

# Shifting the paradigm, from opt-out to all out?

Myrthe Wijnkoop  
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Robin Neumann

In Search of Control  
Denmark Country Report



**Clingendael**

Netherlands Institute of International Relations



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## About the Project

In December 2022, the Dutch government initiated a [working group](#) focussing on the 'fundamental reorientation of the current asylum policy and design of the asylum system.' Its aim is to further structure the asylum migration process, to prevent and/or limit irregular arrivals, and to strengthen public support for migration. One of the [assumptions](#) is that the externalisation of the asylum procedure could be a feasible policy option through effective procedural cooperation, with a country outside the EU, that 'passes the legal test'. In other words, if it would be operationalized in conformity with (international) legal standards and human rights obligations. In that context, the working group expressed the need for more insight on how governments with other legal frameworks than the Netherlands, as an EU Member State, deal with the issue of access to asylum, either territorial or extra-territorial, in order to provide thoughts or angles for evidence-based policy choices by the Dutch government, at national and/or European level.

The purpose of this comparative research project, led by the Clingendael Institute, was to collect existing knowledge about the asylum systems of Australia, Canada, Denmark, the Netherlands, and the United States, and to complement this with an analysis of national legislation, policy, and implementation practices, focussing on access to (extra-)territorial asylum. While there are overlaps, each of the asylum and refugee protection systems in the research project operates in very different geographical situations and political contexts.

Beyond the five country case studies, a separate synthesis report that is based on a comparative analysis of the respective legal frameworks and the asylum systems of those countries addresses directions for Dutch courses of action. The synthesis report and the country case studies can be accessed [here](#).

The main question to be answered in the national reports is: *Which instruments are applied or proposed by Australia, Canada, Denmark, the Netherlands and the United States concerning or affecting access to asylum procedures and humanitarian protection*

Therefore, the country research focuses on several central elements of the national asylum systems, including their access to, and implementation of, interdiction practices, border and asylum procedures and other legal pathways. These were put in a broader public, political and legal context, taking into account the countries' national policy aims and objectives.

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# Introduction

When assessing the topic of access to (extra)territorial asylum in a European context, Denmark holds a certain ‘status aparte’. Denmark joined the EU in 1973 after cautious consideration, having a carefully balanced approach towards European integration. The country’s position can be characterized by a ‘soft’ form of Euroscepticism, making the decision to ‘opt in’ when there are considered benefits.<sup>1</sup> Denmark is not part of the eurozone and negotiated several other ‘opt-outs’ among which the (larger part of the) common EU rules on asylum and migration. This means that they are formally not bound by the EU asylum acquis, which provides them with a unique position as EU-Member State.

After 2015 when 1,2 million people, mostly from Syria, were seeking refuge in the European Union, the Danish government, with broad consensus in parliament, has implemented legislation and policies to further restrict asylum protection.<sup>2</sup> Primary aim was, and still is, to make Denmark less attractive to asylum seekers. Residence permits are now granted on a temporary basis with a view to returning refugees to their countries of origin as soon as possible, and not to integration and long-term residence: a self-indicated so-called ‘paradigm shift.’<sup>3</sup> Moreover, the Danish government is very straightforward, and even takes ‘pride’ in communicating their message of pursuing a very strict (territorial) asylum policy.<sup>4</sup>

The explicitly stated and openly communicated target of the Danish government is furthermore to prevent asylum seekers from arriving ‘spontaneously’ at the territorial borders of Denmark: ‘zero people should apply for asylum in the

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1 Aarhus University, [“An overview of Denmark and its integration with Europe, 1940s to the Maastricht Treaty in 1993,”](#) Nordics Info, accessed on 12 October 2023.

2 The restriction of rights of asylum seekers started already in 2002, when the government under Anders Fogh Rasmussen removed de facto status (with the aim to explicitly not provide protection for Somalis), ended embassy asylum, changed the Refugee Appeals Board members etc. See Aarhus University, [“Danish immigration policy, 1970-1992,”](#) Nordics Info.

3 The Danish Institute for Human Rights, [“You can never feel safe: an analysis of the due process challenges facing refugees whose residence permits have been revoked,”](#) 2022; See also Jens Vedsted-Hansen, Stinne Østergaard and others, [“Paradigmeskiftets konsekvenser. Flygtninge, stat og civilsamfund,”](#) August 2023; Jens Vedsted-Hansen, [“Refugees as future Returnees. Anatomy of the paradigm shift towards temporary protection in Denmark,”](#) CMI 2022-6.

4 See also Thomas Gammeltoft-Hansen, [“Refugee policy as ‘negative nation branding’: the case of Denmark and the Nordics,”](#) in: *Danish Foreign Policy Yearbook* 2017.

country'.<sup>5</sup> Of particular interest in this context is the 2021 amendment to the Danish Aliens Act. This amendment provides for the possibility to transfer asylum seekers to a third state outside the EU for processing the asylum claim, protection in that state or return from there to the country of origin (section 29).<sup>6</sup> This legislation fits in a long Danish tradition of focussing on the external dimension of European asylum and migration policies, including being at the forefront of the European debate on externalizing asylum procedures to countries outside the EU. Already in the 1980's Denmark put forward a plan for external processing of asylum claims during a meeting in the UN General Assembly.<sup>7</sup>

A factor that frequently surfaces in political and public debates on migration in other EU Member States, such as the Netherlands, is that Denmark can pursue these policy lines because of the EU asylum opt-out. And that an opt-out of the EU *acquis* would thus be the panacea to manage asylum better.<sup>8</sup> However, the fact that Denmark is indeed bound to several (other) international and European legal obligations when applying these national laws and policies in practice is often overlooked.

In this report we will look at Denmark's asylum policies and protection system, describing and analysing amongst others the applicable legal framework, the implementation of border and asylum procedures, return policies and relevant statistics. The report will also discuss in more detail any form of extraterritorial access to asylum, through legal pathways and other policies, as well as migration cooperation/partnerships with third countries in as far as they concern access to protection. To which extent are the aims of the Danish government reached, and at what costs? Are there lessons to be learned for the Netherlands (and other EU Member States), considering the opt-out position that Denmark currently holds? To what extent does the Danish 'status aparte' play a significant role in building both the policy directions and the narrative itself?

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5 Ritzau, "[Mette Frederiksen: The Goal is zero asylum seekers to Denmark](#)," *Nyheder*, 22 January 2021.

6 See for a comprehensive legal assessment of this legislation: Nikolas Feith Tan and Jens Vedsted-Hansen, "[Denmark's Legislation on Extraterritorial Asylum in Light of International and EU Law](#)," 15 November 2021; Nikolas Feith Tan, "[Visions of the Realistic? Denmark's legal basis for extraterritorial asylum](#)," *Nordic Journal of International Law* 91, 2022, p. 172-181; See also Chantal Da Silva, "[Denmark passes a law to send its asylum seekers outside of Europe](#)," *Euronews*, 3 June 2021.

7 Dutch Advisory Council on Migration (ACVZ), "[External processing](#)," December 2010, p. 15.

8 Parliamentary documents, *Kamerstukken II*, [35 925, nr. 43](#), 23 September 2021.



# 1 Setting the scene: general background and relevant developments

## Political and sociocultural context: paradigm shift and a 'broad national consensus'

The fact that Denmark opted out of the EU asylum acquis does not implicate that Denmark is a self-centred state. The driving force behind Denmark's accession to the EEC was the desire to become part of an open European economy, rather than support for federalism.<sup>9</sup> The Danish government is an active member of the European and international community and has for example a long tradition as a humanitarian actor in multilateral relations and international cooperation. Denmark is high ranking in lists of humanitarian donor countries and, at least formally, sets the standard of Official Development Assistance (ODA) at the UN goal of 0,7% GNI.<sup>10</sup>

At the same time, Denmark remains very keen to retain its national sovereignty in certain policy domains. It has installed multiple institutional safeguards to allow for selective participation in European integration, such as safeguards in its Constitution with respect to delegating power, and a parliamentary committee which has oversight over decisions in Europe. Since the 2022 invasion of Russia in Ukraine, Denmark however moved a bit closer to the EU again.

Denmark has thus adopted a rather pragmatic non-federalist approach towards the EU and certain policy domains such as asylum and migration. Key parliamentary decisions on European integration and related topics are made by consensus between the main political parties, regardless of the coalition in power.<sup>11</sup> The national political debate on asylum and migration in Denmark has in recent years become no longer a topic with a traditional left-

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9 Aarhus University, "[An overview of Denmark and its integration with Europe](#)," 25 February 2020.

10 Ministry of Foreign Affairs of Denmark, "[The Government's priorities for Danish development cooperation 2023-2026](#)," April 2023; However, in practice the government is falling short: Concord, AidWatch, "[Bursting the ODA Inflation bubble](#)," 2023.

11 Aarhus University, "[An overview of Denmark and its integration with Europe](#)," 25 February 2020.

right political divide. Rather, parties such as the Social Democrats have begun to support stricter asylum policies and limited the access to permanent protection in the country. This has been done by addressing the discussion of cost and benefits of migration from the perspective of the national community, resulting in policies as regards territorial access to asylum that are close to those of right-wing parties such as the Danish People Party, and a national consensus on the topic of migration. Thus, a broad majority in the Danish parliament supports restrictive migration and asylum policies and strict rules for access and settlement of persons originating from outside the EU/EEAS.<sup>12</sup> The general focus shifted from integration to return, from permanent residence to revocation of protection: the 'paradigm shift'.<sup>13</sup>

A clear manifestation of this paradigm shift is that since 2015 a set of restrictive legislative and policy changes was passed by the Danish parliament.<sup>14</sup> A new temporary subsidiary protection ground was introduced in the Aliens Acts (section 7(3)) applicable to situations of generalized violence, whereby the right to family reunification is withheld for initially the first three (and currently two) years of residence.<sup>15</sup> This protection ground is mostly used for Syrians as they are the largest group to receive temporary subsidiary protection. Also, the threshold for revocation of asylum protection other than Convention refugee status was lowered: a durable improvement of the security and human rights situation in the country of origin is no longer necessary.<sup>16</sup> This strong focus on the revocation of asylum residence permits is rather unique in comparison to other EU Member States, as the criteria for cessation in EU *acquis* require a high(er) standard.<sup>17</sup> Other changes to the Danish asylum legislation dealt with the confiscation of

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12 Nikola Nedeljkovic Gøttsche, "[Folketingets partier er stort set enige om Danmarks udlændingepolitik](#)," *Information*, 14 July 2018.

13 L 140, [amendments to the Danish Aliens Act](#). See also Emil Søndergård Ingvorsen, "['Paradigmeskiftet' vedtaget i Folketinget: Her er stramningerne på udlændingeområdet](#)," *DR Politik*, 21 February 2019.

14 L 87, [amendments to the Danish Aliens Act](#).

15 The original legislation spoke about three years 'waiting time' for family reunification, except for exceptional circumstances. However, in [M.A. v. Denmark \(9 July 2021\)](#) the European Court on Human Rights (ECtHR) stated that this provision did not entail a reasonable balance of interests and was therefore in violation of article 8 of the Convention. The duration was then changed to two years.

16 See more extensively on these matter under 'national asylum procedure'.

17 Nikolas Feith Tan, "[The End of Protection the Danish paradigm shift and the law of cessation](#)," *Nordic Journal of International Law*, 90, 2021, p. 60-85.

assets from asylum seekers (the widely commented so-called 'jewelry-law'),<sup>18</sup> introduction of short-term residence permits, mandatory review of protection needs, further restrictions on family reunification, reduced social benefits for refugees and restrictive criteria for permanent residency. This set of legislative and policy changes called for quite some criticism from refugee law experts and UNHCR.<sup>19</sup>

While lowering protection standards and limiting the territorial protection space, Denmark put much effort in the external dimension of asylum and migration policies. Both through migration cooperation with third countries, as for example the MoU with Rwanda, as well as a focus on exploring the possibilities of outsourcing and/or externalizing asylum procedures to countries outside the EU. This complies with a long tradition of Danish policy thinking. Already in 1986 Denmark put forward in a UN setting the idea of externalizing asylum procedures. The Danish government was one of the EU Member States supporting the 2003 United Kingdom proposal to amend EU asylum policy, stating that persons seeking asylum in EU Member States should be automatically sent to a transit and processing center outside the EU, where their applications would then be assessed.<sup>20</sup> And again Denmark together with the UK and the Netherlands were frontrunner EU Member States in promoting and pushing forward initiatives to strengthen refugee protection in the region such as multilateral initiatives like the *Syria Refugee Response and Resilience Plan* (3RP) and the *Ethiopia Country Refugee Response Plan* (ECRRP). Denmark is also one of the driving actors behind the concept of EU Regional Protection Programmes,<sup>21</sup> and had a leading role in the programme in Jordan, Lebanon and Iraq (RDPP II 2018-2021).

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18 The Danish Parliament, "[L 87 Forslag til lov om ændring af udlændingeloven](#)," 10 December 2015; See also Harriet Agerholm, "[Denmark uses controversial 'jewellery law' to seize assets from refugees for first time](#)," *The Independent*, 1 July 2016; *The Local*, "[Here's how Denmark's famed 'jewellery law' works](#)," 5 February 2016; Ulla Iben Jensen and Jens Vedsted-Hansen, "[The Danish 'Jewellery Law': When the signal hits the fan?](#)," *EU Immigration and Asylum Law and Policy*, 4 March 2016.

19 UNHCR Northern Europe, "[Recommendations to Denmark on strengthening refugee protection](#)," 11 January 2021; UNHCR Nordic and Baltic States, "[Observations from UNHCR on the Danish law proposal on externalization](#)," March 2021.

20 UK Home Office, "[New International Approaches to Asylum Processing and Protection](#)," March 2003.

21 Thea Hilhorst et al., "[Factsheet Opvang in de regio: een vergelijkende studie](#)," 18 January 2021; ECRE, "[EU External Cooperation and Global Responsibility Sharing: Towards an EU Agenda for Refugee Protection](#)," February 2017.

Denmark also has one of the oldest refugee resettlement schemes in cooperation with UNHCR in Europe.<sup>22</sup> This fits the Danish profile of a humanitarian actor, with a focus on foreign relations and development cooperation, seeking multilateral approaches to tackle asylum and migration issues.<sup>23</sup> Also NGO's such as the Danish Refugee Council have large scale humanitarian programmes in regions of origin and transit.<sup>24</sup>

### Asylum and migration nexus: economic context

Most immigrants to Denmark are however not asylum seekers, but come from other European countries, reaching almost 75,000 people in 2021.<sup>25</sup> Furthermore, approximately 12,000 migrant workers and around 9,000 foreign students received residence permits that year. With some of 2000 asylum applications in 2021, this constitutes the smallest group of immigrants to Denmark.<sup>26</sup>

In recent years, due to an ageing population, Denmark has been experiencing labour shortages, specifically skilled work, with 42% of Danish companies reporting that they face challenges filling positions in the first quarter of 2022.<sup>27</sup> With the Danish unemployment rate being quite low, 2.5% in August 2023,<sup>28</sup> Denmark has to look elsewhere to fill in the labour shortages. In March 2023, amendments to the current Danish Aliens Act were adopted to strengthen

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22 The numbers of refugees which are indeed resettled in practice are significantly decreasing, and the resettlement status itself is no longer permanent. See under 'Extraterritorial asylum: legal pathways'.

23 UNHCR, "[Denmark](#)." See also the 2022 governmental agreement with references to the multilateral approaches on migration (p. 39-40).

24 The Danish Refugee Council (DRC) is an NGO which also has specific designated tasks in the Danish asylum procedure, for example on legal assistance and the manifestly unfounded cases (see further under national asylum procedures). DRC Asylum also takes part in resettlement missions and sometimes fact-finding missions. DRC Asylum's role in the Danish procedure is not linked to the international work of DRC. See [website](#) Danish Refugee Council.

25 Einar H. H. Dyvik, "[Number of residence permits granted in Denmark in 2022, by reason](#)," Statista, 8 June 2023.

26 Einar H. H. Dyvik, "[Number of residence permits granted in Denmark in 2022, by reason](#)," Statista, 8 June 2023.

27 European Commission, "[Labour Market information: Denmark](#)," 17 January 2023.

28 Trading Economics, "[Denmark Net Unemployment Rate](#)."

international recruitment of talented third-country nationals.<sup>29</sup> One of the changes allows companies to apply to the certification of the Fast track scheme, through which foreign skilled workers can be brought to Denmark through quicker procedures.<sup>30</sup> In a push to support the unionization of staff, these companies must be covered by a union association agreement. The extension of the acceptance 'positive list' for skilled work and those with higher education is another amendment, which specifically lists professions experiencing a shortage of qualified labour.<sup>31</sup> Lastly, a supplementary pay limit scheme was created, which requires a labour migrant to have a job offer with a minimum annual salary of DKK 375,000 (equivalent to approx. 50,200 EUR).<sup>32</sup>

Last year, an increase of the employment rate of non-Western immigrants was measured until 55.8%, an all-time high for Denmark.<sup>33</sup> While the importance of access to the labour market and gaining employment have been recognized as key elements of integration, the recent 'paradigm shift' has shifted Denmark's focus away from integration measures.<sup>34</sup> Currently, the asylum systems and labour migration framework are distinct domains in legislation, separated between 'asylum' and 'work'. The law states that an asylum seeker who has a pending case with immigration services and is residing in the country for at least 6 months, can apply to the DIS for approval to work for a year in the meantime.<sup>35</sup> This excludes asylum seekers in the Dublin procedure.<sup>36</sup> A contract

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- 29 See for example on nurses from Iran: Rasmus Dyrberg Hansen, Jonas Guldberg, and Annette Jespersen, "[Vejle Kommune hyrer sygeplejersker fra Iran, mens de søger godkendelse til job i Danmark](#)," DR, 15 September 2023.
- 30 Shkurta Januzi, "[Denmark Amends Its Aliens Act in a Bid to Lure More Foreign Workers & Students](#)," Schengen Visa, 28 March 2023.
- 31 The Danish Immigration Service, "[The Positive Lists](#)."
- 32 See amongst others: Mads Hørkilde, "[S-minister siger nej til at åbne for »ladeporte« for udenlandsk arbejdskraft](#)," Politiken, 17 September 2023; Jyllands-Posten, "[Minister afviser at lempe regler for international rekruttering](#)," 18 September 2023; DR, "[Løkke: Virksomheder med overenskomst skal kunne få alle de udlændinge, de vil | Politik](#)," 29 August 2023; Dansk Erhverv, "[Dansk Erhverv: Vi skal have et paradigmeskifte for udenlandsk arbejdskraft](#)," 5 September 2023; Berlingske, "[Løkke & co. med usædvanligt forslag: Vil uddanne og hente sygeplejersker og sosu'er fra Filippinerne](#)," 6 July 2023.
- 33 European Commission, "[Denmark: Employment level of migrants and refugees reaches record high](#)," 7 January 2022.
- 34 Refugees Denmark, "[Refugees are absolutely necessary for the Danish labour market](#)," 3 November 2019.
- 35 The Danish Immigration Service, "[Conditions for Asylum Seekers](#)."
- 36 Interview with DRC d.d. 2 November 2023.

must be entered with the DIS which lays out certain conditions which must be met. However, in practice, most asylum seekers do not work due to the difficulty in obtaining work (and thus subsequent authorization) while they are placed in one of the accommodation centers. Different rules apply however for displaced Ukrainians, who are allowed to work directly under the national temporary protection scheme.<sup>37</sup>

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37 More about rights for Ukrainians can be found here: DRC, "[Ukraine: FAQ](#)."

## 2 International legal framework

### Convention obligations<sup>38</sup>

Denmark has ratified the 1951 Geneva Convention Relating to the Status of Refugees and its 1967 Protocol, as well as the other relevant UN human rights treaties such as Convention against Torture (CAT), International Convention on Civil and Political Rights (ICCPR) and Convention on the Rights of the Children (CRC). Denmark is also party to the European Convention of Human Rights (ECHR) and is bound by the European Fundamental Rights Charter (article 18 and 19) as source of primary EU law. The legal protection obligations deriving from these treaties, with non-refoulement as a cornerstone principle, are implemented in the national legislation, more in particular, article 7 of the Danish Aliens Act. The ‘convention status’ or ‘K-status’ (art. 7(1)) refers directly to the UN Refugee Convention. Subsidiary protection (B-status or de facto-status) is granted if a person risks treatment in violation of article 3 ECHR upon return to the country of origin, including individuals who run a real risk because of mere membership of a group.<sup>39</sup> The third protection ground derives from European Court of Human Rights (ECtHR) jurisprudence which is subsequently integrated in Union law, and deals with general temporary protection status for reasons of indiscriminate violence and attacks on civilians in the country of origin (non-individualized violence).<sup>40</sup>

In general terms, the scope of the protection against refoulement in the ECHR, as interpreted by the ECtHR, is broader than under the Geneva Convention.<sup>41</sup> Any return of an individual who would face a real risk of being subjected to treatment contrary to these articles is prohibited. Moreover, protection against the treatment prohibited by Art. 3 ECHR has been considered more absolute

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38 This paragraph equals for a large (generic) part the paragraph on convention obligations in the Dutch country report, as this part of the legal framework applies to both countries.

39 ECtHR, *Salah Sheekh v. The Netherlands*, 1948/04, 11 January 2007.

40 ECtHR, *NA v UK*, No. 25904/07, 17 July 2008.

41 Vladimir Simoňák and Harald Christian Scheu, [Back to Geneva. Reinterpreting Asylum in the EU](#), [Wilfried Martens Centre for European Studies](#), October 2021, p. 20.

in several Court rulings.<sup>42</sup> To prevent refoulement, it is not per se required to admit a person to the territory of a state, if sending him or her back does not lead to a situation where the person would be persecuted or runs a real risk of torture, inhumane or degrading treatment.<sup>43</sup> However, without assessing the individual case, it would be rather difficult to know whether someone has an arguable claim of a real risk of refoulement. So, ensuring effective access to an asylum procedure is a precondition to ensure the principle of non-refoulement.<sup>44</sup> In addition, article 4 of Protocol No. 4 to the ECHR prohibits collective expulsion. This prohibition also requires that there is a reasonable and objective examination of the specific case of each individual asylum seeker.<sup>45</sup>

If a country has jurisdiction, there is an obligation to respect and guarantee the human rights enshrined in the applicable international legislation. If Denmark, as State-party to the ECHR, violates those obligations,<sup>46</sup> the state can be held accountable for an 'internationally wrongful act' by the ones whose rights have been violated.<sup>47</sup> In the context of the ECHR jurisdiction this is not only territorial,<sup>48</sup> but also applied extra-territorially if there is effective (territorial, personal or

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42 Chahal v. United Kingdom, ECtHR judgment of 15 November 1996, paras. 76 and 79, referring to Soering v. United Kingdom, ECtHR judgment of 7 July 1989, para. 88, Ahmed v. Austria, ECtHR judgment of 17 December 1996, Ramzy v. Netherlands, ECtHR judgment of 27 May 2007, para. 100, Saadi v. Italy, ECtHR judgment of 28 February 2008, para. 137. See Jens Vedsted-Hansen: European non-refoulement revisited, in: Scandinavian Studies in Law, 1999-2015, 272.

43 Daniel Thym, "[Muddy Waters: A guide to the legal questions surrounding 'pushbacks' at the external borders at sea and at land](#)," *EU Migration Law Blog*, 6 July 2021.

44 See on this subject matter also Monika Sie Dhian Ho and Myrthe Wijnkoop, "[Instrumentalization of Migration](#)," Clingendael Institute, December 2022.

45 ECtHR, Hirsi Jamaa v. Italy, no. 27765/09, 23 February 2012. See also the Rule 39 measures issued by the ECtHR in August and September 2021 in order to stop the expedited (collective) expulsions of Iraqi's and Afghans stuck at the Latvian, Lithuanian and Polish borders (ECtHR Press Releases of 21 August 2021 and 8 September 2021).

46 ECtHR, M.A. v. France, No. 9373/15, 1 February 2018; ECtHR, Salah Sheekh v. the Netherlands, No. 194/04, 11 January 2007, para. 135; ECtHR, Soering v. the United Kingdom, No. 14038/88, 7 July 1989; ECtHR, Vilvarajah and Others v. the United Kingdom, Nos. 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87, 30 October 1991. See European Union Agency for Fundamental Rights, "[Fundamental rights of refugees, asylum applicants and migrants at the European borders](#)," March 2020, p. 6.

47 International Law Commission, "[Draft Articles on State Responsibility, Official Records of the General Assembly](#)," Fifth-sixth Session (A/56/10), article 2.

48 EHRM, Soering v. United Kingdom. No 14/038/88, 7 July 1989 EHRM, Bankovic a.o. v. Belgium a.o., No. 52207/99, 21 December 2001; Hoge Raad, IS women v. the Government of the Netherlands, 26 June 2020, ECLI:NL:HR:20201148, paras. 4.16-4.18.



functional) control over another territory or over individuals who have carried out the act or omission on that territory.<sup>49</sup> For example in the *Hirsi v. Italy* case, the ECtHR found that a group of migrants who left Libya with the aim of reaching the Italian coast, and that were intercepted by ships from the Italian Revenue Police and the Coastguard and returned to Libya, were within the jurisdiction of Italy. According to the ECtHR a vessel sailing on the high seas is subject to the 'exclusive jurisdiction of the state of the flag it is flying'.<sup>50</sup>

This means that Denmark cannot exempt itself from its human rights obligations, including non-refoulement and access to asylum, by declaring border areas as non-territory or transit zones or to externalize asylum procedure to other countries: the determining factor remains whether or not there is jurisdiction, either/and through de jure or de facto control by the authorities.<sup>51</sup> This does however not mean that access to asylum can only be provided for on Danish territory. The 1951 Refugee Convention states that refugees must be protected, but does not in itself prohibit states negotiating cooperation agreements on where that protection is guaranteed, as long as the preconditions fulfill the legal state obligations. Furthermore, the ECtHR has in 2020 drawn a line with regards to gaining territorial access to the European Union. In its judgment in the case of *N.D. and N.T. v. Spain* it concluded that Spain did not breach the ECHR in returning migrants to Morocco who had attempted to cross the fences of the Melilla enclave. The Court reasoned that because the group had not made use of the entry procedures available at the official border posts, the lack of an individualized procedure for their removal had been a consequence of their own conduct (i.a. the use of force and being in large numbers).<sup>52</sup> In other words, the line of argumentation in this case does require states to deploy effective legal options and means for access to protection for third country nationals, however it also takes into account the actions of the applicants to that effect.

Denmark, when becoming signatory to the ECHR, also adhered to the interpretation of those human rights through the jurisprudence of the ECtHR. In the case *M.D. and others on Syrian asylum seekers*, who were denied asylum

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49 See also February 2022. See also Maarten den Heijer, [Europe and Extraterritorial Asylum](#), 2012; Lisa-Marie Klomp, [Border Deaths at Sea under the Right to Life in the European Convention on Human Rights](#), 2020; Annick Pijnenburg, [At the Frontiers of State Responsibility. Socio-economic Rights and Cooperation on Migration](#), May 2021.

50 ECtHR, *Hirsi Jamaa and Others v. Italy*, No. 27765/09.

51 See also Sergio Carrera, "[Walling off Responsibility](#)," CEPS, nr. 2021(18), November 2021, p. 12.

52 ECtHR, *N.D. and N.T. v. Spain*, Nos. 8675/15 and 8697/15, 13 February 2020.

in Russia, the ECtHR found that it would be a violation of ECHR Art. 2 and Art. 3 if Russian authorities returned the asylum seekers to Syria.<sup>53</sup> The Danish Refugee Appeals Board (RAB) has considered the judgment but did not find that there was a need to change the current practice regarding Syrian cases: according to the RAB the case dealt with specific individualized aspects of the claim rather than the general exceptional nature of the conflict and had therefore no wider impact than that particular case.<sup>54</sup>

### EU law: asylum and migration opt-out

Where Denmark is a party to the international and regional human rights framework and thus bound by the legal obligations enshrined in the conventions, Denmark has opted out of the common European asylum and immigration policies (Title V of Part III of the Treaty on the Functioning of the European Union) and is therefore not bound by measures adopted pursuant to those policies.<sup>55</sup>

The Danish opt-out with respect to asylum is related to the outcome of a referendum on the Maastricht Treaty in 1992.<sup>56</sup> In this referendum, a majority of 50.7% of the Danish voters (with a turnout of 83.1%) rejected the Maastricht Treaty. The solution for the ratification procedure was found through the introduction of four Danish opt-outs, including no participation in majority voting in Justice and Home Affairs.<sup>57</sup> This meant that Denmark did not participate in the harmonization of EU asylum policies. In December 2015, Denmark held a referendum specifically on the opt-out concerning Justice and Home Affairs. The vote was to determine if Denmark would maintain the exemptions in the original opt-out or replace it with an opt-in model. Denmark voted not to modify the original opt-out.<sup>58</sup>

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53 ECtHR, *M.D. and others v. Russia*, Nos. 71321/17 and 9 others, 14 September 2021.

54 Flygtningenaevnet (RAB), "[Drøftelser vedrørende Syrien-praksis på møde i Flygtningenaevnets koordinationsudvalg den 28. oktober 2021.](#)" 29 October 2021.

55 Articles 1 and 2 of the Protocol (No. 22) on the position of Denmark, annexed to the Treaty on European Union and the Treaty on the Functioning of the European Union. See in this respect also the ECtHR in *MA v. Denmark*, 9 July 2021, Application number 6697/18.

56 Aarhus University, "[An overview of Denmark and its integration with Europe.](#)"

57 These four opt-outs were agreed in December 1992 in the Edinburgh Agreement and confirmed in a Danish referendum in 1993 which allowed the ratification procedure to proceed. The other three opt-out were: no participation in the euro; no participation in EU defence; and no participation in European citizenship.

58 Danish Parliament EU Information Centre, "[The Danish opt-outs from EU cooperation.](#)" accessed on 12 October 2023.

This means that Denmark is still not part of the Common European Asylum System (CEAS) and not directly bound by EU legislation on asylum, in particular the Qualification Directive (2011/95/EU), the Procedures Directive 2013/32/EU, the Reception Directive (2013/33/EU) and the Temporary Protection Directive (2001/55/EC).<sup>59</sup> The Return Directive however does apply in Denmark due to the Schengen cooperation. And Denmark decided to join the Dublin system, which contains criteria for the responsibility of a country for an asylum application, via a parallel agreement concluded with the EU in 2006.<sup>60</sup> In practice, the Danish participation in the Dublin system means that Denmark must observe this system's fundamental principle of *mutual trust*.<sup>61</sup> Denmark's asylum practices must offer at least similar procedural and reception standards to asylum seekers transferred to Denmark under the Dublin II regulation.<sup>62</sup>

Despite this approximation of asylum standards, the asylum systems of EU Member States on the one hand and the Danish standards on the other can differ, not only in theory (because of the opt-out) but also in practice. The impact thereof became clear in the 2022 Dutch Council of State's judgment on the legality of Dublin transfers of Syrians to Denmark. They would risk losing their asylum status in Denmark due to ceased circumstances, while the Netherlands under article 15b and 15c of the Qualification Directive had not deemed parts

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59 Denmark did for example not apply the Temporary Protection Directive for Ukrainian displaced persons, but rather enacted a 'special law' in the aftermath of the Russian invasion of Ukraine. The law was intended to prepare for and accommodate a high number of asylum-seekers arriving in Denmark within a short time span. It eased the admissibility for asylum claims for Ukrainians and allowed for an expedited process to seeking and gaining employment within Denmark. The distribution of asylum-seekers was based around placement in areas where the asylum-seekers had a pre-existing network, or in areas that have higher job opportunities. It also contained measures to help Ukrainian children integrate into the Danish schooling system, while also containing provisions to ensure that they could continue to learn Ukrainian.

60 This agreement extends to Denmark the provisions of Council Regulation (EC) No 343/2003 establishing the criteria and mechanisms for determining the Member State responsible for examining an asylum application lodged in one of the Member States by a third-country national, and Council Regulation (EC) No 2725/2000 concerning the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of the Dublin Convention. See Council of the European Union, "[Council Decision 2006/188/EC](#)," 21 February 2006.

61 See also EUAA, "[Background note Dublin II Appeals and Mutual Trust, Challenges related to mutual trust concerns raised in appeals within the Dublin III procedure](#)," 5 April 2023.

62 This is evidenced by a [factsheet](#) filled out by the Danish Ministry of Immigration and Integration, which makes clear that Denmark offers similar procedural guarantees and reception to asylum seekers who are transferred under the Dublin system.

of Syria safe and grants subsidiary protection to Syrians. The Dutch Council of State held that the Syrian applicant had given sufficient evidence that a transfer to Denmark would expose him to a real risk of indirect refoulement to Syria.<sup>63</sup> A year later, in a judgment of September 6, 2023 the Dutch Council of State held that as the national (Dutch) policies to Syria had changed to a more individual assessment, the applicant could no longer demonstrate an evidently and fundamentally different level of protection between the Netherlands and Denmark, and thus there no longer was a risk of indirect refoulement.<sup>64</sup>

The above example shows that despite the Danish opt-outs on asylum, Denmark is still tied to the standards in other EU countries because of its participation in the Dublin system and its concept of “mutual trust”. These standards must generally be in compliance with EU asylum legislation and the interpretation of this by the EU Court of Justice. Indeed, the Dutch Council of State in its judgment of 6 July 2022 referred to the Court of Justice judgment in the Jawo case<sup>65</sup> as well as judgments of the ECtHR with respect to responsibility allocation agreements. It concluded that EU law requires courts to scrutinize the level of protection in general and with respect to specific groups.

EU standards can also bind Denmark in another manner. In *MA v. Denmark* the ECtHR, while acknowledging Denmark’s opt-out regarding EU immigration legislation, referred to the EU family Reunification Directive. In this case, the EU’s legislative framework left a margin of appreciation to Member States. However, the fact that the ECtHR referred to EU standards is an indication that the ECHR, to which Denmark is a party, and EU law are increasingly intertwined. The ECtHR held: *‘At the same time the Court notes that while Denmark was not bound by the common European asylum and immigration policies set out in the Treaty on the Functioning of the European Union, or by any measures adopted pursuant to those policies (see paragraph 42 above) it is clear that within the European Union an extensive margin of discretion was left to the Member States when it came to granting family reunification for persons under subsidiary protection and introducing waiting periods for family reunification.’*<sup>66</sup>

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63 ABRvS, ECLI:NL:RVS:2022:3797, 19 December, 2022; ABRvS, ECLI:NL:RVS:2022:1864, 6 July 2022.

64 ABRvS, ECLI:NL:RVS:2023:3286, 6 september 2023. See also the press release of the Council of State: “[Nederland mag Syrische vreemdelingen weer overdragen aan Denemarken.](#)”

65 EU CoJ, *Jawo v. Germany*, C163/17, 9 March 2019, paras 87-93.

66 ECtHR, *M.A. v. Denmark*, No. 6697/18, 9 July 2021, para. 155.

### 3 Border management in policy and practice

Despite having government coalitions with different political backgrounds during the past decades, preserving Denmark's national identity plays a consistent central role in its migration policy, explaining its strict visa policy and integration regulations. The arrival and admittance of substantial numbers of immigrants is seen as a threat to (or destabilization of) the national welfare system and should thus be prevented.<sup>67</sup> This is why border controls are encouraged and are an important part of the asylum and migration system.

#### Schengen and border controls

Since 2001, Denmark has been part of the Schengen agreement, leading to a division between internal Schengen borders, neighbouring Schengen members Germany and Sweden, and external Schengen borders, which are the sea and air borders.<sup>68</sup> Denmark does not have any external Schengen land borders. The Danish police is the responsible actor in managing the borders.

With the aim of improving its border management systems of the Schengen borders, the Danish police started a collaboration with IDEMIA, a multinational technology company in November 2021. Specific solutions such as self-service kiosks, automatic border control (e-Gates), and mobile biometric tablets were implemented.<sup>69</sup>

Denmark has introduced temporary border controls at internal Schengen borders valid until 11<sup>th</sup> November 2023. Such temporary internal Schengen border controls are valid under the Schengen Borders Code in case of a serious threat, and only to be applied as a last measure.<sup>70</sup> There are currently twelve other EU-Member

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67 Fondation pour l'Innovation Politique (fondapol), [Danish immigration policy: a consensual closing of borders](#), February 2023.

68 Danish Police, "[Border control](#)," accessed on 17 October 2023.

69 Shkurta Januzi, "[Denmark selects IDEMIA to deliver new border control solution for its external schengen borders](#)," *SchengenVisa*, 28 November 2021.

70 Migration and Home Affairs, "[Temporary Reintroduction of Border Control](#)," Danish Police, "[Border control](#)."

States that have enacted this exception for various reasons. In the case of Denmark, the reasons for the recently renewed directive for heightened security are ‘Islamist terrorist threat, organized crime, smuggling, Russian invasion of Ukraine, and irregular migration along the Central Mediterranean route.’<sup>71</sup> It more specifically had to do with the Koran burnings in July 2023. The Danish ministry of Justice stated that the threat necessitated extra controls regarding who enters the country. Even those flying into the country from another Schengen country can expect extra controls.<sup>72</sup>

Furthermore, Denmark currently has an active border control presence at its southern border with Germany as a temporary measure. This measure has been extended multiple times since its introduction in January 2016. Similarly, Denmark introduced internal border controls at the Swedish border in November 2019 for the reason of organised crime and terrorism- executed by regular road, rail, and ferry checks. The country is currently under revision by the European Commission for the legality of such controls, due to the requirement of exceptionality for the measures.<sup>73</sup>

### Emergency brake measure or ‘Nødbremse’

Moreover, an ‘emergency brake’ measure was introduced in the budget legislation of 2017<sup>74</sup> which grants the Minister for Integration the power to reject asylum-seekers arriving at Danish borders, who have previously transited through another Dublin-country and thus effectively close the border.<sup>75</sup>

Precondition for the activation thereof is a crisis situation where the Dublin regulation is still formally in place, but where the Danish government perceives

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71 Ibid.

72 Johannes Birkebaek, “[Denmark tightens border control after Koran burnings](#),” Reuters, 4 August 2023; Crisis 24, “[Denmark: Government extends stricter controls at border checks](#),” 5 September 2023.

73 Bleona Restelica, “[Denmark Being Investigated for Systematically Prolonging Border Controls Since 2016](#),” Schengenvisa, 17 August 2023.

74 Danish Ministry of Finance, “[Finanslov for finansåret 2017](#),” 2017.

75 “*The Foreigner and Integration Minister can in Special Circumstances decide that Foreigners, that claim to fall under section 7 of the Aliens Act can be rejected entry due to prior travel from a country that is included in the Dublin agreement. The decision is taken for a period of up to 4 weeks, and can be extended for a period of up to 4 weeks at a time*”. Danske Love, “[Udlændingeloven](#),” § 28, stk. 7.

that the agreement has ceased to be enforced in practice and that it thus cannot reasonably be expected to adhere to the Dublin procedures.<sup>76</sup>

This would in practice result in a total ban on territorial asylum: to prevent asylum seekers that arrive at the Danish-German border, which is the main border crossing for asylum seekers, to access Danish territory. This legislation is highly controversial within Denmark, as it could also have severe impact on cross-border relations with neighboring countries.<sup>77</sup> Currently no policy or operational plan exists that outlines exact steps that the Ministry should take in order to physically reject asylum seekers crossing the border.<sup>78</sup> At this point it remains a dead letter.

## Detention

The general grounds for immigration-related detention are outlined in Article 35 and 36 in the Danish Aliens Act. Specifically regarding asylum seekers, article 36 lays out that “non-citizens may be detained if non-custodial measures are deemed insufficient to ensure the enforcement of a refusal of entry, expulsion, transfer, or retransfer of a non-citizen.”<sup>79</sup> Further provisions with respect to detention with the view of the possibility to expel rejected asylum seekers can be found in the Danish Return Act (section 14(2)).<sup>80</sup> This framework is being used for several groups: refugees who have had protection, while their case is being reassessed for exclusion-grounds; foreign nationals with other grounds of

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76 The explanatory memorandum on this legislation highlights that such a situation would appear if several countries had in tandem begun to cease enforcing the Dublin rules, but does not specify the minimum bar for the number of countries that would have to stop enforcing the Dublin agreement in order to allow the Minister to take this measure. Udlændinge- og integrationsministeren (Inger Støjberg), the Danish Parliament, “[Forslag til Lov om ændring af udlændingeloven](#),” 15 March 2017.

77 Erik Holstein, “[Mette Frederiksen har fået europæisk skyts til sin udlændingepolitik - Altinget - Alt om politik: altinget.dk](#),” *Altinget*, 9 May 2023. It could mean that Denmark can no longer return asylum-seekers that have travelled through other Dublin countries, or who have been apprehended while traveling into Denmark. This is indeed mentioned in the explanatory memorandum but is considered a logical consequence of the fact that the emergency measure would only be introduced if the agreement in itself has ceased to function. See also Louise Halleskov, “[Kort om asylnødbremser](#)”, *Rule of Law*, 2 March 2020.

78 Anders Sønnderup “[Hvordan trækker man nødbremserne, og laver en grænse de uønskede ikke kan krydse? | Nordjyske.dk](#),” *Nordjyske*, 4 March 2020.

79 Global Detention Project, [Country Report: Immigration Detention in Denmark: Where officials cheer the deprivation of liberty of 'rejected asylum seekers](#), May 2018, p. 7.

80 Ministry of Immigration and Integration, Return Act (in Danish), “[Bekendtgørelse af lov om hjemrejse for udlændinge uden lovligt ophold](#).”

residence, who apply for asylum after an expulsion; and for asylum seekers, who are criminally convicted and expelled before or while their asylum case is being processed. This also includes those who try to travel to or through Denmark using false documents, and who are not deemed to be covered by the protection in the Refugee Convention art. 31(1).

Time served due to convictions takes place in many different detentions and prison facilities. Asylum-seekers detained under the Aliens Act are placed at the Ellebaek Immigration Centre or at Nykøbing Falster Holding Center. In order to comply with the EU Returns Directive, Denmark introduced a time limit on immigration detention of initially maximum six months. In case of refusal of cooperation of the detainee, the court can extend this for another 12 months.<sup>81</sup> In 2018, the average stay lasted 32 days.<sup>82</sup> In Denmark the limitations to detention under Dublin also apply to Dublin cases. Once in detention, the detainee receives free legal aid.<sup>83</sup> DIS's yearly statistical overview does not include numbers regarding immigration-related detention.<sup>84</sup> The Danish Prison and Probation Service however does provide these numbers, stating that in 2021 787 detained asylum seekers were imprisoned, of which 90% were men.<sup>85</sup>

After a visit to Denmark in 2019, the European Committee for the Prevention of Torture (CPT) called the Danish migration detention center Ellebaek out for being “among the worst of its kind in Europe.”<sup>86</sup> The CPT was critically concerned about the fact that migrants in detention centers were subject to prison-like (material) conditions and were bound to prison rules. Degrading treatment and incidents

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81 This is in line with article 15 of the EU Return Directive.

82 Council of Europe, [Report to the Danish Government on the visit to Denmark carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment \(CPT\)](#), 7 January 2020, p. 53.

83 Interview DRC d.d. 2 November 2023: DRC offers free legal aid and counselling, but detainees are also provided with legal representation in the form of a lawyer that can represent them in court. The possibility for detained asylum seekers to talk with DRC while in detention is regulated by the section 37 d of the Danish Aliens Act.

84 Global Detention Project, [Country Report: Immigration Detention in Denmark](#), May 2018, p. 13.

85 Kriminal Forsorgen, “[Kriminalforsorgen statistik 2021](#),” 2021, p. 16

86 European Council on Refugees and Exile, “[Denmark: Council of Europe shocked over conditions on Danish Detention Centers and Threatens Legal Action](#),” 16 January 2020.



of verbal abuse by the custodial staff was furthermore highlighted.<sup>87</sup> The Danish Government responded that it planned some material renovation projects to its detention centers, and that it continuously strives to uphold the liberty and rights of foreign nationals in detention.<sup>88</sup> After having visited Denmark in June 2023, the Commissioner for Human Rights of the Council of Europe concluded that while some material conditions had been improved at Ellebaek, prison-like manner of operations was still of grave concern, including the use of disciplinary solidarity confinement.<sup>89</sup>

### Covid-19 caseload

Between March and July 2020, Dublin transfers of asylum seekers were suspended. Due to closed borders, a historically low number of asylum seekers entered Denmark (1515). Any cases that did occur were carried out online.<sup>90</sup>

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87 Council of Europe, [Report to the Danish Government on the visit to Denmark carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment \(CPT\)](#), 7 January 2020, p. 53-54.

88 Council of Europe, [Response of the Danish Government to paragraph 117 of the report of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment \(CPT\) on its visit to Denmark from 3 to 12 April 2019](#), 3 March 2020.

89 Dunja Mijatovic, [Report following her visit to Denmark from 30 May to 2 June 2023, Commissioner for Human Rights of the Council of Europe](#), Council of Europe, 25 October 2023.

90 European Commission, ["Denmark: How has COVID-19 affected migrants?"](#), 20 November 2020.

## 4 Access and national asylum procedures

### The Danish Asylum Procedure

Most asylum seekers arrive in Denmark without prior consent to enter the territory, due to the difficulty of obtaining visa for humanitarian purposes.<sup>91</sup> In 2002 Denmark abandoned the policy option of asylum on diplomatic posts.<sup>92</sup> Any foreign national who is in<sup>93</sup> or has entered Denmark, whether illegally or with a visa, can apply for asylum. As stated in the paragraph on the applicable international legal framework, the grounds for asylum are based on Denmark's international legal obligations.<sup>94</sup>

Once in Denmark, a person who wants to apply for asylum has to register with the (border)police or at Reception and Application Centre Sandholm in Allerød. The practical and humanitarian work of the reception centre falls under the Danish Red Cross, while the Danish police, the Danish Immigration Service, and

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91 Danish visa rules are based on nationalities. Countries whose citizens must hold visas in order to enter Denmark are divided into five main groups. Different guideline requirements for obtaining a visa apply to each group and the groups are based on the overall risk of a citizen remaining within the Schengen countries after the individual's visa expires. See [The Danish Immigration Service](#); See also Michala Clante Bendixen "[Hvor mange kommer, og hvorfor?](#)," Refugees DK, 29 September 2023.

92 See in this respect Gregor Noll, Jessica Fagerlund and Fabrice Liebaut, [Study on the feasibility of processing asylum claims outside the EU against the background of the Common European Asylum System and the goal of a common asylum procedure](#), Danish Institute for Human Rights and European Commission, 2020.

93 This means that people already with a Danish residence permit, often based on family reunification, can also apply for asylum, The Danish Immigration Service, "[Adult Asylum Seeker – Who can apply for asylum?](#)".

94 Danish immigration authorities can grant a temporary residence permit as a refugee in line with three provisions of Article 7 of the Danish Aliens Act: 7.1) Convention status or K-status: meeting the UN Refugee Convention's definition of refugees, linked to fear of being persecuted for reasons of race, religion, nationality, membership of a social group or political opinion. 7.2) subsidiary protection status or B-status: due to risk of torture or inhumane treatment in the country of origin, or 3) temporary protection status: the situation at the country of origin is characterized by indiscriminate violence and attacks on civilians. See also Danish Refugee Council, "[Getting Asylum in Denmark](#)."

the Danish Refugee Appeals board are in charge of the case management.<sup>95</sup> The initial phase of the procedure starts with registration of the asylum seeker after which they will be issued a specific card which serves as a personal ID. Usually they will after a couple of days be provided with accommodation in an asylum reception center, determined by the DIS. Subsequently asylum seekers are summoned by the DIS to fill out a written asylum form on the person's name, country of birth, residence, family, reasons for fleeing, fear of return, countries travelled through etc, which can be done in any language. As soon as possible, this is followed by the first personal interview, so-called "OM-samtale", with the DIS and an interpreter at Sandholm, to establish the travel route and to determine the motivation for seeking asylum.

On the basis of the written application and the interview, and a search in the common European fingerprint register, the DIS will determine whether the application should be processed in Denmark or another country according to the Dublin rules: this is solely an admissibility procedure without an examination of the merits of the case (section 29a Aliens Act).<sup>96</sup> The Dublin procedure is laid down in section 29a of the Aliens Act. If the asylum seeker has been granted international protection in another Member State in the European Union, the DIS can decide to reject the processing of the application in accordance with the Danish Aliens Act section 29b. A decision to reject the processing of an asylum application can be appealed to the Refugee Appeals Board. The appeal does not have automatic suspensive effect, except for Dublin cases.<sup>97</sup>

In 2022, a transfer decision to another Dublin agreement country was made in 472 asylum cases.<sup>98</sup>

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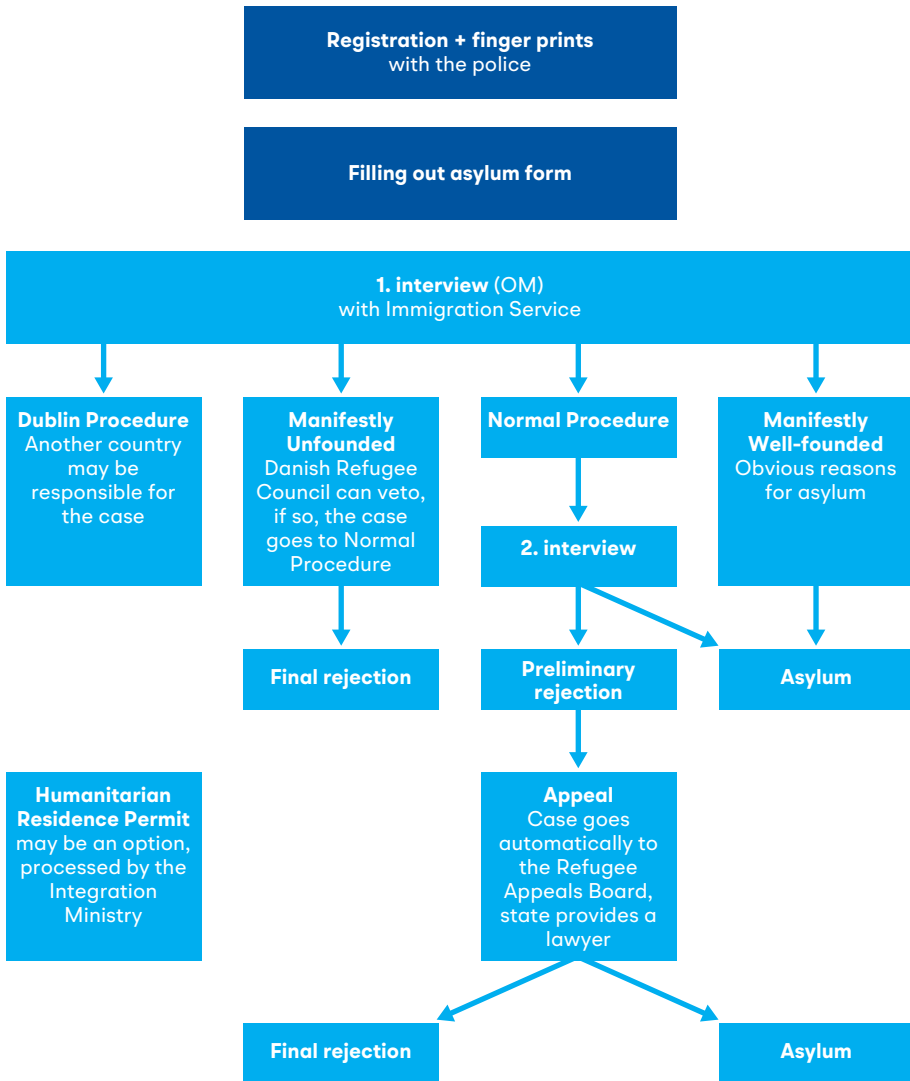
95 Danish Red Cross, "[What we do in the asylum department.](#)"

96 The Danish Immigration Service, "[Tal og fakta på udlændingeområdet 2021](#)", 2021, p. 9.

97 EDAL, "[Country Profile-Denmark](#)," 1 February 2018. See also for overviews of the Danish asylum procedure: DRC, "[The Danish Asylum System](#)," and DRC, "[Overview of the Danish asylum procedure](#)," January 2020.

98 The Danish Immigration Service, "[Tal og fakta på udlændingeområdet 2022](#)," 2022, p. 9, Table A.2.

Asylum Procedure



Source: [Refugees DK](#)

If the DIS has established that the application is admissible and will be processed in Denmark, the case can be decided to fall within the manifestly unfounded procedure (ÅG), expedited manifestly unfounded (ÅGH), or manifestly founded

procedure.<sup>99</sup> The latter is a faster procedure deemed for asylum applications with a high eligibility rate, most often categorized on the basis of the country of origin (such as the Syrians in 2015, before the policy change). These cases are often processed within a few months. If the application is considered well-founded, a residence permit with the according status is granted and a municipality will be assigned as the responsible actor for the integration process of the refugee/asylum permitholder.

In the 'manifestly unfounded procedure', applications are processed that are likely to be rejected. This would be the case if an asylum seeker has no valid grounds for seeking asylum, or if the applicant's grounds for seeking asylum do not warrant protection (article 53 Aliens act). If the application is likely to be rejected in the 'manifestly unfounded procedure', the case will first be put to the Danish Refugee Council (DRC).<sup>100</sup> The DRC has the opportunity to veto the DIS's rejection following an interview with the applicant.<sup>101</sup> In 2022, the DRC did not agree with the DIS's decision of manifestly unfounded cases in about 11% of the cases.<sup>102</sup> If that is the case the asylum seekers person receives the normal right to appeal to the RAB. If the DRC agrees with the DIS, the rejection is final without the possibility of appeal.<sup>103</sup>

The expedited version of this procedure is based on a list of certain (safe) countries of origin which hardly ever lead to asylum protection.<sup>104</sup> This list of countries is regularly reviewed by both the DRC and the DIS. These cases are often decided within a few days with no possibility for appeal to RAB. However, involvement of DRC should ensure that the case is processed in the right way.

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99 The Danish Immigration Service, "[Processing of an asylum case.](#)"

100 See supra note 24 for an explanation of the role of this NGO.

101 Danish Refugee Council, "[The Danish asylum procedure – phase 2.](#)" December 2015.

102 The Danish Immigration Service, [Tal og fakta på udlændingeområdet 2022](#), p. 69, attachment 3.

103 Ministry of Immigration and Integration, "[International Migration Denmark, Report to OECD.](#)" November 2022, p. 38.

104 The Danish Immigration Service, "[Processing of an asylum case.](#)"; Countries on this list are Albania, Australia, Bosnia and Herzegovina, Canada, Georgia (with the exception of LHBTI persons and persons from Abkhazia and South-Ossetia), Iceland, Liechtenstein, Moldova, Mongolia, Montenegro, New-Zealand, Northern Macedonia, Norway, Russia (with the exception of ethnic Chechens, LHBTI persons, Russian Jews and persons who are politically active and mistreated by the authorities, Serbia, USA and Switzerland.

Most of the asylum applications are on the individual merits assessed and decided in the regular procedure. In 2022, Denmark received 4,597 asylum applications<sup>105</sup> of which 30.52% (1,043) were granted residence permits.<sup>106</sup> Of the granted residence permits issued in asylum cases, 509 were granted a K-status, 71 a B-status, and 50 received temporary protection status (as Syrians no longer receive that status).<sup>107</sup>

Next to this asylum process based on international protection grounds, an asylum seeker can apply for a residence permit on humanitarian grounds in accordance with Article 9b.1 of the Danish Aliens Act. This can also be submitted after a rejection of the asylum application by the DIS. As a separate procedure, this application is submitted to and processed by the Ministry of Immigration and Integration. The Danish parliament stated that a humanitarian residence permit should be an exception and is only to be granted in very specific cases, for example a severe deterioration of a serious handicap upon return to country of origin.<sup>108</sup> Of note, this is very rarely granted, with only 2 cases leading to an approved residence permit in 2022.<sup>109</sup>

Formally, and in line with international refugee law, the burden of proof in assessing the merits of the asylum claims is shared between the applicant and the government, whereby the DIS in first instance and the Refugee Appeals Board in the second has to motivate their assessment and decision. Information is initially gathered through the written application and interviews with the asylum seeker. The individuals' credibility and individual risk is assessed, in

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105 The Danish Immigration Service, "[Tal og fakta på udlændingeområdet 2022](#)," 2022, p. 10, table A.1.2.

106 Ibid., table A.4.

107 Ibid.

108 The Danish Immigration Service, "[Apply for residence permit on humanitarian grounds](#)," August 2018.

109 See supra note 93. Unaccompanied minors who seek asylum (UMAs) are considered a specifically vulnerable group. Their asylum applications are in general processed within a short timeframe and they are housed in special accommodation centers. If the minor is initially viewed as too immature for the asylum process, the asylum procedure will be postponed until they are deemed as mature enough to understand and handle the procedure (The Danish Immigration Service, "[Unaccompanied minor asylum seeker](#)") If there is doubt about the proclaimed age of the minor asylum seeker – thought to be older than 18 years – an age survey, including medical assessment will be conducted to get physical proof of their age. In 2022, the DIS conducted age tests, of which 64% were assessed to be older than 18 years.

light of general 'Country of Origin Information' reports. The risk assessment in practice has been subjected to criticism for being illogical and unpredictable – specifically regarding the decision which protection status is granted in which case. For example, in 2021, 34% of granted residence permits for Syrians were based on Article 7(1)<sup>110</sup>, whereas in 2022, 62% of Syrians gained the same status.<sup>111</sup> The credibility assessment has furthermore been declared too tough, following its increasingly strict policies. In comparison to other EU countries, in the first quarter of 2023, Denmark was 19<sup>th</sup> in the EU in terms of asylum seekers per capita. This is a drastic drop to Denmark's 5<sup>th</sup> place in 2014.<sup>112</sup>

To acquire a permanent residence permit, strict requirements must be met, also as a consequence of the recent national legislative asylum reform as part of the paradigm shift. The most important preconditions are that a person has legally resided in Denmark for at least 8 years, whereby the period during the asylum process does not count, passing the Danish 2 language test, and having been in regular full-time employment for at least 3.5 years.<sup>113</sup>

### Accommodation

Depending on the type and/or phase of the procedure, asylum seekers are transferred to a reception center. Upon arrival, applicants stay in the Sandholm center. Dublin claimants often stay in Sjælsmark which is a return centre run by the Prison and Probation Service until they are transferred. During the asylum procedure asylum seekers reside in one of the accommodation centers which are mostly in Jutland.<sup>114</sup>

The DIS is responsible for providing and operating reception and accommodation centers for asylum seekers and irregular migrants based on the Danish Aliens Act

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110 The Danish Immigration Service, "[Tal og fakta på udlændingeområdet 2021](#)," 2021, p. 67, attachment 3.

111 The Danish Immigration Service, "[Tal og fakta på udlændingeområdet 2022](#)," 2022, p. 69, attachment 3.

112 Bleona Restelica, "[Denmark registering fewer asylum seekers than most other EU member states](#)," 18 April, 2023.

113 Ministry of Immigration and Integration, "[International Migration Denmark, Report to OECD](#)," November 2022, p. 52.

114 After rejection of a claim, and when considered not cooperative with respect to return to the country of origin, rejected asylum seekers are moved to return and deportation centre Avnstrup (families) or Sjælsmark or Kærshovedgård. **Ellebæk is a closed center with the aim of forced return ('motivational measure'). See also under 'return'.**

section 42 a, subsection 5. However, in practice about half the accommodation centers are run by the Danish Red Cross, and the rest by municipalities.<sup>115</sup> Services such as a basic cash allowance, healthcare, education for adults and children, accommodation, and clothing packages are provided for (DIS) during the asylum procedure, unless the asylum seeker has sufficient own means.<sup>116</sup> Based on the ‘jewelry law’, asylum seekers must inform the authorities upon arrival if they carry possessions worthy of 10.000 Danish kroner (1344 euro’s).<sup>117</sup> If this is the case, these valuables will be seized to cover the accommodation expenses.

Accommodation centers are open centers, with security control for visitors. All adult asylum seekers must enter a personalized contract with the accommodation center they have been assigned to. This agreement includes the context of daily tasks the asylum seeker is required to do, such as cleaning. The material rights can be diminished or revoked in case of non-compliance with the contract, or in case of any other kind of misbehavior.

Rooms and kitchen are often shared. If the application case will be processed in Denmark, the asylum seeker has to complete introductory basic Danish language and Danish cultural and social conditions courses.<sup>118</sup> Accommodation centers have ‘in-house activities’ and “out-of-house activities” such as unpaid job-training programs.<sup>119</sup> However in recent years, the centers have been moved more and more to rather isolated and thinly populated areas, which makes it increasingly difficult for asylum seekers to connect with Danish society and to keep themselves sufficiently occupied. In practice, asylum seekers often have to move from one center to the other, which is problematic, e.g. schooling for children, medical care, access to psychologists etc.<sup>120</sup>

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115 Ministry of Immigration and Integration, [“International Migration Denmark, Report to OECD, 2022,](#) p. 38. Also, possibility for private accommodation under certain rules approved by DIS, but is not often used.

116 The Danish Immigration Service, [Conditions for Asylum Seekers.](#)

117 See paragraph ‘setting the scene’.

118 Ministry of Immigration and Integration, [“International Migration Denmark, Report to OECD,”](#) p. 40.

119 Ministry of Immigration and Integration, [“International Migration Denmark, Report to OECD,”](#) p. 39.

120 Interview with DRC, 2 November 2023.



## Appeals procedure

The appeals system in Denmark is two-tiered, with the DIS being the first responsible actor, and the Refugee Appeals Board (RAB - Flygtningenaevnet) the second – the highest authority in asylum cases.<sup>121</sup>

After a preliminary rejection, the case is automatically referred to and appealed to the RAB for a second instance review.<sup>122</sup> At the same time the asylum seeker is given written notice of the first instance rejection and is invited for an interview with the Danish Return Agency. This interview is referred to as a ‘think pause’ that aims to inform the asylum seeker about the chances of receiving asylum and to offer financial return support instead of right to appeal.<sup>123</sup> If the asylum seeker does not wish to withdraw the claim, the State will automatically appoint and pay for a lawyer and translator (decided by the appointed lawyer).<sup>124</sup>

The asylum seeker has the right to stay in Denmark until the outcome of the case. The oral appeal board hearing is generally scheduled within a few months. In Dublin cases there is usually only a written procedure, during which it is difficult in practice to get cases overturned.<sup>125</sup> The review process consists of three board members; the chairman – who must be an appointed judge, one appointed member by the Ministry of Refugee, Immigration and Integration Affairs, and one appointed member from the Council of the Danish Bar and Law Society.<sup>126</sup> Any decision taken by the RAB on whether to reverse the decision of the DIS or to reject the asylum application is final. In 2022, the cumulative waiting time for the cases was 405 days.<sup>127</sup> In the same year, the RAB reversed 31,48% of the DIS’s decisions.<sup>128</sup>

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121 Danish Refugee Council, [“Stakeholders in the Danish asylum system,”](#) See on the working of the RAB: Jens Vedsted-Hansen, [“Flygtningenaevnet er blevet kompromitteret under paradigmeskiftets krydspres,”](#) *Information*, 27 September 2023.

122 Danish Refugee Council, [“The Danish asylum procedure - What happens if asylum is rejected?”](#)

123 Interview DRC d.d. 2 November 2023: According to the Danish Return Agency about 10% of the asylum seekers accepted the financial offer and withdraw their claim in Spring 2023.

124 Denmark does not provide for legal representation in the first instance. There is a right to get free legal counselling through DRC, but there is still risk that mistakes are made in the first instance procedure. See interview DRC d.d. 2 November 2023.

125 Interview DRC d.d. 2 November 2023.

126 Asylum Appeal Board, [“General Information regarding the Danish Refugee Appeals Board,”](#) 19 September 2017.

127 The Immigration Appeals Board, [“The Immigration Appeals Board’s statistics in cases in 2022,”](#) 28 February 2023.

128 The Immigration Appeals Board, [“The Immigration Appeals Board’s statistics in cases in 2022,”](#) 28 February 2023.

A request can be made to reopen the asylum case after the final decision, but only when there are significant and radical changes with respect to the situation in the country of origin, when there is new evidentiary material which could not have been presented earlier, or if there is a new motive for asylum.<sup>129</sup> In practice, it takes a long time to get cases re-assessed, waiting times may run up to a year.<sup>130</sup>

### Group-based protection policies

Soon after the Taliban took over in Afghanistan in 2021, Denmark evacuated people that supported the Danish authorities such as former military interpreters and employees at the embassy in Kabul in the country and offered them temporary protection.<sup>131</sup> By 15 September, 1,038 local staff, translators, NGO workers and local staff working for international organizations were flown over.<sup>132</sup> While most of these people were later resettled to the US,<sup>133</sup> 256 Danish temporary residence permits were granted to Afghans under the special act in 2021, and 593 in 2022.<sup>134</sup> Up until now, the ad hoc special regulation granted protection for two years with no possibility of extension.<sup>135</sup> However, on 5 October 2023, the Danish government submitted a proposal for the extension of the residence permits under the special law. The bill has yet to be adopted, but it is expected to enter into force on 27 November 2023.<sup>136</sup>

In February 2023, the Danish Refugee Board decided to extend protection under Section 7(1) to all women and girls from Afghanistan based on their gender: prima facie protection, which in this form is not implemented elsewhere in Europe.<sup>137</sup> This was applied to everyone in this category waiting for a decision, as well as retrospectively for recently denied applications by reopening these cases.<sup>138</sup>

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129 Danish Refugee Council, "[The Danish asylum procedure – phase 3.](#)"

130 Information received by DRC.

131 Pursuant under the Special Act no. 2055 of 16 November 2021.

132 ECRE, [Afghans seeking protection in Europe](#), December 2021, p. 7-8.

133 Jens Vedsted-Hansen, [Refugees as future returnees? Anatomy of the 'paradigm shift' towards temporary protection in Denmark](#), CMI, November 2022, p. 11.

134 Danish Immigration Service, "[Tal og fakta på udlændingeområdet 2022](#)," 2023.

135 Ministry of Immigration and Integration, "[International Migration Denmark, Report to OECD](#)," p. 8.

136 The Danish Immigration Service, [Extension of residence permit under the special law for persons who have assisted Danish authorities etc. in Afghanistan](#), 5 October 2023.

137 Flytningensævnet, [Flytningenævnet giver asyl til kvinder og piger fra Afghanistan](#), February 2023.

138 EUAA report 2023, p. 136.

In the footsteps of the EU Directive on Temporary Protection by which Denmark is not bound through its opt-out, Denmark introduced a special act in March 2022, which has granted all Ukrainian refugees, including dependent family members, immediate residence permits for a period of two years.<sup>139</sup> This special act does not apply to third country nationals not considered refugees, since they are expected to return to their country of origin. Ukrainian nationals that have received a residence permit elsewhere are not eligible for temporary protection in Denmark either.<sup>140</sup> By November 2022, 31,000 residence permits were granted under this special act.<sup>141</sup>

Initially, most asylum seekers from Syria were granted protection, either refugee status, subsidiary protection or temporary protection status. However, in 2019 the Danish Government 'reclassified' Damascus as safe, and the authorities started revoking or not renewing status for specific groups from Syria. Over 1000 refugees from the Damascus region were informed that their temporary asylum status was being reassessed. This will be discussed further in the next chapter, placing it in the context of the Danish paradigm shift.

### Paradigm shift: temporary nature of protection

As a response to the higher number of foremost Syrians seeking asylum in 2015, the Aliens Act was amended to introduce a new Section 7(3) for temporary protection status. The goal was to further differentiate protection for refugees fleeing due to the general situation of their country of origin and refugees who were being individually persecuted.<sup>142</sup> As previously discussed in the section on the political and social cultural context, the introduction of a general temporary protection status and the rules of revocation shifted Danish asylum policy towards an emphasis on returns and on a temporary nature of protection.<sup>143</sup>

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139 Extension of the Special Act until March 2025, [Særløven for fordrevne fra Ukraine forlænges med et år](#), 28 September 2023; Refugees DK, [Information to and about refugees from the war in Ukraine](#), 15 March 2022.

140 J. Vedsted-Hansen, [Refugees as future returnees? Anatomy of the 'paradigm shift' towards temporary protection in Denmark](#), CMI, November 2022, p. 11.

141 Ministry of Immigration and Integration, ["International Migration Denmark, Report to OECD"](#), p. 42.

142 Nadja Filskov et al., [You can never feel safe: an analysis of the due process challenges facing refugees whose residence permits have been revoked](#), The Danish Institute for Human Rights, 2022, p. 20. See also Jens Vedsted-Hansen, CMI 2022-6.

143 Done through the Amending Act no. 153 of 18 February 2015 as from 14 November 2014.

This shift was further solidified with the introduction of Section 19a of the Aliens Act, which emphasized the temporary nature of granted residence permits.<sup>144</sup> The duration of protection depends on the type of status granted, with the DIS being the responsible actor that automatically decides whether the residence permit can be extended upon the expiration date. A residence permit based on convention status (7(1) Aliens Act) is granted for 2 years, with the possibility of extension for two years at a time. Status based on Article 7.2 and 7.3 of the Aliens Act are initially granted for one-year, with the possibility of extension for two-years at a time for the former, and one-year for the latter.<sup>145</sup> Whereas the provision with respect to the duration of the refugee convention status would be in violation of EU law (Qualification Directive), the articles with respect to subsidiary protection are indeed aligned.

A clearer distinction was furthermore made regarding the conditions that apply for revocation of status depending on the type of status initially granted. The general rules for the revocation of residence permits are laid out in Section 19 (1 and 2-5) of the Aliens Act. Convention status, in accordance with article 7(1), has the highest threshold of revocation, requiring ‘fundamental, stable and durable changes in the country of origin.’<sup>146</sup> In contrast to this, individual subsidiary protection and temporary protection status have much lower requirements for cessation of status. For these forms of subsidiary protection, durable change in the country of origin is not required. Rather, revocation of status is possible for both, even when the general conditions of the country of origin are “serious, fragile and unpredictable – as long as the improvements cannot be considered ‘entirely temporary.’”<sup>147</sup> This does not apply for refugees with a subsidiary protection status granted because of an individual risk (article 7(2)). In similar fashion to the appeals procedure of the asylum application, when the DIS revokes the residence permit, it is referred to the Refugee Appeals Board for review. Lastly, Denmark’s international obligations must not be violated regarding revocation decisions, such as Article 8 of the ECHR.

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144 Filskov et al., [You can never feel safe](#), p. 20.

145 Filskov et al., [You can never feel safe](#), p. 21.

146 Filskov et al., [You can never feel safe](#), p. 41. See also article 1(c) sub 5 Geneva Convention.

147 The Ministry of Justice, [Bill No. 72 presented on 14 November 2014 regarding proposal for an act amending the Aliens Act](#), Section 2.5.2.

In certain cases, despite changes in the country of origin, the DIS can decide to uphold and extend protection status. Set out in Section 26 of the Aliens Act, this is the case, for example, for families with children under the age of 18 who have a personal link to Denmark, or when the refugee has a spouse/cohabitating partner or minor child living in Denmark who is at risk of persecution in his/her home country.<sup>148</sup> However, following the 2019 amendments, this so-called criteria for ‘assessment of attachment’ to Denmark is given less consideration in the reassessed cases.<sup>149</sup>

As duly noted, the current revocation legislation and practice differs from the EU provisions of duration and revocation of protection status, which is legally possible because of Denmark’s opt-out. While these changes are in line with Denmark’s focus on the temporary nature of protection, refugees with subsidiary- and temporary protection in Denmark are now significantly less protected than elsewhere in the EU.

‘Project Damascus’ further exemplifies the ‘paradigm shift’. In February 2019, the DIS started to review residence permits of Syrian refugees from Damascus, and later also Rif-Damascus that were granted under Section 7 (2) and Section 7(3) Aliens act due to general conditions in Syria.<sup>150</sup> This review was based on a RBA statement, only days after the necessary legislation passed parliament, noting that the general situation in Syria had changed, and that the risks of endangerment was reduced in certain areas. Since the summer of 2020, the Danish government holds the opinion that originating from the region of Damascus alone, is no longer sufficient ground for a protection status.<sup>151</sup> Similarly, in 2023 the provinces Larakia and Rif-Damascus have been considered safe enough for return. Those granted protection based on convention grounds (article 7(1)) were exempted from this new policy.<sup>152</sup> If the DIS decides that the ground for individual protection has ceased, the case is automatically referred to

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148 The Danish Immigration Service, “[Extension of a residence permit as a refugee or an ordinary quota refugee](#),” 1 July 2019.

149 Filskov et al., [You can never feel safe](#), p. 19.

150 Filskov et al., [You can never feel safe](#), p. 30.

151 The decision that Damascus was considered sufficiently safe for return was heavily criticized.

See for example Human Right Watch, “[Denmark: Flawed COI reports lead to flawed refugee policies](#),” 19 April 2021; UNHCR Northern Europe, “[Recommendations to Denmark on strengthening refugee protection](#),” 11 January 2021.

152 Vedsted-Hansen, [Refugees as future returnees?](#), p. 11.

the Appeals board.<sup>153</sup> Between February 2019 and May 2023, 2,155 cases have been reassessed from people originating from Damascus city, Rif-Damascus and Latakia.<sup>154</sup> Between June 2019 and December 2021, the Appeals Board overturned 49% of the cases, upheld 37% and referred back to the first instance in 14% of the cases.<sup>155</sup> These numbers highlight disparities of the decision made between the DIS and the RAB. Currently, 371 statuses have been revoked, forcing Syrians to return.<sup>156</sup> However, return remains impossible to effectuate as Denmark has no diplomatic relationship with Syria and no means to enforce those returns in practice. Following a Dutch Council of State ruling on not transferring Syrians to Denmark under the Dublin agreement because of the risk of indirect refoulement in 2022, the Dutch government requested the Danish government for more information on their return policy to Syria.<sup>157</sup> The Danish authorities acknowledged that protection status could be revoked or denied in Denmark for those Syrians who only invoke the general situation in Syria, but that this was done with restraint as the security situation in Syria is still characterized by arbitrariness and unpredictability. Also, there would not be forcible returns to Syria, in light of foreign policy considerations: ‘a unilateral Danish policy on forcible returns to Syria could be taken as a legitimization of the Syrian regime’.<sup>158</sup> The result is that Syrians remain rightless and stuck in Denmark, often in closed centres.<sup>159</sup> They are in fact in a legal limbo, with no durable solution or perspective of building up their lives again in sight. Denmark has taken a unique and highly criticized position on this in the EU. And it is foremost a clear signal that the paradigm-shift has perhaps provided Denmark with a tough immigration image, but substantially its policies have thus far failed.

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153 Johannes Birkebaek and Nikolaj Skydsgaard, [“Denmark deems Syrian province safe for returning refugees, worrying UNHCR,”](#) Reuters, 17 march 2023; Vedsted-Hansen, [Refugees as future returnees?](#), November 2022, p. 27.

154 Ministry of Immigration and Integration, [“Udlændinge- og Integrationsudvalget 2022-23,”](#) 22 May 2023.

155 Vedsted-Hansen, [Refugees as future returnees?](#), November 2022, p. 27.

156 Ministry of Immigration and Integration, [“Udlændinge- og Integrationsudvalget 2022-23,”](#), p. 3.

157 Parliamentary documents *Kamerstukken II*, nos. 30 573 and 19637, nr. 195, 7 November 2022.

158 See in this light also the critical position of EEAS: Josep Borrell, [“The conditions are not met to change the EU’s policy on Syria,”](#) EEAS, 18 June 2023.

159 Elian Peliter and Jasmina Nielsen, [These Refugees Can’t Stay in Denmark, but they can’t be sent home,](#) New York Times, 7 March 2022.

## 5 Extraterritorial access to asylum

### Legal Pathways: Resettlement

Denmark has a longstanding history when it comes to UNHCR resettlement schemes. Resettlement through UNHCR is the only formal Danish legal protection pathway: there are no other humanitarian admission programmes or protected entry procedures.

Since 1978, Denmark used to resettle 1500 refugees over a three-year period. Resettlement is explicitly laid down as a protection ground ‘tool’ in the Danish Aliens Act (section 8). Until 2016, in collaboration with UNHCR, a delegation from the DIS and the DRC selected individual refugees, often from 2-3 different countries each year. After being interviewed and declared eligible for the programme, the refugees receive basic information about Denmark and subsequently an entry visa. Upon arrival, they are directly settled in municipalities.

Also with respect to resettlement, the Danish policy and practice became stricter in recent years. In 2016, the parliament put a temporary stop to resettlement,<sup>160</sup> which became more definite in 2018 when legislation was passed to annul the previous multi-annual agreement with UNHCR. The quota is currently determined on a yearly basis by the Minister, and the number is depending on the total spontaneous arriving asylum seekers in Denmark. Since then, there have been very limited resettlement missions, and as of 2020 it only concerned refugees who were residing in Rwanda (2020, 2021 and 2022), and thus linked to the MoU with Rwanda (see following paragraph).<sup>161</sup> The Minister has set strict criteria on the profile of refugees (women and children) and in practice the quotas do not get filled. In the period from 2015 until now less than 1100 refugees were resettled.<sup>162</sup>

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160 See Ulrik Dahlin and Jesper Løvenbalk Hansen, “[Danmark går enegang med stop for kvoteflygtninge](#),” *Information*, 12 September 2017.

161 See Ministry of Immigration and Integration, “[Danmark tager 200 kvoteflygtninge fra Rwanda](#),” 12 August 2022.

162 In 2015: 580, 2016: 85, 2017-2019: 0. See the Danish Immigration Service, “[Tal og fakta på udlændingeområdet 2019](#),” In 2020: 31, 2021: 197, 2022: 165, 2023: 0, See the Danish Immigration Service, “[Tal og fakta på udlændingeområdet 2022](#).”

As part of the legislative ‘paradigm shift’ reform, also the residence permit issued to resettled refugees is currently granted on a temporary basis for a period of 2 years.<sup>163</sup> And since they can also be given subsidiary protection, with a lower and more generalized revocation/cessation threshold, resettlement may thus result in return. For example, 32 resettled refugees under section 8(2) have been subject to cessation procedures due to an improvement of the general situation in Somalia. This is at least at odds, but in fact in contradiction, with the concept of resettlement as a ‘durable solution’ for refugees in need of protection.<sup>164</sup> UNHCR has called for the gradual increase of the Danish resettlement quota, as well as the continued introduction of complementary pathways.<sup>165</sup>

### Externalization of asylum procedures

As stated earlier, the focus, or ‘vision’ of Denmark on externalization of the asylum procedure is nothing new. Being a frontrunner from the 1980’s,<sup>166</sup> regularly addressing the issue at regional and international tables, it was in 2018 that the concept got more concrete shape. Initiated by the Social Democrats, a policy plan (‘platform’) was developed for a ‘new and fairer asylum system according to familiar lines’:<sup>167</sup>

- spontaneous asylum would no longer be possible in Denmark;
- Denmark would establish a ‘reception center’ outside Europe preferably in partnership with other EU states, where asylum seekers would be transferred to;
- those asylum seekers found to be refugees would be further transferred to UNHCR to receive international protection, either in a UN camp or locally in the third country;
- and Denmark would offer resettlement places as an alternative to asylum.

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163 L174: ‘for the purpose of temporary stay’. See also UNHCR, “[Observations on the Proposed Amendments to the Danish Aliens Legislation](#),” 18 January 2019.

164 Nikolas Feith Tan, “[The End of Protection](#),” 2021, p. 80.

165 UNCHR, “[Recommendations to Denmark on strengthening refugee protection in Denmark, Europe and globally](#),” January 2021. See also UNHCR, “[Preliminary Observations on the law proposal 2018](#),” 18 January 2019, with reference to the Global Compact on Refugees that Denmark has committed to.

166 In Denmark, the 1980’ Aliens Act was promoted as the most humanitarian refugees act in the world and some politicians have since used this as an argument to say that the Danes had been too generous. See also Nordics Info, “[Danish Immigration Policy 1970-1992](#).”

167 Nikolas Feith Tan, “[The End of Protection](#),” 2021.



As with previous similar ‘visions’, i.e. the United Kingdom in 2003, the idea received limited support in the EU, and was declared ‘unrealistic’ by the European Commission.<sup>168</sup> The Danish government consequently focussed on the legal aspects and (im)possibilities of externalization and published a legal note on the matter in January 2021.<sup>169</sup> Based on that note, Denmark passed in June 2021 a legislative amendment to its Aliens Act, allowing for the transfer of asylum seekers to a third state outside the EU for processing the asylum claim, protection in that state or return from there to the country of origin (section 29).<sup>170</sup> The amendment entails that such transfers must take place under an international agreement between Denmark and the third country and that asylum seekers are to be transferred, unless it would be in breach of Denmark’s international obligations.<sup>171</sup> This pre-condition follows clearly from the beforementioned preparatory legal note, acknowledging that international obligations, such as the non-refoulement principle and the right to family life, do indeed limit the possibilities to transfer asylum seekers who are already on the territory and within jurisdiction of the Danish authorities.<sup>172</sup>

The new legislative amendment as tabled (L9226) provides for a framework for the ‘externalisation model’ in three phases:<sup>173</sup>

1. a pre-transfer ‘screening’ procedure in Denmark;
2. an asylum procedure in the third country with which the agreement is concluded; and
3. for those recognized as refugees, protection in that third country.

The explanatory memorandum describes the first phase in some more detail, with a two-instance individualized procedure (first the DIS, with an appeal to the Refugee Appeals Board, see also under ‘national/territorial asylum’) to assess

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168 Nikolas Feith Tan, “[The End of Protection](#),” 2021.

169 Danish Ministry of Immigration and Integration, “[Juridisk analyse af mulighederne for overførsel af asylansøgere til asylsagsbehandling i et tredjeland inden for rammerne af international ret](#),” January 2021, p. 3.

170 See for a comprehensive legal assessment of this legislation: Nikolas Feith Tan and Jens Vedsted-Hansen, 2021; Nikolas Feith Tan, “[The End of Protection](#),” 2021; See also Chantal Da Silva, “[Denmark passes a law to send its asylum seekers outside of Europe](#),” *Euronews*, 3 June 2021.

171 [Lovforslag nr. L 226](#), 29 april 2021.

172 Danish Ministry of Immigration and Integration, “[Juridisk analyse af mulighederne for overførsel af asylansøgere til asylsagsbehandling i et tredjeland inden for rammerne af international ret](#),” January 2021.

173 Nikolas Feith Tan, “[The End of Protection](#),” 2021.

whether the asylum seeker can lawfully be transferred to the third country. Examples of persons exempted from transfer are nationals from the third state itself, asylum seekers with family residing in Denmark and seriously ill persons.

With respect to the second phase, the amendment states that the third country must have ratified and in fact respect the 1951 Refugee Convention and there must be access to a sound asylum procedure. It does not go into further detail on the minimum norms, protection standards, or legal rights for recognized refugees, or rejected asylum seekers. In many respects, it left key details and implementation questions unanswered.<sup>174</sup> For example, Denmark has thus far not worked with a list with safe third countries. And how should the minimalistic approach towards refugee rights in the explanatory memorandum be explained (stating that the third country must in practice respect the prohibition of non-refoulement in the Refugee Convention)? It is also not clear whether or not Denmark remains responsible for the operationalization of the asylum procedure in the third country, or that it will be the third country upon which that responsibility will be transferred. A relevant question when it comes to jurisdiction and legal accountability for the operation.

Another interesting legal question is related to the beforementioned 'opt-out' position of Denmark within the EU. From the parallel Dublin agreement between Denmark and the EU, it follows that Denmark may not unilaterally enter into agreements with third states that would alter the determination of responsibility for asylum applications, unless there is agreement of the Community (article 5). Generally spoken, the European Commission's reaction to the whole idea was far

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174 See also for a critical assessment of the externalization legislation: Danish Refugee Council, "[The Danish scheme for externalization is harmful to refugees and a threat to international refugee cooperation](#)," 3 November 2022. ECRE, "[Denmark: Parliament votes blindly on externalising asylum procedure and protection obligations](#)," 11 June 2021; Martin Lemberg-Pedersen, Zachary Whyte and Ahlam Chemlali, "[Denmark's new externalization law: motives and consequences](#)," *Forced Migration Review*.

from positive.<sup>175</sup> On the other hand, the current discussion on asylum within the EU as well as the interest of other countries in externalisation models may render this less politically salient. From a legal point of view however, although it can be argued based on European jurisprudence that the Dublin Regulation does not prevent Member States (including Denmark) from transferring asylum seekers to safe third countries, it is exactly that precondition that is relevant. Denmark is not bound by the safe third country concept as laid down in the Asylum Procedures Directive and could thus be expected to have more legal space to navigate due to the absence of the connection criterium ex article 38 APD. However, it does apply indirectly, because the Dublin Regulation refers to the concept as defined and used by the Directive.<sup>176</sup> Currently, no reference in the Danish legislation is made to the fact that the asylum seeker should have a meaningful connection with the third country as a pre-condition for transfer.<sup>177</sup>

Furthermore, to operationalize or implement this legislation in practice, it all comes down to the conclusion of international agreements by Denmark with third countries. Denmark has not yet made an agreement with a third country that could lead to implementation of the law. The European Commission has repeated this reply in several answers to the European Parliament after the amendments to the Danish Aliens Act (e.g., in May 2021, July 2021 and September 2021) with the addition that “To the Commission’s knowledge, no such agreement is yet concluded. To assess whether the amended Act respects Denmark’s international obligations, it is necessary to also examine the content of any such agreement.”

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175 On 18 June 2021 Commissioner Ylva Johansson [stated](#) that “[t]he idea of a transfer of asylum-seekers to third countries for processing and accommodation is contrary to the spirit of the Geneva Convention. A system aiming for external processes outside the EU instead of protecting right to apply for asylum in the EU would send a strong and wrong signal to the outer world: Europe is disengaging. ... External processing of asylum claims raises fundamental questions about both access to asylum procedures and effective access to protection. It is not possible under existing EU rules or proposals under the New Pact on Migration and Asylum. The Pact on Migration and Asylum is based on the right to asylum as a fundamental right in the European Union, guaranteed by the EU Charter.” See also Marie Moller Munksgaard, [“The European Commission warns: As soon as Denmark sends asylum seekers to Rwanda, there will be a legal aftermath,”](#) Altinget; the Danish Parliament, [“Kritik af dansk lov om modtagecentre i udlandet forud for RIA-møde,”](#) 7 June 2021.

176 See also Nikolas Feith Tan and Jens Vedsted-Hansen, [“Denmark’s Legislation on Extraterritorial Asylum in Light of International and EU Law,”](#) *EU Immigration and Asylum Law and Policy*, 15 November 2021.

177 See also on this matter Michael Hoppe, [“Externalisierung oder der ‘Eine Ring’ für Europa \(editorial\)”](#) in ZAR (Zeitschrift für Ausländerrecht und Ausländerpolitik), 10/2022, p. 342.

The legal assessment by the Danish Ministry noted that Denmark's obligations to the EU are not considered to be an obstacle. The legal note does however point to the risk for a potential exclusion from cooperation under the Dublin Regulation when such an international agreement is indeed implemented.<sup>178</sup> If such an agreement between Denmark and a third country is to be concluded, this will probably be subject to parliamentary scrutiny and democratic control as it would be considered a formal treaty, not a mere MoU.

In that respect it is relevant to point out that the MoU that was concluded between Denmark and Rwanda<sup>179</sup> in September 2022 is of a different nature than the one between the UK and Rwanda.<sup>180</sup> The Denmark- Rwanda MoU deals with general migration cooperation. The dialogue between both countries concerns support to the Emergency Transit Mechanism to Rwanda; development cooperation, and new ideas on transferring asylum seekers from Denmark to other countries.<sup>181</sup> This is in line with previous statements by the Danish government that *Denmark is committed to finding new and sustainable solutions to the present migration and refugee challenges that affect countries of origin, transit and destination [...] It is also the vision of the Danish Government that the processing of asylum applications should take place outside of the EU in order to break the negative incentive structure of the present asylum system.*<sup>182</sup> However no such model is currently in sight. In fact, the current government

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178 Danish Ministry of Immigration and Integration, "[Juridisk analyse af mulighederne for overførsel af asylansøgere til asylsagsbehandling i et tredjeland inden for rammerne af international ret](#)," January 2021.

179 Although the the Organisation of the African Union issued a strong [statement](#) in response to the Danish legislative amendment, highly condemning the outsourcing of responsibility for refugee protection, [Rwanda is actively seeking partnerships with European countries](#).

180 UK Home Office, "[Memorandum of Understanding between the government of the United Kingdom of Great Britain and Northern Ireland and the government of the Republic of Rwanda for the provision of an asylum partnership arrangement](#)," 14 April 2022.

181 Denmark had no previous development relation with Rwanda, however according to the Danish project office in Kigali a programme is being set up with a budget of 11 million euro for development goals, 10 million euro for climate adaptation and 6 million for a migration partnership aimed at strengthening protection capacity for refugees (Congoese and Burundians) in the region. See Monika Sie Dhian Ho and Francesco Mascini, "[Dealen met Rwanda](#)," Clingendael Institute, 30 October 2023, p. 14.

182 Ministry of Foreign Affairs and the Ministry of Immigration and Integration of the Kingdom of Denmark & the Ministry of Foreign Affairs and International Cooperation of the Republic of Rwanda, "[Memorandum of understanding \(...\) regarding cooperation on asylum and migration issues](#)", April 2021.

coalition declared in their trilateral agreement that they seek multilateral approaches on asylum and migration issues.<sup>183</sup> Therefore, an 'alleingang' on externalization, without the support and cooperation of a group of likeminded in the EU, and outside their standing legal obligations does not seem to be the path currently followed by the Danish government. However, the Danish Prime Minister and Minister for Immigration have both stated that Denmark is also willing to establish bilateral schemes if necessary.<sup>184</sup> As the amendment yet only exists on paper, it remains to be seen what will happen in practice.

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183 The government position is to explore possibilities with other countries in the EU. See Prime Minister's Office, "[Regeringsgrundlag 2022](#)," 14 December 2022. See also Ebad Ahmed, "[Denmark puts asylum center talks with Rwanda on back burner](#)," AA, 25 January 2023.

184 Anders Redder, "[Centralt papir nævner en EU-løsning: Men ny regering taler åbent om dansk enegang i Rwanda-sag](#)," in: *Jyllands-Posten*, 15 December 2022; Morten Frich et al., "[Mette Frederiksen vil samle Danmark om en udlændingepolitik, som næppe er realistisk](#)," 6 February 2018.

## 6 Return in the context of migration cooperation

In Europe, the frame that the Danish focus on return is effective persists. In practice however, the government struggles, as any other country, with expelling asylum seekers whose application has been rejected or whose permit has been revoked.

### Return Procedure

The Danish Return agency assumed its tasks as an agency under the Ministry of Immigration and Integration in August 2020.<sup>185</sup> The Danish Refugee Council and the Danish Red Cross are two official cooperation partners of the Return Agency.

In May 2023, the Danish Ministry of Immigration and Integration reported that approximately 550 asylum seekers were waiting to be deported following rejected asylum applications.<sup>186</sup> Those staying in Denmark without possibilities for a legal stay are in the so called 'exit position'. This group consists of those rejected in the normal asylum procedure, the manifestly unfounded (expedited) procedure, people affected by the Dublin Agreement that need to be sent elsewhere, and other grounds for expulsion such as revocation of temporary protection status. As discussed in the appeals section, first instance rejected asylum seekers have the possibility to appeal to the RAB. Once the RAB has made a final decision, the Danish Return Act states that rejected asylum seekers have only 7 days to exit Denmark voluntarily. Before this time limit of departure, the Danish Return Agency will contact the individual for a mandatory interview. During this interview, duty to cooperate is highlighted, information is provided on the next steps as well as entering a return contract with the Agency.<sup>187</sup>

Denmark has introduced policies to convince rejected asylum seekers to return home voluntarily. These include pre-departure preparatory assistance, practical

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185 The Danish Return Agency, "[About Us](#)."

186 Arta Desku, "[About 550 asylum seekers in Denmark waiting to be deported, with rejection rates at the lowest since 2009](#)," Schengen Visa, 23 May 2023.

187 The Danish Return Agency, "[The return contract](#)"; DRC is also providing return and [reintegration support](#).

operational (financial) assistance in returning, pre-departure counselling services and reintegration assistance in their country of origin.<sup>188</sup> Those that chose for voluntary return can stay at return centres, until their departure, sometimes with a duty to report.<sup>189</sup> These return centers are very expensive compared to regular open accommodation centers.<sup>190</sup>

While legislation expects the rejected asylum-seeker to return voluntarily, reality paints a different picture. After it has been established that a rejected asylum seeker is not cooperating with return, something that is judged by the Danish Return Agency with no chance to appeal, the case is subsequently transferred to the Danish police.<sup>191</sup> Additionally, certain 'motivational measures' to return are implemented.<sup>192</sup> These include staying in a deportation centre, a halt to (financial) assistance for return, and denial of any further benefits given to those voluntarily sent back. Additionally, the rejected asylum-seeker then risks forced return to his or her home country.<sup>193</sup> Primary aim is to motivate people to leave, but in practice it breaks them down.<sup>194</sup>

## Cooperation on Returns

Up until the end of the program in July 2022, Denmark was member of the European Return and Reintegration Network (ERRIN) through which cooperation on returns is arranged with countries like Iraq, sharing identification documents and providing travel visas.

Furthermore, DRC is part of the European Reintegration Support Organisations (ERSO) network which consists of European NGOs working with repatriation counselling and reintegration support. ERSO cooperates with several reintegration partners. DRC can facilitate reintegration support through these reintegration partners for people who accept to return. The Danish authorities will ask DRC to facilitate reintegration support through a local reintegration

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188 Ministry of Immigration and Integration, [International migration – Denmark: report to OECD](#), December 2021. p. 62-63.

189 The Danish Immigration Service, "[Return Centre](#)."

190 Interview DRC d.d. 2 November 2023.

191 DRC, "[The Danish Asylum procedure phase 3 – What happens if you do not leave voluntarily?](#)"

192 DRC, "[The Danish Asylum procedure phase 3 – What happens if you do not leave voluntarily?](#)"

193 The Danish Ombudsman [monitors forced deportations](#).

194 Interview DRC d.d. 2 November 2023.

partner, if the Danish authorities do not have other access to cooperation with a reintegration partner in the relevant country.<sup>195</sup>

Forced return is, when possible, planned with the country of origin for readmission and reintegration arrangements.<sup>196</sup> However, the case of Syrian refugees who have had their status revoked or not extended exemplifies the obstacles and challenges in practice. As Denmark does not have any diplomatic relations with Syria, it lacks the capability to carry out these returns leading to a 'de facto non-enforcement' of the duty to leave. This is the result of the formal decision of the government not to engage in such relations with Assad's regime, leaving Syrian refugees in deportation centres with minimal facilities.<sup>197</sup> Some of these refugees decide to either live in irregular accommodation situations or move to neighbouring countries such as Germany, Sweden or the Netherlands.<sup>198</sup> Currently, the question rises whether or not these asylum seekers are subject to indirect refoulement when sent back to Denmark under the Dublin regulation, once they ask for protection elsewhere in the EU after having their permit revoked.<sup>199</sup>

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195 DRC, "[Countries with reintegration partners.](#)"

196 UN Migration Network, "[Status on the implementation of GCM – Danish contribution.](#)"

197 Jens Vedsted-Hansen 2022, p. 35.

198 Jens Vedsted-Hansen 2022, p. 35.

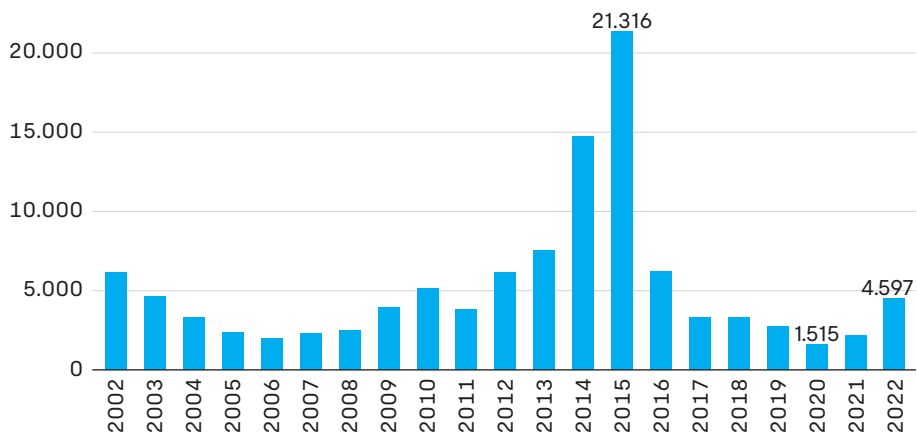
199 See earlier in this report under 'international legal framework'.



# 7 Statistics

The number of first asylum applications in Denmark has been steadily decreasing since 2015 when over 21.000 people applied for asylum, foremost from Syria. In the years that followed, the number of asylum seekers decreased significantly, with a low point of 1515 in 2020 (Covid 19) and counted 4600 in 2022.<sup>200</sup>

Number of asylum seekers from 2002 – 2022



200 Einar H. Dyvik, "Number of asylum seekers in Denmark from 2012 to 2022," Statista.

## Asylum applications

Nationality	Number of asylum applications in Denmark				
	2018	2019	2020	2021	2022
Ukraine	50	36	20	25	2.070
Afghanistan	115	90	69	557	379
Syria	604	493	344	325	379
Eritrea	680	486	170	379	199
Iran	195	135	86	67	123
Russia	89	72	32	17	110
Morocco	181	157	103	67	109
Iraq	119	121	61	63	103
Georgia	402	66	38	52	95
Belarus	37	33	19	27	94
Stateless*	149	204	88	65	82
Turkey	27	25	35	36	61
Nigeria	28	20	15	21	51
Uzbekistan	5	1	1	0	45
Somalia	106	166	43	40	43
Others	772	611	391	358	654
<b>Total</b>	<b>3.559</b>	<b>2.716</b>	<b>1.515</b>	<b>2.099</b>	<b>4.597</b>

\* Including stateless Palestinians.

Number of asylum applications in Denmark from 2018 – 2022:

Source: [Danish Immigration Service](#)

The main countries of origin during the last five years are Syria, Afghanistan and Eritrea. As is the case in more European countries, due to ever-changing (country-specific) asylum policies the eligibility rates in Denmark fluctuate. In 2015 it reached a record high of 85%, in 2020 it dropped to 44%, and in 2022 it was 59%. During the first 4 months of 2023, 76% of the applicants were granted asylum in first instance.<sup>201</sup> This does not include appeals (second instance), so the actual recognition rate is higher.

201 Michala Clante Bendixen, [“What are the chances of being granted asylum?”](#) Refugees DK.

However, when addressing the statistics in more detail, it becomes clear that the recognition rate of asylum applications of people immediately upon arrival is much lower. So-called 'remote registered' (Syrians and Eritreans who came via family reunification, evacuated Afghans with a high-risk profile who applied for asylum at a later stage) form around half of the granted statuses.

As is mostly the case, the eligibility for asylum protection depends on where the applicant is originating from. Syrians, Eritreans and Afghans are the largest groups in the whole of Europe, also in Denmark. The recognition rate in the first instance for Syrian nationals was 99% in 2016, 96% in 2017, 99% in 2018, 94% in 2019 and in 2020 it dropped to 88%. Very few applicants from so-called safe countries arrive in Denmark in general, which explains for a large part the relatively high recognition rate in Denmark compared to the EU on average.<sup>202</sup> Since 2016 it became more difficult for asylum seekers from Iraq, Iran, Somalia and Afghanistan to gain protection, even more in Denmark than in the rest of Europe.<sup>203</sup> In 2021 only 3% of the Afghans were granted asylum.<sup>204</sup> Recognition rates of applications for family reunification also vary according to the country of origin.<sup>205</sup>

In 2021, 2,511 people got a residence permit through family reunification. This number has been going down (see figure below).<sup>206</sup>

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202 In the EU, only 39% were granted asylum in 2022, but 50% received a permit if national forms of protection such as humanitarian stay are included. They are rarely used in Denmark.

203 Michala Clante Bendixen, [What are the chances of being granted asylum?](#) Refugees DK.

204 After Taliban seized power, the rate for Afghans has risen to over 90%, but most of the Afghan applicants in Denmark were evacuated and thus have a high-risk profile. Denmark has recently decided to grant asylum to all women and girls from Afghanistan, which will obviously make the rate stay high.

205 Statista, for 2018, depending on country: Eritrea 36%, Somalia 37%, Syria 54%, Iran 73%, Thailand 82%.

206 Ministry of Immigration and Integration, [International Migration Denmark, Report to OECD](#), November 2022, p. 14.

## Overview of all residence permits, etc. granted in Denmark, 2015–2021\* (persons, percentage)

Category	2016	2017	2018	2019	2020	2021	Share
							2021
<b>Family reunification, etc. ** (B)</b>	8,149	7,790	5,234	3,648	4,529	2,897	7%
Family reunification **	7,679	7,015	4,601	3,222	4,012	2,511	6%
– of which spouses and co-habitants	3,825	4,127	3,225	2,206	2,862	1,947	5%
– of which minor children	3,852	2,887	1,373	1,014	1,146	561	1%
Other residence cases (incl. adoption)	470	775	633	426	517	384	1%

## Number of positive decisions on family reunification 2015–2021\*

Category	2015	2016	2017	2018	2019	2020	2021*
<b>Spouses and cohabitants (A)</b>	4,996	3,624	3,927	2,959	1,908	2,592	1,596
– of refugees in Denmark	2,575	1,425	1,156	493	356	480	249
– of other immigrants in Denmark	228	201	256	268	219	302	181
– of which Danish/Nordic nationals in Denmark	2,193	1,998	2,515	2,198	1,333	1,810	1,166
<b>Family reunification according to the EU rules (B)</b>	246	218	209	289	329	296	373
– of which spouses and cohabitants (b)	237	201	200	266	298	270	351
– of which children	8	16	9	21	29	23	19
– of which parents/other family	1	1	0	2	2	3	3
<b>Spouses and cohabitants (A+B)</b>	5,233	3,826	4,127	3,255	2,206	2,862	1,947
<b>Minors (C)</b>	6,403	3,836	2,878	1,352	985	1,123	542
– children to refugees in Denmark	5,517	2,887	2,109	643	425	430	162
– children to other than refugees in Denmark	886	949	769	709	560	693	380
<b>Total (A+B+C)</b>	<b>11,645</b>	<b>7,678</b>	<b>7,014</b>	<b>4,600</b>	<b>3,222</b>	<b>4,012</b>	<b>2,511</b>

\* 1 January - 31 August 2021

Source: The Danish Immigration Service

# Conclusion

Denmark has opted out of the Common European Asylum System and is therefore not bound by the larger part of the *acquis*. The opt-out was a deliberate and well-considered decision at that time as the country was, and still is, keen on retaining its national sovereignty in dealing with asylum and migration from a cost-benefit ratio. At the same time, from the perspective of foreign policies and relations, the Danish have always been a frontrunner with respect to the external EU dimension of asylum and migration, as it was one of the first countries to develop and discuss ideas on externalization of asylum procedures (1986). In more recent years, the Danish asylum policy can be characterized as 'shifting' in various ways. First, a shift towards growing and eventually broad national consensus on restrictive migration policies: from the new Aliens Act of 2002 which is in contrast to a rather liberal one of 1983 and instigated by terrorist threats, to the changes in the political thinking of the Social-Democrats. This is indeed interesting as the number of asylum seekers arriving in Denmark has always been relatively low. Secondly, the so-called 'paradigm shift' after 2015: the prior legislative and policy focus of permanent residence and integration changed to perspectives of temporary protection, revocation of permits and return. And thirdly, the current government tends to shift from a somewhat unilateral approach vis-à-vis externalization of national asylum procedures to increasingly multilateral EU agreements with third countries.

What is the Danish situation with respect to access to asylum, and to what extent is the opt-out position of Denmark impactful? The national Danish asylum procedure is, in general terms, quite solid. As in the Netherlands, there is a cooperation with NGO's, such as the Danish Refugee Council (Asylum unit) which has a special role in the asylum procedure, and also with the Danish Red Cross on accommodation. The number of applications are rather low (4600 in 2022) and there are no significant backlogs, taken into account that there has been capacity to start revocation procedures. Points of criticism on procedural aspects relate mainly to the appeals procedure: amongst others, the limits to appeal options and the fact that there are currently only three members, instead of the previous five, resulting in lack of certain expertise/perspectives on case law. Moreover, the appeals procedure lacks legal representation in various stages of the proceedings. Because of the opt-out, Denmark can deviate from the Asylum Procedures Directive as it is not formally bound by it. However, in

general, Denmark's asylum system is still rather closely aligned with the EU *acquis*. Its national temporary protection scheme for Ukrainian displaced is quite similar to the EU TPD scheme. As Denmark is part of the Schengen and the Dublin system, it must abide by similar standards based on the mutual trust principle underlying these systems. Moreover, Denmark is a signatory to the Refugee Convention, other UN human treaties and the ECHR, including the applicable case law. Altogether, the international and regional legal framework applicable to Denmark do not greatly differ from other EU Member States.

Notwithstanding this legal framework, the 'paradigm shift' brought about several significant changes in the protection standards and focus of national asylum law and policies: differentiation in protection status, lower revocation thresholds, focus on temporary status, postponement of the right to family reunification, and return centres where persons may need to stay with limited rights without any perspective. Even the permits of resettled refugees (which is considered a 'durable solution') are nowadays temporary and can be revoked, something that was greatly objected by UNHCR. There have been legal consequences: because of Denmark's asylum policy towards Syrians i.e. the revocation of permits and expressing the intention of returning them to Syria led to hampering of the Dublin transfer. The ECtHR furthermore made clear that it was not reasonable to let asylum permit holders wait for three years for family reunification.

Next to this 'paradigm shift', the Danish government also persisted in its attempts to externalize the asylum procedure to countries outside the EU. An amendment to the Aliens Act in 2021, allows for the transfer of asylum seekers to a third state outside the EU for processing the asylum claim, protection in that state, or return from there to the country of origin (section 29). These transfers must take place under an international agreement between Denmark and the third country and asylum seekers are to be transferred unless it would be in breach of Denmark's international obligations. This still rather vague human right clause does indeed acknowledge the legal lesson learned: that the possibilities to transfer asylum seekers who are already on the territory and within jurisdiction of the Danish authorities are, in fact, limited.

Is the Danish 'model' successful? The current number of asylum seekers is obviously lower than in 2015. However, this is the case in (almost) all EU countries. In Denmark the applicants more than doubled in 2022 (4600) in comparison to 2010 (2100). The focus on re-assessed protection needs, revocation and return have clearly failed. Out of 30.000 Syrians in Denmark, only 1200 cases were

re-assessed, only a few hundred were revoked, yet no one has been returned. Instead, they are still in legal limbo in Denmark due to the absence of diplomatic relations with Syria. The only controlled and regularized way to receive persons in need of protection on Danish territory is used increasingly less. Currently, the Danish externalization law only exists on paper: there is no concrete agreement with a third state yet, and the operationalization of the law remains shrouded with legal and practical uncertainties and questions.

The message sent by the Danish government to the outside world, however, is quite clear-cut: if you come to Denmark, we will take your valuables and put you on remote islands to await your return. If you are in need of protection, this is only temporary, and you will be sent home as soon as possible. Or we will send you to another part of the world let your asylum claim be processed. This direct and harsh narrative of an unwelcoming state is a conscious political strategy choice. Danish leaders have repeatedly stated: we want zero asylum seekers irregularly on Danish territory.

Given the perceived failure of the paradigm shift and Denmark's continued inclination to limit territorial asylum as much as possible (reverting to zero), there may be a heightened focus on and efforts towards externalizing the asylum procedure. The current Danish government is seeking 'external dimension' solutions with like-minded EU countries, which fit the existing EU legal framework of the safe third country concept, screening procedures at the borders, and multilateral deals such as with Turkey.

The question is however, what will Denmark do when this approach will not deliver any desired result in the near future? What if Denmark leaves their multilateral approach, falls back to unilateral engagements, and goes ahead with a partner like Rwanda, as the United Kingdom did as a non-EU Member State. Will this amount to a de facto withdrawal of Denmark from the Dublin system? What are the consequences for the current status aparte of Denmark in the EU? What kind of national legislative and policy decisions will follow, and how do they interact with the Danish ECHR obligations, to which it is, like the UK, signatory? After the UK Supreme Court ruling that the deal was unlawful due to the risk of indirect refoulement,<sup>207</sup> the UK government has issued emergency

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207 UK Supreme Court, *R and others v. Secretary of State for the Home Department*, [no 2023/0093](#), 15 November 2023.

legislation to fill that protection gap and determine Rwanda a safe third country in order to go ahead with their flagship asylum policy. But as British media stated: declaring a country safe is not the same as proving to a court that it genuinely is. The outcome will also depend on further ECtHR rulings on the legality of the transfer agreement in the UK-Rwanda deal.

These are indeed untested legal waters, which are still quite muddy.<sup>208</sup>

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208 With reference to the title of the article by Daniel Thym ('Muddy Waters: A guide to the legal questions surrounding 'pushbacks' at the external borders at sea and at land,' EU Migration Law Blog, 6 July 2021.)



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