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Consultation response regarding the draft proposal for a law on repatriation for foreigners without legal residence (repatriation law)

DIGNITY - Danish Institute Against Torture (DIGNITY) would like to thank the Ministry of Immigration and Integration for the request of November 30, 2020, for any comments on the proposal for a new repatriation law (hereinafter "draft law"), which continues provisions from the Aliens Act and at the same time introduces a number of new initiatives to promote the main purpose of the law "to support the departure of foreigners who do not (no longer) have the right to legally reside on Danish territory", and that most of them should do so voluntarily.¹

Our comments and recommendations focus on the issues that fall within DIGNITY's mandate, which primarily concern the prohibition of torture and inhuman and degrading treatment and more generally the conditions for torture survivors and other vulnerable and traumatized refugees.

Vulnerable refugees may, for various reasons, end up in an exit and return position and thus fall within the scope of the Return Act. This can happen, for example, after asylum has been refused or after a residence permit has been revoked after a few years of residence in Denmark. It is important that the Danish Return Service and other authorities are aware of the special needs and rights of vulnerable refugees in the three possible main scenarios: a) voluntary departure; b) forced removal; and c) departure cannot be carried out and the vulnerable persons end up in a stuck situation in a departure center in Denmark. International committees and national actors have repeatedly criticized Danish authorities' practices towards vulnerable refugees and pointed out the lack of implementation of Denmark's legal obligations under the UN Convention against Torture and Other Cruel and Degrading Treatment and Punishment (hereinafter "UN Convention against Torture") and other international conventions.

DIGNITY lacks a position on this criticism in the draft law and believes that the drafting and adoption of a new main law on return is an obvious opportunity to create the necessary legislative framework for a better practice. We therefore make the following recommendations for specific changes to the draft law:

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¹ Legislative notes p. 25.

Better identification of vulnerable and traumatized refugees and transfer of health information from one authority to another

Approximately 30-50% of refugees in Denmark suffer from trauma as a result of torture, war and flight.² Currently, asylum seekers are screened at the reception in Sandholm to determine whether they have been exposed to torture and trauma, and with consent, the Red Cross passes on relevant health information to the Danish Immigration Service.

It is DIGNITY's experience that information about an asylum seeker's particular vulnerability does not necessarily follow the asylum seeker throughout the system, e.g. from asylum centers to the municipalities and to other authorities in the asylum system.³ No or limited disclosure of health information may mislead the Home Office and authorities at accommodation centers to believe that refugees do not have health problems and therefore special considerations are not taken into account. Staying in accommodation centers and detention at Ellebæk can be particularly stressful for people who have been subjected to torture, violence and other trauma in their home country or during the journey to Denmark. In certain situations, trauma can be reactivated, resulting in exacerbation of PTSD symptoms, depression, anxiety, etc.

Thus, there is a need for the asylum system to pay special attention to this group and for the staff to be professionally equipped and know who may have special needs. The criticism of the lack of identification of vulnerable groups has been made repeatedly by the UN Committee against Torture⁴ and the Human Rights Committee,⁵ and by DIGNITY in previous consultation responses, shadow reports to UN committees and in the UPR.⁶

DIGNITY thus recommends that the final draft law should include provisions on vulnerable groups with a requirement that the relevant authorities ensure the identification of torture and other trauma (e.g. in chapters 6, 7, 8 and 9).

² Rigsrevisionen's report submitted to the Danish Parliament with the State Auditors' comments: The process for refugees with trauma, Report no. 6/2018 of December 19, 2018.

³ See also Rigsrevisionen's report, ib.

⁴ CAT/C/DNK/CO/6-7, February 14, 2016, paragraphs 22-23: The Committee is concerned at the lack of a regular mechanism for the identification of victims of torture throughout the asylum process. Moreover, the Committee is concerned that intake procedures at the Ellebæk Prison for Asylum Seekers and Others Deprived of their Liberty (Ellebæk Prison), where decisions on fitness of asylum seekers for detention and identification of victims of torture are made by a nurse, are inadequate. It is also concerned at the lack of a system for handling victims of torture upon their identification during administrative detention (arts. 3, 13 and 14). 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 centers and places of detention such as the Ellebæk Prison; and (b) ensure that victims of torture are not held in places of deprivation of liberty and have prompt access to rehabilitation services. See also UN Committee against Torture Follow-Up letter of May 10, 2018 and List-of-Issues of January 28, 2019 (CAT/C/DNK/QPR/8(2019)).

⁵ UN Human Rights Committee CO (CCPR/C/DNK/CO/6) of August 15, 2016.

⁶ Available on our website: <https://www.dignity.dk/dignitys-arbejde/juridisk-indsats/>

Detention of refugees in connection with repatriation

It follows from section 16 of the bill that a foreign national must "as far as possible" be deprived of liberty unless the deprivation of liberty would be contrary to Denmark's international obligations.⁷ ICCPR article 9 contains a prohibition against arbitrary deprivation of liberty, which is also a means of preventing inhuman treatment as a result of deprivation of liberty, cf. UN Human Rights Committee General Comment no. 35.⁸ Article 5(1)(f) of the ECHR requires, among other things, that the authorities process the detainee's case with sufficient speed so that he or she is not detained unnecessarily long.⁹

In light of international and national criticism of the current practice regarding administrative detention of foreign nationals¹⁰, DIGNITY finds it critical that the draft bill does not stipulate that detention may only be used as a last resort and for the shortest possible period of time. The wording of the bill that a foreigner "as far as possible shall be deprived of liberty" creates a risk that deprivation of liberty will be considered the rule rather than the exception. DIGNITY therefore recommends that section 16 of the draft bill be reworded in line with international standards, and it is emphasized that negative consequences for mental health as a result of detention and the specific conditions of detention, including the use of solitary confinement, should be mitigated, especially for persons with mental illness.

It is positive that the draft law mentions that restraint must be shown in relation to the deprivation of liberty of vulnerable groups.¹¹ DIGNITY recommends a clarification in the explanatory notes that "restraint" should be interpreted to mean that torture survivors should not be deprived of their liberty (see also UN Committee against Torture and UNHCR).¹²

⁷ Draft law p. 254.

⁸ See also DIGNITY Joint Submission to the United Nations Human Rights Committee Comments on Draft General Comment No. 35 on Article 9 of the International Covenant on Civil and Political Rights (May 30, 2014) and in Joint Observations regarding Draft General Comment No. 5 (2020) on migrants' rights to liberty and freedom from arbitrary detention (November 2020).

⁹ Jens Elo Rytter, *Fundamental Rights of the Individual*, (2016), p. 189

¹⁰ UN Committee against Torture CAT/C/DNK/CO/6-7 of February 14, 2016 and List-of-Issues of January 28, 2019 (CAT/C/DNK/QPR/8(2019)), and UN Human Rights Committee concluding observations of August 15, 2016 (CCPR/C/DNK/CO/6). See also DIGNITY shadow report and follow-up report to the UN Committee against Torture and the UN Human Rights Committee, available at dignity.dk and ohchr.org

¹¹ Draft Act, p. 264: The proposed provisions in section 16 will require restraint with regard to the deprivation of liberty of more vulnerable groups. Detention of families with minor children and unaccompanied minors will thus only be carried out as a last resort and for the shortest possible period of time.

¹² UN Committee against Torture Concluding Observations 14 February 2016 (CAT/C/DNK/CO/6-7), para 23. Guideline 9 of the UNHCR 2012 Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum-seekers: [v]ictims of torture and other serious physical, psychological or sexual violence also need special attention and should generally not be detained.... Detention can and has been shown to aggravate and even cause the aforementioned illnesses and symptoms.

DIGNITY furthermore criticizes the use of deprivation of liberty as a motivational measure, as there is evidence that such measures have no effect.¹³ DIGNITY therefore recommends that the draft law does not allow such deprivation of liberty and that the legislative framework is generally formulated in accordance with international standards.

Places to stay

The new Repatriation Act affects aspects of conditions at accommodation facilities and continues the current rules on residence, notification and reporting obligations. Conditions at the departure centres Kærshovedgård and Sjælsmark have been continuously criticized by the Danish Parliamentary Ombudsman and a number of civil society organizations.¹⁴

With a new main act in this area, it is obvious that relevant international obligations regarding vulnerable refugees who are staying in an accommodation facility prior to a return journey or due to a stuck situation should be considered. The UN Convention against Torture stipulates, among other things, that Denmark has an obligation to adopt legislation to *prevent* inhuman and degrading treatment, cf. Article 2 of the UN Convention against Torture.

DIGNITY therefore recommends that the draft law contains a provision stating that the Danish Home Travel Agency will prevent inhuman and degrading treatment in connection with the use of residence, notification and reporting obligations at accommodation facilities for rejected and deported asylum seekers.

Use of diplomatic insurance

According to the comments to section 16 of the draft bill, detention may take place if there is a real prospect of deportation, and this will be the case if "negotiations have been initiated on a diplomatic assurance aimed at ensuring that the foreign national can be deported without this being in violation of section 31 of the Aliens Act".¹⁵ Diplomatic assurances are used when there is a risk that a deportation is in violation of the non-refoulement principle, cf. section 31 of the Aliens Act, and the agreement must

¹³ Report on asylum seekers' ability to access the labor market and live outside asylum centers, June 2012, p. 58, where the National Police writes that experience has shown that detention does not have the desired motivational effect.

¹⁴ DIGNITY's criticism appears in previous consultation responses and shadow reports to the UN, see dignity.dk

¹⁵ Draft bill, p. 255: "The requirement of a real prospect of removal also means that, as a starting point, foreigners on tolerated stay cannot be detained, as foreigners on tolerated stay as a result of the non-refoulement principle of prohibition of removal due to the risk of torture or inhuman or degrading treatment or punishment, cf. section 31 of the Aliens Act, cannot be removed as a starting point. However, there may, for example, be a real prospect of removal if negotiations have been initiated on diplomatic insurance aimed at ensuring that the foreign national can be removed without this being in violation of section 31 of the Aliens Act."

thus ensuring that he or she is not subjected to torture and inhuman treatment.

In line with a number of other organizations, including Amnesty International, DIGNITY is extremely critical of the use of diplomatic assurances, as such agreements easily risk becoming a slippery slope to circumvent the prohibition against deportation for torture etc. cf. section 31 of the Aliens Act. Diplomatic guarantees can only be considered legal if a number of conditions are met, cf. Report 2009 no. 1505 (chapter 10), including effective monitoring from the Danish side and a stable government in the receiving country with control over the law enforcement authorities.¹⁶ The explanatory notes do not explain how these requirements can be met in practice.

DIGNITY recommends that the draft law is amended so that it does not open up the possibility of using diplomatic assurances to enforce an expulsion.

Accompanied exit

It makes sense, as mentioned in the draft law, that vulnerable groups may need accompanied departure due to their health situation.¹⁷ DIGNITY knows from experience with the rehabilitation of traumatized torture survivors that these persons are often characterized by emotional anxiety and stress reactions. These reactions can be affected by an impending departure, which for some can bring back unpleasant memories. For particularly vulnerable refugees, it can be difficult to grasp the consequences of an exit, which requires a certain overview and outlook, and such a surplus can be difficult for refugees to have. We also note that some refugees with psychological injuries who are in a departure position will never have received treatment for their trauma. This can make it difficult for them to cope with leaving the country.

DIGNITY therefore recommends that the explanatory notes to the law emphasize torture survivors as a particularly vulnerable group and that a thorough medical assessment of their needs should be carried out prior to departure.

¹⁶ Report 2009 no. 1505, chapter 10 on 'diplomatic guarantees'

¹⁷ Draft Act, p. 99: "Accompanied deportation may also take place without the use of force or coercion, but where the accompaniment is justified by other considerations, such as the foreign national's health, age or special needs, etc. In addition, a foreign national may be accompanied on a deportation if the Danish Home Travel Agency assesses that it is necessary in order to carry out the deportation. This may, for example, be in the case of a particularly vulnerable foreign national, if the deportation involves several changes at transit airports, or if the foreign national is accompanied due to his or her age. Furthermore, the foreign national's home country or the country to which the foreign national is being removed may require that the foreign national be accompanied. These expulsions will most often not involve coercion or force."

Fit-for-flight

Reference is made to the Council of Europe Committee of Ministers' 20 Guidelines on Forced Return, which the Committee of Ministers adopted in 2005 and which Denmark has endorsed.¹⁸ These guidelines contain detailed recommendations on how a person is assessed to be ready for return and whether a return can be carried out, and they emphasize that "persons shall not be removed as long as they are medically unfit to travel".¹⁹ DIGNITY recommends that the explanatory notes explain how these recommendations will be implemented in practice.

DIGNITY further recommends that the healthcare personnel involved in the so-called 'fit for flight assessments' in connection with the return journey and the uniformed personnel accompanying during a deportation are trained in and have knowledge of how trauma and torture can manifest itself in the individual person and how re-traumatization can be prevented. We also recommend that healthcare professionals have access to relevant medical records and screening results from the asylum system and, when relevant, from Ellebæk.

Repeal of the automatic appeal to the Refugee Appeals Board

The draft law newly states that asylum seekers can waive their right to appeal to the Refugee Appeals Board against a refusal of asylum from the Immigration Service, and as a reward, they will receive a cash amount in addition to the repatriation grant.

DIGNITY is very critical of this legislative amendment for reasons of legal certainty. Firstly, asylum seekers are not represented by a lawyer at the Danish Immigration Service, and the draft law does not suggest that they should be granted a lawyer prior to a decision not to appeal against a refusal of asylum. This means that the asylum seeker no longer has the right to unwilling counseling, but only receives information from the Repatriation Service, which is intended to facilitate departure. Secondly, it is a fundamental principle of administrative law that a decision in the first instance can be appealed to a second instance. Thirdly, it is well known that the Immigration Service almost never requests a torture examination from the Institute of Forensic Medicine. In a case before the Refugee Appeals Board, the Board can request such an examination of the asylum seeker, which has happened in practice, and the lawyer can obtain an examination from Amnesty's medical group. If a refusal of asylum is not processed by the Refugee Appeals Board, there is a high risk that even fewer torture examinations will be obtained in the future. Lack of attention to trauma as a result of torture can affect the asylum authorities' assessment of evidence and credibility, cf. the Refugee Board's 28th report 2019.²⁰

¹⁸ Council of Europe, Twenty Guidelines on Forced Return, September 2005.

¹⁹ Council of Europe, Twenty Guidelines on Forced Return, p. 46.

²⁰ P. 493: If the torture investigation then concludes that the applicant's injuries may have been caused by torture, it may affect the overall credibility assessment of the applicant's statements,

DIGNITY therefore calls for the current system of automatic appeal to the Refugee Appeals Board to be maintained.

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As explained above, we would like the draft law to explicitly reflect our knowledge of torture survivors and other vulnerable refugees with psychological injuries. We are also happy to contribute with expertise to build up the necessary expertise at the Danish Home Travel Agency and are of course available if you have any comments on the above.

Sincerely, Rasmus Grue

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as it cannot be expected that persons who have previously been subjected to torture are always able to give an explanation of the facts of the case in the same way as a person who has not previously been subjected to torture. In addition, the Committee applies the principle of benefit of the doubt. The Committee does not expect a torture investigation to reveal the cause of torture, which is obviously not possible. Nor can a torture examination always clarify whether the applicant's injuries are the result of torture or whether they are the result of, for example, fights, assaults, accidents or acts of war. However, in cases where the applicant's explanation gives rise to doubt, a torture examination can support the applicant's explanation to such an extent that the principle of benefit of the doubt leads to the applicant being granted asylum.