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Contents

SUMMARY	1
ABBREVIATIONS	3
1 INTRODUCTION	4
1.1 Subject and Aim of the Thesis	4
1.2 Delimitation	6
1.3 Method and Sources	6
1.4 Disposition	7
2 DETENTION OF ASYLUM SEEKERS – AN INTERNATIONAL PERSPECTIVE	8
2.1 International Conventions and Standards	8
2.1.1 International Conventions	9
2.1.1.1 International Covenant on Civil and Political Rights	9
2.1.1.2 The 1951 Refugee Convention	11
2.1.1.3 European Convention on Human Rights	14
2.1.2 International Standards	16
2.1.2.1 ExCom Conclusions	16
2.1.2.2 1999 Detention Guidelines	17
2.1.2.3 Other Important Standards	19
2.2 Non-Governmental Organizations	21
2.3 Concluding Remarks	22
3 DETENTION OF ASYLUM SEEKERS IN DENMARK	24
3.1 Brief History	24
3.2 Detention of asylum seekers under the Aliens Act	24
3.3 The Law Proposal Concerning Detention of Asylum Seekers	27
3.3.1 Background	27
3.3.2 Content of the Proposal	27
3.3.3 The Specific Provisions	28
3.3.3.1 Article 25 – Administrative Expulsion	28
3.3.3.2 Article 35 – Effective Expulsion	29
3.3.3.3 Article 36 – Detention of Criminal and Uncooperative Asylum Seekers	29
3.4 Concluding Remarks	32

4	ANALYSIS OF THE DANISH AMENDMENT CONCERNING DETENTION OF ASYLUM SEEKERS	34
4.1	Areas of Concern	34
4.1.1	Application of Public Order with a too Low Threshold	34
4.1.2	Length of Detention	35
4.1.3	Continued Imprisonment of Convicted Criminals Pending Removal	36
4.1.4	Detention of Uncooperative Asylum Seekers	38
4.2	The Concept of Public Order	40
4.2.1	Public Order in International Human Rights Law	41
4.2.2	Public Order in International Refugee Law	43
4.3	The Principle of Proportionality	44
4.3.1	Gravity of the Offence	45
4.3.2	Duration of Detention	46
4.3.3	Individual Circumstances of the Case	48
4.4	Concluding Remarks	49
5	CONCLUSION	51
5.1	The Alleged Violations of International Law	51
5.2	Final Remarks	53
	BIBLIOGRAPHY	54
	Literature	54
	Articles and Reports	55
	International Treaties	55
	Other Instruments and Documents	56
	National Legislation	57
	Public Publications	57
	TABLE OF CASES	59

Summary

It has been stated by an international consensus that detention of asylum seekers should normally be avoided, yet states recourse to detention in an extensive manner and the detention of asylum seekers risks becoming regarded as an administrative practise. There are a number of human rights instruments that consist of protective measures to ensure that individuals are not arbitrarily or unlawfully deprived of their liberty. Together, these measures constitute an international framework of basic safeguards, which, if fully implemented, would help to eliminate the more serious abuses to which detainees are frequently subjected.

In June 2001, Denmark adopted an amendment to the Danish Aliens Act where the application of detention of asylum seekers was extended. According to the Danish Government the changes were a result of the increasing number of criminal acts among asylum seekers. The authorities also found a grand problem with uncooperative asylum seekers that delay the asylum procedure.

This thesis describes the background and causes of the Danish amendment to the Aliens Act, concerning detention of criminal and administrative expelled asylum seekers. It also seeks to analyse whether the amendment is in conformity with international human rights conventions and standards.

Further, the thesis suggests that the Danish amendment, in parts, arguably can be considered to be in breach with international human rights law. These areas deal primarily with; the application of public order, the length of detention, the continued imprisonment of convicted criminals and the detention of uncooperative asylum seekers. The decisive criterion as to whether these cases of detentions are in conformity with international laws and standards is the principle of proportionality, where a strict balancing of interests should be assessed. Moreover, the prohibition of arbitrariness, which could be summarized as by necessity, reasonableness and proportionality, should have a role in deciding whether a detention is in conformity with international instruments.

When analysing the amendment's compliance with international law, the conclusion can be drawn that there are cases where the law itself violates international law, but also cases where the enforcement of the law constitutes such violations. After scrutinizing the preparatory work of the new provisions and their conformity with international human rights laws and standards there seems to be shortcomings in the applicability of these instruments, especially regarding the use of the principle of proportionality, such as neglecting the individual's rights when weighing their rights to the interests of the state. Further, Denmark has not paid accurately attention to

the principle that other monitoring mechanisms should be applied to unless proven insufficient.

The conclusion can be drawn that something has to be done with regard to the deficiencies of the amendment's compliance with international law. For example, political pressure from the international community together with actions by national non-governmental organizations could play an important role in condemning the Danish legislative performances in regard to detention of asylum seekers.

In conclusion, it can be noted that the far right winged politics in Denmark plays an increasingly prominent role on the political arena and consequently exercises an influence upon mainstream political parties. With regard to the present political climate in the country, it is unlikely that any far-reaching changes concerning the detention of asylum seekers will take place. It is important that the international community takes a firm stand against the developments of the asylum politics in the country, which otherwise could escalate into more severe breaches of international human rights law.

Abbreviations

ECHR	European Convention for Protection of Human Rights and Fundamental Freedoms
ECRE	European Council on Refugees and Exiles
ExCom	UNHCR's Executive Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
UDHR	Universal Declaration of Human Rights
UDL	Udlaendingeloven (The Danish Aliens Act)
UNHCR	United Nations High Commission for Refugees

1 Introduction

1.1 Subject and Aim of the Thesis

According to an international consensus, the detention of asylum seekers and refugees should normally be avoided. Nonetheless, the detention of asylum seekers and refugees appears to have increased in the western world.¹ One of the purposes of refugee protection is to safeguard human rights. Refugees and asylum seekers should be treated in conformity not only with the refugee law regime, but also in accordance with human rights standards. This may seem as obvious, but a separateness of the treatment of refugees compared to nationals, especially in the case of detention, has been developed. Even though their rights to liberty and security of person, and freedom of movement, are strengthened through human rights instruments and mechanisms, the detention of asylum seekers risks becoming regarded as a matter of administrative practice, perhaps even a routine.

As noted in recent years, the arbitrary detention of asylum seekers and refugees, such as detention for insufficient reasons without an adequate analysis of the circumstances of each case, or detention for disproportionate and indefinite periods, are more and more frequent all over the world. Increasingly many countries use detention of asylum seekers as a part of reception or determination procedures to deter future potential applicants. These growing trends seriously undermine the already threatened right to seek and enjoy asylum in other countries.

Even in Denmark this developing trend can be observed. The legislation, concerning asylum seekers and refugees, is pointing in a direction where restraining measures in this area have increased. In June 2001, Denmark adopted a law amendment to the Danish Aliens Act, where the applicability concerning detention of asylum seekers was extended. According to the Danish Government, these changes were a result of the rising numbers of criminal acts among the asylum seekers. The authorities also discovered a grand problem with uncooperative asylum seekers that delayed the asylum procedure.

As of November last year the far-right Danish People's Party, (*Dansk Folkeparti*) got approximately 19 percent of the votes, and has thus become increasingly prominent on the political scene and as such has a great impact on political parties. This political climate may also be connected to the adoption of restrictive policies and legislation, which concern immigrants, refugees and asylum seekers. The political interests threaten to undermine

¹ Landgren, Karin, "Comments on the UNHCR Position on Detention of Refugees and Asylum Seekers", in *Detention of Asylum Seekers in Europe: Analysis and Perspectives*, Hughes, Jane and Liebaut, Fabrice (eds.), 1998, p. 142.

the Danish Government's obligations towards asylum seekers and it remains to see what will happen in the field of human rights in Denmark in the near future.

The aim of this thesis is to describe the background and causes of the Danish amendment to the Aliens Act, concerning detention of criminal and administrative detained asylum seekers, and to analyse if it is in conformity with international human rights conventions and standards. A discussion as to whether the new amendment is in conformity with the principle of proportionality will also take place. In order to reach a conclusion it is necessary to thoroughly survey all international instruments, both binding and non-binding, relevant to detention of asylum seekers.

The reason why I chose Denmark as a case study, and not any other countries that also have imposed restrictive measures on asylum seekers, is that I am most familiar with Denmark, having lived and worked there. Furthermore, Denmark is particularly significant as being a country where normally no human rights abuses take place, except when it comes to issues concerning refugees, asylum seekers and other aliens.

Since it is useful for the understanding of the thesis, I will shortly define some terms that are important considering detention of asylum seekers. The words "asylum seeker" usually applies to those whose claims are being considered under admissibility or pre-screening procedure as well as those who are being considered under refugee status determination procedures. It also includes those exercising their right to seek judicial and/or administrative review of their asylum request.²

Detention can be defined as a confinement within a narrowly bounded or restricted location including prisons, closed camps, detention facilities or airport transit zones, where freedom of movement is substantially curtailed, and where the only opportunity to leave this limited area is to leave the territory. It should be underlined that there is a qualitative difference between detention and other restrictions on freedom of movement. When considering whether an asylum seeker is detained, the cumulative impact of the restrictions as well as the degree and intensity of each of them should be assessed.³

Another form of depriving the asylum seeker his or her liberty is retention. The distinction between detention and retention can be difficult to draw and

² UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, Office of the United Nations High Commissioner for Refugees, Geneva, February 1999, paragraph 4.

³ UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, Office of the United Nations High Commissioner for Refugees, Geneva, February 1999, Guideline 1. See also Resolution 43/173, *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, adopted by the General Assembly 9 December 1988, section 2(b) and (d) of the preamble.

has caused many problems with regard to the interpretation. States tend to recourse to that detention at e.g. airports is retention since the asylum seeker is free to leave the country whenever he or she wants to.⁴ However, the concept of retention will not be further analysed in this thesis.

1.2 Delimitation

The restrictive legislative measures that have been adopted concerning detention of asylum seekers are not an isolate phenomenon. In the integration area, laws have been enforced, by the Danish Parliament, which under some circumstances can be questioned in relation to international human rights law and standards. For example, one of the latest amendments requires that persons wishing to bring a spouse to Denmark are over 25 years of age and dispose a dwelling of a certain size. Additionally, refugees have to live at an allotted place to receive the integration allowance. However, it will be too far reaching both in substance and due to space limits to discuss all the laws concerning integration of aliens, and consequently their conformity with international instruments will not be analysed. Further, I will not focus on whether Denmark follows its international obligations with regard to the conditions and treatment of detainees in detention camps and their procedural safeguards.

Three regional inter-governmental organisations – the Council of Europe, the Organization of American States and the Organization of African Unity – have all adopted international instruments that specify, in more or less similar terms, that no one should be arbitrarily deprived of his or her liberty, which includes both refugees and asylum seekers. It would although be too far reaching to go through all these instruments and also fall outside the scope of the thesis, and therefore the investigation will be limited to, at the regional level, the issue under the European Convention for Protection of Human Rights and Fundamental Freedoms. It should however be noted that Denmark is a state party to the European Convention for Protection of Human Rights and Fundamental Freedoms.⁵

1.3 Method and Sources

As a general reference on asylum seekers' rights in the Danish society, I have used "Udlaenderet", in which, prominent researchers such as Professor Jens Vedsted-Hansen and Kim U. Kjaer have made contributions. This book has also been used, together with preparatory works, for explana

⁴ Detention of Asylum-Seekers in Europe, European Series, Volume 1 No. 4, October 1995, UNHCR, Geneva, p. 45ff.

⁵ Denmark ratified the European Convention for Protection of Human Rights and Fundamental Freedoms on 13 April 1953.

tions on how the Danish Aliens Act is to be construed. As for the understanding and interpretation of the international conventions and standards several monographs and anthologies as well as documents from bodies within the United Nations system, such as the United Nations High Commissioner for Refugees, the Human Rights Committee and the Commission on Human Rights, has been informative. For analysis on the scope of different provisions, in the European Convention on Human Rights, case law from the European Court of Human Rights has been valuable. The above-mentioned sources are of a descriptive nature and the analyses in the thesis are therefore the authors' own conclusions. The research in this field of study is relatively comprehensive, although the latest amendments in Denmark have not been thoroughly examined.

1.4 Disposition

The thesis will start with a fairly concise look at the main international conventions such as the International Covenant on Civil and Political Rights, the 1951 Refugee Convention and the European Convention on Human Rights and further international standards e.g. the United Nations High Commissioner's Executive Committee's Conclusion No.44 and the 1999 Guidelines, provided by the same body within the United Nations, with provisions creating rights for detained asylum seekers. This will be followed by chapter three, which begins with a brief history of the Danish alien legislation and an introduction to the Danish Aliens Act and its provisions concerning detention of asylum seekers. After that there will be a thorough survey of the law proposal, adopted in June 2001, dealing with deprivation of liberty regarding asylum seekers. In chapter four I will analyse whether the amendment to the Danish Aliens Act is in conformity with international laws and standards. The thesis ends with a chapter where concluding statements will be presented.

2 Detention of Asylum Seekers – An International Perspective

2.1 International Conventions and Standards

When talking about detention of refugees and other restrictive measures there are several international instruments and standards worth mentioning. These international instruments and standards are important and applicable for the protection of refugees and asylum seekers' rights in the case of detention.

The word convention is synonymous to treaties, protocols, charters, covenants, declarations etc. and establishes rules expressly recognized by contesting states.⁶ According to article 2 of the Vienna Convention on the Law of Treaties⁷ a treaty “means an international agreement concluded between States in written form and governed by international law, whether embodied in a single instrument or in two or more related instruments and whatever its particular designation”.

International standards, such as for example recommendations and guidelines of different UN bodies, can be seen as accepted norms by the international community, and usually these norms represent the consensus among the states and should therefore be respected.⁸ These instruments can be called soft law as contrary to hard law that comprises treaties, conventions etc. Soft law is fundamentally characterized by norms that are not in a formal sense legally binding.⁹

⁶ UN Treaty Reference Guide, available at <<http://untreaty.un.org/olainternet/Assistance/Guide.htm>>, (30 October 2001).

⁷ Vienna Convention on the Law of Treaties, 24 May 1969, 1155 U.N.T.S.331, entered into force January 27, 1980.

⁸ The Standing Committee of the Executive Committee of the High Commissioner's Programme on detention practices note Detention of asylum-seekers and refugees: the framework, the problem and recommended practice (EC/49/SC/CRP.13), 4 June 1999, section II, paragraph 11.

⁹ Kjaer, Kim U., *Den retlige regulering af modtagelsen af asylansøgere i en europæisk kontekst*, 2001, p. 198ff.

2.1.1 International Conventions

2.1.1.1 International Covenant on Civil and Political Rights

The core of the universal system of human rights consists of the three instruments that constitute the International Bill of Human Rights, namely the Universal Declaration of Human Rights¹⁰ (hereinafter UDHR) from 1948, the International Covenant on Civil and Political Rights¹¹ (henceforth ICCPR) and the International Covenant on Economic, Social and Cultural Rights¹² (hereinafter ICESCR). It is important to bear in mind that, under international law, a declaration like the UDHR is different from a treaty, which has become effective through a required number of ratifications. Of course a declaration is of great significance, but it is more of a hortatory and recommendatory nature than in a formal sense binding, even though arguments have been developed for viewing the UDHR binding as customary international law.¹³

By contrast, the ICCPR, as well as other conventions, binds states parties in accordance with its terms, except when a party has made reservations to provisions in the convention. However, reservations must not be incompatible with the object and purpose of the treaty. Furthermore, a treaty might prohibit reservations or only allow for certain reservations too be made.¹⁴ As with the interpretation of these legal instruments, there are differences even with regard to the interpretation of basic provisions. This was more common when consensus was absent when adopting the articles in the 1960's, but disagreement of the interpretation can still occur. The ICCPR creates an institution with a treaty organ, the Human Rights Committee. The organ gives institutional support to the norms of ICCPR, since the Covenant imposes formal obligations on state parties, such as submission of periodic reports, to the Committee. Individual rights characterize the ICCPR and group rights or collective rights are rare.¹⁵

This Chapter will primarily focus on ICCPR, but in this context it is worth mentioning that it is stated in article 3 of the UDHR that "No-one shall be subjected to arbitrary arrest, detention or exile", which constitutes a fundamental principle among the member states of the United Nations and that

¹⁰ Universal Declaration of Human Rights, General Assembly res.217A (III), of December 1948, U.N.Doc A/810 at 71 (1948).

¹¹ International Covenant on Civil and Political Rights, 16 December 1966, 999 U.N.T.S.171, entered into force March 23, 1976. Denmark ratified the ICCPR on 6 January 1972.

¹² International Covenant on Economic, Social and Cultural Rights, 16 December 1966, 993 U.N.T.S.3, entered into force January 3, 1976.

¹³ See Harris, David and Joseph, Sarah (eds.), *The International Covenant on Civil and Political Rights and United Kingdom Law*, 1995, p. 1ff and Steiner, Henry J., and Alston, Philip, *International Human Rights in Context: Law, Politics, Morals*, 2000, p. 136ff.

¹⁴ Vienna Convention on the Law of Treaties, 24 May 1969, 1155 U.N.T.S.331, article 19.

¹⁵ Steiner, Henry J., and Alston, Philip, *International Human Rights in Context: Law, Politics, Morals*, 2000, p. 142f.

has been agreed to be respected. It has also been incorporated in a number of binding human rights instruments.

Returning to the ICCPR, the provisions applicable on detention of refugees are articles 9.1 and 12. Article 9.1 reads:

“Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law”.

The state parties in their reports to the Human Rights Committee have often understood this article in a somewhat narrow way. The Human Rights Committee therefore points out, in its General Comments, that article 9.1 is applicable to all deprivations of liberty, including for the purpose of immigration control. Also in cases of so-called preventive detention, for reasons of public security, the detention should be controlled by the same provisions, e.g. it must not be arbitrary and it must be based on grounds and procedures established by law.¹⁶ The prohibition of arbitrariness in the second sentence of article 9.1 is addressed to the national legislature organs of enforcement, which means that the law itself not shall be arbitrary, but also that the enforcement of the law in a given situation shall not be arbitrary.¹⁷ The term arbitrary should be given a broad application and covers situations characterized by the absence of requirements such as necessity, proportionality to the aims to be achieved, predictability and justice.¹⁸

Article 12 deals with freedom of movement and reads as follow:

*“1. Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.
2. Everyone shall be free to leave any country, including his own.
3. The above-mentioned rights shall not be subject to any restrictions except those which are provided by law, are necessary to protect national security, public order (ordre public), public health or morals or the rights and freedoms of others, and are consistent with the other rights recognized in the present Covenant”.*

...

Article 12.3 ICCPR provides for exceptional circumstances under which rights under paragraphs 1 and 2 may be restricted. It is stressed by the Hu

¹⁶ Human Rights Committee, Right to liberty and security of persons (Art.9):30/07/82. CCPR General comment 8. General Comments, Sixteenth session, 1982.

¹⁷ Nowak, Manfred, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, 1993, p. 172.

¹⁸ Tootell, Anne-Marie, Hughes, Jane and Petrusek, David, “The relevance of Key UN Instruments for Detained Asylum Seekers”, in *Detention of Asylum Seekers in Europe: Analysis and Perspectives*, Hughes, Jane and Liebaut, Fabrice (eds.), 1998, p. 188.

man Rights Committee that the restrictions, provided by law must not impair the essence of the right to liberty of movements. The restrictive measures must be necessary and in conformity with the principle of proportionality, which means that the restrictions must be appropriate to achieve their protective function; they must be the least interfering instruments among those that might achieve the desired result; and they must be proportionate to the interest to be protected.¹⁹

In 1986, the Human Rights Committee issued a general comment on the position of aliens under the ICCPR²⁰. According to this general comment, all rights in the Covenant apply to everyone, “irrespective of reciprocity, and irrespective of his or her nationality or statelessness”²¹, although there are some exceptions in article 13 and article 25 of the ICCPR. Generally, the non-discrimination rule in article 2 of the ICCPR also applies to aliens, but as the Human Rights Committee established; states parties do not always follow this rule and in a number of countries aliens do not enjoy the same rights as the citizens or are subject to limitations that sometimes are impossible to justify under the ICCPR.²² The Covenant gives aliens all the rights guaranteed therein, and the state parties shall ensure that these requirements are observed in their legislation and practiced as appropriate. It is ensured in the general comment that aliens have the full right of liberty and that they shall not be subjected to arbitrary or unlawful interference with their privacy or family life.²³

2.1.1.2 The 1951 Refugee Convention

The Convention Relating to the Status of Refugees²⁴ (henceforth the 1951 Convention) is undisputedly one of the most important instruments concerning refugees and asylum seekers. It is binding not only upon the State Parties to that instrument but also to those who have ratified the 1967 New York Protocol²⁵. Already during the drafting of the 1951 Convention the issue of detention was discussed and the seriousness of such restriction and

¹⁹ Human Rights Committee, Freedom of movement (Art.12):.02/11/99.

CCPR/C/21/Rev.1/Add.9, CCPR General comment 27. General Comments, Sixty-seventh session, 1999.

²⁰ Human Rights Committee, The position of aliens under the Covenant:.11/04/86. CCPR General comment 15. General Comments, Twenty-seventh session, 1986.

²¹ Human Rights Committee, The position of aliens under the Covenant:.11/04/86. CCPR General comment 15. General Comments, Twenty-seventh session, 1986, paragraph 1.

²² Human Rights Committee, The position of aliens under the Covenant:.11/04/86. CCPR General comment 15. General Comments, Twenty-seventh session, 1986, paragraph 2.

²³ Human Rights Committee, The position of aliens under the Covenant:.11/04/86. CCPR General comment 15. General Comments, Twenty-seventh session, 1986, paragraph 4.

²⁴ Convention Relating to the Status of Refugees, 28 July 1951, 189 U.N.T.S.137, entered into force April 22, 1954. Denmark ratified the 1951 Convention on 4 December 1952.

²⁵ Protocol relating to the Status of Refugees, 31 January 1967, 606 U.N.T.S.267, entered into force October 4, 1967.

a limited use of detention was emphasised.²⁶ The articles 31 and 32 of the 1951 Convention are the most relevant provisions that are applicable concerning detention of asylum seekers and refugees.

Article 31 and Article 32 of the 1951 Refugee Convention read as follow:

Article 31

Refugees unlawfully in the country of refuge

“1. The Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of Article 1, enter or are present in the territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.

2. The Contracting States shall not apply to the movements of such refugees restrictions other than those which are necessary and such restrictions shall only be applied until their status in the country is regularized or they obtain admission into another country. The Contracting States shall allow such refugees a reasonable period and all the necessary facilities to obtain admission into another country”.

Article 32

Expulsion

“1. The Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order.

2. The expulsion of such a refugee shall be only in pursuance of a decision reached in accordance with due process of law. Except where compelling reasons of national security otherwise require, the refugee shall be allowed to submit evidence to clear himself, and to appeal to and be represented for the purpose before competent authority or a person or persons specially designated by the competent authority.

3. The Contracting States shall allow such a refugee a reasonable period within which to seek legal admission into another country. The Contracting States reserve the right to apply during that period such internal measures as they may deem necessary”.

Asylum seekers, even those whose status is not yet determined, are protected under article 31 paragraph 2, which limits states in restricting refugees’ freedom of movement. States are not allowed to impose restrictions in the freedom of movement of refugees other than those that are necessary.²⁷ The Ad Hoc Committee on Statelessness and Related Problems has stated that

²⁶ Landgren, Karin, “Comments on the UNHCR Position on Detention of Refugees and Asylum Seekers”, in *Detention of Asylum Seekers in Europe: Analysis and Perspectives*, Hughes, Jane and Liebaut, Fabrice (eds.), 1998, p. 144.

²⁷ Landgren, Karin, “Comments on the UNHCR Position on Detention of Refugees and Asylum Seekers”, in *Detention of Asylum Seekers in Europe: Analysis and Perspectives*, Hughes, Jane and Liebaut, Fabrice (eds.), 1998, p. 145ff.

the term necessary should be interpreted narrowly. Probably, the Ad Hoc Committee had in mind situations where the security of the state was in danger or under other special circumstances, such as large scale and sudden influx of refugees.²⁸ According to Atle Grahl-Madsen, a prominent professor in the field of international refugee law, the drafters of the 1951 Convention did not mean to prohibit detention for the purpose to investigate a person's identity and claimed history. However, such a measure must, in order to be legally correct, be deemed necessary.²⁹

Apparently, the use of detention in the context of Article 31 has attracted the drafters of the 1951 Convention surprisingly little during the creation of the article. What constituted necessary restrictions in the freedom of movement concerning refugees were not defined, neither was the question whether a state could detain a person that enters the country in an illegal manner.³⁰ However, article 31 as such, does not exclude restrictions or deprivation of liberty pending the asylum procedure, since those measures are not a penalty within the meaning of article 31, but administrative measures that are not connected with an offence such as illegal entry. Consequently, in several cases of detention of asylum seekers, article 31 of the 1951 Convention does not offer protection and the legal situation is under some circumstances unclear.³¹

According to article 32 an asylum seeker or a refugee can be expelled if he or she is a danger to the national security or the public order in the country. While waiting for such an expulsion the asylum seeker or refugee can be detained.³² The meaning of public order will be more thoroughly described in chapter 4 below. The words "national security" will not be further analysed, but shortly it could be said that national security cover acts of rather serious nature that directly or indirectly threatens the government on whose territory a refugee stays.³³

²⁸ Landgren, Karin, "Comments on the UNHCR Position on Detention of Refugees and Asylum Seekers", in *Detention of Asylum Seekers in Europe: Analysis and Perspectives*, Hughes, Jane and Liebaut, Fabrice (eds.), 1998, p. 146f.

²⁹ Grahl-Madsen, Atle, *The Status of Refugees in International Law*, 1972, p. 418.

³⁰ Landgren, Karin, "Comments on the UNHCR Position on Detention of Refugees and Asylum Seekers", in *Detention of Asylum Seekers in Europe: Analysis and Perspectives*, Hughes, Jane and Liebaut, Fabrice (eds.), 1998, p. 147.

³¹ Giakoumopoulos, Christos, "Detention of Asylum Seekers in the light of Article 5 of the European Convention on Human Rights", in *Detention of Asylum Seekers in Europe: Analysis and Perspectives*, Hughes, Jane and Liebaut, Fabrice (eds.), 1998, p. 165 and Goodwin-Gill, Guy S., *The Refugee in international Law*, 1996, p. 305.

³² Grahl Madsen, Atle, "Expulsion of Refugees", in *Nordisk Tidsskrift for International Ret*, Vol. 33 (1963), p. 41-50, in *The Land Beyond: Collected Essays on Refugee Law and Policy* by Atle Grahl-Madsen, Macalister-Smith, Peter and Alfredsson, Gudmundur (eds.), 2001, p. 7f.

³³ Grahl Madsen, Atle, "Expulsion of Refugees", in *Nordisk Tidsskrift for International Ret*, Vol. 33 (1963) 41-50, in *The Land Beyond: Collected Essays on Refugee Law and Policy* by Atle Grahl-Madsen, Macalister-Smith, Peter and Alfredsson, Gudmundur (eds.), 2001, p.8.

2.1.1.3 European Convention on Human Rights

The European Convention for Protection of Human Rights and Fundamental Freedoms³⁴ (hereinafter the ECHR) is primarily based on the rights of individuals to protection against abuses of state power. The European Court of Human Rights, established under article 19 of ECHR, has addressed the issue of detention in a number of decisions, which variously declare detention as arbitrary and thus inconsistent with the ECHR.³⁵ Case law under the European Court of Human Rights will not be considered under this chapter, but in chapter 4 below.

As stated in article 1 of the ECHR, the rights set out in the convention are guaranteed to “everyone within [the] jurisdiction” of the contracting parties. This implies that every contracting party has an obligation to secure the rights not only to its own nationals but also to aliens.³⁶ The ECHR contains several articles that are relevant concerning detention of refugees and asylum seekers, such as articles 5.1.b and 5.1.f ECHR and article 2.3 in Protocol No. 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol³⁷ (henceforth Protocol No. 4) thereto. The ECHR is not an instrument that is specially designed to protect aliens and asylum seekers, but it is anyway important in securing their rights in Western Europe, especially through the case law emanating from the European Court of Human Rights.

Article 5 of the ECHR is one of the cornerstones in the protection of the individual, since it prescribes a right to liberty and security of person. The article contains of a list of six categories where deprivation of liberty is permitted. The list is exhaustive and applies both to criminal cases and administrative detention.³⁸ Article 5.1.b and 5.1.f of the ECHR states:

*“1. Everyone has the right to liberty and security of person.
No one shall be deprived of his liberty save in the following
cases and in accordance with a procedure prescribed by law:*

³⁴ European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 U.N.T.S.221, ETS No.5, entered into force September 3, 1953.

³⁵ Gomien, Donna, Harris, David and Zwaak, Leo, *Law and practise of the European Convention on Human Rights and the European Social Charter*, 1996, p.33f and Giakoumopoulos, Christos, “Detention of Asylum Seekers in the light of Article 5 of the European Convention on Human Rights”, in *Detention of Asylum Seekers in Europe: Analysis and Perspectives*, Hughes, Jane and Liebaut, Fabrice (eds.), 1998, p. 166f.

³⁶ Giakoumopoulos, Christos, “Detention of Asylum Seekers in the light of Article 5 of the European Convention on Human Rights”, in *Detention of Asylum Seekers in Europe: Analysis and Perspectives*, Hughes, Jane and Liebaut, Fabrice (eds.), 1998, p. 161ff.

³⁷ Protocol No. 4 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto, Strasbourg, 16 September 1963, ETS No. 46, entered into force May 2, 1968.

³⁸ Gomien, Donna, Harris, David and Zwaak, Leo, *Law and practise of the European Convention on Human Rights and the European Social Charter*, 1996, p. 127ff.

...
b) the lawful arrest or detention of a person for non-compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
...
f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition”.

It follows from article 5.1.b ECHR that when a person satisfies the obligation, he or she should immediately be released. A criminal convict, on the other hand, could not be realised on such grounds. Article 5.1.f ECHR allows for detention for the purpose of enforcing immigration control. However, it has been held by the Commission, a now defunct institution established under article 19 of the ECHR, that the lawfulness of a deportation is not a prerequisite for the detention to be in conformity with article 5.1.f ECHR. The detention is considered to be lawful when it has a legal basis and cannot be seen as arbitrary. Further article 5 of the ECHR provides guarantees against undue prolongation of detentions.³⁹ According to the case law under the convention, a detention during an extradition procedure that lasted for two years was seen as a violation of article 5.1.f ECHR.⁴⁰

Detention of asylum seekers and refugees based on public order grounds are mentioned in article 2.3 of Protocol No. 4 to ECHR, which reads:

“No restrictions shall be placed on the exercise of these rights other than such as are in accordance with law and are necessary in a democratic society in the interests of national security or public safety, for the maintenance of ordre public, for the prevention of crime, for the protection of health or morals, or for the protection of the rights and freedoms of others”.

The restrictions imposed on the individual under such circumstances must be in accordance with the law and the requirement of necessity must be upheld.⁴¹ Compared with article 5 of the ECHR, article 2.3 of Protocol No.4 is the article that principally deals with restrictions on the freedom of movement.

Inherent in the whole Convention is the principle of proportionality, which means that there has to be a fair balance between the protection of individual rights and the interest of the community at large. Such a balance can only be achieved if the restrictions on the individual are strictly proportionate to the

³⁹ Gomien, Donna, Harris, David and Zwaak, Leo, *Law and practise of the European Convention on Human Rights and the European Social Charter*, 1996, p. 134ff.

⁴⁰ See *Quinn*, Judgment of 22 March 1995, European Court of Human Rights, Series A 311.

⁴¹ Starmer, Keir, *European Human Rights Law, The Human Rights Act 1998 and the European Convention on Human Rights*, 1999, p. 96.

legitimate aimed pursued.⁴² If there exists a less restrictive, but equally effective restriction than the one used, that restriction is unlikely to be considered proportionate.

2.1.2 International Standards

2.1.2.1 ExCom Conclusions

The United Nations High Commission for Refugees' (henceforth UNHCR) advisory body, the Executive Committee (hereinafter ExCom) adopts conclusions on different topics that concern refugees. The conclusions are without binding force, however they are an indicator of current state practice, and reflect the consensus of a broad group of states, including states that have not signed the different international refugee instruments.⁴³

In 1986, the ExCom adopted Conclusion No.44 (XXXVII) on Detention of Refugees and Asylum Seekers⁴⁴ (henceforth Conclusion No.44). Conclusion No.44 reflects minimum standards, without prejudice to applicable higher standards established by domestic law or international law, as for example ECHR.⁴⁵ The Conclusion No.44 starts with an expression of deep concern with the large numbers of refugees and asylum seekers in the world who are subject of detention "or similar restrictive measures"⁴⁶. The ExCom then states that in the view of the hardship, which it involves, detention should normally be avoided. Further it establish that, if necessary, detention might be resorted only to grounds prescribed by law to verify identity; to determine the elements on which the claim to refugee status or asylum is based; to deal with cases where refugees or asylum seekers have destroyed their travel and/or identity documents or have used fraudulent documents in order to mislead the authorities of the state in which they intend to claim asylum; or to protect national security or public order.⁴⁷

⁴² Starmer, Keir, *European Human Rights Law, The Human Rights Act 1998 and the European Convention on Human Rights*, 1999, p. 169ff.

⁴³ Landgren, Karin, "Comments on the UNHCR Position on Detention of Refugees and Asylum Seekers", in *Detention of Asylum Seekers in Europe: Analysis and Perspectives*, Hughes, Jane and Liebaut, Fabrice (eds.), 1998, p. 142.

⁴⁴ ExCom Conclusion No.44 (XXXVII) on Detention of Refugees and Asylum Seekers, 1986, Report of the 37th Session: UN doc. A/AC.96/688, para. 128.

⁴⁵ ExCom Conclusion No.44 (XXXVII) on Detention of Refugees and Asylum Seekers, 1986, Report of the 37th Session: UN doc. A/AC.96/688, para. 128, preface.

⁴⁶ ExCom Conclusion No.44 (XXXVII) on Detention of Refugees and Asylum Seekers, 1986, Report of the 37th Session: UN doc. A/AC.96/688, para. 128, paragraph (a).

⁴⁷ ExCom Conclusion No.44 (XXXVII) on Detention of Refugees and Asylum Seekers, 1986, Report of the 37th Session: UN doc. A/AC.96/688, para. 128, paragraph (b).

The ExCom recognize the importance of fair and expeditious procedures for determining refugee status or granting asylum in protecting refugees and asylum seekers from unjustified or unduly prolonged detention.⁴⁸

2.1.2.2 1999 Detention Guidelines

In 1995, following an in-depth survey of European legislation and practice in respect of detention of asylum seekers and refugees, the UNHCR issued Guidelines on the Detention of Asylum Seekers. They set out minimum standards for what might be considered as state practice. Guidelines are not rights directly granted to asylum seekers, but rather recommendations to members of the international community.⁴⁹ In 1999 the UNHCR issued the Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers⁵⁰ (hereinafter 1999 Guidelines). These Guidelines address some of the lacunae in the existing standards on refugee detention. They also seek to reflect the international legal developments.

In the preface to the 1999 Guidelines it is pronounced that the detention of asylum seekers is inherently undesirable and that freedom from arbitrary detention is a fundamental human right, and further expresses its concern that the Western World are increasingly resorting to detention of asylum seekers. The 1999 Guidelines stresses the importance of article 31 of the 1951 Convention and, that in consistence with that article and the ExCom Conclusion No.44, detention should only be applied in cases of necessity and under the above-mentioned circumstances (see chapter 2.1.2.1).⁵¹ When detaining a person to protect national security and public order, it must be related to situations where there is evidence to show that the asylum seeker has criminal antecedents and/or affiliations, which are likely to pose risk to public order or national security if he or she is allowed entry to the country.⁵²

Detention of asylum seekers, which is applied for purposes other than those listed above, for example, as a part of a policy to deter future asylum seekers, is seen as contrary to the norms of international refugee law. It is put forward in the 1999 Guidelines that detention should not be used as a puni

⁴⁸ ExCom Conclusion No.44 (XXXVII) on Detention of Refugees and Asylum Seekers, 1986, Report of the 37th Session: UN doc. A/AC.96/688, para. 128, paragraph (c).

⁴⁹ Detention of Asylum-Seekers in Europe, European Series, Volume 1 No. 4, October 1995, UNHCR Geneva, p. 1f.

⁵⁰ UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, Office of the United Nations High Commissioner for Refugees, Geneva, February 1999.

⁵¹ UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, Office of the United Nations High Commissioner for Refugees, Geneva, February 1999, introduction section.

⁵² UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, Office of the United Nations High Commissioner for Refugees, Geneva, February 1999, Guideline 3.

tive or disciplinary measure for illegal entry or presence in the country. It is further stated that detention also should be avoided for failure to comply with administrative requirements or other institutional restrictions related to residence issues.⁵³

Further, according to the Guidelines, detention of asylum seekers must be clearly prescribed by national law, which in turn must be in conformity with general norms and principles of international human rights law. Detention should be exercised in a non-discriminatory manner for a minimum period of time, and it must be subject to judicial or administrative review to ensure that the detention continues to be necessary under the circumstances of the case, with the possibility of release where no grounds for its continuation exist.⁵⁴

There should always be a presumption against detention and where there are monitoring mechanisms that could be employed as alternatives to detention, these should be applied first, unless it is evident that such an alternative would be ineffective in the particular case.⁵⁵ Consequently detention should only take place after a full consideration of all possible alternatives or when monitoring mechanisms have shown to be insufficient. Account should be taken of whether it is reasonable to detain the asylum seeker and whether it is proportionate in relation to the objectives that are going to be achieved. The fact that asylum seekers often have had traumatic experiences should also be taken into account when detaining an asylum seeker.⁵⁶

Alternatives to detention may be monitoring requirements such as reporting and residency requirements, provision of a guarantor, release on bail and collective accommodations on open centres. These alternatives are not exhaustive, instead they are guidelines on options that provide state authorities with a form of control over the asylum seekers while allowing the asylum seekers basic freedom of movement.⁵⁷

⁵³ UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, Office of the United Nations High Commissioner for Refugees, Geneva, February 1999, Guideline 3.

⁵⁴ UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, Office of the United Nations High Commissioner for Refugees, Geneva, February 1999, Guideline 5.

⁵⁵ UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, Office of the United Nations High Commissioner for Refugees, Geneva, February 1999, Guideline 3.

⁵⁶ UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, Office of the United Nations High Commissioner for Refugees, Geneva, February 1999, Guideline 2 and 3.

⁵⁷ UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, Office of the United Nations High Commissioner for Refugees, Geneva, February 1999, Guideline 4.

2.1.2.3 Other Important Standards

The detention of persons has also been on the agenda of other human rights bodies for a long time. In 1988, the General Assembly adopted a resolution made by the Office of the High Commissioner for Human Rights named Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment⁵⁸. These Principles represent a consensus among states on how different rules of detention should be interpreted and that asylum seekers have a right, as all other individuals, to be treated in accordance with these standards.⁵⁹ It is stated in the beginning of the document that the principles apply on “all persons under any form of detention or imprisonment”⁶⁰. One of the facts stated in principle 3 is, that during detention there shall be no derogation from any human rights.

In 1991 the Commission on Human Rights, as a body within the United Nation system, established a Working Group on Arbitrary Detention to investigate cases of detention imposed arbitrarily or otherwise inconsistently with relevant international standards. The Working Group was asked, in 1997, to devote its attention to detained immigrants and asylum seekers and has since then conducted visits to different countries to investigate their situation. In 1999 the Working Group published a document with criteria for determining whether or not the deprivation of liberty of asylum seekers and immigrants may be arbitrary.⁶¹ In order to determine this, the Working Group considered whether or not the alien was able to enjoy all or some basic rights such as the right to communicate, the right to be informed about the detention in its own language, the right to be brought promptly before a judge etc.⁶² According to principle 6 of the document, the decision to detain an asylum seeker must be founded on criteria established by law. In principle 7 it is further established that there must be a maximum period of the detention and the custody should in no case be unlimited or of excessive length.

⁵⁸ Resolution 43/173: Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by the General Assembly 9 December 1988.

⁵⁹ Standing Committee of the Executive Committee of the High Commissioner’s Programme on detention practices note Detention of asylum-seekers and refugees: the framework, the problem and recommended practice (EC/49/SC/CRP.13), 4 June 1999, section II, paragraph 7.

⁶⁰ Resolution 43/173: Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, adopted by the General Assembly 9 December 1988, section 1 of the preamble.

⁶¹ U.N. Commission on Human Rights Working Group on Arbitrary Detention, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment regarding the situation of immigrants and asylum seekers, U.N. Doc. E/CN.4/2000/4/Annex 2 (1999).

⁶² U.N. Commission on Human Rights Working Group on Arbitrary Detention, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment regarding the situation of immigrants and asylum seekers, U.N. Doc. E/CN.4/2000/4/Annex 2 (1999), principles 1-5.

The Standing Committee of the Executive Committee of the High Commissioner's Programme on detention practices (hereinafter the Standing Committee) issued a note, named "Detention of asylum-seekers and refugees: the framework, the problem and recommended practice"⁶³, in 1999. The purpose of the note was to draw attention to the increasing institutionalisation of the practice of the detention and to highlight the fact that the majority of asylum seekers have not committed crimes (and usually they are not suspected of having done so) and consequently their detention raises significant concern, both in relation to the fundamental right to liberty, and because of the standards and quality of treatment to which they are subjected.⁶⁴

According to the paper, detention should be considered as being arbitrary if the detention is disproportionate or indefinite. Furthermore the detention must be prescribed by law that is precise and should not include any elements of inappropriateness or injustice. In addition, it is stated that those who are detained have a right to be treated in conformity with internationally accepted norms and standards, such as, among others, the United Nations Body of Principles for the Protection of all Persons under Any Form of Detention or Imprisonment.⁶⁵

The Standing Committee declares in the paper that the decision to detain an asylum seeker is often used in a discretionary way, for example it is not uncommon that asylum seekers are detained on the formal basis that there is a risk of absconding before the completion of the status determination procedure. While national law have provisions for detention under those circumstances, international standards lay down that there must be some substantive basis for such a conclusion in each individual case.⁶⁶ Moreover, many jurisdictions make detention of asylum seekers mandatory when the person in question appears at the border with no identity documents, or when the documents are false. States do not take into consideration the important fact that asylum seekers frequently have had to flee from a country where there might not be any time to organize any documents or where it might be too risky to use correct papers. When the asylum seeker is willing to cooperate

⁶³ Standing Committee of the Executive Committee of the High Commissioner's Programme on detention practices note Detention of asylum-seekers and refugees: the framework, the problem and recommended practice (EC/49/SC/CRP.13), 4 June 1999.

⁶⁴ Standing Committee of the Executive Committee of the High Commissioner's Programme on detention practices note Detention of asylum-seekers and refugees: the framework, the problem and recommended practice (EC/49/SC/CRP.13), 4 June 1999, paragraph 1.

⁶⁵ Standing Committee of the Executive Committee of the High Commissioner's Programme on detention practices note Detention of asylum-seekers and refugees: the framework, the problem and recommended practice (EC/49/SC/CRP.13), 4 June 1999, paragraphs 9-10.

⁶⁶ Standing Committee of the Executive Committee of the High Commissioner's Programme on detention practices note Detention of asylum-seekers and refugees: the framework, the problem and recommended practice (EC/49/SC/CRP.13), 4 June 1999, section III, paragraph 14.

in the identity process he or she should not be detained when misleading the authorities in the beginning of the procedure.⁶⁷

The Standing Committee proposes, similar to the 1999 Guidelines, that alternative measures should always be considered before resorting to detention. Further, when detaining an asylum seeker an assessment of the personal history of the asylum seeker in question should be carried out.⁶⁸ These proposals represent a minimum of recommended practise concerning arbitrary detention of asylum seekers.

The Sub-Commission on the Promotion and Protection of Human Rights, working under the Economic and Social Council adopted a resolution⁶⁹, in 2000, concerning detention of asylum seekers. In the resolution the Sub-Commission express its concern that certain detention practices and policies may act to deter a person from seeking refugee in that particular country. It also encourages states to adopt alternative measures to detention.⁷⁰

2.2 Non-Governmental Organizations

It is common knowledge that many Non-Governmental Organizations (henceforth NGO) play an important role in the collection and dissemination of facts concerning alleged violations of human rights. Institutions and organizations rely on information concerning human rights situations and violations that are provided by NGOs. It is not unusual that NGOs contribute, in a significant manner, to the development of human rights norms as well as promotion, implementation and enforcement of human rights. They are also a central actor in the view of standard setting.⁷¹

An important actor in the field of detention of asylum seekers is the European Council on Refugees and Exiles (henceforth ECRE). ECRE is a so-called umbrella organisation for co-operation between the European NGOs concerned with refugees. ECRE works with, among other things, policy de

⁶⁷ Standing Committee of the Executive Committee of the High Commissioner's Programme on detention practices note Detention of asylum-seekers and refugees: the framework, the problem and recommended practice (EC/49/SC/CRP.13), 4 June 1999, section III, paragraphs 14-15.

⁶⁸ Standing Committee of the Executive Committee of the High Commissioner's Programme on detention practices note Detention of asylum-seekers and refugees: the framework, the problem and recommended practice (EC/49/SC/CRP.13), 4 June 1999, section IV, paragraph 26.

⁶⁹ Resolution 2000/21 on Detention of Asylum-Seekers, 18 August 2000, E/CN.4/SUB.2/RES/2000/21.

⁷⁰ Resolution 2000/21 on Detention of Asylum-Seekers, 18 August 2000, E/CN.4/SUB.2/RES/2000/21, see the preamble and paragraph 6.

⁷¹ Coomans, Fons, Flinterman, Cees, Grünfeld, Fred, Westendorp, Ingrid and Willems, Jan (eds.), *Human Rights from Exclusion to inclusion; Principles and Practice: An Anthology from the Work of Theo van Boven*, 2000, p. 347 and Steiner, Henry J., and Alston, Philip, *International Human Rights in Context: Law, Politics, Morals*, 2000, p. 938.

velopment, research, legal analysis and networking. In 1996 ECRE issued a Position Paper on the Detention of Asylum Seekers⁷², in which it was emphasised that detention should only be used in exceptional cases and that alternative measures should always be considered.

Further, the ECRE strongly condemns the systematic use of detention as a part of the determination procedure. Detention may, according to the ECRE, be resorted to if it is necessary and the asylum seeker is liable for prosecution of a serious non-political offence, other than an offence under the national alien law and if the asylum seeker demonstrates a threat to the national security or public order. An absolute maximum period of detention should be established by law. Rejected asylum seekers should not be detained for prolonged periods as a result of states failing to cooperate in the deportation process.⁷³

2.3 Concluding Remarks

As seen above there are several instruments and standards concerning detention of asylum seekers and refugees, of which some deal specifically with detention of the named group of people and others that are more general in their content.

The effectiveness of international law in general depends either upon the willingness of states to surrender some of their sovereign powers to wider international control, or on reciprocity, the understanding that each party will act in a certain way because of others will. International human rights law is largely based on a system of multilateral treaties that establish objective standards for state conduct, rather than reciprocal rights and obligations. These treaties place duties on states in relation to individuals within their jurisdiction, rather than to other state parties. In the context of detention the state parties as a consequence must treat the individuals, both aliens and nationals, without discrimination and in accordance with its international obligations.

The legal instruments, such as the 1951 Convention and the ECHR do to a certain extent not protect the asylum seeker in the case of detention as much as desired. Other international standards, such as guidelines, ExCom Conclusions etc. are reaching much further in protecting the asylum seeker, since they are much more specific in its nature. The standards have probably been developed as a consequence of the poor protection of detained refugees and asylum seekers as the international instruments offer. Unfortunately

⁷² ECRE Position Paper on the Detention of Asylum Seekers, April 1996, available at <<http://www.ecre.org/positions/detain.shtml>>, (25 October 2001).

⁷³ ECRE Position Paper on the Detention of Asylum Seekers, April 1996, paragraphs 1-6, 11-13, 15 and 23, available at <<http://www.ecre.org/positions/detain.shtml>>, (25 October 2001).

those standards are not as imposing on states as conventions, but they do nevertheless play a significant role.

3 Detention of Asylum Seekers in Denmark

3.1 Brief History

Danish laws have during most of the 20th century had as its starting point that for foreign citizens there should be a special foundation of rules when entering or living in Denmark. Prior to these rules, there was a high level of freedom for non-citizens to stay in Denmark, for a shorter or longer time, but it had to be in conformity with the public order and the foreign citizens should not be a burden for public support. In 1926, the situation changed and a requirement of residence- and work permit was introduced for those foreign citizens that wanted to stay and work in the country for more than three months. This requirement meant that there was a change from a predominantly selective foreign control to a more general control order.⁷⁴ The current Danish legislation within this area consists of the Aliens Act⁷⁵ (*Udlaendingeloven*, henceforth UDL) from 1983, with subsequent amendments.

The Danish legislation regarding foreigners has been changed several times during the last couple of years. However, the major changes took place during spring 2000 and spring 2001. The last changes concern detention of asylum seekers.

Below follows a general description of the provisions in the Danish law concerning detention of asylum seekers. Thereafter the specific law proposal concerning detention of asylum seeker will be scrutinized and the chapter will end with some concluding remarks.

3.2 Detention of asylum seekers under the Aliens Act

Deprivation of liberty concerning asylum seekers is common in Denmark, especially in those cases where criminal law is not applicable. According to statistics of the 30th of September 1999, 5.044 aliens were deprived their liberty in accordance with articles 35 and 36 of the UDL.⁷⁶ Detention of asylum seekers could be actualised in three cases; when the asylum seeker is in a position when he or she is going to be returned to the country of origin,

⁷⁴ Vedsted-Hansen, Jens, "Grundbegreber og hovedsondringer i udlaenderretten", in Christensen, Lone B. among others (eds.), *Udlaenderret*, 2000, p. 3.

⁷⁵ The Aliens Act No. 226 of 8 June 1983, entered into force 8 June 1983.

⁷⁶ See Kjaer, Kim U., "Frihedsberovelse og andre tvangsforanstaltninger", in Christensen, Lone B. among others (eds.), *Udlaenderret*, 2000, p. 748.

during the procedure and when the asylum seeker is in the position to be expelled.

When talking about asylum seekers in a position to be returned to the country of origin, the provision in article 36.1.1 UDL can be actualised. This provision is used as a legal basis to detain an alien when other measures are insufficient, and to secure the possibility to refuse an alien entry to the country. The article is further used to expel an alien, to send an alien back to a safe third country, according to the Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the Community⁷⁷ (hereinafter the Dublin Convention), or when an alien does not have the permission to stay in Denmark. In article 34 UDL, it is stated that until a decision is taken an alien who is going to be expelled, rejected entry to the country, transferred to an other country or to the country of origin, can be imposed by the police to give his passports and travel documents to the police, come to meetings at the police station or live at an allotted place etc. The measures in article 34 UDL has to be insufficient before the necessity of deprivation of liberty can come into question. In each case there must be a careful evaluation of whether the detention can be used or not, and the intention was that this article should only be applied under exceptional circumstances, but in reality the deprivation of liberty stated in article 36.1.1 is frequently used.⁷⁸

The decision to deprive a person his or her liberty is taken by the Danish police, but the detained person has to be brought before a judge within three days from the moment where a person is detained, to investigate whether the detention is lawful.⁷⁹ The lawfulness of the detention shall be reviewed every fourth week according to article 37 UDL. This provision is in conformity with the ECHR article 5.3, which states that a detained person shall be brought promptly before a judge within a reasonable time. In accordance with case law from the European Court of Human Rights, a person cannot be detained for more than 30 days without his case being tried again.⁸⁰

In 1995, a provision concerning deprivation of liberty of asylum seekers in the manifestly unfounded procedure, was incorporated in article 36.1.3 UDL. The manifestly unfounded procedure is a fast procedure where applications from people from the Baltic- and Eastern European countries are examined. The background to this special procedure was the Danish authorities bad experience with a few young men, from these countries, who in 1994 tried to destroy and delay the asylum procedures by repeatedly not

⁷⁷ Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the Community, Dublin, 15 June 1990, OJ (1997) C 254/1, entered into force September 1, 1997.

⁷⁸ Kjaer, Kim U., "Frihedsberovelse og andre tvangsforanstaltninger", in Christensen, Lone B. among others (eds.), *Udlaenderet*, 2000, p. 757ff.

⁷⁹ See articles 36 and 37 UDL.

⁸⁰ *Lamy v. Belgium*, Judgment of 3 March 1989, European Court of Human Rights, Series A 151, paragraph 29.

appearing at the meetings with the authorities and committing a great share of the crimes in the area around the asylum centres.⁸¹

According to the national police and the Ministry of Internal Affairs, the deprivation of liberty was a necessary condition to guarantee that the asylum seekers are present during the procedure.⁸² The intention was also to keep the asylum procedure short, no longer than one week, to prevent crimes at the asylum centres and to found a sort of “signal effect”, where less people with manifestly unfounded applications tried to get asylum in Denmark.⁸³ The procedure and article 36.1.3 UDL and the practise connected to it was criticised for being inconsistent with Denmark’s international obligations, namely article 5 and article 14 of the ECHR, since the detention of men from certain countries can be seen as discriminatory.⁸⁴ It should be mentioned that the rule laid down in article 36.1.3 UDL, can be seen as principally subsidiary to the provision in article 34 UDL.

In the second section of article 36 UDL it is settled that the asylum seeker can be deprived his liberty, if he or she does not follow the Danish Immigration Service’s (*Udlaendingestyrelsen*) decision to live at one of the Danish Red Cross Centre, or if he or she without valid reason, does not appear at the meetings at the police or at the Danish Immigration Service or is violent or threatening against the personnel at the Red Cross Centre. The provision in the second section of article 36 UDL was inserted in the law with the purpose to prevent that asylum applications would take too long time due to the fact that asylum seekers sometimes sabotage the procedure when they do not appear at the meetings with the authorities. The deprivation of liberty is provided to be durable for a fairly short time, from a couple of hours to not more than twenty-four hours, and the only purpose of the detention is to secure the presence of the asylum seeker in the procedure. In practise this rule is relatively seldom used.⁸⁵

⁸¹ Kjaer, Kim U., ”Frihedsberovelse og andre tvangsforanstaltninger”, in Christensen, Lone B. among others (eds.), *Udlaenderet*, 2000, p. 760f.

⁸² Kjaer, Kim U., ”Frihedsberovelse og andre tvangsforanstaltninger”, in Christensen, Lone B. among others (eds.), *Udlaenderet*, 2000, p. 761.

⁸³ Kjaer, Kim U., ”Frihedsberovelse og andre tvangsforanstaltninger”, in Christensen, Lone B. among others (eds.), *Udlaenderet*, 2000, p. 761.

⁸⁴ Kjaer, Kim U., ”Frihedsberovelse og andre tvangsforanstaltninger”, in Christensen, Lone B. among others (eds.), *Udlaenderet*, 2000, p. 761f.

⁸⁵ Kjaer, Kim U., ”Frihedsberovelse og andre tvangsforanstaltninger”, in Christensen, Lone B. among others (eds.), *Udlaenderet*, 2000, p. 751.

3.3 The Law Proposal Concerning Detention of Asylum Seekers

3.3.1 Background

During autumn 2000 the Danish Government imposed several measures towards the increasing number of criminal acts among asylum seekers. For example, a special centre for fast asylum procedures was established at the Sandholm Centre, where criminal asylum seekers and asylum seekers from safe countries of origin are lodged. Except from these measures the police initiatives in and around the Sandholm Centre were intensified.⁸⁶ Statistics from the national police, from 2000, showed that 5.107 asylum seekers were accused for actions against the criminal law and other special laws.⁸⁷ According to statistics from March to December 2000, the Danish Red Cross found out that there were 175 occasions of violence between the habitants at the asylum centres, 81 incidents of threats respectively 83 occasions of harassment between the habitants and 32 incidents of violence against the personnel at the reception centres.⁸⁸

The Danish authorities, dealing with issues related to aliens, also considered it a great problem that some asylum seekers made the asylum procedure very difficult and slow. In those cases, the Danish authorities meant that there could be a presumption that the asylum seeker in question did not have a real reason to apply for asylum and that delays and complications in the procedure consequently is detrimental both in relation to the general confidence in the asylum system and in relation to other asylum seekers.⁸⁹ According to the Danish Government, the development of the asylum procedures and the statistics were not acceptable even though measures were implied in autumn 2000, and the conclusion was that other measures had to be taken. In February 2001, the Danish Government, proposed changes in the existing Aliens Act, especially concerning criminal and uncooperative asylum seekers.

3.3.2 Content of the Proposal

The proposed law implied, in short, that asylum seekers, who are administratively expelled because of criminal acts and asylum seekers that put considerable obstacles in the way of the investigation of the asylum procedure,

⁸⁶ Lovforslag nr. L 191 af 20. marts 2001, Forslag til Lov om ændring af udlaendingeloven (Frihedsberovelse af asylansogere og administrativ udvisning m.v.), p. 4.

⁸⁷ Lovforslag nr. L 191 af 20. marts 2001, Forslag til Lov om ændring af udlaendingeloven (Frihedsberovelse af asylansogere og administrativ udvisning m.v.), p. 4.

⁸⁸ The Danish Red Cross cited in Lovforslag nr. L 191 af 20. marts 2001, Forslag til Lov om ændring af udlaendingeloven (Frihedsberovelse af asylansogere og administrativ udvisning m.v.), p. 4.

⁸⁹ Lovforslag nr. L 191 af 20. marts 2001, Forslag til Lov om ændring af udlaendingeloven (Frihedsberovelse af asylansogere og administrativ udvisning m.v.), p. 4f.

should be deprived their liberty. The main purpose of the proposed changes in the Danish alien law was, according to the Danish Government, to counteract crimes among the asylum seekers and to protect other asylum seekers at the reception centres against violence and thereby also protect the law and order at the centre. The law proposal also implied that the provisions concerning administrative expulsion, in the Danish Aliens Act, would be applicable in those cases where asylum seekers appear violent or threatening towards the personnel or other asylum seekers at the centre, where breaches of the criminal law concerning violent acts occurred and when there were breaches against the weapon law.⁹⁰

The Danish Government meant that it was of decisive importance that asylum seekers, who stay in the country, comply with existing Danish laws and rules. It was also of importance that law and order is preserved at the reception centres and that those rules which are of concern regarding the asylum procedure, are complied with, especially those rules which imply that the asylum seeker must co-operate in the investigation of the asylum case. If these rules were not complied with, the Government put forward that actions would be taken and that there would be consequences immediately for the asylum seeker.⁹¹

3.3.3 The Specific Provisions

3.3.3.1 Article 25 – Administrative Expulsion

Article 25 UDL states that an alien can be expelled if he or she is a danger to the public security. As stated in article 25.a.1 UDL an alien can be expelled if he commits crimes such as theft, deception, blackmail, usury and similar offences. The proposal added that crimes such as causing fear for oneself or somebody else's life, committing threats, assaults and appearing violent towards the personnel or other asylum seekers at the reception centre, are grounds that could cause expulsion. This was said to promote that law and order are upheld at the centre.⁹²

According to the practise of the Danish Immigration Service, an alien can be administratively expelled if he or she has committed shop theft for a value that exceeds 500 Danish crowns. If an asylum seeker is subjected to two warnings for a petty crime ("*bagatell forseelse*"), for less than 500 Danish

⁹⁰ Lovforslag nr. L 191 af 20. marts 2001, Forslag til Lov om ændring af udlændingeloven (Frihedsberovelse af asylansøgere og administrativ udvisning m.v.), p. 5.

⁹¹ Lovforslag nr. L 191 af 20. marts 2001, Forslag til Lov om ændring af udlændingeloven (Frihedsberovelse af asylansøgere og administrativ udvisning m.v.), p. 4.

⁹² Lovforslag nr. L 191 af 20. marts 2001, Forslag til Lov om ændring af udlændingeloven (Frihedsberovelse af asylansøgere og administrativ udvisning m.v.), p. 5.

crowns the asylum seeker will face an administrative expulsion.⁹³ The Danish Government proposed that the same limits should be applicable in relation to article 25.a.1 UDL.⁹⁴ The changes in article 25.a.1 UDL are an extension of the applicability of the administrative expulsion. It is precarious that the administrative expulsion, which is a decision not taken by a judge but by the police, and which affects people in a serious way, is expanded by the law proposal.

3.3.3.2 Article 35 – Effective Expulsion

In article 35 UDL there is an extra section added. The purpose of this article is to secure an effective realization of a judgement concerning expulsion.⁹⁵ Accordingly, it is established in article 35.2 UDL that an alien that has applied for residence permit and that is expelled after a judgement in accordance with articles 22-24 UDL, can be detained to secure an effective fulfilment of the expulsion. Thus, the detention can be actualised after the point of time where the asylum seeker has served his or her sentence for a crime. Since the detention can stretch out over the initial sentence, the detention can easily get the character of an additional penalty, or double sanction, which can be as infringing as, or even more infringing than, the criminal sanction.⁹⁶

3.3.3.3 Article 36 – Detention of Criminal and Uncooperative Asylum Seekers

In article 36 of the UDL there are two more sections added to the provision, namely section three and four. The purpose of the new article 36.3 UDL is to secure an effective fulfilment of an administrative decision of expulsion and the purpose of the new article 36.4 is to secure an effective procedure of the asylum cases as well as an effective expulsion from the country. Generally, it was said, that detention should only be adopted when other, not as infringing, measures are insufficient to achieve the same result.⁹⁷

3.3.3.3.1 Article 36.3 - Detention of Criminal Asylum Seekers

⁹³ Lovforslag nr. L 191 af 20. marts 2001, Forslag til Lov om ændring af udlaendingeloven (Frihedsberovelse af asylansøgere og administrativ udvisning m.v.), p. 11.

⁹⁴ Lovforslag nr. L 191 af 20. marts 2001, Forslag til Lov om ændring af udlaendingeloven (Frihedsberovelse af asylansøgere og administrativ udvisning m.v.), p. 11.

⁹⁵ Lovforslag nr. L 191 af 20. marts 2001, Forslag til Lov om ændring af udlaendingeloven (Frihedsberovelse af asylansøgere og administrativ udvisning m.v.), p. 8.

⁹⁶ Horingssvar vedrørende lovforslag nr. L 191 af 20. marts 2001 om ændring af udlaendingeloven, Dansk Flygtningehjaelps horingssvar, p. 6.

⁹⁷ Horingssvar vedrørende lovforslag nr. L 191 af 20. marts 2001 om ændring af udlaendingeloven, Dansk Rode Kors horingssvar, p. 7.

According to the new article 36.3 UDL, an asylum seeker that is expelled in conformity with article 25.a.1 UDL, can be deprived his liberty to secure an effective fulfilment of the expulsion. This gives the opportunity to deprive an asylum seeker, who has committed crimes, his or her liberty during the rest of the asylum procedure. The time for an asylum procedure, in Denmark, is usually between six and twelve months.⁹⁸ Thus, it is notable that the Danish Government wants to impose the possibility to detain a person during the remaining part of the asylum procedure, since the crimes committed that cause expulsion in such cases, generally are crimes where the sanction is probation, fines or short imprisonments.⁹⁹ It is even more remarkable that in connection to this proposal there are no demands or suggestions, from the Danish Government, of a shorter asylum procedure.¹⁰⁰

The longer a detention of an asylum seeker who has committed a crime that corresponds to a relatively short penalty, the more it distances from the originally cause for the detention, which is to secure the presence of the asylum seeker with the purpose to effectuate an expulsion. The detention of the asylum seeker can consequently get the character as a double penalty that are more interfering than the penalty itself and, which is very important, only affect asylum seekers, but not any national law offenders.

According to the proposal an asylum seeker shall be deprived his liberty in *all* cases where he or she is administrative expelled in accordance with article 36.3 UDL. The only exceptions are when the authorities practise its possibility to give refugee status to a certain group of people or expulsions cannot be carried out because of certain humanitarian conditions.¹⁰¹ The normal assessment whether the person is likely to abscond is consequently not carried out. The Danish Government meant that the purpose of article 36.3 UDL is to secure that asylum seekers, that are going to be expelled, should be restrained from travelling in the country freely and that the other, not as infringing, measures in article 34 UDL could not be relevant.¹⁰² As stated in article 36.1 UDL, detention is of subsidiary character in relation to the measures in article 34 UDL. To deviate from that legal principle in article 36.3 UDL is probably inconsistent with both Danish and international law.

⁹⁸ Lovforslag nr. L 191 af 20. marts 2001, Forslag til Lov om ændring af udlaendingeloven (Frihedsberovelse af asylansogere og administrativ udvisning m.v.), p. 7.

⁹⁹ See article 25.1.a UDL.

¹⁰⁰ Horingssvar vedrorende lovforslag nr. L 191 af 20. marts 2001 om ændring af udlaendingeloven, Dansk Flygtningehjaelps horingssvar, p. 6.

¹⁰¹ Lovforslag nr. L 191 af 20. marts 2001, Forslag til Lov om ændring af udlaendingeloven (Frihedsberovelse af asylansogere og administrativ udvisning m.v.), p. 23f. See also Notat vedrorande Lovforslag nr. L. 191/2000-01 til lov om ændring af udlaendingeloven (frihedsberovelse af asylansogere og administrativ udvisning m.v.) from Det Danske Center for menneskerettigheder, p. 4.

¹⁰² Lovforslag nr. L 191 af 20. marts 2001, Forslag til Lov om ændring af udlaendingeloven (Frihedsberovelse af asylansogere og administrativ udvisning m.v.), p. 6f.

3.3.3.3.2 Article 36.4 - Detention of Uncooperative Asylum Seekers

According to article 36.4 UDL, the asylum seeker can be detained to secure an effective expulsion, if the measures in article 34 UDL (see above) are insufficient and the asylum seeker through his behaviour try to withhold information important for the asylum procedure e.g. to oppose to inform the authorities about his nationality, travel route etc., or in any other similar way fail to contribute to the investigation of the case or without reasonable grounds fail to appear at meetings with the police or the Danish Immigration Service.

The intention of the amendment was to avoid that asylum seekers oppose the asylum procedure and as a consequence prolong their residence in the country, which in turn would increase the asylum seekers opportunities to commit crimes and make use of the economic benefits from the Danish authorities.¹⁰³

It is common knowledge that most of the people that seek asylum in Europe have to use human smugglers to escape persecution in their home countries. In these situations the asylum seekers usually have to throw their identification documents away and during the escape, they are hidden and consequently unaware of the travel route. Hence, even if the asylum seeker wants to co-operate with the authorities he or she just might not be able to do so. This should not be a burden for the asylum seeker. It has therefore been suggested, to the authorities from the Danish Red Cross, that detention only should be effectuated when the asylum seeker continues to give the authorities incorrect information about his identity, travel route and so forth.¹⁰⁴

3.3.3.3.3 Common remarks on article 36

According to the law proposal, article 36 UDL should not be applied on asylum seekers if there would be considerable probability that the asylum seeker would gain refugee status.¹⁰⁵ This does not imply that there will be an independent evaluation of the individual asylum seeker's grounds. Instead there will only be an omission of the detention if the asylum seeker is of a certain nationality or belongs to a special group of population, wherefrom all, or at least a great amount of people, are considered to gain refugee status

¹⁰³ Lovforslag nr. L 191 af 20. marts 2001, Forslag till Lov om ændring av udlaendingeloven (Frihedsberovelse af asylansogere og administrativ udvisning m.v.), p. 10.

¹⁰⁴ Horingssvar vedrorende lovforslag nr. L 191 af 20. marts 2001 om ændring af udlaendingeloven, Dansk Rode Kors horingssvar, p. 8.

¹⁰⁵ Lovforslag nr. L 191 af 20. marts 2001, Forslag till Lov om ændring av udlaendingeloven (Frihedsberovelse af asylansogere og administrativ udvisning m.v.), p. 24.

according to the practice at the Danish Immigration Service or the Refugee Board.¹⁰⁶

It is said in the proposal that the length of the detention is dependant on an individual evaluation of the circumstances in each case, such as how long the asylum procedure takes and if the asylum seeker cooperates in the investigation.¹⁰⁷

3.4 Concluding Remarks

It is remarkable that despite the fact that several instances have made critical comments on the law proposal, the Danish Government neglected many of the very important views that were presented, and on 7 June 2001 the new law regarding changes in the Aliens Act, concerning asylum seekers came into force¹⁰⁸. Worth mentioning is that the instances, such as the Danish Human Rights Centre, the Refugee Council, the Refugee Board, the Danish Red Cross, the Board for Ethnic Equality and the UNHCR Regional Office for the Baltic and Nordic Countries and others, only had one week or less to respond to the proposal, before it was debated in the Parliament (*Folketinget*).¹⁰⁹ Thus, the comments made by the different instances hardly had any impact on the legislation and the instances found it very difficult to make a thorough and serious survey of the law proposal during such a short period of time.¹¹⁰

One of the reasons for the short responding time is probably the political climate in Denmark. The asylum issue was one of the most important questions in the election debate in Denmark. To win votes, the political parties had to show their positions in the political debate through actions. For the ruling parties it was important that they showed the Danish people that they were capable to take immediate steps against an increasing amount of criminal asylum seekers.

¹⁰⁶ Lovforslag nr. L 191 af 20. marts 2001, Forslag till Lov om ændring af udlaendingeloven (Frihedsberovelse af asylansogere og administrativ udvisning m.v.), p. 24.

¹⁰⁷ Notat vedrorande Lovforslag nr. L. 191/2000-01 til lov om ændring af udlaendingeloven (frihedsberovelse af asylansogere og administrativ udvisning m.v.) from Det Danske Center for menneskerettigheter, p. 5.

¹⁰⁸ Lov om ændring af udlaendingeloven nr 458 af 07/06/2001, (Frihedsberovelse af asylansogere og administrativ udvisning m.v.), entered into force 7 June 2001.

¹⁰⁹ See for example Notat vedrorande Lovforslag nr. L. 191/2000-01 til lov om ændring af udlaendingeloven (frihedsberovelse af asylansogere og administrativ udvisning m.v.) from Det Danske Center for menneskerettigheter, p. 1 and Horingssvar vedrorende lovforslag nr. L 191 af 20. marts 2001 om ændring af udlaendingeloven, Naevnet for etnisk ligestillings horingssvar, p. 2.

¹¹⁰ Notat vedrorande Lovforslag nr. L. 191/2000-01 til lov om ændring af udlaendingeloven (frihedsberovelse af asylansogere og administrativ udvisning m.v.) from Det Danske Center for menneskerettigheter, p. 1 and Horingssvar vedrorende lovforslag nr. L 191 af 20. marts 2001 om ændring af udlaendingeloven, Naevnet for etnisk ligestillings horingssvar, p. 2.

Generally, the instances were positive over the proposal from the government to prevent the growing criminal acts among the asylum seekers.¹¹¹ As the Danish Red Cross commented: “it is of great importance, both for the people’s continuing support to the asylum system in Denmark, and in relation to the tolerance for refugees in Denmark, that there will be taken effective measures towards those aliens that misuse the asylum system”¹¹². According to the Danish Human Rights Centre the detention of asylum seekers in Denmark are too widely used and the focus should instead be on the shortening of the time of the asylum procedure. An asylum procedure that takes six months or more is absolutely too long when one asylum case, taken alone, does not demand more work effort than one to two workdays. With more effective coordination and planning between the different authorities the asylum procedure could be shortened considerably. If the time for the asylum procedure would be shortened then the time for the detention would decrease and consequently the period of detention and the penalty for the crime committed would be in proportion to each other.¹¹³

¹¹¹ Notat vedrorande Lovforslag nr. L. 191/2000-01 til lov om ændring af udlændingeloven (frihedsberovelse af asylansøgere og administrativ udvisning m.v.) from Det Danske Center for menneskerettigheder, p. 1.

¹¹² Horingssvar vedrorende lovforslag nr. L 191 af 20. marts 2001 om ændring af udlændingeloven, Dansk Røde Kors horingssvar, p. 1, p. 7.

¹¹³ Notat vedrorande Lovforslag nr. L. 191/2000-01 til lov om ændring af udlændingeloven (frihedsberovelse af asylansøgere og administrativ udvisning m.v.) from Det Danske Center for menneskerettigheder, p. 2f.

4 Analysis of the Danish Amendment Concerning Detention of Asylum Seekers

This chapter focus on the aspect whether the new Danish law amendment, concerning detention of asylum seekers, is in conformity with international laws and standards. The chapter begins with a short presentation of the areas that perhaps could be seen as inconsistent with international human rights instruments. The first two areas of concern are dealt with very briefly since they are being further scrutinized in the second and third section of this chapter. Following this, an account of the concept of public order, both in international law as such and in refugee law will be touched upon. The third section of this chapter deals with the principle of proportionality and whether the Danish amendment is in conformity with this.

4.1 Areas of Concern

4.1.1 Application of Public Order with a too Low Threshold

According to article 25 UDL an alien can be expelled if he or she is a danger to public order. The new article 25.a.1 UDL extends the applicability of expulsion under some circumstances, such as for example when the asylum seeker has committed minor offences or appeared violent against the personnel at the reception centres. As mentioned above, it is stated in article 36.3 UDL that an alien expelled according to article 25.a.1 UDL could be detained to secure an effective expulsion. In short the amendment means that asylum seekers that are administrative expelled because of criminality can be detained pending the expulsion order.

The Danish Government expresses in the law proposal that the new articles 35.2 (effective realization of an expulsion judgment through detention) and 36.3 UDL are in conformity with paragraph (b) of the ExCom Conclusion No.44, where it is stated that detention may be resorted to protect national security or public order. This is a sort of misinterpretation of the ExCom Conclusion No. 44, since that provision probably assign to more severe crimes. The threshold in the amendment, which permits detention of asylum seekers pending the extradition of an expulsion order, is probably set too low. A person who, for example, has been convicted of criminal theft above 500 Danish Crowns or who is subjected to two warnings for a petty crime (*“bagatell forseelse”*), for less than 500 Danish Crowns shall, according to article 25.a.1 UDL in conjunction with article 36.3 UDL, be considered a risk to public order and therefore detained pending expulsion.

The words “public order” are not defined in article 32 of the 1951 Convention or in the ExCom Conclusion No. 44. Neither the preparatory works of the 1951 Convention nor the state practise do precisely define public order, but the expression could almost certainly be interpreted to imply that the offence must be of a serious nature.¹¹⁴ To found detention of an asylum seeker on grounds of petty crimes for reasons of public order is most likely a too broad interpretation of international standards.¹¹⁵ The concept of public order and the amendment’s conformity with international instruments and standards will be discussed later on.

4.1.2 Length of Detention

Linked to the low threshold for detaining an asylum seeker is the length of the detention. According to the preparatory work to the law amendment, article 36.3 UDL gives the right to detain an asylum seeker, who is going to be expelled, during the whole asylum procedure. This means that the detention can last for three to six months and in some cases even longer. Such long periods of detention are probably disproportionate and it has, as described earlier, been put forward in several documents, such as the 1999 Guidelines (paragraph 5), the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment regarding the situation of immigrants and asylum seekers (principle 7) and the ECRE Position Paper on the Detention of Asylum Seekers, that a maximum period of detention should be established by law.

The European Court of Human Rights has developed a jurisprudence concerning time limits for detention of persons pending deportation and extradition. According to the developed practise, detention in such situations becomes arbitrary and disproportionate if the deportation or extradition procedures are not conducted with due diligence.¹¹⁶ The length of detention will also be scrutinized further below.

¹¹⁴ Grahl Madsen, Atle, “Expulsion of Refugees”, in Nordisk Tidsskrift for International Ret, Vol. 33 (1963) 41-50, in *The Land Beyond: Collected Essays on Refugee Law and Policy* by Atle Grahl-Madsen, Macalister-Smith, Peter and Alfredsson, Gudmundur (eds.), 2001, p. 8ff.

¹¹⁵ Preliminary observations with regard to the Danish government’s proposal to amend the Danish Aliens Act regarding Detention Practices for Asylum Seekers, from UNHCR Regional Office for the Baltic and Nordic Countries, 26 March 2001, concerning Law proposal No. L 191 20 March 2001.

¹¹⁶ See *Bozano v. France*, Judgment of 18 December 1986, European Court of Human Rights, Series A 111 and *Quinn*, Judgment of 22 March 1995, European Court of Human Rights, Series A 311.

4.1.3 Continued Imprisonment of Convicted Criminals Pending Removal

As shown above, detention carried out in accordance with article 35.2 and article 36.3 UDL can get the character of a double penalty, since asylum seekers who have been sentenced to imprisonment for a crime, and are going to be expelled from Denmark after the completion of the sentence, are supposed to remain in prison pending the execution of the expulsion order.

This so-called double penalty does not apply to national law offenders. It could be seen as a discriminatory treatment that asylum seekers can be imprisoned for longer periods than Danish citizens having been convicted for the same crime and from the beginning having received the same sentence. The provisions in article 36.3 and article 35.2 UDL can thus be in conflict with article 14 ECHR (prohibition of discrimination) in conjunction with article 5 ECHR, since such a double penalty would be a detention carried out in a discriminatory way. As mentioned above, article 1 ECHR clearly states that the rights set out in the Convention are guaranteed to everyone within the jurisdiction of the state. This means that Denmark, as a state party to the ECHR, has an obligation to secure the rights set forth in the ECHR not only to Danish citizens but also to asylum seekers. In this context Denmark does not fulfil this obligation.

The prohibition of discrimination is also to be found in article 2 of the ICCPR, a so-called “umbrella clause”, which basis can be found in article 2.1 of the UDHR. One of the aims of article 2.1 UDHR was to achieve equal treatment of nationals, aliens and stateless persons under the Covenant. If a distinction is permissible or discriminatory depends on whether the parties are in a comparable situation, whether unequal treatment is based on reasonable and objective criteria and whether the distinction is proportional in a given case.¹¹⁷ These criteria correspond to those in comparable conventions, for example ECHR.¹¹⁸

When a national criminal and a criminal asylum seeker are penalized for the same offence with an equal sentence, they are in a comparable situation. The difference is that the asylum seeker is going to be expelled. To continue the imprisonment of the asylum seeker can neither be seen as reasonable nor objective, if the sole purpose is to execute an expulsion order. An asylum seeker could only be deprived his or her liberty for that purpose if there is a serious risk of absconding, or if he or she is a risk to public order or national security, and in those cases the asylum seeker should not be imprisoned, but may be kept in a special non-penalty facility, otherwise the prolonged pen

¹¹⁷ Nowak, Manfred, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, 1993, p. 43ff.

¹¹⁸ Nowak, Manfred, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, 1993, p. 43ff.

alty could be seen as disproportionate.¹¹⁹ The so-called double penalty, as the Danish Government has imposed is accordingly discriminatory towards asylum seekers, and violate article 14 in conjunction with article 5 of the ECHR and article 2 of the ICCPR. Denmark shall secure the asylum seekers' right to not be treated in a discriminatory manner.

Furthermore, the right to not be treated in a discriminatory way is established in several other international documents and standards, for example it is mentioned in paragraph 5 in the 1999 Guidelines and in ECRE's Position Paper on the Detention of Asylum Seekers. In the resolution named Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, it is laid down in principle 3 that during detention there shall be no derogation from any human rights of persons and consequently all the rights set forth in international instruments and standards should be obeyed. The imposed provisions, in article 35.2 UDL and article 36.3 UDL, consequently also violate, the above-mentioned, international standards.

It has also been adhered that the provision in article 35.2 UDL lacks a careful weighing of the proportionality between respect for the personal liberty and the society's interest in detaining a person for the purpose to accomplish an expulsion.¹²⁰ A deprivation of liberty is a serious interference in the personal freedom and detention should be used as limited as possible. It is therefore remarkable that it is stated in the proposal that article 35.2 shall be utilized in an extensive way.¹²¹ This implies that there will be an almost automatic use of detention to secure an effective realization of the judgement concerning expulsion. This is neither consistent with the rule to use less infringing measures than detention when possible, which is stressed by the Human Rights Committee in its General Comments to article 12 of the ICCPR, in Guideline 3 of the 1999 Guidelines and in paragraph 26 in the Standing Committee's note "Detention of asylum-seekers and refugees: the framework, the problem and recommended practice", nor with the principle of proportionality.

In this perspective it is also questionable whether such "double penalty" as mentioned above is really necessary. In the law proposal, the Danish Government does not require any kind of evaluation whether the detention is necessary in relation to the purpose that article 35.2 UDL and 36.3 UDL are supposed to achieve. It is only mentioned that the detention should last until the execution of the expulsion is carried out. This could probably be seen as

¹¹⁹ Preliminary observations with regard to the Danish government's proposal to amend the Danish Aliens Act regarding Detention Practices for Asylum Seekers, from UNHCR Regional Office for the Baltic and Nordic Countries, 26 March 2001, concerning Law proposal No. L 191 20 March 2001, p. 2.

¹²⁰ Horingssvar vedrørende lovforslag nr. L 191 af 20. marts 2001 om ændring af udlaendingeloven, Dansk Flygtningehjaelps horingssvar, p. 6 and Notat vedrorande Lovforslag nr. L. 191/2000-01 til lov om ændring af udlaendingeloven (frihedsberovelse af asylansogere og administrativ udvisning m.v.) from Det Danske Center for menneskerettigheter, p. 4.

¹²¹ Lovforslag nr. L 191 af 20. marts 2001, Forslag til Lov om ændring av udlaendingeloven (Frihedsberovelse af asylansogere og administrativ udvisning m.v.), p. 8.

arbitrary and therefore inconsistent with the 1999 Detention Guidelines, where it is stated that the detention should not be carried out in an arbitrary way. Further, there should be an assessment whether the detention is necessary and account should then be taken whether the detention is reasonable and if it is proportionate in relation to the aims that are going to be achieved. If the detention can be judged necessary it should only be imposed in a non-discriminatory manner, for a minimal period of time.¹²²

The prohibition of arbitrariness is also emphasised in the Standing Committee's note "Detention of asylum-seekers and refugees: the framework, the problem and recommended practice" and in the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment regarding the situation of immigrants and asylum seekers. The above-mentioned detention can only under special circumstances, such as when there is a serious risk that the expulsion order cannot be carried out properly, be judged necessary and consequently not arbitrary.

4.1.4 Detention of Uncooperative Asylum Seekers

As of today it is a grand problem that asylum seekers repeatedly fail to turn up for interviews without a reasonable explanation, and refuse to provide information as to their nationality, identity, flight route etc. Consequently, many countries detain these persons during the asylum procedure to speed up the procedure, but more importantly, to make the asylum seekers more cooperative and deter other asylum seekers for likewise behaviour. Detention is only applicable when less restrictive measures are insufficient, although it has been shown that the practise of detaining uncooperative asylum seekers have been used more as a rule than an exception.¹²³ According to article 36.4 UDL an asylum seeker can be deprived his or her liberty, if he or she is going to be expelled and refuses to cooperate with the authorities and provide them with information important for the investigation or if the person in question fails to appear at the meetings.

It seems that article 31 of the 1951 Convention does not exclude restrictions or deprivation of liberty pending the asylum procedure, since such measures are administrative and not a penalty as such. The purpose of the detention must nevertheless be to investigate a person's identity or claimed history. In order to be legally correct the detention must therefore be deemed neces

¹²² UNHCR Revised Guidelines on Applicable Criteria and Standards Relating to the Detention of Asylum Seekers, Office of the United Nations High Commissioner for Refugees, Geneva, February 1999, Introduction and Guideline 3.

¹²³ Standing Committee of the Executive Committee of the High Commissioner's Programme on detention practices note Detention of asylum-seekers and refugees: the framework, the problem and recommended practice (EC/49/SC/CRP.13), 4 June 1999, paragraphs 14-15.

sary.¹²⁴ Detention of uncooperative asylum seekers can also be justified under article 5.1.b and 5.1.f of the ECHR, but according to article 5.1.b ECHR the asylum seeker should be released when he or she changes his or her attitude and satisfies the obligation to provide the authorities with information. Inherent in the ECHR is the principle of proportionality, which implies that there has to be a fair balance of interest between the protection of the individual and the interest of the whole community. The restrictions on the individual therefore have to be proportionate to the legitimate aim pursued.¹²⁵

The detention of asylum seekers, until the information needed for the status determination has been obtained, corresponds also to one of those circumstances for which UNHCR has indicated that detention may be justified. In its ExCom Conclusion No. 44, paragraph (b), it is stated that if necessary, detention might be resorted to determine refugee status when asylum seekers have misled the authorities or destroyed or used fraudulent travel or identity documents. This is also prescribed in Guideline 3 in the 1999 Guidelines.

The requirement that the detention must be necessary has been emphasised in the 1951 Convention, the ECHR, the ExCom Conclusion No.44 and in the 1999 Guidelines. In the evaluation whether the detention is necessary, there should be an assessment about whether all possible alternatives to detention have shown to be inappropriate. If the detention is unnecessary it will as a consequence be disproportionate to the legitimate aim pursued. After what has been stated, both in international instruments, such as the 1951 Convention and the ECHR, and in international standards it can be concluded that detention of uncooperative asylum seekers during the procedure according to article 36.4 UDL can be seen as legally correct, but the requirement of necessity has to be fulfilled in each case and detention should only be resorted to when other measures have shown to be insufficient.

In the preparatory work to UDL it says that article 36.4 UDL only should be used when the measures in article 34 UDL are unsatisfactory.¹²⁶ It is therefore questionable whether article 36.4 UDL will be so scarcely used as proposed, since the requirement of necessity is not clearly defined and the authorities could rather easily motivate that detention should be used instead of other monitoring measures. Another important factor in the case of detention of uncooperative asylum seekers is the aspect of the length of detention, but it will be discussed under chapter 4.3.2 below.

¹²⁴ Landgren, Karin, "Comments on the UNHCR Position on Detention of Refugees and Asylum Seekers", in *Detention of Asylum Seekers in Europe: Analysis and Perspectives*, Hughes, Jane and Liebaut, Fabrice (eds.), 1998, p. 145ff.

¹²⁵ Starmer, Keir, *European Human Rights Law, The Human Rights Act 1998 and the European Convention on Human Rights*, 1999, p. 169ff.

¹²⁶ Lovforslag nr. L 191 af 20. marts 2001, Forslag till Lov om ændring af udlændingeloven (Frihedsberovelse af asylansøgere og administrativ udvisning m.v.), p. 10.

It must be emphasized that the fact that an asylum seeker has entered the country illegally, e.g. with false documentation, should not alone result in detention, as long as the person immediately turns to the authorities when entering the country and in addition assists loyally in the investigation. A detention in such case would be inconsistent with article 31.2 of the 1951 Convention, where it is stated that under the circumstances when refugees enter a country illegally or with false papers it should not be criminalized as such.

As is stated in the proposal there must be an individual evaluation in each case of detention.¹²⁷ That is in conformity with the principle of proportionality. In the comments to the law proposal, attention was drawn to the fact that for some asylum seekers a detention can be a particular burden. Some asylum seekers may have a subjective fear of persecution, as a result of torture in the persecuting country, which can lead to distrust even towards the Danish authorities. This subjective fear can be of such grand dimension that it can be very difficult for the asylum seeker to co-operate in the investigation and therefore it is important to take the personal circumstances into consideration in each case.¹²⁸

In conclusion it could be said that the new Danish provision, in article 36.4 of the UDL, about uncooperative asylum seekers are in conformity with international law and standards, at least when looking at the preparatory work to the article. The future will tell whether or not the practise emanating from article 36.4 UDL will widen the field of application under the article and restrict the asylum seekers freedom of movement in an unacceptable way.

4.2 The Concept of Public Order

As shown in chapter 3.3.3.1, the Danish amendment contains provisions relating to administrative expulsion of aliens based on public order grounds, which result in automatic administrative detention. The comments below focus on the issue of public order as a ground for deprivation of liberty and do not deal with the measure of expulsion as such. The Danish amendment raises the question as to whether a habitual author of petty offences or a person with an anti-social or reckless attitude may be labelled as a "criminal asylum seeker", considered as a danger to public order justifying detention, irrespective of the criminal conviction.

¹²⁷ Lovforslag nr. L 191 af 20. marts 2001, Forslag till Lov om ændring af udlaendingeloven (Frihedsberovelse af asylansøgere og administrativ udvisning m.v.), p. 10.

¹²⁸ Horingssvar vedrørende lovforslag nr. L 191 af 20. marts 2001 om ændring af udlaendingeloven, Dansk Rode Kors horingssvar, p. 9.

4.2.1 Public Order in International Human Rights Law

Public order as a ground for detention is mentioned in several human rights instruments, such as the ICCPR and the ECHR. In these instruments it is article 12 of the ICCPR and article 2.3 of the 4th protocol to the ECHR, which explicitly contain the right to freedom of movement, restricted by public order grounds that are applicable in relation to detention of asylum seekers. It is interesting to note that the right to liberty, as contained in article 9 of the ICCPR and article 5 of the ECHR, is not restricted by public order. Instead article 5 of the ECHR limits the right to liberty by an exhaustive list of cases under which deprivation of liberty is permitted. According to the Human Rights Committee, detention for reasons of public order, shall be controlled by the provisions in article 9.1 ICCPR. Some authors have argued that since the restriction of public order is foreseen in relation to the right to freedom of movement (article 12 of the ICCPR and article 2.3 of the 4th protocol to the ECHR) the review of proportionality in the case of detention should be done with a higher stringency whenever the right to liberty is at stake.¹²⁹

The restrictions in article 12.3 ICCPR, based on public order grounds, must be necessary and in conformity with the principle of proportionality. This implies that the restrictions must be appropriate to the legitimate aim pursued, they must be the least interfering measure and they must be proportionate to the interest that is supposed to be protected. The words “public order“ in ICCPR covers public safety and prevention of crime.¹³⁰

Already during the preparatory work to the Covenant it was feared that the vague concept of public order would offer a justification for nearly every restriction on freedom of movement, but a strict interpretation was placed on the necessity (proportionality) of the restriction and its compatibility with other rights of the Covenant (especially the prohibition of discrimination).¹³¹ There is no discussion in the preparatory work about the degree of crime that could justify detention, but in analogy with restrictions on the freedom of internal movement and residency the crime must be severe to constitute a threat to public order. Petty crimes would probably not be seen as a danger to the public order in accordance with the ICCPR.

The public order ground that is applicable on detention of refugees and asylum seekers is also laid down in article 2.3 of the 4th protocol to the ECHR.

¹²⁹ See Additional Comments on Danish draft legislation to amend the Danish Aliens Act, from UNHCR Regional Office for the Baltic and Nordic Countries, 3 April 2001, concerning Law proposal No. L 191 20 March 2001 and Nowak, Manfred, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, 1993.

¹³⁰ Human Rights Committee, Freedom of movement (Art.12):02/11/99. CCPR/C/21/Rev.1/Add.9, CCPR General comment 27. General Comments, Sixty-seventh session, 1999.

¹³¹ Nowak, Manfred, *U.N. Covenant on Civil and Political Rights: CCPR Commentary*, 1993, p. 212f.

When the European Court of Human Rights has interpreted restrictions on fundamental rights protected by the ECHR, such as the right to family life, right to freedom of expression, and more relevant in this case, right to liberty, the public order exception has not been defined more precisely.¹³² Instead, when national laws allow deprivation of liberty based on public order grounds, in this case prevention of crime, the margin of appreciation of states is circumscribed by objective criteria. The European Court of Human Rights invokes a strict interpretation of the rights in the Convention and thus a favourable balancing of individual rights against state interest. The margin of appreciation doctrine can be described as the court giving a certain amount of discretion for the states to decide whether a given course of action is compatible with the requirements in the ECHR.¹³³

In the case *Abdulaziz, Cabales and Balkandali v. the United Kingdom*¹³⁴ (concerning, among others, respect for family life and whether there was an interference by the public authorities in that right), the margin of appreciation doctrine was discussed. In the judgment it was stated that the state has “a wide margin of appreciation in determining the steps to be taken to ensure compliance with the convention with due regard to the needs and resources of the community and of individuals”¹³⁵. The scope of the margin of appreciation may however vary depending on what elements of a particular provision are at stake. Also the balancing of interests that should take place under the provision will depend upon the nature of the right that is at issue.¹³⁶ However, as stated by the court in the case *Moustaquim v. Belgium*¹³⁷, when the restrictions made by the authorities constitute an interference with the rights protected, they must be shown to be necessary and proportionate to the legitimate aim pursued.¹³⁸

Even though Denmark enjoys a margin of appreciation, when detaining asylum seekers on grounds of public order, it is constrained by objective criteria. There must consequently be a balancing of interests between the state and the individual and there will also be an assessment of whether the detention is proportionate and necessary with regard to the aim pursued.

¹³² See *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, Judgment of 28 May 1985, European Court of Human Rights, Series A 94 and *Moustaquim v. Belgium*, Judgment of 18 February 1991, European Court of Human Rights, Series A 193.

¹³³ Gomien, Donna, Harris, David and Zwaak, Leo, *Law and practise of the European Convention on Human Rights and the European Social Charter*, 1996, p. 215.

¹³⁴ *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, Judgment of 28 May 1985, European Court of Human Rights, Series A 94, paragraphs 67-68.

¹³⁵ *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, Judgment of 28 May 1985, European Court of Human Rights, Series A 94, paragraph 67. See also *Johnston and Others*, Judgment of 18 December 1986, European Court of Human Rights, Series A 112, paragraph 55.

¹³⁶ Gomien, Donna, Harris, David and Zwaak, Leo, *Law and practise of the European Convention on Human Rights and the European Social Charter*, 1996, p. 216f.

¹³⁷ *Moustaquim v. Belgium*, Judgment of 18 February 1991, European Court of Human Rights, Series A 193.

¹³⁸ *Moustaquim v. Belgium*, Judgment of 18 February 1991, European Court of Human Rights, Series A 193, paragraph 44.

Thus, we can draw the conclusion that the right to freedom of movement, restricted by public order for prevention of petty crimes, and especially when the restriction will be of such an infringing nature as detention, the margin of appreciation of the state is not very wide. Further, the analysis above, implies that a perpetrator of minor offences, considered as a criminal asylum seeker, according to article 36.3 UDL, and thus a threat to public order (article 25.1.a), is not in conformity with what normally would be considered as a danger to the public order according to article 12 ICCPR and probably not, after a careful balancing of interest, article 2.3 of the 4th Protocol. The aspect of whether the amendment is proportionate to the desired result will be discussed further below.

4.2.2 Public Order in International Refugee Law

The 1951 Convention refers to public order only in the expulsion provision, article 32, but all the same it provides some, but limited, guidance concerning the scope of public order in the context of detention of asylum seekers. What constitutes public order has not been clearly defined. Nevertheless, it seems like a refugee or an asylum seeker that builds up a criminal record or becomes a danger to the security of the state, would be considered as a person being a threat to public order. In other words, the person's behaviour must constitute a real threat to the maintenance of national security or public order. Probably, the threshold of the offence will necessarily be higher when the rights of a recognised refugee are at stake.¹³⁹

More guidelines about what constitutes threats to public order are to be found in other refugee law documents. As mentioned above it is stated in the ExCom Conclusion No. 44 that an asylum seeker may be detained to protect national security or public order. In UNHCR's 1999 Guidelines it is further prescribed, in Guideline 3, that when detaining a person to protect public order and national security, the detainee must have had a criminal background or connections, and these circumstances should constitute a risk to public order if allowed entry to the country.

Probably this does not mean that the asylum seeker must have criminal antecedents and/or affiliations to constitute a risk to public order, but that such criteria are circumstances that should be taken into consideration when evaluating the case. In each case there must be an assessment of all the circumstances that could constitute a threat to public order. The detention of asylum seekers is an exception and on the basis of an interpretation of public order in international human rights law, as well as refugee law, the exception seems to apply to individuals that are suspected of serious crimes. From

¹³⁹ Grahl Madsen, Atle, "Expulsion of Refugees", in *Nordisk Tidsskrift for International Ret*, Vol. 33 (1963), p. 41-50, in *The Land Beyond: Collected Essays on Refugee Law and Policy* by Atle Grahl-Madsen, Macalister-Smith, Peter and Alfredsson, Gudmundur (eds.), 2001, p. 8ff and Goodwin-Gill, Guy S., *The Refugee in international Law*, 1996, p. 303.

the above mentioned issues we can draw the conclusion that, article 36.3 UDL in conjunction with article 25.1.a UDL, is not in conformity with article 32 of the 1951 Convention and Guideline 3 of the 1999 Guidelines, since one minor offence hardly can constitute a threat to the public order, not even petty crimes committed repeatedly may be included in the category of offences that could constitute such threats.

4.3 The Principle of Proportionality

The principle of proportionality plays a significant role, in the case of detention of asylum seekers, since the detention must be proportionate to the legitimate aim pursued. Consequently, the principle of proportionality is the decisive criterion when depriving a person his or her liberty. It implies a strict balancing of interests between the right, which is subject to restriction, and the community interest to be protected. Such balancing takes into account several important parameters applicable to the gravity of the offence, the length of detention and the individual circumstances of the case.¹⁴⁰ These parameters in relation to international law and standards and the Danish amendment's conformity with them will be analysed below.

Although the word proportionality does not appear in the ECHR, it is inherent in the whole convention that there is a need to find a fair balance between the protection of the individual rights and the interests of the community at large.¹⁴¹ The principle of proportionality is concerned with finding that "fair balance". Such a balance can be achieved only if restrictions on the individual rights are strictly proportionate to the legitimate aim pursued. In other words, even where it is clear that there is a legitimate purpose for restricting the individual's right, the authorities must still show that the restriction in question does not go beyond what is strictly necessary to achieve the purpose.

It should be mentioned that most relevant decisions, from the European Court of Human Rights, in this area relate to pre-trial detention or expulsion cases as opposed to cases involving administrative detention as such.¹⁴² Even though criteria resulting from pre-trial detention cases may not systematically be applicable on cases relating to administrative detention of asylum seekers, there are constituents which may, by analogy, be relevant to asylum seekers who are administratively detained pending expulsion, fol

¹⁴⁰ Starmer, Keir, *European Human Rights Law, The Human Rights Act 1998 and the European Convention on Human Rights*, 1999, p. 169ff.

¹⁴¹ Starmer, Keir, *European Human Rights Law, The Human Rights Act 1998 and the European Convention on Human Rights*, 1999, p. 169ff.

¹⁴² See for example *Letellier v. France*, Judgment of 26 June 1991, European Court of Human Rights, Series A 207, *Beldjoudi v. France*, Judgment of 26 March 1992, European Convention on Human Rights, Series A 234 and *Nasri v. France*, Judgment of 13 July 1995, European Court of Human Rights, Series A 320.

lowing a criminal offence. In the context of analysing the principle of proportionality, the rights under the ECHR are of significant importance, and are therefore the instrument mainly dealt with below.

4.3.1 Gravity of the Offence

According to case law from the European Court of Human Rights concerning pre-trial detention and expulsion, based on public order grounds, the measure that restrict the right protected by the ECHR must be balanced against the seriousness of the offence. In the case of *Letellier v. France*¹⁴³, Mrs. Letellier was suspected of having conceived the scheme of murdering her husband and instructed a third party to carry it out in return for payment. The danger of a disturbance of the public order, following a release of the suspect, could, according to the Commission, not solely derive from the gravity of the crime, instead personal factors should also be taken into account (see further below).¹⁴⁴

In every case it is important to discuss for or against the existence of a requirement to make a restriction on public order grounds. All relevant circumstances should therefore be considered, to assess whether the measure is necessary in a democratic society, that is to say, justified by a pressing social need and, in particular, proportionate to the legitimate aim pursued.¹⁴⁵ Returning to the *Letellier* case, the European Court of Human Rights held that by reason of their particular gravity and the public reaction to them, certain offences might give rise to such social disturbance which will justifying pre-trial detention, at least for a while. However, as stated above, the court came to the conclusion that the disturbance of public order could not solely result from the gravity of the offence. It was also held that the necessity of the detention should be carefully assessed throughout the whole period.¹⁴⁶ As the court stated, the public order ground "can only be regarded as relevant and sufficient only provided that it is based on facts capable of showing that the accused's release would actually disturb public order"¹⁴⁷.

This implies that the Danish authorities, when detaining asylum seekers for reasons of being a threat to the public order, in accordance with article 25.1.a UDL and article 36.2 UDL, have to carry out an assessment as to

¹⁴³ *Letellier v. France*, Judgment of 26 June 1991, European Court of Human Rights, Series A 207.

¹⁴⁴ *Letellier v. France*, Judgment of 26 June 1991, European Court of Human Rights, Series A 207, paragraph 49.

¹⁴⁵ *Beldjoudi v. France*, Judgment of 26 March 1992, European Convention on Human Rights, Series A 234 and *Nasri v. France*, Judgment of 13 July 1995, European Court of Human Rights, Series A 320.

¹⁴⁶ *Letellier v. France*, Judgment of 26 June 1991, European Court of Human Rights, Series A 207, paragraphs 49-51.

¹⁴⁷ *Letellier v. France*, Judgment of 26 June 1991, European Court of Human Rights, Series A 207, paragraph 51.

whether the detention is necessary in the society and whether it is proportionate to the legitimate aim pursued. If the authorities do not follow these requirements they will be in breach of the ECHR. As concerning the gravity of the offence, it is probably disproportionate to deprive an asylum seeker his or her liberty when he or she is charged of petty crimes, since there must be a certain grade of gravity of the offence and the accused must actually disturb public order. Even though there is a higher threshold for recognised refugees (the cases mentioned above concern aliens that have lived in a European country for a long time) than asylum seekers, when deprived their liberty based on public order grounds for prevent future crimes, petty offences, such as theft for about 500 Danish Crowns, could most likely not constitute a danger to the public order.

4.3.2 Duration of Detention

Neither the 1951 Convention nor the ICCPR provide for a maximum length of detention of asylum seekers. In UNHCR's ExCom Conclusion No. 44, paragraph (c), the importance of expeditious procedures in protecting asylum seekers from unduly prolonged detention are recognised. Of relevance to the duration of detention is the standards established by the UN Working Group on Arbitrary Detention, which state that the law must provide for an absolute time limit of detention.¹⁴⁸ Article 5.1.f of the ECHR does not set any "reasonable time" or other expressed limits as to the length of an alien's detention pending expulsion. Nevertheless, article 5.1.f ECHR has been interpreted by the European Court of Human Rights to be understood as containing a safeguard as to the duration of the detention authorised, since the intention of article 5 of the ECHR as a whole is to protect the individual from arbitrariness.¹⁴⁹

In the *Bozano*¹⁵⁰ judgment, the European Court of Human Rights stated that article 5.1.f of the ECHR implies that detention of an alien, which is justified by the fact that the proceedings are in progress, can cease to be justified if the proceedings concerning him or her are not conducted with due diligence.¹⁵¹ This is also emphasised in the *Quinn* judgment.¹⁵² Consequently

¹⁴⁸ U.N. Commission on Human Rights Working Group on Arbitrary Detention, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment regarding the situation of immigrants and asylum seekers, U.N. Doc. E/CN.4/2000/4/Annex 2 (1999), principle 7.

¹⁴⁹ See for example *Quinn*, Judgment of 22 March 1995, European Court of Human Rights, Series A 311, paragraphs 42 and 47.

¹⁵⁰ *Bozano v. France*, Judgment of 18 December 1986, European Court of Human Rights, Series A 111.

¹⁵¹ *Bozano v. France*, Judgment of 18 December 1986, European Court of Human Rights, Series A 111, paragraph 54.

¹⁵² *Quinn*, Judgment of 22 March 1995, European Court of Human Rights, Series A 311, paragraph 48.

the detention must not last longer than is required for a normal conduct of the proceedings.

The reasonableness of the length of detention has to be assessed in each individual case, which also was established in the *Letellier* judgment. The Court stated that the national authorities should ensure that the pre-trial detention of an accused person does not exceed a reasonable time.¹⁵³ The wordings “reasonable time” has not been defined as such, since the Court has been reluctant to apply established decisive criteria under article 5 of the ECHR. It has preferred to take a case-by-case approach, since relevant factors are extremely diverse.¹⁵⁴ It could be worth mentioning that even quite lengthy detentions have been found in conformity with the ECHR’s requirements since the government concerned could not be held responsible for the delays to which the asylum seeker’s conduct, such as prolongation of the procedure to oppose expulsion or deportation, give rise.¹⁵⁵

Even though there are no time limits set out in the international instruments we can draw the conclusion that when detaining an asylum seeker pending an expulsion there should at least be set a maximum period by national law and the length of the detention should not be unlimited or of excessive length. Consequently there must be proportionality between the length of detention and the aim that is supposed to be achieved.

In the case of Denmark there are no time limits established by law and in relation to article 36.3 UDL it is stated in the preparatory work that the length of detention should last until the expulsion is carried out. The time that an asylum seeker can be deprived its liberty could thus last for several months and in some cases over one year. To find out whether the detention is in conformity with the principle of proportionality and fulfil the criteria of reasonableness, the parameters of each case has to be assessed. It is therefore difficult to determine in advance, whether the provision in article 36.3 UDL violate article 5 of the ECHR, as well as international standards, such as paragraph (c) of the ExCom Conclusion No. 44 and principle 7 of the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment regarding the situation of immigrants and asylum seekers.

Further, article 36.4 of the UDL, does not prescribe any time limits during which asylum seekers can be detained administratively. This is questionable, since it is stated in several international documents that there must be a limit established on the duration of the detention. Yet it is mentioned in the preparatory work to article 36.4 UDL, that detention could last during the

¹⁵³ *Letellier v. France*, Judgment of 26 June 1991, European Court of Human Rights, Series A 207, paragraph 35.

¹⁵⁴ Starmer, Keir, *European Human Rights Law, The Human Rights Act 1998 and the European Convention on Human Rights*, 1999, p. 242.

¹⁵⁵ Giakoumopoulos, Christos, “Detention of Asylum Seekers in the light of Article 5 of the European Convention on Human Rights”, in *Detention of Asylum Seekers in Europe: Analysis and Perspectives*, Hughes, Jane and Liebaut, Fabrice (eds.), 1998, p. 176.

whole asylum procedure, and the asylum seeker should be released if he or she begins to cooperate in such a way that the procedure could be effectively accomplished. The part on co-operative asylum seekers would consequently be in conformity with international laws and standards, such as article 5.1.b ECHR and paragraph 5 of the 1999 Guidelines.

However, despite the observations it would be desirable that the Danish authorities provide maximum period of detention in its national law, which is emphasised in the above-mentioned Body of Principles (principle 7) and by the ECRE. Long time procedures are disproportionate when the detention is a result of crimes where the subsequent penalties are probation, fines or short imprisonments. Six months of detention or more for a small offence that is normally followed by a fine, is regarded as disproportionate and neither in conformity with general Danish law traditions, nor is the law proposal an expression of a necessary proportionality adjustment in accordance with the ECHR.

4.3.3 Individual Circumstances of the Case

In pre-trial detention cases, which by analogy can be applied on cases relating to administrative detention of asylum seekers, the preservation of public order implies that other elements should be considered in addition to the gravity of the crime. Of particular relevance to the Danish amendment is that case law of the ECHR, which requires that particular circumstances and personality of the person concerned should be taken into account when considering the necessity to continue the detention. Circumstances to take into consideration are for instance the likelihood of the repetition of the crime, the risk of absconding etc. According to the *Letellier* judgment it was stated that the danger of public order could not only derive from the gravity of the offence and thus, to determine whether there was a danger of such nature, it was necessary to take other factors into account, such as the possible attitude and conduct of the accused once released.¹⁵⁶

It should be noted that it is mentioned, in the preparatory work, that the detention according to the new articles will, in accordance with the principle of proportionality, not be carried out if it is particularly burdensome for the individual and the conclusion can be drawn that an assessment of the personal circumstances will therefore take place.¹⁵⁷ This is in conformity with the 1999 Guideline where such evaluation is emphasised in Guideline 2. It is important to give prominence to the fact that detention is a serious interference in the personal liberty and the asylum seeker can have been exposed to torture in relation to past experiences in custody. Therefore it is essential,

¹⁵⁶ *Letellier v. France*, Judgment of 26 June 1991, European Court of Human Rights, Series A 207, paragraph 49.

¹⁵⁷ Lovforslag nr. L 191 af 20. marts 2001, Forslag til Lov om ændring af udlaendingeloven (Frihedsberovelse af asylansøgere og administrativ udvisning m.v.), p. 24.

from a proportionality perspective, to be extra careful when detaining an asylum seeker.

In relation to detention on grounds of public order, the preparatory work does not provide any evaluation of the individual factors, such as behaviour and attitude of the accused when released. This implies that article 36.3 UDL would be inconsistent with the case law under the European Court of Human Rights.

4.4 Concluding Remarks

After the last changes in the Danish Aliens Act, the provision on administrative detention has got a more far-reaching range of applicability than the original provisions in the Aliens Act from 1983. At that time, detention of asylum seeker could almost only be used when there was a suspicion about the asylum seeker's identity. The amendment can mainly be questioned in four areas of concern. A short concluding statement, based on the above analyses, as whether these constitute violations of international law and standards, will here be presented.

In conclusion it could be said that the application of public order with such low threshold, as established in article 25.1.a UDL taken together with article 36.3 UDL, would most certainly not constitute a threat to public order as prescribed in article 12 ICCPR, article 2.3 of the 4th Protocol, article 32 of the 1951 Convention and in Guideline 3 of the 1999 Guidelines. Moreover, to decide whether a crime constitutes a threat to public order, parameters such as the gravity of the offence, the attitude and conduct of the suspected and other individual circumstances, assessed through the principle of proportionality, has to be taken into account.

Article 36.3 and 36.4 UDL, could cause lengthy detentions that under some circumstances are prohibited by international law, such as article 5 of the ECHR. Long time procedures and detentions of excessive lengths are further inconsistent with principle 7 of the Body of Principles, established by the UN Working Group on Arbitrary Detention and paragraph (c) of the ExCom Conclusion No.44. However, it is difficult to say whether detentions under article 36.3 and 36.4 UDL violates international laws and standards, since such issues are dealt with on a case-by-case basis where the individual circumstances and the principle of proportionality play an important role.

Continued imprisonment of convicted criminals pending removal, carried out in accordance with article 35.2 UDL and 36.3 UDL is clearly discriminatory and consequently a violation of article 14 in conjunction with article 5 ECHR and article 2 ICCPR. Moreover, it is doubtful whether such unlimited detentions could be in conformity with the necessity requirement and the principle of proportionality.

The detention of uncooperative asylum seekers, provided for in article 36.4 UDL does not constitute a violation of international law, since that is a circumstance under which detention is lawful, according to article 31 of the 1951 Convention, articles 5.1.b and 5.1.f of the ECHR, paragraph (b) of the ExCom Conclusion No. 44 and Guideline 3 in the 1999 Guidelines, provided it is necessary and that the individual circumstances of the case is paid attention to. In this context, the length of the detention should also be considered.

The principle of proportionality is a determining factor in all the areas of concern. From the information obtained through the analyses above, detention on grounds of public order, for a petty crime is probably disproportionate. Further, detentions of asylum seekers pending an expulsion, and who are detained for several months, without a valid reason, such as e.g. a real risk of absconding, would not be proportionate to the aim pursued. When the court decides whether a detention is of excessive length, the principle once again plays a decisive role. And lastly when detaining an uncooperative asylum seeker it must be proportionate to the legitimate aim pursued.

Detaining an asylum seeker without assessing whether other measures, such as those mentioned in article 34 UDL, are applicable could probably be seen as inconsistent with accepted international standards. In several international documents, as for example in paragraph (b) of the ExCom Conclusion No. 44 and in Guideline 2 of the 1999 Guidelines, it is emphasised that as a general principle, asylum seekers should not be detained. Also in the preparatory work to the 1951 Convention it is clearly pointed out that detention of asylum seekers and refugees should be avoided. Not only in relation to article 34 UDL, but also to several changes in the UDL it could be said that Denmark acts against the general principle that detention always should tried to be avoided.

5 Conclusion

International human rights instruments have developed a series of protective measures to ensure that individuals are not arbitrarily or unlawfully deprived of their liberty. These measures range from treaty provisions, legally binding on states parties to the treaty in question, to minimum guidelines imposing no legal obligation but establishing internationally recognized standards to which states should aspire. Together, these measures constitute an international framework of basic safeguards, which, if fully implemented, would help to eliminate the more serious abuses to which detainees are frequently subjected.

As a party to the 1951 Convention, ICCPR, ECHR and its 4th Protocol, Denmark is obliged to comply with them. The international standards are more of a recommendatory nature, but since they are adopted by an international consensus they can be considered to have some authoritative value, although they lack the status as the above conventions enjoy. However, Denmark should, as a part of the international community, also obey to these standards.

It is understandable that the Danish Government both wants and has to do something about the criminal asylum seekers that enter the country. But that should not affect innocent asylum seekers and lead to consequences such as depriving asylum seekers their right to be treated in accordance with international laws and standards. The asylum seekers' claims are more and more being seen as abusive and fraudulent, which in turn makes Denmark resort to more restrictive measures. In imposing these contested measures, such as detention on criminal asylum seekers, the Danish society seeks to deter future members of such a clientele of coming to Denmark, which unfortunately also will include ordinary asylum seekers. These lines of conduct do hardly reflect the needs of the asylum seekers nor does it comply with the intention of the 1951 Convention or with international standards such as Resolution 2000/21, adopted by the Sub-Commission on the Promotion and Protection of Human Rights.

5.1 The Alleged Violations of International Law

After having analysed the Danish amendment, it can be concluded that the amendment, at least in parts, arguably is in breach with international human rights law. The areas of concern are those dealing primarily with the application of public order, the length of detention, continued imprisonment of convicted criminals and detention of uncooperative asylum seekers. The decisive criterion as to whether these areas of concern are in conformity with international laws and standards is the principle of proportionality. It

implies a strict balancing between the right, which is subjected to restriction and the community interest to be protected. Such balancing takes into account whether the restriction is necessary to the legitimate aim pursued. In the case of Denmark, several provisions of the amendment lack such weighing of interests. Thus, Denmark appears to fail to fulfil the requirements set out in the principle of proportionality.

Arbitrary detention of asylum seekers occurs when they are deprived their liberty for insufficient reasons, without an adequate analysis of their individual circumstances, without an opportunity to have their case reviewed by an independent body, in the absence of lawful restrictions, or for disproportionate and indefinite periods. Taken these parameters into consideration when scrutinising whether articles 25.1.a, 35.2, 36.3 and 36.4 of the UDL is in conformity with international laws and standards, the outcome will be somewhat nuanced. After a careful analysis of the above-mentioned articles the amendment has, to some extent, appeared to comply with international laws and standards, although there are cases where the law itself violates the international law and also cases where it is the enforcement of the law that constitutes the violation. In some cases it is though difficult to see whether the provision in question violates the international instruments, since it depends on how the specific article is applied in a specific situation. In those cases it is consequently left for the future to see whether they constitute a violation of international human rights laws and standards.

Denmark does provide for monitoring mechanisms, other than detention, such as reporting to the police, depositing of passports, provision on bail etc. However, detention is adhered to in a large extent, and according to some provisions (e.g. article 36.3 UDL) less infringing measures than detention does not even have to be considered. This is arguably not in conformity with the principle that detention should be avoided and only used when absolutely necessary. Furthermore, accurate attention to the fact that asylum seekers often are victims of human rights violations, and that detention is a very severe infringement in the personal liberty is not given. Using other monitoring methods than detention would provide for both obvious humanitarian advantages for asylum seekers and fiscal advantages for Denmark.

These shortcomings in human rights performance are unfortunate because Denmark, together with the other Nordic countries, generally enjoys high profiles in this regard, with emphasis on respect for the rule of law and social justice. The good reputations are reinforced by solid support for human rights causes in international organizations. With respect to the extended application of detention of asylum seekers, the credibility in foreign policy and development cooperation could seriously be undermined.

5.2 Final Remarks

It can be concluded that something has to be done with regard to the deficiencies of the amendment's compliance with international law. An example of this is political pressure on the Government, from other countries, to do something about the non-compliance with human rights instruments. Such an action is often used on the international arena and could in this respect play a significant role.

Where the detained asylum seeker find him/herself in a position where the enforcement of the law violates international human rights law, remedies, such as individual communications procedure provided for under ICCPR and ECHR, should not be underestimated. The opportunities for remedy contained under these instruments could be published to encourage lawyers and others, acting on behalf of the detained asylum seeker to challenge their detention before supranational bodies. Regarding the provisions, in the amendment, where the law itself violates international law, there are no remedies applicable due to the principle of state sovereignty. Instead, it is the country itself that has an obligation towards the international community to fulfil its obligation and adopt legislation that is in conformity with international laws and standards.

National NGO's could also play a prominent role by submitting written evidence to the Human Rights Committee, when the Committee is scrutinising Denmark's performance under the periodic reporting procedure. Further, NGO's together with the media could play a significant role in educating and informing the Danish citizens about the serious situation and through these actions convince both the public opinion and the Government that there is a need to change the negative trend concerning asylum seeker's situation in general, and the detention of them in particular.

As has been stated in the thesis, the far-right Danish People's Party, (*Dansk Folkeparti*) plays an increasingly prominent role on the political arena and consequently exercises an influence upon mainstream political parties. This political climate threatens to undermine the Danish Government's obligations towards asylum seekers and it remains to see what will happen in the field of human rights in Denmark in the near future, but as concerns detentions of asylum seekers, any far-reaching changes, are not very likely to take place.

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