Security and Intelligence Service Act is intended to serve as a safety valve that supplements section 12(2) of the Act. Furthermore, it also states that the fact that the PET has processed information about a person, etc. without justification does not in itself constitute sufficient grounds for the Oversight Board to order the PET to grant insight into information about the person in question under the current section 13(3). Regarding the nature of exceptional circumstances that can justify an order to the PET, please refer to the explanatory memorandum on section 12 of the Danish Security and Intelligence Service Act.

4.3. Oversight of the police

The Minister of Justice is ultimately in charge of the police authority and exercises his/her powers through the National Commissioner who is the head of the police and the Commissioners of the police districts. The Danish National Police sets the directions and defines the strategies for the entire police service (in close cooperation with the police districts) and advises and supports the local police authorities. The PET also forms part of the Danish National Police, but in certain situations – due to the special duties of the intelligence service – it reports directly to the Minister of Justice instead of the National Commissioner.

The police service belongs to the executive branch and is thus subordinated to the Minister of Justice. The Minister of Justice may issue general guidelines or instructions regarding police investigations (e.g. prioritising certain types of crime), but the Minister is bound by certain general principles of law, such as legality, equal treatment, the obligation to base decisions on objective reasons and proportionality.

Internal oversight within the police is organised along hierarchical lines. The various departments in the Danish National Police perform hierarchical supervision of the local police districts to ensure that the local districts follow the national regulations and act in accordance with principles of good public administration, with the Ministry of Justice in turn performing supervision over the Danish National Police.

4.3.1. The Independent Police Complaints Authority

The Independent Police Complaints Authority (IPCA) is tasked with carrying out investigations of criminal offences committed by police personnel while on duty and handling complaints concerning the conduct of police personnel, as well as investigating cases concerning the death or injury of persons in police custody. The IPCA is an autonomous government agency independent of the police, prosecution service and the Ministry of Justice.

The IPCA can initiate an investigation either *ex officio* or on the basis of a complaint. In investigating possible criminal offences committed by the police, whether on the basis of a complaint or *ex officio*, the IPCA has all the same tools as in an ordinary criminal investigation (forensic examinations etc.). Upon completion of the investigation, the IPCA will forward the case to the regional public prosecutor, who decides whether a prosecution should be brought.

If a complaint concerns police misconduct, the decision by the IPCA – following an investigation into the alleged misconduct and interviews of the parties involved – is final and cannot be submitted to another administrative authority. The IPCA can express criticism of the police staff member subject to the complaint, find that there are no grounds for expressing criticism or find the misconduct regretful or inappropriate. The file is then forwarded to the Danish National Police for possible further disciplinary proceedings.

4.4. Oversight of the PET

4.4.1. The Danish Intelligence Oversight Board

The Danish Intelligence Oversight Board is a special independent monitoring body that was established on 1 January 2014. It is stated in the Danish Security and Intelligence Service Act that the president of the Oversight Board must be a judicially appointed High Court Judge.

Acting in response to complaints or on its own initiative, the Oversight Board ensures that the PET processes information about physical or legal persons in accordance with the Danish Security and Intelligence Service Act and the rules issued pursuant thereto, see section 18 of the Danish Security and Intelligence Service Act.

The Oversight Board must ensure that the PET complies with the rules of the Act on:

- procurement of information, including gathering and collection;
- internal processing of information, including deadlines for the deletion of information;
- transfer of information, including to the Danish Defence Intelligence Service (FE) and to other Danish administrative authorities, private recipients, foreign authorities and international organisations; and
- prohibition of processing information about physical persons residing in Denmark solely on the basis of their legal political activity.

The Oversight Board thus inspects, among other things, whether the PET is processing information about a person without justification.

The task of the Oversight Board is to perform checks of the legality of the PET's processing of information about physical and legal persons in accordance with the law. Thus, the Oversight Board does not check whether the PET performs its tasks in an expedient manner, including how the service prioritises its operative and intelligence resources, as this is based on a police assessment. Therefore, the Oversight Board cannot review the PET's assessment of whether, for example, a person constitutes a threat to national security, see Parts 12 and 13 of the Danish Criminal Code. The Oversight Board can check whether the information that constitutes the basis for the assessment has been processed in accordance with the Danish Security and Intelligence Service Act.

The Oversight Board notifies the Minister of Justice of matters about which the Minister, in the view of the Oversight Board, should be aware. If, in exceptional cases, the PET decides not to follow a recommendation in a statement from the Oversight Board, see section 19(1) of the Danish Security and Intelligence Service

Act, the PET must inform the Oversight Board accordingly and, without undue delay, submit the case to the Minister of Justice for a decision, see section 19(2) and (3) of the Danish Security and Intelligence Service Act.

The Oversight Board may demand that the PET provide all information and all materials of significance for the Oversight Board's activities, see section 20(1) of the Danish Security and Intelligence Service Act. The Oversight Board may also require written statements from the PET regarding factual and legal matters of significance for the Oversight Board's activities, see section 20(3) of the Danish Security and Intelligence Service Act.

4.4.2. Oversight by the Danish Parliament

The Danish Parliament's Intelligence Services Committee (ISC) has the parliamentary insight into the PET. The Committee must be informed of significant circumstances relating to: security, foreign policy issues, matters of importance to the activities of the intelligence services, and the content of certain guidelines on the activities of the intelligence services prior to the issuances of said guidelines.

ISC must be given a detailed annual orientation on the activities of the PET. The Government is obliged, upon request by ISC, to give the Committee information about the activities of the PET, including statistical information, and the Committee can require that the head of the PET participate in Committee meetings. The annual report that the PET is required to issue pursuant to the Danish Security and Intelligence Service Act must be submitted to the Committee before it is made public.

ISC can request that the PET provide a report on matters pertaining to the activities of the PET, including the background for threat assessments that have resulted in the rejection of applications for citizenship. However, the Committee does not have the power to revise a threat assessment.

4.4.3. Oversight by the Ministry of Justice

The Ministry of Justice performs oversight of the PET, and the intelligence service is subject to the instructions of the Minister. The head of the PET reports directly to the Minister of Justice, even though the PET is organisationally under the auspices of the Danish National Police.

In this regard, it is incumbent upon the head of the PET to always keep the Ministry of Justice directly informed about all matters of importance pertaining to the country's internal security and generally on all matters of importance within the activities of the intelligence service, including as regards all important individual cases, see section 1(1)(4) of the Danish Security and Intelligence Service Act.

Section 2 of the Danish Security and Intelligence Service Act further states that the PET must submit an annual report on its activities to the Minister of Justice and that

this report must be made public. The report must provide general information on the PET's ordinary activities and must include a general review of the PET's activities during the year, as well as the service's economic and administrative circumstances.

4.5. Access to judicial review

In its judgment of 13 September 2013, the Supreme Court stated that Denmark has acceded to a number of international conventions that may affect the processing of applications for citizenship or for the granting of citizenship. According to the Supreme Court, these international obligations are to be complied with by Parliament and its Naturalization Committee when assessing if Danish citizenship is to be granted to an applicant. An applicant who has not been included in a bill on the granting of citizenship can thus have the courts review if these international obligations have been violated and if the applicant for that reason is entitled to compensation.

5. The feasibility of postponing consideration of specific applications

5.1. Legal assessment

In the assessment of the Ministry of Immigration and Integration, the 1961 Convention does not in itself oblige the contracting states to grant citizenship to an applicant covered by the Convention in immediate connection with the submitted application. In this regard, the Ministry notes that the Convention does not contain a requirement of case processing within a defined time.

Furthermore, in the assessment of the Ministry of Immigration and Integration, it would not contravene the purpose of the 1961 Convention or the considerations on which the Convention is based to postpone the assessment of whether an applicant is entitled to be granted Danish citizenship under the Convention, to the extent that such postponement can be objectively justified, for example on the basis that the applicant in question is currently under investigation for offences against national security or a criminal offence that may result in imprisonment for five years or more.

Such postponement of the assessment of whether an applicant is entitled to the granting of Danish citizenship under the Convention will not contravene the Convention on Nationality as long as the specific case, following an overall assessment, can be processed within a reasonable time. In this connection, it must be deemed of great importance that a contracting state's police and prosecuting authority should have the opportunity to investigate and conduct a criminal case against such applicants before the contracting state makes a decision to grant them citizenship.

It is against this background that the Ministry of Immigration and Integration assesses that it will not be in conflict with Denmark's international obligations, including the 1961 Convention, to postpone the assessment of whether an applicant covered by the 1961 Convention is entitled to inclusion in a bill on the granting of citizenship in cases where the applicant is currently under investigation for offences against national security or a criminal offence that can result in imprisonment for five years or more.

In the assessment of the Ministry of Immigration and Integration, the postponement of the assessment of whether an applicant is to be rejected or included in a bill on the granting of citizenship can be extended for as long as the investigation against the applicant is upheld. However, it is a requirement that the postponement does not result in the applicant not receiving a decision within a reasonable time.

5.2. Extension of the procedure for the processing of applications from stateless persons covered by the 1961 Convention

Going forward, based on the above assessment and the current procedure for processing of applications from stateless persons – in cases where an applicant covered by the 1961 Convention is under investigation for offences against national security or a criminal offence that can result in imprisonment for five years or more, and where the applicant otherwise meets the Convention's conditions for citizenship – the Ministry of Immigration and Integration will postpone the processing of the case.

In these cases, the Ministry of Immigration and Integration will not issue a rejection of the applicant's application, and, as a general rule, the Ministry will not submit the application to the Danish Parliament's Naturalization Committee.

In cases where the applicant is under investigation for offences against national security or a criminal offence that can result in imprisonment for five years or more, the Ministry will every six months, *on its own initiative*, confirm if the investigation is still ongoing.

If, based on a concrete assessment, the Ministry of Immigration and Integration finds that a decision should be made in the case in view of the overall case processing time, the Ministry will submit the case to the Danish Parliament's Naturalization Committee without a recommendation, but with a report on the relevant convention obligations.

In these cases, it will be up to the Danish Parliament to determine whether a decision is to be made in the case, or if the decision should remain postponed subject to clarification of the applicant's circumstances.

In conclusion, it is important to emphasize that this new procedure only postpones the time at which a person will receive a decision regarding their application for Danish citizenship. The postponement is carried out with reference to the fact that the applicant is under investigation for offences against national security or an offence that can result in imprisonment for five years or more. Thus, the extension of the procedure does not exclude stateless persons from applying for Danish citizenship and it does not lead to rejections of applications of stateless persons in violation of the provisions of the 1961 Convention. Finally, the applicants in question may have the courts review whether the relevant international obligations have been violated and whether the applicants for that reason are entitled to compensation.