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OVERVIEW

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HUMAN RIGHTS OBLIGATIONS AND THIRD COUNTRY ASYLUM PROCESSING

Asylum processing in third countries is not in principle a breach of international law. But Denmark remains legally responsible for asylum seekers transferred to another country. The government will therefore have to ensure that human rights are respected in reception centres in third countries. This note provides an overview of Denmark's human rights responsibility for third country asylum processing.

In 2018, the Danish Social Democrats released a policy platform that proposes transferring all asylum seekers arriving on Danish territory to a third country for the processing of their asylum claims.[1] The stated intention of this policy was that in future Denmark would not receive spontaneous asylum seekers, but that asylum processing would be moved to a third country.

On this basis, the Danish government is working to establish a reception centre in a third country outside Europe in accordance with Denmark's international obligations.

Third country processing is not in and of itself in breach of international law, but Denmark remains legally responsible for asylum seekers transferred to another country. This responsibility flows from Denmark's obligations under international human rights and refugee law.

Third country processing involves the transfer of an asylum seeker from one country to another country for the purposes of assessing their asylum claim. Under the Social Democrats' proposal, asylum seekers arriving spontaneously in Denmark will be transferred to a reception centre in a third country outside the EU, where their asylum claim will be processed. No third country has yet agreed to host such a centre.

With a legislative amendment scheduled for February 2021, the government intends to create a legal basis for transferring asylum seekers to third countries, with the aim of processing their asylum application and, for those considered to be refugees, protection in the third country.[2]

The government can either set up a reception centre under Danish jurisdiction, where the government must pay particular attention to the question of asylum seekers who spontaneously apply for asylum at the centre. Or the government

can set up a reception centre under the jurisdiction of the third country. Here, the government must be particularly attentive to the asylum process in the third country.

This note presents an overview of the human rights obligations relating to the two possible models of third country processing:
• A centre under Danish jurisdiction
• A centre under the jurisdiction of the third country.

The note first provides an overview of third country processing practice and sets out a number of general principles.

THIRD COUNTRY PROCESSING IN PRACTICE

The processing of asylum claims in third countries has been carried out by a number of countries since the 1980s.

The United States has used Guantanamo Bay, Cuba, as an asylum processing centre for asylum seekers arriving by boat since the 1990s. In response to an exodus of asylum seekers from Haiti, the United States began intercepting and transferring asylum seekers for processing by United States immigration officials in Guantanamo Bay. The United States exercises complete control and jurisdiction over Guantanamo Bay under a perpetual lease agreement with Cuba. Under the Migrant Interdiction Program, the United States continues to intercept and transfer asylum seekers to Guantanamo Bay on a small scale to this day.

Under the Pacific Solution, in place in the period 2001–2007, Australia transferred asylum seekers arriving by boat to regional processing centres in Nauru and Papua New Guinea.

In late 2012, this approach was reprised under Operation Sovereign Borders. Under this policy, no person seeking protection by boat may have their asylum claim processed or protection need met in Australia. Between 2012 and 2019, 4,177 asylum seekers were transferred to the centres. While the Australian government denies its jurisdiction over the centres, the United Nations Human Rights Committee and Committee Against Torture have found that Australia held effective control, and thus jurisdiction, over asylum seekers and refugees at the centres.[3]

In Europe, the EU–Turkey Statement of March 2016 provides for the return of asylum seekers arriving in the Greek Aegean islands to Turkey.[4] In exchange, the EU resettles from Turkey one Syrian refugee for every Syrian returned from the Greek islands. While the Statement has led to a significant fall in irregular migration between Turkey and Greece, relatively few people have been returned under the Statement, with only 2,735 migrants returned since March 2016. The EU–Turkey Statement is based on the safe third country concept, explained below.

Most recently, the United States and Guatemala entered into a bilateral Asylum Cooperative Arrangement (ACA), under which non-Guatemalan asylum seekers may be transferred from the United States to Guatemala without the chance to claim asylum.[5] The ACA is also based on the safe third country concept. Between November 2019 and March 2020, 939 asylum seekers were transferred under the ACA, though only 30 people applied for asylum in Guatemala. The operation of the ACA was suspended in March 2020 due to the COVID-19 pandemic.[6] The United States has entered into similar bilateral arrangements with Honduras and El Salvador, but transfers have not yet begun.

PRE-TRANSFER SCREENING

Regardless of which third country processing model Denmark chooses, European human rights law requires a pre-transfer screening of all asylum seekers who reach Danish territory, to assess whether Denmark's international obligations prevent transfer. While Denmark is not obliged to hear an asylum seeker's claim for international protection, it does have obligations before sending a person to a third country.

RIGHTS AND OBLIGATIONS DURING PRE-TRANSFER SCREENING

THE PRINCIPLE OF NON-REFOULEMENT

According to Article 33(1) of the Refugee Convention asylum seekers may not be transferred to a country where they have a well-founded fear of persecution on the basis of race, religion, nationality, membership of a particular social group or political opinion.

This is called the principle of non-refoulement. The Danish Aliens Act refers directly to the Refugee Convention concerning the principle of non-refoulement.[7] However, under Article 33(2), asylum seekers who pose a risk to the security of the country can be transferred.

The European Court of Human Rights prohibits the transfer of any person to a real risk of torture or inhuman or degrading treatment or punishment in absolute terms.

As a result, Article 3 of the European Convention on Human Rights prevents the deportation of an asylum seeker to serious harm, even when the person presents a risk to Denmark's security. The protection provided in Article 3 of the European Convention on Human Rights is thus wider than Article 33(1) of the Refugee Convention.

Moreover, the European Court of Human Rights has found that obligations under Article 3 extend to a thorough examination of whether there is a real risk the individual will be denied access to an adequate asylum procedure in the third country.[8]

Article 3 of the European Convention on Human Rights further protects against the transfer of particularly vulnerable individuals. The European Court of Human Rights has emphasised that asylum seekers are a particularly vulnerable group.[9] For example, Denmark's Article 3 obligations will be engaged in situations involving the transfer of seriously ill persons,[10] unaccompanied children[11] and families with children where reception facilities in the third country are not adapted to their specific vulnerabilities.[12]

Finally, Article 3 of the Convention Against Torture prohibits the transfer of any person to a country where they face a real risk of torture. Articles 6 and 7 of the International Covenant on Civil and Political Rights have also been interpreted by the Human Rights Committee as including an implied prohibition against transfer to a real risk of torture or cruel, inhuman or degrading treatment or punishment.

In summary, the principle of non-refoulement, as laid out in a number of international treaties, requires that the Danish state ensure that no person is deported to a country where they are at risk of being subjected to torture or inhuman or degrading treatment or punishment.

PROHIBITION AGAINST COLLECTIVE EXPULSION

Article 4 of Protocol 4 to the European Convention on Human Rights prohibits the forced removal of a group of aliens, except where such a measure is taken on the basis of a reasonable and objective examination of the particular case of each individual.[13] While collective expulsion must apply to a group of people, there is no requirement that the group be of a particular number of persons – thus two people can make up a group.[14]

The prohibition against collective expulsion requires that Denmark provide each individual asylum seeker arriving on the territory or at land or sea borders an opportunity to argue against their expulsion to the competent authorities, in this case the Danish Immigration Service and Refugee Appeals Board.[15]

To comply with Article 4 of Protocol 4 ECHR, Denmark must issue an individual removal decision to each asylum seeker to be sent to a third country. The only exception is when the asylum seeker's own culpable conduct removes this obligation, for example when a large group of aliens create a dangerous situation by using force to enter illegally.[16]

RIGHT TO AN EFFECTIVE REMEDY

Article 13 of the European Convention on Human Rights provides for the right to an effective remedy. Thus, where an asylum seeker in Denmark wants to file a complaint about transfer to a third country, **Article 13 requires that the individual have effective access to an independent, competent national authority with suspensive effect.**[17]

RIGHT TO FAMILY LIFE

The right to family reunification is not expressly included in the Refugee Convention, however Article 8 of the European Convention on Human Rights in some cases requires Denmark to provide for family reunification of asylum seekers arriving on Danish territory with an existing family life to a resident of Denmark.

Whether or not "family life" exists is a question of fact depending upon the existence close personal ties between the asylum seeker and a Danish resident (including refugees already receiving protection). For example, an asylum seeker arriving on Danish territory can have a family life with their parent, child or spouse who already live in Denmark.

As a result, Article 8 of the European Convention on Human Rights places positive obligations on Denmark to allow an asylum seeker to reunite with family on its territory where there is an insurmountable objective obstacle preventing family reunification in any other place.[18]

CENTRE UNDER DANISH JURISDICTION

In a reception centre under Denmark's jurisdiction, Danish immigration officers will conduct the asylum procedure, and Denmark will have effective control over the centre and asylum seekers inside it. In general, this means that Denmark will be responsible for what happens in the centre.

EXTRATERRITORIAL JURISDICTION

There are two bases on which Denmark's jurisdiction can be established extraterritorially.

First, where Denmark exercises effective control over the **area** where the centre is established in the third country. Here, jurisdiction will be triggered, and Denmark will owe obligations under, **inter alia,** the European Convention on Human Rights.[19] The key question is whether Denmark exercises control of the centre, including the extent to which Danish rules and authorities control the operation of the centre.

Second, where Denmark exercises effective control over **asylum seekers** transferred to the third country, jurisdiction will also be triggered. The European Court of Human Rights has recognised three ways in which extraterritorial jurisdiction through effective control over persons may arise:

- The acts of diplomatic and consular agents when exercising physical control over transferred asylum seekers in the third country, e.g. at an embassy[20]
- Use of force or physical power or control by state agents in the third country, for example through detention of asylum seekers[21]
- Aircraft and vessels flying under the Danish flag. This means that if a Danish ship with asylum seekers on board is located in a third country's territorial waters, Denmark will have jurisdiction.[22]

The United Nations committees (which present nonbinding views) have a more expansive view of extraterritorial jurisdiction. In 2014, the Committee Against Torture found Australia held jurisdiction over asylum seekers detained at the Manus Island regional processing centre as:

> All persons who are under the effective control of the State party, because inter alia they were transferred by the State party to centres run with its financial aid and with the involvement of private contractors of its choice, enjoy the same protection from torture and ill-treatment under the Convention (Articles 2, 3 and 16).[23]

In 2017, the Human Rights Committee similarly held:

> the Committee (...) considers that the significant levels of control and influence exercised by the State party over the operation of the offshore regional processing centres, including over its establishment, funding and service provided therein, amount to such effective control.[24]

Under this model, where Danish jurisdiction is established on an extraterritorial basis that doesn't relate to control of the centres themselves, not necessarily all rights under the European Convention on Human Rights are enlivened. Rather, recent European Court of Human Rights caselaw suggests Denmark is obliged to secure only those rights relevant to the situation of the individual.[25]

RELEVANT RIGHTS AND OBLIGATIONS AT A CENTRE UNDER DANISH JURISDICTION

The Institute anticipates that rights relating to the prohibition against torture, inhuman or degrading treatment or punishment (Article 3), the right to an effective remedy (Article 13), the right to a fair and effective asylum process (Articles 3 and 13) and the right to liberty and security (Article 5) are particularly relevant in a third country centre under Danish jurisdiction.

THE PRINCIPLE OF NON-REFOULEMENT

Where Denmark exercises jurisdiction over the centre, it will owe non-refoulement obligations under Article 3 of the European Convention of Human Rights. A particularly complex issue is Denmark's obligations if asylum seekers spontaneously present themselves at the centre. The Institute emphasises that Denmark must consider its non-refoulement obligations when an asylum seeker seeking protection arrives spontaneously at a Danish-run centre.

RIGHT TO AN EFFECTIVE REMEDY

Article 13 of the European Convention of Human Rights on the right to an effective remedy also applies to asylum seekers who have their case heard at a third country centre under Danish jurisdiction. In such a case, an asylum seeker seeking to appeal their case at the centre, Denmark is obliged to grant the person access to an independent, competent, national authority with suspensive effect.[26]

RIGHT TO A FAIR AND EFFECTIVE ASYLUM PROCEDURE

The Refugee Convention is silent on asylum procedures, leaving it up to state parties. However, the European Court of Human Rights in its caselaw on Articles 3 and 13 has developed a number of principles on the asylum procedure, including:

- That individuals must receive adequate information about the asylum procedure in place, requiring a reliable system of communication between the authorities and the asylum seekers.[27]
- That individuals must have effective access to the asylum procedure, which may require the availability of interpreters and access to legal aid.[28]
- That asylum applications be given 'rigorous scrutiny' and be individually examined on the merits.[29]

A Danish-run asylum procedure in a third country must thus, at a minimum, meet the above standards.

RIGHT TO LIBERTY AND SECURITY OF PERSON

Where a Danish-run reception centre in a third country involves restrictions on freedom of movement, the right to liberty and security of person may be engaged. Article 5 of the European Convention on Human Rights protects against arbitrary detention and other unlawful restrictions on freedom of movement.

Under Article 5(1)(f), asylum seekers may be deprived of liberty only in accordance with a procedure prescribed by law, and the measure can only be justified to prevent unauthorised entry onto the national territory or for the purpose of expulsion.

Under Article 5(2), detained asylum seekers must be promptly informed of the reasons for their detention in a language that they understand. Article 5(4) requires access to a judge, who must speedily decide on the legality of their detention after a thorough examination of all the facts, with periodic review of the detention if prolonged.[30]

CENTRE UNDER THIRD COUNTRY JURISDICTION

If the reception centre will be solely under the third state's jurisdiction, Denmark will rely on the 'safe third country' concept to transfer asylum seekers to the third country where they will undergo an asylum procedure and, for those found to be refugees, receive protection there.

According to this model the third country's immigration officers will conduct the asylum procedure and Denmark will not exercise effective control over the centre or asylum seekers after transfer.

SAFE THIRD COUNTRY CONCEPT

The safe third country concept allows for the transfer of an asylum seeker to a particular country on the basis that they can access a fair and efficient asylum

procedure and receive international protection in accordance with the 1951 Refugee Convention there.

In general, the safe third country concept applies to asylum seekers who have transited through a particular country on the way to Denmark and have the opportunity to apply for protection there. The government suggests a new use of the safe third country concept through the transfer of asylum seekers to a third country with which they have no prior connection.

At present, there is no basis in Danish law for the transfer of an asylum seeker to a country with which they have no prior connection outside the EU. As a result, the use of the safe third country concept under this model will require amendment of the Aliens Act.

RELEVANT RIGHTS AND OBLIGATIONS AT A CENTRE UNDER THIRD COUNTRY JURISDICTION

THE PRINCIPLE OF NON-REFOULEMENT

Denmark has a **non-refoulement** obligation under Article 3 of the European Convention on Human Rights to asylum seekers who are transferred to a reception centre under the jurisdiction of the third country. In this case the principle also extends to 'indirect' **refoulement**, which means that Denmark must ensure that an asylum seeker who is transferred to a third country does not subsequently face further deportation posing a real risk of torture or inhuman or degrading treatment or punishment.[31]

This means Denmark cannot transfer an asylum seeker where there is a real risk of onward transfer to torture or inhuman or degrading treatment or punishment.[32]

Based on the caselaw of the European Court of Human Rights, in assessing whether transfer to the third country complies with Denmark's Article 3 obligations, Danish authorities must:

- Conduct a thorough examination of the relevant conditions in the third country.[33]
- Assess the accessibility and reliability of the country's asylum system and the safeguards it affords in practice.[34]
- In some cases, request and obtain certain explicit conditions, such as diplomatic guarantees, from the receiving state in light of the individual's needs.[35]

CONCLUSION

Although third country processing is not in itself in breach of international law, there are a number of factors the government must be aware of to comply with Denmark's international obligations.

First, it is essential that Denmark conducts a thorough screening of spontaneous asylum seekers in Denmark before they are sent to reception centres abroad. Here, among other things, Denmark must respect the principle of non-refoulement and the prohibition against collective expulsion.

In the case where a reception centre is established under Danish jurisdiction, Denmark will have responsibility for what occurs at the centre as well as the asylum seekers there. The Institute anticipates that rights related to the prohibition of torture, inhuman or degrading treatment or punishment (Article 3), access to an effective remedy (Article 13), the right to fair and effective asylum processing (Articles 3 and 13) and the right to freedom and security (Article 5) are particularly relevant to a third country processing centre under Danish jurisdiction.

Where the centre is established under the jurisdiction of the third country, Denmark will rely on the safe third country concept to transfer asylum seekers. Here Denmark has human rights responsibility under the principle of non-refoulement, including both direct and indirect refoulement.

NOTES

1 Retfærdig og realistisk: En udlændingepolitik, der samler Danmark, February 2018.
2 Lovprogram for Folketingsåret 2020-2021, 6 October 2020.
3 Committee Against Torture, **Concluding observations on the fourth and fifth periodic reports of Australia**, 2014) para 17; Human Rights Committee, **Concluding observations on the sixth periodic report of Australia**, 2017) para 35.
4 European Council, EU–Turkey statement, 18 March 2016.
5 Agreement Between the Government of the United States of America and the Republic of Guatemala on Cooperation Regarding the Examination of Protection Claims, 26 July 2019.
6 Refugees International and Human Rights Watch, **Failure of Protection under the US-Guatemala Asylum Cooperative Agreement**, 2020).
7 The Danish Aliens Act Section 31(2).
8 **Ilias and Ahmed v. Hungary**, Application No. 47287/15, 21 November 2019 (European Court of Human Rights).
9 **MSS v Belgium and Greece** Application no 30696/09 (European Court of Human Rights) para 251; **Tarakhel v Switzerland** Application no 29217/12 (European Court of Human Rights) para 118.
10 **Paposhvili v. Belgium** Application no 41738/10 (European Court of Human Rights).
11 **Mubilanzila Mayeka and Kaniki Mitunga v Belgium**, Application No. 13178/03 12 October 2006 (European Court of Human Rights).
12 **Tarakhel v. Switzerland** para 105.
13 **Khlaifia and Others v. Italy**, Application no. 16483/12 1 September 2015 (European Court of Human Rights).
14 **N.D. and N.T. v Spain**, Application no. 8675/15 8697/15 13 March 2020 (European Court of Human Rights) para 194.
15 With respect to sea borders, see **Hirsi Jamaa and Others v. Italy** Application no 27765/09 (European Court of Human Rights). With respect to land borders, see **N.D. and N.T. v Spain**.
16 **N.D. and N.T. v Spain** para 194.
17 **A.M. v. the Netherlands**, Application no. 29094/09, 5 July 2016 (European Court of Human Rights) paras 67-71.
18 **Tuquabo-Tekle and Others v. the Netherlands**, Application no. 60665/00, 1 December 2005 (European Court of Human Rights) para 42; **Benamar and Others v. the Netherlands**, Application No. 43786/04, 5 April 2005, Admissibility Decision (European Court of Human Rights). See also, **Gül v. Switzerland**, Case No. 53/1995/559/645, 19 February 1996, (European Court of Human Rights) paras 38-42; **Sen v. the Netherlands**, Application No. 31465/96 21 December 2001 (European Court of Human Rights) para 31.
19 **Loizidou v Turkey** (Preliminary Objections) Application no 15318/89, 23 March 1995 (European Court of Human Rights).

20 W.M. v Denmark Application no 17392/90 (European Commission of Human Rights) 14 October 1992; cf M.N. and others v. Belgium, Application no. 3599/18, 5 May 2020 (European Court of Human Rights).
21 Hassan v United Kingdom Application no 29750/09 (Grand Chamber), 16 September 2014 (European Court of Human Rights) para 136.
22 Hirsi Jamaa and Others v Italy para 77.
23 Committee against Torture, Concluding observations on the fourth and fifth periodic reports of Australia CAT/C/AUS/CO/4-5 (26 November 2014).
24 Human Rights Committee, Concluding observations on the sixth periodic report of Australia CCPR/C/AUS/CO/6 (9 November 2017).
25 Al-Skeini v United Kingdom, Application no. 55721/07, 7 July 2011 (European Court of Human Rights) para 137; Hirsi Jamaa and Others v Italy para 75.
26 A.M. v The Netherlands, Application no. 29094/09, 5 July 2016 (European Court of Human Rights) paras 67-71.
27 MSS v Belgium and Greece (Grand Chamber) Application no 30696/09, 21 January 2011 (European Court of Human Rights) para 301.
28 MSS v Belgium and Greece.
29 MSS v Belgium and Greece; Chahal v. the United Kingdom, Application no 22414/93, 15 November 1996 (European Court of Human Rights); Jabari v Turkey, Application no. 40035/98, 11 July 2000 Chahal v. the United Kingdom, Application no 22414/93, 15 November 1996 (European Court of Human Rights) para 39.
30 Louled Massoud v. Malta, Application no 24340/08, 27 July 2010 Chahal v. the United Kingdom, Application no 22414/93, 15 November 1996 (European Court of Human Rights).
31 MSS v Belgium and Greece para 286.
32 T.I. v. The United Kingdom Application no 43844/98 (European Court of Human Rights).
33 Ilias and Ahmed v. Hungary para 139-41.
34 Ilias and Ahmed v. Hungary para 139-41.
35 Tarakhel v. Switzerland para 105.