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Zero asylum seekers: The new Danish law (not) on asylum

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Abstract

The recently adopted amendments to the Danish Aliens Act respond to the expressly declared intent to stop people seeking asylum in Denmark. The national government intends to reach this goal by handing the whole international protection processing over faraway third countries, neglecting its obligations in the field of human rights, migration and asylum. This contribution first explores the peculiar migration and asylum system in place in the country, which is not bound to almost the entire EU legislation on the matter. Second, it offers an overview of the main features of this new, highly controversial, law.

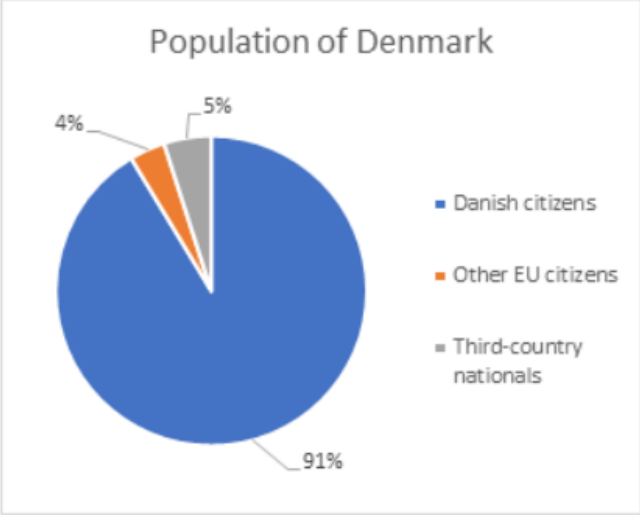
1. "Lovely numbers"

> *"Lovely numbers. The policy of the government is to make sure that refugees' stay is temporary. When possible, it's only natural that refugees go home to their countries of origin. I'm happy to give people protection when they need it. But I'm also happy every time a refugee can return home".*

These words, delivered by the Danish Minister of Immigration and Integration Mattias Tesfaye, give us a clue of the grounding approach of his country's policy on migration and asylum. Although it is true that the refugee status may not be indefinitely grated, it shall be maintained as long as necessary or justified. The 1951 Geneva Convention relating to the Status of Refugees clearly outlines the exhaustive grounds upon which the refugee status shall cease. In particular, it establishes that the Convention no longer applies if the circumstances, intended as fundamental and major changes in the country of origin or habitual residence, that granted the refugee status have ceased to exist. Conversely, a mere and transitory change cannot be assumed to remove the basis of the fear of persecution.

This, however, does not coincide with the position of the Danish government, which since 1986 suggested to externalize the international protection process in third countries to keep migrants distant from their national border. Most recently, in April 2021, the government decided to revoke the residence permit of 886 Syrian and 373 Somali refugees on the ground that Damascus and Mogadiscio are now allegedly safe to return to and there is no longer need to "host" them in Denmark.

The strong anti-migration sentiment embedded in national policy can hardly be justified by numbers. Indeed, as of 1 January 2021, 298.005 third-country nationals are living in Denmark, which amount to no more than 5% of the total population (5.82 million). The largest group of regular migrants comes from Turkey, while Syrian, Eritrean and Afghan are the top 3 nationalities claiming international protection in the country. Over the last few years, the number of international protection (IP) seekers in Denmark has been sharply decreasing from 21.000 in 2015 to 1.500 in 2020. In 2020, only 601 gained the refugee status, the lowest number registered in the last three decades.



Source: European Website on Integration, Governance of Migrant Integration in Denmark, available at: https://ec.europa.eu/migrant-integration/governance/denmark

2. The "paradigm shift" in the Danish law on migration and asylum

The Danish Aliens Act, adopted in 1983 and amended many times since, covers both migration and asylum law, as Denmark does not provide for a self-standing refugee law, and regulates almost every aspect of the migration process. Major amendments adopted in 2002 and between 2015 and February 2019 radically shifted the focus from permanent protection and integration to temporary statuses and return. This strongly restrictive grip to migration is also known as "paradigm shift".

The Danish Aliens Act recognizes three refugee categories, namely those qualified under the 1951 Geneva Refugee Convention (or convention refugees); *de facto* refugees who, although not eligible for the traditional refugee status, cannot be removed because of objective, not subjective, grounds for believing that they would be at risk of death penalty, torture or other inhumane or degrading treatment; and *quota refugees*, i.e. refugees relocated in Denmark. In February 2015, the Danish Ministry of Justice introduced a new temporary permit called "temporary subsidiary protection status". This one-year residence permit, renewable for two years, granted protection to around 4.000 people who, if returned in their country of origin, would have been at risk of death penalty, torture or other inhumane or degrading treatment in the context of generalized violence and attacks on civilians. This provision, specifically tailored for Syrians, aimed to include a highly temporary and return-oriented status that could cease "*irrespective that the situation – despite improvements – continues to be serious, fragile and unpredictable*" (Bill No. L 72/2014-15, explanatory memorandum para 2.1.1.2).

Over time, the Danish Aliens Act also drastically reduced the duration of the other protection statuses, in turn increasing the frequency of reviews to renew or withdraw the protection

status. In 2019 these reviews became a mandatory practice, thus leaving refugees in precarious uncertainty and undermining the stability of the refugee status.

Moreover, since 2002, the Danish government made it increasingly difficult to obtain a permit for family reunification, a measure that particularly affected IP seekers and holders. As underlined by Adamo, the complexity and ambiguity of the Danish legislation on family reunification "*may lead to non-transparent and unpredictable administrative practices*", in particular because "*the rules are to be found in several different legal texts, but also because Aliens Act has been amended in a patchy way and not entirely revised to create a more manageable set of rules*". It may even lead to indirect discrimination, affecting only specific groups. For instance, the 2002 amendments to the Aliens Act sharply restricted the eligibility of children to be authorized to family reunification. In particular, Article 9.1 (2) holds that children may be denied family reunification if above 15 years of age, unless this would entail a violation of their right to family life or of the best interests of the child. According to Adamo, this controversial restriction stemmed from the fact that adolescents who had not lived in Denmark during their most formative years would hardly adopt, and integrate with, Danish values and culture. Even more contentious is the amendment introduced in 2004 according to which children over 8 years old may be required to meet requirements for successful integration in order to be granted family reunification. Therefore, a family reunification claim lodged by a minor between 8 and 15 years old would be evaluated primarily according to their integration potential rather than to their best interests and fundamental rights, including family unity and family life.

In light of the drastic changes in the Danish migration and asylum policy, UNHCR delivered an 11-page letter to the national government where, *inter alia*, it recommended Copenhagen to ensure that all children are entitled to family reunification in order to fully comply with the Convention on the Rights of the Child. It also calls on the government to grant family reunification to all beneficiaries of international protection, including those covered by the temporary subsidiary protection status by allowing them to reunite with their family without a waiting-period. Indeed, another amendment endorsed in 2016 concerned temporary subsidiary protection beneficiaries, who were required by law to wait three years before applying for family reunification to the separated spouses and children, this meaning that thousands of refugees have been separated from their families for years. This practice has been recently condemned by the Grand Chamber of the European Court of Human Rights (ECtHR) in *M.A. v. Denmark* for violation of Article 8 ECHR. The Court held that three years constitute an excessive waiting period and underlined the fact that all migrants with a protection status have a right to family reunification.

Moreover, the 2019 amendments took further significant steps to restrict permanent residence and citizenship for third country nationals, along with access to various economic

benefits. Additionally, these lowered the threshold to withdraw or not to renew subsidiary and temporary protection statuses. In fact, they shifted integration towards return, establishing that international protection must end unless such cessation would be in breach of Denmark's international obligations. Therefore, cessation would be the rule, instead of the exception. Emblematically, the reform adopted in 2019 consistently replaced the term "integration" with "self-support and return".

3. *Externalization as the underlining basis of the new Danish asylum law*

"*If you apply for asylum in Denmark, you know that you will be sent back to a country outside Europe, and therefore we hope that people will stop seeking asylum in Denmark*", said the Parliament's spokesman on immigration and integration Rasmus Stoklund.

The Social-Democrat government advanced a new legislative proposal on asylum in February 2021, which was adopted by the vast majority of the Parliament in July. By amending, again, the Danish Aliens Act, Denmark foresees to remove IP seekers arriving in the country to non-EU partner countries as soon as they enter the territory and ask for international protection. The new law also facilitates IP seekers' preventive detention to ensure their transferability and deportation in extraterritorial camps outside the EU. Accordingly, IP seekers would be detained for having committed no crime but only for attempting to exercise their legitimate right to asylum. As noted by Lemberg-Pedersen, the national police would be in charge of stopping, screening, arresting and deporting IP seekers.

Under the new law, IP seekers' protection claim would be evaluated in and by non-EU countries, meaning that they would be responsible for the removal of IP seekers in case of rejection as well as for their reception and integration in case of successful outcome of their claim. In other words, under no circumstances would IP seekers get to enter Denmark. Under the new law, the examination processing facilities are to be built after signing an agreement, or equivalent arrangement, with a third country, requiring that country to act in accordance with certain obligations under international law. According to Chatham House, IP seekers would be removed to a faraway third country regardless of where they are from. Although no country has as yet agreed to collaborate with Denmark on the project, the government declared that it is negotiating with five to ten countries, including Rwanda with which, Chatham House reports, Denmark signed a diplomatic agreement in March 2021 leading to speculation it presumably intends to open an asylum processing facility there.

Information is lacking regarding which Danish and third country's authorities have responsibility over IP seekers, according to which criteria third countries are to be selected and under which circumstances these latter would accept to undertake such unreasonable burden

and, last but not least, to what extent this new law may meet customary principles as well as international and EU obligations that Denmark is bound to fully respect.

Both the 1951 Refugee Convention and EU law provide for clear criteria in order to determine the State responsible for an international protection claim. Outsourcing asylum and protection processing is in open breach of these provisions as well as of the principle of *non-refoulement*. Enshrined in Article 33 of the 1951 Geneva Convention, this principle addresses any practice that could be implemented to avoid admitting IP seekers into a State's territories ("in any manner whatsoever"). This includes direct actions, namely those undertaken by governments or their officers and agents, and indirect actions, for instance implemented through internal laws or administrative practices. Emblematic examples of forbidden actions are deportation, return, expulsion, and rejection. UNHCR has clarified that Article 33 encompasses not only recognized refugees but also all IP seekers, even in case of mass influx. Therefore, automatically arresting and deporting IP seekers outside the EU means for Denmark to be in profound violation of international refugee law and human rights law, where its scope of application is significantly broader and encompasses all those cases where there is a real risk of serious harm. Externalization collides with all those international and regional human rights instruments (among others, ECHR, International Covenant on Civil and Political Rights, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, EU Charter on Fundamental Rights), which produce legally binding effects on Denmark and where the principle of *non-refoulement* is enshrined.

Furthermore, Article 31 of the 1951 Refugee Convention provides that States shall not impose penalties on refugees on account of their illegal entry or presence, provided that they present themselves without delay to the authorities and show a good cause for their illegal entry or presence. It means that IP seekers shall not be detained exclusively on the ground that they are seeking protection.

Although Denmark consistently opted-out the Common European Asylum System (CEAS), it is still bound by the requirements set out in the Dublin III Regulation and, in general, in EU law, principles and values. Externalizing international protection is not compatible with the right to effectively accessing asylum procedures and protection. Moreover, detention, defined as a deprivation of liberty, must be used as a measure of last resort, only when it is necessary and proportionate and pursues a legitimate purpose prescribed by law to be interpreted in a restrictive manner. Hence, detention shall never be arbitrary and shall be ordered only when alternatives, meant as sufficient but less coercive measures, are not applicable. While migrant children should never be detained, EU law provides for specific grounds for detention upon removal for adult IP seekers and migrants.

Immigration and asylum detention cases must always be assessed in light of international and EU human rights standards, most notably the ECHR and the EU Charter of Fundamental Rights, as interpreted by the respective courts. The ECHR comprises an exhaustive list of grounds for detention, including to prevent unauthorised entry or to facilitate the removal of a third country national. Relevant safeguards are Article 5 ECHR (right to liberty and security) and Article 2 of Protocol No. 4 (freedom of movement). Beyond other relevant provisions enshrined in the CEAS, the Dublin III Regulation provides that detention should only take place in the case of a "significant risk of absconding" to secure transfer procedures from one Member State to another. In *Al Chodor*, the Court of Justice clarified that the expression "risk of absconding" has to be determined in an unambiguous way and within the pertinent measures to be adopted at the national level. Plus, the Dublin III Regulation prohibits detention solely on grounds of being subject to its transfer procedure. Finally, the objective of the Regulation is to identify the EU Member State responsible for examining an international protection claim following three hierarchical criteria, referring to the presence of family members (Articles 9-11), visas (Article 12) or country of first entry (Article 13). Transfer procedures must be disposed when another Member State is found to be responsible for the case. Therefore, it seems clear that detention 1) should not be justified solely to carry out such a transfer; 2) should not be implemented when the transfer involves a non-EU country; 3) should not take place when the criteria set out in the Regulation are not met.

From the outset this proposal has encountered harsh criticism by UNHCR, which declared to strongly oppose efforts that seek to externalize asylum and international protection obligations to other countries, and by the European Commission, which confirmed that outsourcing asylum to countries outside Europe is in violation of EU law and risks "*undermining the foundations of the international protection system for the world's refugees*". The Danish Refugee Council (DRC) issued a statement where it condemns this initiative as "*irresponsible and lacking in solidarity*". In fact, DRC points to the detrimental repercussions in terms of cooperation, responsibility-sharing and mutual trust that this new model would have on neighbouring countries, where IP seekers would likely stop to avoid being removed back to third countries. Even worst, it has been reported that some Syrian refugee families have fled Denmark to the Netherlands and Belgium in the attempt to escape the risk of being removed back to Syria.

Beyond the manifest unlawfulness of this last amendment to the Danish Aliens Act, what is relevant to point out here is that Copenhagen is sending out a very clear, straightforward message: IP seekers are not welcome in Denmark. Thus, we can expect its migration and asylum policy to become so severe to deter future migrants from attempting to enter the country. By means of this undoubtable externalization measure, Denmark rejects the recognition, the enforcement and the enjoyment of the right to asylum, letting third countries, already exposed to large migrants and refugees' inflows, do the "dirty job".

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