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Copenhagen, 04 March 2021

DIGNITY's response to the consultation on the amendment to the Danish Aliens Act (the introduction of the possibility of transferring asylum seekers to have their applications processed and to be accommodated in third countries)

DIGNITY wishes to thank the Danish Ministry of Immigration and Integration for the request of 4 February 2021 for comments to the proposed amendment to the Danish Aliens Act (hereafter, the "draft act"). Our response focusses on the issues which come within DIGNITY's mandate and field of expertise, which is primarily the ban on torture and inhuman and degrading treatment and, more generally, conditions for the survivors of torture and other vulnerable and traumatised refugees.

Above all, DIGNITY finds it extremely worrying that the government is considering transferring asylum procedures and the protection of refugees in Denmark to a third country outside Europe. Experiences from other countries (for example, Australia and the USA) show that such externalisation models often result in violations of human rights obligations pursuant to the UN Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT/UN Convention against Torture). The UN's Committee Against Torture¹ has determined that, despite transferral to a third country, Australia remained subject to obligations under The UN's Convention against Torture, including those relating to ensuring rehabilitation.²

The draft act makes us none the wiser as to how the government itself assesses the scope of and the concrete implementation of Denmark's international obligations

¹ The Committee against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.

² See the UN Committee against Torture's criticism of Australia in Concluding Observation of 22 December 2014 (CAT/C/AU/CO/4-5): The State party should adopt the necessary measures to guarantee that all asylum seekers or persons in need of international protection who are under its effective control are afforded the same standards of protection against violations of the Convention regardless of their mode and/or date of arrival. The transfers to the regional processing centres in Papua New Guinea and Nauru, which in 2013 were deemed by the Office of the United Nations High Commissioner not to provide "humane conditions of treatment in detention", do not release the State party from its obligations under the Convention, including prompt, thorough and individual examination of the applicability of article 3 in each case and redress and rehabilitation when appropriate.

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as the draft act contains neither a final choice with regard to models 1 and 2, nor a detailed description of the scope of Denmark's legal obligations in relation to several important matters (for example, conditions in accommodation centres and levels of protection if asylum is granted in a third country).

As explained below, we are not convinced that the proposed asylum scheme takes account of all of Denmark's obligations under the UN's Convention against Torture and Article 3 of the European Convention on Human Rights (ECHR).

The legal assessment of Denmark's human rights obligations

Denmark's approach to international human rights conventions rests on the crucial premise that a thorough legal assessment is carried out on Denmark's human rights obligations before a bill is discussed and adopted, and there is a legislative power that has primary responsibility for setting out the frameworks for implementation of obligations imposed under conventions.

Neither the draft act nor the government's memo of January 2021³ includes such a comprehensive legal assessment of all the numerous important points of impact from an asylum seeker coming to Denmark for eventual transferral to a third country or the subsequent granting or refusal of asylum. Prevailing principles for the interpretation of obligations under conventions should be used to determine the content of all relevant human rights norms, including obligations under the UN's Convention against Torture (see below). The government's memo refers to the fact that "neither the European Court of Human Rights nor the European Court of Justice have had the opportunity to address the outlined schemes, and ***the legal assessment is therefore subject to a degree of uncertainty*** (our emphasis). The draft act repeatedly states that it is presupposed that Denmark is fulfilling its international obligations. However, in our view, the legal argument for these conclusions is not sufficient. For example, the problem relating to the diplomatic assurances can be highlighted, cf. page 33 of the draft act (see below).

In line with Folketinget's (the Danish Parliament) overall responsibility for the implementation of Denmark's international obligations, there is a need for complete thoroughness, and it must be presupposed that a draft act with wide-reaching consequences for a group of people, who already find themselves in an exposed situation, will include an independent and complete legal assessment of all human rights issues, including those in areas not covered by any clear legal practice.

³ The Danish Ministry of Immigration and Integration: Legal analysis of the possibilities for the transferral of asylum seekers' application processing in a third country within the frameworks of international law.

Therefore, DIGNITY strongly urges the government to prepare such a legal analysis with the adoption of a position on all forthcoming consultation responses and to include it in the draft act prior to its presentation to Folketinget.

Compliance with Denmark's obligations under the UN's Convention against Torture

The UN's Convention against Torture contains international norms which are relevant to the draft act, including the ban on torture (Article 1), the principle of non-refoulement (Article 3), the ban on inhuman and degrading treatment (Article 16), the prevention of torture etc. (Articles 2 and 16) and the legal claims of torture victims, including for rehabilitation (Article 14).

It is remarkable that, even though the UN's Convention against Torture constitutes a legal obligation for Danish authorities, it is not being incorporated into and addressed in the draft act, cf. Section 3 of the draft act in relation to Denmark's international obligations, which covers "the most relevant conventions" without mentioning the UN's Convention against Torture, cf. page 34 of the draft act.

DIGNITY explicitly urges the government to address the UN's Convention against Torture and to assess the draft act's relationship to Denmark's obligations under conventions as a result thereof.

Specific rights for survivors of torture

In addition to the above, DIGNITY wishes to emphasise that the draft act, in its present form, does not take account of the special needs and rights of torture survivors if they arrive in Denmark and submit an application for asylum. Under the UN's Convention against Torture and other conventions,⁴ Denmark has a number of obligations, including:⁵

- Victims of torture should be identified during the asylum seeking phase.⁶

⁴ Reference is made to, for example, the ECHR, the International Covenant on Civil and Political Rights (ICCPR), the UN's Convention on Children's Rights (UNCRC) and the UN's Convention on the Rights of Persons with Disabilities (CRPD).

⁵ For a more in-depth explanation of some of these obligations, refer to DIGNITY's consultation response and to DIGNITY's shadow reports and comments on UN committees, see dignity.dk (legal department).

⁶ Refer to the UN's Convention against Torture Articles 3, 13 and 14, and the UN Torture Committee's CO to Denmark of 4 February 2016, para. 23: The State party should (a) put into place procedures for the systematic screening and medical examination of alleged torture victims by qualified personnel throughout the asylum process, including at reception centres and places of detention such as the Ellebæk Prison. Screening will also result in identification of processing needs with a view to being able to provide early intervention with regard to the torture survivor. Early intervention is assumed to be a significant factor when it comes to the health of the torture survivor.

- Danish asylum authorities should secure an investigation if there is any justifiable doubt as to whether the asylum seeker has been subjected to torture.⁷
- Torture victims have the right to redress and specialised treatment and rehabilitation.⁸
- Victims of torture should not be deprived of their liberty.⁹
- Torture victims are entitled to special care; therefore, the accommodation centre should be subject to special requirements.¹⁰
- The compulsory deportation of torture victims to third countries must meet the requirements of the UN's Convention against Torture Articles 3, 14 and 16.
- Denmark has an obligation to prevent torture and inhuman and degrading treatment.¹¹

The draft act does not include a legal assessment of the extent and consequences of these rights, but only scattered and sporadic references to vulnerable groups.¹² Therefore, DIGNITY urges the government to explain how the new asylum scheme will ensure protection of the rights of particularly vulnerable and traumatised torture survivors who are seeking asylum in Denmark, and whether they will all, following the government's assessment, come under the exemption clauses and will thus have the right to have their asylum applications processed in Denmark.

If the asylum seeker is expected to be transferred to the third country to have his/her application processes, the government should explain how their rights are expected to be protected in this country, and whether the government, at the very least, will set out a requirement that the third country has ratified the UN's Convention against Torture and the Supplementary Protocol, and that the country is, in reality, able to meet its international obligations.

DIGNITY further recommends that the new asylum scheme takes account of the torture survivor's right to lodge a complaint with the UN's Torture Committee, both during the preliminary phase and later on if he/she is transferred to a third country. Such complaints should be granted a suspensive effect in order to ensure that

⁷ *Ib.*

⁸ *Ib.*, para 23: "ensure that victims of torture are not held in places of deprivation of liberty and have prompt access to rehabilitation services". See also the UN Torture Committee's General Comment No. 3 (2012) in relation to Article 14.

⁹ *Ib.* Furthermore, reference is made to the risk of inhuman treatment, cf. the UN's Convention against Torture Article 16.

¹⁰ Cf. the UN's Convention against Torture Articles 14 and 16.

¹¹ Cf. the UN's Convention against Torture Articles 2 and 16.

¹² Cf. draft act, page 37: Denmark's obligation to "investigate where there is effective access to life-saving medicine and the medical treatment of asylum seekers in the third country," and "furthermore, could the lack of adequate psychiatric support in the third country also, in the circumstances, constitute a violation of the provisions in Article 3 of the ECHR".

effective legal resources in the implementation of the UN's Convention against Torture.¹³

The principle of non-refoulement on transferral to a third country

It is positive that the new asylum model prepares the ground for an assessment by the Danish Immigration Service and the Danish Refugee Board of whether a transfer to a third country will be in compliance with the principle of non-refoulement and Denmark's international obligations. It is expected that account is taken of the torture survivor's special needs and rights (see above), and that the process in general fulfils the general legal certainty guarantees.

It follows from the absolute principle of non-refoulement that Denmark, on transferring an asylum seeker to a third country, must not send them if there is a risk of inhuman treatment etc. or a risk of chain refoulement. It is particularly important to emphasise the latter when it involves transferral to a third country and not expulsion to the homeland. Article 3 of the ECHR means that a refugee can never be sent to a country where there is reason to assume that the person in question will be at a real risk of being treated in contravention of Article 3. The same principle is protected in Article 3 of the UN's Convention against Torture and Article 33 of the Refugee Convention.

Compliance with the principle of non-refoulement requires, inter alia, that a number of preventive measures, including a thorough identification of torture survivors in the preliminary phase,¹⁴ and a thorough assessment of the human rights situation in the third country.¹⁵

As the government is considering a host country outside the EU, and in all likelihood is allegedly a country in Africa, it is difficult to pinpoint a country that not only has ratified the UN's Convention against Torture, including the UN's Refugee Convention, but also actually respects the rights in practice,. The group of asylum seekers who cannot be transferred to have their asylum application processed in a third country can therefore be turn out to be large. For example, an LGBT person who does not enjoy protection in the third country (for instance, because homosexuality has been criminalised) will not be able to be sent from Denmark. Torture victims who are entitled to treatment and cannot receive this treatment in the third country will not be able to be transferred either without Denmark's international obligations being violated. Here, reference is made to practice from the European Court of Human Rights (ECHR) (*Paposhvili vs. Belgium* (2016) and

¹³ UN Torture Committee's , General Comment No. 4 (2017) on the implementation of Article 3 (CAT/C/GC/4), para 31 see also

¹⁴ UN Torture Committee's , General Comment No. 4 (2017) on the implementation of Article 3 (CAT/C/GC/4), para 18 see also

¹⁵ *Ib*, para 27

Savran vs. Denmark (2019)) and the UN Committee Against Torture's ruling in *A.N. vs. Switzerland*, in which the Committee pointed out:

*The Committee therefore considers that by deporting the complainant to Italy, the State party would deprive him of his right to rehabilitation, and that this situation would by itself amount, in the circumstances of the complainant, to ill-treatment. Accordingly, forcibly returning the complainant to Italy would constitute a breach of articles 14 and 16 of the Convention.*¹⁶

Reference is also made to the fact that the EU's rights protection can also hinder expulsion in specific cases, cf. the EU's Charter of Fundamental Rights and relevant legal practice from the European Court of Justice in Luxembourg, including the ruling of 24 April 2018, *MP vs. Secretary of State for the Home Department*.

Therefore, DIGNITY recommends that the legislative commentaries include a legal analysis of all relevant legal sources relating to the principle of non-refoulement with specification of all situations where transferral to a third country is not possible due to Denmark's binding legal obligations.

Diplomatic assurances

According to the UN's Convention against Torture, there is very little room for manoeuvre in legal terms for the use of diplomatic assurances. The UN's Committee against Torture has stressed that diplomatic assurances must not be used as a loophole to undermine the principle of non-refoulement,¹⁷ and the UN's Special Rapporteur for torture has likewise been extremely critical of the use of diplomatic assurances.¹⁸ White paper 2009/1505 pointed out that, according to international law, diplomatic assurances are only legal if a number of conditions are met, cf. Section 10.3.4.

The draft act does not contain a thorough legal assessment of Denmark's obligations under international law with reference to diplomatic assurances, a recent creation which it is suggested are used in respect of asylum seekers, but only refer to the fact that, in future, can be based on the criteria set out by the ECHR in a specific case (*Othman vs. UK*), which concerned the high-profile Islamist Abu Qatada. The reference to a very specific case does not give an accurate representation of the many legal misgivings that would arise when diplomatic

¹⁶ CAT/C/64/D/742/2016, para 8.8. See also General Comment No. 4 (2017) para 22: "Once such a state of health and the need for treatment have been medically certified, they should not be removed to a State where adequate medical services for their rehabilitation are not available or guaranteed".

¹⁷ General Comment no. 4 (2017) on the implementation of Article 3 (CAT/C/GC/4), para 20.

¹⁸ Report of 1 September 2004 (A/59/324), para. 37: In circumstances where this definition of "systematic practice of torture" applies, the Special Rapporteur believes that the principle of non-refoulement must be strictly observed and diplomatic assurances should not be resorted to.

assurances are used in respect of many groups of refugees, including families with children as mentioned in the draft act.

DIGNITY advises against the use of diplomatic guarantees and recommends that if an asylum seeker cannot be transferred to the third country due to the principle of non-refoulement, then the person in question's asylum application should be processed in Denmark.

Conditions in the accommodation centre in the third country

The draft act does not describe Denmark's legal obligations in relation to the specific conditions in the accommodation centre in the third country, see Article 3 of the ECHR and Article 16 of the UN's Convention against Torture. The final choice of model 1 or 2 will have a significant impact on the matter of Danish jurisdiction and responsibility for the conditions in the accommodation centre. In any event, stringent requirements should be set out in relation to employees' qualifications and their knowledge of and expertise in, for example, human rights norms and the consequences of torture and trauma.

Shabby and poor conditions in the centre can constitute inhuman and degrading treatment and thus result in it not being possible to expel asylum seekers who have to live in an accommodation centre from Denmark, cf. ECHR legal practice.¹⁹

Monitoring

The legal draft presupposes a monitoring mechanism, the purpose of which is to ensure that the third country meets its obligations, cf. page 10 of the draft act, and which should be implemented by an autonomous body, cf. page 33 of the draft act. The body will be able to carry out pre-arranged and unannounced visits to the accommodation facilities, gain access to information on the treatment of asylum seekers and asylum cases, conduct private interviews with asylum seekers and monitor the active consideration of the asylum applications and the further processing of recognised refugees and rejected asylum seekers.

Our experience shows that the establishment of autonomous monitoring mechanisms outside Europe is difficult to carry out in reality. Often, problems will arise with access to facilities and conducting regular visits in a country without strong rights protection will essentially be difficult.

The legal draft does not answer the absolutely crucial question of which Danish institution will be able to carry out the monitoring in the third country if Model 1 is used. Therefore, it is unclear whether, for example, the government has the

¹⁹ Here, refer to Tarakel vs. Switzerland (2014) and M.S.S. vs. Belgium and Greece (2011).

Folketinget's Ombudsman in mind, and whether the mandate will apply broadly to the accommodation centre, and conditions after the granting of asylum and the execution of outward journeys. If Model 2 is used, it is crucial that the monitoring mechanism is independent from the receiving country's authorities and has expertise in and the capacity to identify and assess whether the processing of and conditions for asylum seekers is in compliance with international norms. Requirements must be set out in relation to the ratification of OPCAT and the establishment of an NPM.

According to DIGNITY's assessment, it is absolutely crucial to our final position on the draft act that the monitoring institution is identified, and that the mechanism is described better, including with regard to the powers required if violations of human rights are identified.

Level of protection in the third country²⁰

The new asylum model presupposes that Denmark enters into an agreement or equivalent arrangement with a third country whereby the active consideration of the asylum application and accommodation is to take place, cf. page 10 of the draft act. However, the draft act does not specify what this agreement will entail, and how Denmark will ensure the pre-supposed "necessary legal permanence", cf. page 33 of the draft act.

Specifically, with regard to survivors of torture, there are special treatment needs since they require the specialised treatment for trauma. Such a measure will require the presence of, for example, a trauma treatment centre, capacity to provide the proper treatment and a certain level of training and information for, for example, general practitioners and others who may come into contact with survivors of torture and refer them for trauma treatment. DIGNITY has many years' experience in constructing rehabilitation centres around the world, including in Africa and in countries without a well-developed health care system. We know that it will take many years to build up the right expertise and it must be expected that it would require long-term investment. DIGNITY recommends therefore that resources are set aside for comprehensive resource building.

The proposed arrangement is based on a prerequisite that the third country provides protection in the event that an asylum seeker is transferred from Denmark and granted asylum, cf. page 10 of the draft act. Such protection can exist at various levels from, as a minimum, compliance with the principle of non-refoulement to

²⁰ The above comments on the requirements resulting from the principle of non-refoulement also apply in relation to the third country's expulsion of rejected asylum seekers.

more comprehensive protection with the incorporation of the norms in the UN's Refugee Convention and other conventions.²¹

DIGNITY is highly critical of the lack of specification of the required level of protection for refugees who are granted asylum in the third country. It is crucial to DIGNITY's final position on the draft act that the government identifies a third country and further explains the protection that refugees can enjoy, in reality, in the country, including in relation to the country's obligations under the UN's Convention against Torture (for example, the requirement on treatment, cf. Article 14) and that the government specifies which precautions Denmark will take if the third country does not fulfil its obligations under the Convention. Could it be envisaged that Denmark will demand that the asylum seeker in question is sent back to Denmark?

Concluding remarks

In recent years, in consultation responses, DIGNITY has repeatedly expressed legal concerns about further tightening of the law on aliens, and in particular has pointed out the requirement that Denmark, in asylum cases, is still complying with the ban on torture and inhuman treatment and that the rights of torture victims under the UN's Convention against Torture are being respected. More recently, DIGNITY pointed out a number of human rights issues in connection with the consultation on the new Repatriation Act (Hjemrejselov).

We have not been given the impression that our consultation response – or that of other organisations – has led to the adoption of a position on convention-related obligations under the UN's Convention against Torture and/or concrete changes in the final draft act. Therefore, we fear

that the draft act will be presented in Folketinget in its current form and with the present legislative commentaries.

In the light of the enormous consequences of the new asylum scheme, including the risk of violations of the ban on expulsion to face torture and inhuman treatment, we must therefore strongly urge the government to carry out a thorough legal assessment of Denmark's international obligations and to

²¹ See Australia's High Court ruling of 31 August 2011 i *Plaintiff M70/2011 vs. Minister for Immigration and Citizenship* [2011] HCA 32, (2011) 244 CLR 144.

reconsider the desire to transfer asylum seekers from Denmark to have their asylum cases processed and be protected in a third country outside Europe.

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Kind regards

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